

Court of Queen's Bench of Alberta

Citation: Brentech Services Ltd. v. Sunray Manufacturing Inc., 2008 ABQB 301

Date: 20080520
Docket: 0203 02087
Registry: Edmonton

Between:

Brentech Services Ltd.

Applicant/Plaintiff/Appellant

- and -

Sunray Manufacturing Inc., Brad Roberts and Richard Simpson

Defendants/Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi**

Appeal from the Order by
L. A. Smart, Master in Chambers
Dated the 11th day of September, 2007
Filed on the 7th day of February, 2008

Introduction

[1] This is an appeal from the decision of the learned Master L.A. Smart, granted on September 11, 2007, in which he ordered that an action commenced by Brentech Services Ltd. (the "Appellant") against Sunray Manufacturing Inc., Brad Roberts and Richard Simpson be dismissed for want of prosecution pursuant to Rule 244(1) of the *Alberta Rules of Court*.

Standard of Review

[2] An appeal from a Master's decision is a *de novo* hearing. However, the Alberta Court of Appeal in *Dickey v. Pep Homes Ltd.*, 2006 ABCA 402 ("*Dickey*"), said that despite this identification, it is not a "pure *de novo* approach." The court, in that case, agreed with the description of the nature of an appeal from a master's order contained in *Taylor v. Alberta (Workers' Compensation Board)*, [2005] A.J. 968 (Q.B.), which said, "... appeals from a Master's decision to a Justice are appeals *de novo*, meaning that the applicable standard of review on appeal from a Master is that of correctness."

[3] The Court of Appeal in *Dickey* at para. 27 said, "The order made by the master could not be disregarded, and the chambers judge in the exercise of his discretion was entitled to affirm that order." Thus, the question in this case is whether the Master was correct in his ruling.

Procedural Facts

[4] The Appellant commenced an action against the Respondents by way of statement of claim, which it filed on January 29, 2002. The Appellant served Sunray Manufacturing Inc. and Brad Roberts (collectively, the "Respondents") on February 25, 2002. The parties provided no evidence that the Appellant served Richard Simpson with the statement of claim. Only the Respondents defended the action.

[5] The cause of action stems from agreements that the Appellant and Sunray Manufacturing Inc. allegedly entered into in January of 2001. The Appellant alleges that Sunray Manufacturing Inc., at the instance of its principals, Brad Roberts and Richard Simpson, breached the agreements in March of 2001. Those breaches resulted in loss of profits to the Appellant.

[6] The Respondents' counsel filed and served on the Appellant's counsel a demand for further and better particulars on March 4, 2002. On March 4, 2002, Respondents' counsel also filed and served a notice of motion returnable the next day seeking an order that the Appellant reply to the demand for further and better particulars and seeking an extension of time for filing their defence until eight days after the Appellant provides them with the particulars. The parties appeared before Marshall J. on March 5, 2002. Marshall J. granted an order (the "Marshall Order"), but the content of the Marshall Order was disputed by the parties. No minutes were settled and the Marshall Order was not approved or filed. Nor did the Appellant comply with the provisions of the Marshall Order, which Marshall J. delivered from the Bench.

[7] On July 26, 2002 and, again, August 23, 2002, Appellant's counsel wrote Respondents' counsel seeking to settle the minutes of the Marshall Order. Respondents' counsel did not respond to those letters. Procedurally, nothing was done in this matter until January 18, 2007, at which time the Appellant changed solicitors and filed a notice of change of solicitors. On that same date, the Appellant's new solicitors filed a notice of motion seeking to settle the minutes of the Marshall Order. The parties took various steps after that date, which are not relevant to this appeal.

[8] The issue of delay and prejudice resulting from the delay was raised by Respondents' counsel on January 24, 2007. On August 27, 2007, Respondents' counsel filed and served the notice of motion, which resulted in the order with which this Court is dealing.

Substantive Facts

[9] In September of 2003, Sunray Manufacturing Inc.'s building and all its business records, including the records related to the subject-matter of the Appellant's action were destroyed by fire. As well, during the Summer of 2003, the legal files and other information related to the subject-matter of the Appellant's action in the possession of the Respondents' former solicitor were destroyed in a sewer back-up and flood of the former solicitor's home located on the valley floor of the North Saskatchewan River. Accordingly, the Respondents submit that they have no documents to which they might refer in mounting their defence to the Appellant's action.

Issues

[10] The issues in this appeal arise from the wording of Rule 244 of the *Alberta Rules of Court*, which provides:

244.(1) Where there has been a delay in an action, the Court on application by a party to the action may, subject to any terms prescribed by the Court,

- (a) dismiss the action in whole or in part for want of prosecution, or
- (b) give directions for the expeditious determination of the action.

(2) If the Court denies the relief sought under subrule (1)(a), the Court

- (a) shall prescribe terms or give directions that, in the opinion of the Court, are sufficient to substantially prevent or remedy, as the case may be, any non-trivial prejudice caused to any adverse party by reason of the delay, and
- (b) may prescribe terms or give directions that, in the opinion of the Court, will prevent further delay in the action.

(3) If in the opinion of the Court it is unable to devise terms or directions that are sufficient to satisfy subrule (2)(a), the Court shall find that there has been serious prejudice to the party moving to dismiss the action.

(4) Where, in determining an application under this Rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay shall be prima facie evidence of serious prejudice to the party that brought the application.

[11] Thus, the issues on this appeal are whether there has been an inordinate or inexcusable delay and whether, if this Court finds that the delay is inordinate or inexcusable, the Respondents will suffer serious prejudice as a result. If this Court does not find inordinate or inexcusable delay, whether it can devise terms or give directions for the expeditious determination of the action.

Analysis

[12] The Alberta Court of Appeal established the test for dismissal of an action for want of prosecution in *Kuziw v. Kucheran Estate* (2000), 266 A.R. 284, [2000] A.J. No. 944, 2000 ABCA 226 (“*Kuziw*”), which provided that the applicant must show:

- (a) inordinate delay;
- (b) which is inexcusable; and
- (c) likely to seriously prejudice the applicant.

[13] Even without the finalization of the terms of the Marshall Order, it is still an effective order. Rule 322(2) of the *Alberta Rules of Court* says that, “Every ... order takes effect from the date of pronouncement” and Rule 322(3) of the *Alberta Rules of Court* says that “This Rule applies whether or not the ... order has been entered in accordance with these Rules.” When a party seeks to have an order signed by the granting judge, Rule 323.1(4)(a) of the *Alberta Rules of Court* requires the party seeking the signing to present the granting judge with the order “accompanied by the clerk’s notes that are relevant to that ... order.”

[14] The clerk’s notes in this case say, “Application granted. Requirements to file a statement of defence are extended until 8 day [*sic.*] after the particulars are provided.” These notes appear clear that Marshall J. granted the application the Respondents were seeking. This Court has not seen the draft order that the parties were circulating, but the Appellant’s options are clear from these notes and other rules contained in the *Alberta Rules of Court*. A statement from *Lethbridge Motors v. American Motors* (1987), 79 A.R. 321 at 323-324 (C.A.), which is quoted in *Nelson Lumber Co. v. Northline Transport Ltd.* [1992] A.J. No. 139 at para. 4 (cited to QL) (Master) is particularly relevant to the case with which this Court is dealing. It said, “it is for the plaintiff to keep his action moving; he cannot pass the blame to the defendant for delay of this kind.” This is especially so when the Appellant has an obligation to comply with an order and will derive some benefit from its keeping its “action moving.” In this case, the Appellants did not make any attempt to keep the matter moving except for the two letters it sent to Respondents’ counsel following the granting of the Marshall Order, the last of which was dated August 23, 2002.

[15] The Appellant referred this Court to *Hurley v. Weir* [1994] N.J. No. 86 (Nfld S.C.-C.A.) (“*Hurley*”), in which the court upheld a refusal to dismiss an action for want of prosecution. The case has some similarities to the case with which this Court is dealing, in that the defendants were seeking further particulars from the plaintiffs. The defendants received those particulars

but, instead of filing their statement of defence, they chose to demand further and better particulars, for which they received no reply. The court found at para. 14, that, “the defendants took no further steps, *either by seeking an order with respect to the particulars sought* or by filing a defence” [emphasis added]. In the case with which this Court is dealing, the Respondents took the further step of seeking an order with respect to the particulars they were seeking. Thus, an earlier statement in *Hurley* at para. 12, is apropos to the case with which this Court is dealing, when it said:

... once the defendant has done what is legally required of him or her there is no onus on that defendant to bring the matter to trial, and that there is nothing improper in his waiting for the appropriate time to apply to have the matter struck out for want of prosecution.

[16] Appellant’s counsel could not provide this Court with an explanation as to why the Appellant did not pursue the finalization of the Marshall Order. Certainly the Appellant had this ability pursuant to the Rule 323.1 of the *Alberta Rules of Court* on notice to the Respondents. We must remember the nature of the Marshall Order; it compelled the Appellant to provide further and better particulars so as to facilitate the filing of an amended statement of defence by the Respondents. There was a detriment to the Appellants, in the sense of having to provide further information, but there was also the benefit of moving this matter along to facilitate its proving its claim, if any.

[17] The Appellant cites two cases in support of its argument that the Respondents had a positive duty to move this matters along. The first is *W.R. Scott Equipment Ltd. v. Leddy*, [1984] A.J. No. 553 (Master) (“*Leddy*”), in which the court held that the defendants could not complain of serious prejudice through their delay in complying with undertakings they gave at examinations for discovery. The court said at paras. 36-38:

The giving of an undertaking imposes a legal obligation on a party. The duty of activity rests on the undertaking party, not the other side. The Defendants cannot use their failure of obligated activity as a shield.

In October, 1979 the Defendants knew they would need the documents now missing. They were obligated to forthwith obtain them. If the Defendants did not move smartly to get the documents and the documents then disappeared the fault lies solely with the Defendants. The delay was solely with the Defendants. Failure to move quickly to obtain the documents results in a de facto self induced incapacity.

In my view, any prejudice the Defendants may suffer as a result of any proven facts as alleged in the September, 1982 letter cannot be laid at the Plaintiff’s feet.

[18] The second case the Appellants presented to this Court was *Nelson Lumber*. The *obiter dictum* in *Nelson Lumber* was similar to the holding in *Leddy*, in that the court did not allow the defendant to have the benefit of his failure to comply with his undertakings.

[19] What makes these cases distinguishable from the case with which this Court is dealing is that the Master was considering the failure on the part of the defendants to comply with undertakings. Obtaining undertakings is solely in the hands of the party giving the undertaking. In the case with which this case is dealing, the Appellant had a positive duty to comply with the Marshall Order, which took effect “from the date of pronouncement.” Finalizing the Marshall Order was, in the first instance, in the Respondent’s hands, but the *Alberta Rules of Court* provide both parties with clear options when the order is not finalized. This is especially so when the order favours both parties and helps to move the matter along.

[20] To obtain a sense of the purpose of Rule 244 of the *Alberta Rules of Court*, one should look to Rule 244.1 of the *Alberta Rules of Court*, which says:

244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advance the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

Thus, Rule 244 of the *Alberta Rules of Court* involves delays of fewer than 5 years and Rule 244.1 of the *Alberta Rules of Court*, involves delays of 5 or more years. The latter contains the mandatory “shall” whereas the former provides the court with discretion as to whether it would grant the relief the applicant is seeking, provided the applicant meets the three-part test referred to earlier.

[21] The Alberta Court of Appeal in *Kuziw* at paras. 30 and 31, tells us that whether a delay is “inordinate” is determined on a case-by-case basis and it adopted a definition of “inordinate” from *Wallersteiner v. Moir*, [1974] 3 All E.R. 217 at 243 (C.A.), where the court said it means “much in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case.” In this case, the Appellant did not provide the further and better particulars, as required by the Marshall Order. While the specific terms of the Marshall Order required settlement, Marshall J. certainly granted some form of order, as reflected in the clerk’s notes. Nothing was done in this matter until the Appellant retained new counsel in January of 2007, which was over 4 years and 10 months after Marshall J. granted the Marshall Order and over 4 years and 4 months after the Appellant’s former counsel inquired about finalizing the terms of the Marshall Order. This is an inordinate delay.

[22] The second part of the test is whether the delay is inexcusable. *Kuziw* at para. 39, tells us that “until a credible excuse is made out, the natural inference would be that it is inexcusable” [footnotes omitted]. Other than the issues concerning the finalization of the terms of the Marshall Order, the Appellant did not provide this Court with any excuse, credible or otherwise, for its not moving this matter along. Something as simple as a series of telephone calls or letters might be sufficient, but absolutely nothing was done for over four years. As the Alberta Court of Appeal said in *Volk v. 331323 Alta. Ltd.*, 1998 ABCA 54 at para. 23 (“*Volk*”), “the delay in prosecuting this action was the procrastination of the Plaintiff’s former solicitor. That is not sufficient to

excuse the delay.” Thus, this Court finds that the delay of over 4 years and 10 months is inexcusable.

[23] Rule 244(4) of the *Alberta Rules of Court* says that once a court finds that a delay is inordinate and inexcusable, “that delay shall be prima facie evidence of serious prejudice to the party that brought the application.” This presumption is rebuttable. *Kuziw* at para. 50, tells us that “the issue of serious prejudice must be assessed in light of all of the evidence provided by the parties” and *Volk* at para. 21, says that this presumption will lead to a dismissal of the case, “unless there is evidence that at least raises a *legitimate doubt* about the existence of serious prejudice to the applicant attributable to the delay” [emphasis added].

[24] In this case, the alleged serious prejudice to the Respondent is the loss of Sunray Manufacturing Inc.’s business records through the fire and sewer back-up. The court in *Nelson Lumber* at pp. 5 and 6 (cited to QL), said:

The prejudice must be something that arose during the period of delay. The prejudice is one that must accrue during the period of the delay. Prejudice unrelated to the delay cannot be set up against a dilatory plaintiff.

For example, a defendant may be prejudiced because relevant documents were destroyed in a fire before the action was commenced or were destroyed six months after the action was commenced. That prejudice, although real, does not flow from the delay.

A witness may die before an action is commenced or die six months after the action is commenced. That real prejudice does not flow from any delay.

...

Too often in these kinds of applications defendants just put forward a boilerplate bare assertion that something or someone is missing. That is not good enough. There must be evidence about the efforts made to locate what or who is allegedly missing. Of course if no effort has been made the evidence about prejudice has no probative value.

These are very strong statements that encompass two important aspects; the temporal aspect (“prejudice must be something that arose during the period of delay”) and the substantive aspect (“Prejudice unrelated to the delay cannot be set up”). It is difficult to imagine a situation that could satisfy these two aspects, especially in the light of the examples the court provided in that case.

[25] Whether as a result of *Nelson Lumber* or some other reason, the Alberta Legislature amended the *Alberta Rules of Court* to add what is now Rule 244. *Kuziw* at para. 16, cautions us that:

It is apparent from a review of the new Rule 244 when compared with the old Rules, that significant changes have been made and thus one ought to view some case authority arising under the old Rules prior to 1994 with caution.

[26] *Nelson Lumber* was decided before new Rule 244. One of the most significant changes was the addition of the presumption of serious prejudice. *Kuziw* at para 27, noted this when it said:

Rule 244(4) materially affects the onus on the defendant/applicant that existed under the old rule. Proof of inordinate and inexcusable delay is in and of itself *prima facie* evidence of serious prejudice to the party that brought the application. Without more, the applicant has proven its case [footnotes omitted].

[27] Each case must be decided on its own facts. The Respondent argues:

... ‘but for’ the Plaintiff’s delay between March 5, 2002 and September 6, 2003 all of the Defendant’s business records would have been accessible and available to be utilized in fashioning a timely and responsive defence to the alleged claims. Once the fire and flood had occurred, after September 6, 2003, when records have been completely destroyed, the continuing delay by the Plaintiff up until January 18, 2007 then further conspired to deny the Respondent/Defendants the opportunity to either be examined and report with relatively fresh recall, or take prudent steps even after the fire loss to attempt to reconstruct the contents and the sequence of the now-destroyed paper. However, given the further additional lapse of almost 3½ years even after the fire, such extraordinary remedies for recovery and distillation of memory, and reconstruction of paper trails are understandably lost and the Defendants prejudiced thereby.

This Court agrees and, accordingly, it finds that the Respondents have been seriously prejudiced by the delay.

Conclusion

[28] This Court finds that the learned Master was correct in dismissing the Appellant’s action for want of prosecution pursuant to Rule 244(1) of the *Alberta Rules of Court* and, accordingly, this appeal is dismissed with costs in favour of the Respondents.

Heard on the 11th day of April, 2008.

Dated at the City of Edmonton, Alberta this 20th day of May, 2008.

K.D. Yamauchi
J.C.Q.B.A.

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