

Court of Queen's Bench of Alberta

Citation: Alberta v. Fjeld, 2008 ABQB 558

Date: 20080917
Docket: 0503 02287
Registry: Edmonton

Between:

Her Majesty the Queen In Right of Alberta

Plaintiff (Respondent)

- and -

Rhonda Fjeld

Defendant (Appellant)

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

Appeal from the Order by
R.P. Wacowich, Master in Chambers
Dated the 15th day of April, 2008

[1] This is the matter between Her Majesty the Queen in Right of Alberta as the Respondent, and Rhonda Fjeld as Appellant. The Appellant appeals the order of Master R.P. Wacowich in which he denied the Appellant's application to set aside a default judgment on the grounds that the Appellant did not have an arguable defence and there was undue delay in bringing the application.

[2] The relevant facts are that on February 15th, 2000, the Respondent issued a Commercial Timber Permit to the Appellant, which in these reasons I will refer to as the "Permit", to harvest timber on Crown land. According to the terms of the Permit, the Appellant had to pay the outstanding timber dues to the Respondent in accordance with the Timber Management Regulations. The Permit was issued in the Appellant's name, but all matters related to the

management of the Permit were performed by the Appellant's husband, Darren Cox, who operated under the trade name Northern Forest Products. Darren Cox and his business will be referred to throughout these reasons as "Cox".

[3] Pursuant to Sections 78.1 and 96 of the Timber Management Regulations, a person who obtains a commercial timber permit is required to pay timber dues to the Respondent within 30 days following the last day of the month in which the timber was sold. Permit holders are required to submit a timber return, also known as a Form TM-7, at the same time. The timber return sets out how much timber was harvested and is the basis on which the Respondent calculates the amount of timber dues owing. The requirement is also set out on the face of the Permit.

[4] The Appellant never submitted any timber returns or paid any dues on the Permit as required. As no timber returns had been filed and no dues paid, the Respondent sent a letter to Cox on April 14th, 2003, asking for an update with respect to the harvesting of timber from the permit area. This letter reminded Cox that if timber had been harvested, he must remit the timber dues to the Respondent within a month of processing. Cox did not respond to this letter. The letter was sent to the Appellant on August 26th, 2003. This letter also reminded Appellant that she was responsible for the timber dues from the Permit area and that if she did not provide any records by September 8th, 2003, she would be assessed the full timber volume as expressed in the Permit.

[5] As the Appellant never provided any timber returns or paid any timber dues, the Respondent calculated the amount owing based on the volume set out in the Permit. This debt worked out to \$129,124.11, which in these reasons I will refer to as the "Debt". To collect the Debt, the Respondent sent an invoice by registered mail to the Appellant on July 9th, 2004. The Appellant did not accept this letter.

[6] After sending additional invoices to the Appellant, the Respondent finally filed a statement of claim seeking recovery of the Debt. The statement of claim was filed on February 4th, 2005 and served on the Appellant by registered mail on February 23rd, 2005. The Appellant never provided the Respondent with a statement of defence to the statement of claim, and default judgment was obtained on April 7th, 2005.

[7] The Appellant filed a defence on March 14th, 2005, but did not serve it on the Respondent. The Appellant was unrepresented at the time and submits that she did not know that she had to serve the statement of defence. The original statement of defence not only denies the entire statement of claim, but it also specifically denies that there was any agreement with the Respondent on or about February 15th, 2000, or that she was ever contacted by the Respondent about any agreement or Debt.

[8] As all matters related to the management of the permit were performed by Cox and as the Appellant relies on the evidence of Cox to support her position, this Court must also examine Cox's relationship with the Respondent. Cox also had several timber permits with the Respondent. Like the Appellant, Cox also refused to pay the timber dues as required. This,

among other things, has resulted in the Respondent commencing two separate actions against Cox. Cox filed and served statements of defence on these claims on or about August 15th of 2005. Cox changed solicitors on at least four occasions following the commencement of these actions. When Cox did not have counsel, he refused to respond to correspondence sent to him directly by the Respondent.

[9] On March 20th, 2006, the Respondent was advised that Cox was now represented by a lawyer, Christine Goodwin, which in these reasons I will refer to as "Goodwin". On June 21st, 2006, and July 24th, 2006, counsel for the Respondent wrote to Goodwin to confirm that she was acting for Cox. On August 1st, 2006, the Respondent received a letter from Goodwin's office confirming that she was acting on Cox's behalf. On March 23rd, 2007, Goodwin brought up the Appellant's default judgment. She advised the Respondent's counsel that she had just found out about it. Goodwin asked if the Respondent would consent to setting it aside. This request was denied. Counsel for the Respondent advised Goodwin that she would have to bring an application to have it set aside. Goodwin never brought the application.

[10] On June 27th, 2007, the Respondent was advised that Goodwin had been administratively suspended by the Law Society of Alberta. Brenda Edwards, who in these reasons I will refer to as "Edwards", was acting as the administrator of Goodwin's files. On August 17th, 2007, counsel for the Respondent wrote directly to Cox asking him to provide the name of his new counsel. Cox did not respond to this letter. On August 27th, 2007, Edwards informed the Respondent that she had also written to Cox. Cox did not respond to Edwards' letter. Edwards has confirmed that in her search of the files held by Goodwin, there was no record of any file to indicate that Goodwin also represented the Appellant in this action.

[11] On July 19th, 2007, counsel for the Respondent was contacted by a solicitor, Dave Shynkar, who in these reasons I will refer to as "Shynkar". Shynkar indicated that he was counsel for Cox on a different matter and came across the Respondent's writ on land owned by Cox and the Appellant. Shynkar wanted to know if there was an application to set aside the default judgment against the Appellant. Counsel for the Respondent informed him that there was not. Counsel for the Respondent asked Shynkar if he could provide a mailing address for Cox, as there has been problems contacting Cox with respect to other court actions. Shynkar sought instruction on this and later informed counsel for the Respondent that Cox would not provide his mailing address.

[12] In January of 2008, the Appellant retained Ackroyd LLP to represent her interests, including the setting aside of the default judgment, which forms the subject matter of this appeal. On February 8th, 2008, the Appellant's new solicitors filed a motion to set aside the default judgment.

[13] I want to make it very clear in these reasons that Ackroyd LLP has used its best efforts to resolve this situation. Lawyers do not create facts; facts create facts.

[14] The parties concede that an appeal of a Master's order to a Justice of the Court of Queen's Bench is heard *de novo*, and the parties are at liberty to introduce new evidence which

was not before the Master during the initial application, and the parties cite *Armstrong v. Esso Resources Canada Ltd.* (1992), 10 C.P.C. (3d) 343 at para. 3 (Alta. C.A.), and *Ross v. McRoberts* (1999), 237 A.R. 344 (C.A.). The parties do differ slightly on the deference that a Queen's Bench Justice should give to a decision of a Master. The Appellant says that the Queen's Bench Justice's decision on the matters should be unfettered. The Respondent says that a Queen's Bench Justice should not lightly disturb a Master's decision on appeal, "unless there is some clear error in the interpretation of the law (or the application thereof), some palpable and overriding error of fact, or some other appropriate reason why the decision should be varied," citing *Hong Kong Bank of Canada v. Krywolt*, 2002 CarswellAlta 920, which is a decision of the Alberta Queen's Bench.

[15] In fact, these theories collide. If the appeal is truly *de novo*, then this Court may proceed to make its own decision regardless of the Master's decision. The theory proposed by the Court in *Krywolt* is more in the nature of an appeal than a *de novo* hearing. More recently, the Alberta Court of Appeal in *Dickey v. Pep Homes Ltd.*, 2006 ABCA 402, which in these reasons I will refer to as "*Dickey*", said that despite the identification of an appeal from a Master's order as a *de novo* hearing, 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." 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.

[16] Both parties agree that the test the court must apply in deciding whether to set aside a default judgment is taken from *Graylake Holsteins Ltd. v. Kzam Farms Ltd.*, 2004 ABQB 828 at para. 19. The test is whether the Appellant is able to show that:

- a) she has an arguable defence; and
- b) she did not deliberately let judgment go by default and has some excuse for the default, such as illness or a solicitor's inadvertence; and
- c) after learning of the default judgment, she moved promptly to open it up.

[17] The Appellant concedes that to meet the *Graylake* test, the Appellant must succeed on all aspects. At this stage, it is worth noting the comment of Master Wacowich when he dismissed the Appellant's application when he said:

Normally I would rather err on the side of setting aside a default judgment, and normally I do. In this case, I am satisfied I should not. I do not believe there is an arguable defence, and I do not believe that the applicant moved promptly.

Was he correct in his decision?

[18] There was some argument concerning payments Cox made on other permits, but those payments are not relevant to this matter, as they related to different permits from the one in issue and simply confuse the issue at hand. Although Cox handwrote the number of the Permit on his cheque, the quantum of the amounts owing in the returns he filed in relation to this cheque correspond exactly to the amounts in the returns he filed. It is too coincidental to believe that Cox intended to make a payment on the Permit, especially since neither he nor the Appellant ever filed any returns under the Permit.

[19] The Appellant argues that there is an issue concerning the timing of the Respondent's commencement of the proceedings to collect the Debt. In other words, was the Respondent beyond the limitation period as set forth in section 3(1) of the *Limitations Act*, RSA 2000, Chapter L-2? The Appellant argues that the Respondent cancelled the Permit on or about August 28th, 2000, and the Respondent notified the Appellant in a letter dated September 18th, 2000 that:

- a) all forest products and chattels were to be removed from the permit lands within 30 days;
- b) holding and forest charges had been adjusted to the date of cancellation; and
- c) the Defendant was to be advised further of the finalization of the account.

Timber dues are owing on the 30th day following the end of the month in which the timber is harvested. This harvest is reported by the permit holder to the Respondent in the form of a timber return. This requirement is stated right on the Permit.

[20] The *Limitations Act*, s. 1.c. 3(1) says:

If a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to the conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding . . .

the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[21] The Appellant argues that this is a codification of the common law principle of discoverability articulated by the Supreme Court of Canada to mean that “a cause of action arises for the purpose of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence,” citing *Central and Eastern Trust Company v. Rafuse*, [1986] 2 S.C.R. 147 at para. 89, and *De Schazo v. Nations Energy Co.*, [2005] 367 A.R. 267 at para. 26. She also cites *Peixeiro v. Haberman* (1997), 152 D.L.R. (4th) 429 at paras. 36 and 39 (S.C.C.), where the Court emphasized the concept of reasonable discoverability in evaluating whether an action is barred by a limitations statute holding that:

. . . in balancing the defendant’s legitimate interest in respecting limitation periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration.

[22] The Appellant argued that the Respondent knew or ought to have known that the “injury for which the claimant seeks a remedial order had occurred” on or before April 1st, 2001, based on the invoice dated February 27th, 2004. That invoice says that the Respondent calculated an amount owing for “royalty charges” in the amount of \$86,136, pursuant to an “April 2001 audit return.” Thereafter, the Respondent charged interest at the rate of 1 percent per month commencing May 1st, 2001, as permitted by the Timber Management Regulations. Did the Respondent have the requisite knowledge contemplated by the *Limitations Act* on April 1st, 2001, or May 1st, 2001, to proceed with the court action? If so, it is beyond the limitation contemplated by Section 3(1), and the action would be statute-barred.

[23] The Appellant never filed a return as required, so the Respondent had no way of knowing if the timber had been harvested and if so how much was owed. The Respondent requested the timber return and dues from the date of termination of the permit. The Respondent sent the Appellant what amounts to a demand letter on August 26th, 2003, stating that:

You have the opportunity to produce a legitimate record of the volume of timber harvested from this permit. In the event that you are unable to produce these records, the charges on the timber will be based on the full amount of the timber volume estimated prior to harvest. I will need to hear from you or receive some information from you pertaining to this permit by September 8th or we will proceed with the timber dues as stated.

The Appellant did not respond, so the Respondent sent the February 27th, 2004 invoice which had calculated from April 2001. In other words, it used that date as the time of the audit, but did not know exactly what was owing until it did its calculations based on the “full amount of the timber volume estimated prior to harvest.”

[24] It is not unreasonable for a creditor to give a debtor time within which to pay amounts owing. In fact, the law requires it. One could even argue that the Respondent was magnanimous

in giving the Appellant so much time within which to file the returns and submit the amounts owed.

[25] As the Appellant never reported the timber harvest, the Respondent had no choice but to assess the amount owing by using the full amount of timber volume as expressed on the Permit. Realizing that the Appellant was not cooperating, it sent the August 26th, 2003 letter and filed its statement of claim on February 4th, 2005. Since the Respondent filed its claim within two years of the assessment, it cannot be argued that the claim is now statute barred.

[26] This should fully respond to the question at issue. However, this Court will also address the other aspects of the *Graylake* test. The Appellant knew of the statement of claim when it was served on her. This is shown by the fact that she filed a statement of defence. The fact that she did not serve the statement of defence is no excuse, as the back of the statement of claim says not only must she file the statement of defence, but that “you or your lawyer must also leave a copy of your statement of defence at the address for service for the plaintiff named in the statement of claim.” As well, it says:

“If you do not do both things within 15 days, you may automatically lose the lawsuit. The plaintiff may get a court judgment against you if you do not file or do not give a copy to the plaintiff or do either thing late.”

[27] To succeed on this ground, the Appellant must prove, on a balance of probabilities, that she did not deliberately let the judgment go by default, and has some excuse for the default such as illness or solicitor’s inadvertence. There is no allegation that she was ill or that she had a solicitor acting for her at the time. The Respondent entered the default judgment. Did the Appellant allow the default judgment to go by default? Yes, as she was aware or should have been aware of the wording on the statement of claim.

[28] After learning of the default judgment, did the Appellant move promptly to open it up? The Appellant was informed of the default judgment when she was served by registered mail on approximately February 16th, 2006. The Appellant’s evidence was that in approximately March of 2006, Cox and the Appellant hired Goodwin to represent them on a number of matters, including the default judgment obtained by the Respondent. In his cross-examination on his affidavit, Cox refused to provide documentary evidence of his and the Appellant’s hiring of Goodwin on the basis of privilege. The Appellant submitted that she retained counsel in a timely manner once she learned of the default judgment. Although the Appellant apparently retained Goodwin weeks after the Appellant was served with the default judgment, Goodwin did not even mention the Appellant’s default judgment to the Respondent’s counsel until March 23th, 2007, one year after the Appellant had apparently retained Goodwin, on the basis that Goodwin had “just found out about it.” This was approximately two years after the Respondent had obtained the default judgment.

[29] The Appellant argued that on being notified that Goodwin had been suspended by the Law Society of Alberta in June 2007, the Appellant proceeded to approach and retain new counsel. She first approached their current counsel in November 2007 and finally retained them

in January 2008. But the question is whether she did this promptly. One would have thought that Goodwin, a lawyer, would have mentioned the default judgment early in her retainer, had she in fact been retained. But this Court questions whether the Appellant had retained Goodwin at all until March 23rd, 2007. As well, there is no evidence that the Appellant contacted Goodwin at any time during Goodwin's apparent 15-month retainer to determine the status of this matter. Despite that, a five-month wait before contacting current counsel after being notified of Goodwin's suspension and, thereafter, a further two-month wait before actually retaining them is not prompt. As the Court stated in *Goulet v. Da Silva*, 2002 ABQB 369 at para. 71, with citations excluded:

As to this, the delay of the applicant would run from the time she learned of the judgment. At the earliest, this was in mid-April of 2001. It appears from her affidavit that she was negotiating with the respondent's counsel in October and November of 2001. This is not particularly prompt.

The Appellant has not tendered evidence to satisfy her onus of explaining this delay.

[30] The Appellant further submits that even if there had been a delay in applying to set aside the default judgment, delay alone is not a barrier to granting the application, provided the conduct is not wilful or the Respondent has not suffered irreparable harm, citing *Goulet* at para. 72. These factors are disjunctive, so the Respondent need only show one factor. Although the Respondent did allege irreparable harm, that harm relates to the writ of enforcement it obtained following the default judgment, so this does not factor into these reasons.

[31] The Respondent submits that throughout their dealings with the Respondent, Cox and the Appellant acted in a way that can only be described as wilful and deliberate. These acts, which span the past eight years, include *inter alia* not reporting to the Respondent when they harvested the timber, not responding to any of the Respondent's letters, not responding to the administrator of Goodwin's practice, not providing an address to the Respondent for the purposes of correspondence, and not responding to letters from the Respondent's counsel. As was noted by the British Columbia Court of Appeal in *Foan v. Hyde*, 1991 Carswell B.C. 768 at para. 15:

Ms. Griffin for the appellant says that the delay or the default which the appellant must negate as default and delay related to the particular application question, and that delay or default which may have occurred at earlier stages of the action cannot be taken into consideration, citing *Canadian Imperial Bank of Commerce v. Shaw*, BCSC April 26th, 1985. But it seems to me that it is entirely proper to consider the appellant's conduct throughout the present proceedings in order to decide whether the explanation which he gives for not contesting the application in question can be accepted.

The Appellant has asked this Court to distinguish the *Foan* case on the basis of the egregious acts of the defendant in that case. That may be so, but the principles outlined in that case are sound for any type of case.

[32] Thus, this Court agrees with the Respondent's submissions. In this case, the Appellant's explanations for the delay cannot be accepted, and she has not satisfied the onus placed upon her. The history of this matter shows intentional and wilful delay on the Appellant's part. She has from the beginning tried to avoid paying the outstanding timber dues she owes to the Respondent. The Appellant has not succeeded on any aspects of the *Graylake* test.

[33] Thus, the Master was correct in his ruling, and this appeal is dismissed, with costs to the Respondent under Schedule 'C', Column 3 in the amount of \$1,500.

Rendered orally on the 22nd day of August, 2008.

Dated at the City of Edmonton, Alberta this 16th day of September, 2008.

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

Appearances:

Ms. Allyson F. Jeffs
Ackroyd LLP
for the Defendant (Appellant)

Glenn Epp, Esq.
Alberta Justice
Civil Litigation Legal Services
for the Plaintiff (Respondent)