Court of King's Bench of Alberta

Citation: Anderson v Novhaus Inc, 2024ABKB0095

Date: February 16, 2024
Docket: 1913 00146
Registry: FORT MCMURRAY

Between:

Kyle Anderson, Norine Anderson, and Byron Wall

Plaintiffs

- and -

Novhaus Inc., the Can Company Inc., and Aurelien Balondona

Defendants

Reasons for Judgment
of the
Honourable Justice Douglas R. Mah

A. What this Application is about

[1] Mr. Balondona applies under Rule 9.15(1) to set aside summary judgment awarded by me on September 6, 2023 against himself personally and the corporate defendant Novhaus Inc. He was not in attendance in Court on that day because of circumstances that he says fall within the Rule and thus the judgment should be vacated.

[2] Specifically, Rule 9.15(1) permits the Court to revoke a judgment or Order made following a trial or hearing at which an affected person did not appear because of accident, mistake, or insufficient notice. Mr. Balondona relies on para 22 of ***Hammond v Hammond***, 2019 ABQB 522 (Lema J) at para 12 which states:

The rule exists to remedy the injustice of an order being granted against a non-attending party where the party *would have attended* but for some "interfering" event or circumstance.

[3] Mr. Balondona argues that there are two such interfering events or circumstances:

- First, he was in a remote part of Africa with limited technology resources and therefore unable to attend; and
- Second, this Court granted a procedural Order (by Justice Hayes-Richards) on August 9, 2023 setting the matter for hearing on September 6, 2023 based on false pretenses or at least a misapprehension that Mr. Balondona had consented to the September 6, 2023 hearing date.

[4] The Plaintiffs argue that the summary judgment granted by me was validly obtained and should not be disturbed. They assert that neither of the so-called interfering events prevented Mr. Balondona from appearing or at least having representation on September 6, 2023. They say he simply chose not to attend, and moreover, the second reason given is made-up and an attempt to rewrite what actually happened.

[5] For the reasons that follow, I side with the Plaintiffs.

B. Background

[6] Mr. Balondona is the principal and directing mind of the corporate defendant Novhaus Inc. This lawsuit involves a long-standing dispute between the Plaintiffs and these Defendants concerning a contract for the provision of a sea can home. The Plaintiffs paid Novhaus some $270,000 in two installments and received nothing in return. I accepted the submission that the funds had been converted by Novhaus. As to Mr. Balondona's personal liability, counsel for the Plaintiffs made these submissions that were also accepted by me on September 6, 2023:

- The transaction is a "consumer transaction" within the meaning of the ***Consumer Protection Act*** which at s 142.1(1) allows an action in this Court against the principal or director for loss or damage caused by contravention or non-compliance. Here, Novhaus, although taking prepayments, failed to register under the ***Act*** and avoided bonding and security requirements, thus depriving the Plaintiffs of recourse they should have had.
- With reference to ***Phillips v 707739 Alberta Ltd,*** 2000 ABQB 139 (Rooke J) at para 217, personal liability may be imposed on the person who is the directing mind and engages in fraudulent actions in relation to the corporation's activities which cause the loss.
- Novhaus, despite advertising that it had experience in the business of sea can homes had in fact, as of the date of Mr. Balondona's questioning, never completed a single prefabricated, ready-to-move sea can home.
- Mr. Balondona failed, despite request, to provide details of the sea can home and in particular did not provide a serial number that would have enabled the Plaintiffs to protect their interest at Personal Property Registry. Whatever interest the Plaintiffs might have had was lost when Novhaus's landlord took possession of its warehouse.

- Mr. Balondona failed to account to the Plaintiffs in any way as to how their funds were used or applied.[1]

[7] The September 6, 2023 appearance before me was the result of an August 9, 2023 procedural Order granted by Justice Hayes-Richards, which Mr. Balondona now says was procured by false pretenses or misrepresentation. The sequence of events leading up to the August 9, 2023 appearance before Justice Hayes-Richards is summarized as follows:

- The Notice of Application for summary judgment was filed in June 2023 with a hearing date of August 9, 2023. The application materials were served on the then counsel of record for the Defendants on June 30, 2023.
- The then counsel of record for the Defendants formally withdrew on July 6, 2023.
- The application materials, whether by Plaintiffs' counsel or the Defendants' former counsel, were provided directly to Mr. Balondona. On July 18, 2023 Mr. Balondona contacted Plaintiffs' counsel by email to advise that he had received the material and that because of his mother's health, he felt he would be unable to attend the application. He mentioned that he was not in Alberta and was trying to get a lawyer but had not been successful because he was "not there in person and also for financial reasons."
- Plaintiffs' counsel responded to Mr. Balondona on July 26, 2023 indicating that she was prepared to adjourn the application for a period of one month to September 6, 2023 for the purposes of either facilitating settlement or enabling Mr. Balondona to retain new counsel for the application.
- Counsel for the Plaintiffs did not receive a response from Mr. Balondona to that email.
- On August 2, 2023 Plaintiffs' counsel again contacted Mr. Balondona by email to advise that the August 9, 2023 application could not be adjourned without Mr. Balondona's consent, that the Plaintiffs' side was still open to adjourning the application to September 6, 2023 and that Mr. Balondona needed to respond in a timely manner. Plaintiffs' counsel warned that if Mr. Balondona did not respond, she would be proceeding with her application on August 9, 2023 as scheduled.
- This time Mr. Balondona did respond on August 4, 2023 requesting a later adjournment date to late October or November. He did say he was "back home" and providing care to his ailing mother. He also adverted to the "limited communication we have here" but did not elaborate on his exact whereabouts or when he might return to Alberta. He further mentioned that he "did not have any luck getting a lawyer to represent me at the moment" and thus wanted the later adjournment.
- Counsel for the Plaintiffs replied the same day offering to adjourn to either September 6, 2023 or September 13, 2023 and stating their side was not prepared to adjourn to October or November. Mr. Balondona was advised that if he wanted a longer adjournment, he could attend at the application and request that from the judge.
- Mr. Balondona replied on August 7, 2023 indicating that "I have been away and out of Alberta for almost a year and did not plan to return until my mom health improved and also because of my financial situation. I was aware to your notice only late June due to

[1] Refer to the transcript of proceedings before me on September 6, 2023 pp 3-5.

> my lawyer resigning from the case. I have proposed the time when I think I can come back but you don't want that. So, you decide either." (underlining added)

[8] The plaintiff Mr. Anderson deposes that their side interpreted the underlined portion above as meaning Mr. Balondona was leaving it up to Plaintiffs' counsel (Ms. Cooper) to decide whether to adjourn to September 6, 2023 or September 13, 2023. Before Justice Hayes-Richards, counsel for the Plaintiffs stated that:

> So, I don't believe that there's anyone here on behalf of the respondents. We have been requested by the respondents to adjourn this matter over. The date is going to be September 6th. I'm, however, seeking terms of an order that the respondent shall be required to file their response materials no later than August 25th, 2023 and I'm also seeking costs, as we had communicated to the respondent that we were prepared to adjourn on July 26th, but they didn't respond to us in time for us to adjourn this online today.[2]

[9] This appearance resulted in Justice Hayes-Richards adjourning the matter to September 6, 2023 and directing response materials to be filed by August 25, 2023.

[10] I was the chambers judge in Fort McMurray on September 6, 2023. No respondents' material had been filed. As noted above, I granted the Plaintiffs' application for summary judgment.

[11] It turns out that Mr. Balondona had been in Cameroon the whole time. He states in his affidavit of December 7, 2023 that:

- He only returned to Alberta from Cameroon on October 1, 2023.
- He had been in a remote part of Cameroon caring for his sick mother with only limited access to telecommunications.
- He learned on or about October 15, 2023 that judgment had been granted against him personally when he learned that his shares in a different corporation had been seized by a civil enforcement agency.
- He did not attend on August 9, 2023 to speak to the adjournment as he was still in Cameroon, had only intermittent access to telecommunications and, furthermore, could not retain legal counsel due to his financial situation at the time.
- He was unable to attend Court on September 6, 2023 as he remained in a remote part of Cameroon at the time and had limited access to telecommunications.
- When he said "So you decide either" in his email to counsel of August 7, 2023 he meant that counsel should choose between late October or November (his proposed adjournment dates), not September 6, 2023 or September 13, 2023 (her proposed adjournment dates).

[2] Transcript of proceedings before Justice Hayes-Richards on August 9, 2023 p 1.

C. What Rule 9.15 is meant to address

[12] Justice Lema succinctly sets out the history and purpose of Rule 9.15 in ***Hammond*** at paras 9 -12:

> [9] The evolution from those rules to Rule 9.15 is reflected in an Alberta Law Reform Institute report from July 2004 (key extract at Appendix A). ALRI proposed:
>
> > ... the adoption of a general provision allowing for an application to set aside or vary orders and judgments granted *following inadvertent failure to appear at a trial or a chambers motion*. [emphasis added]
>
> [10] As reflected in ALRI's report and the cases below, the key is inadvertent, or unintentional, non-attendance. Whether called an "accident" or a "mistake," the reason must satisfy a "but for" test: "but for (or except for) [insert reason], I would have attended." As the Rule states, the focus is non-attendance [appear] "*because of* accident or mistake."
>
> [11] In this context, the reason must be something other than failure to receive notice or insufficient notice. The premise of Rule 9.15(1)(b) is that the party received notice and, *despite that notice*, did not attend.

[13] At paragraph 12, Justice Lema makes the comment earlier quoted that the purpose of the Rule is to remediate the injustice caused to a non-attending party where that party *would have attended* but for some "interfering" event or circumstance.

[14] This is not a case where any sort of "accident" is alleged that prevented Mr. Balondona from attending Court. Nor is it a question of "insufficient notice" since Mr. Balondona admits to having more than two months of advance notice and had been communicating regularly with counsel for the other side with regard to the application during those two months. The sole issue is whether a "mistake" within the meaning of the Rule operated so as to prevent Mr. Balondona from attending Court or, as Justice Lema puts it, whether there was an "interfering event or circumstance."

[15] Rule 9.16 provides that, unless otherwise ordered, an application under Rule 9.15 must be made to the judge who granted the original judgment or Order, so here we are.

D. Ruling

[16] Not physically being available, as Mr. Balondona surely was while he was in Cameroon, is not a mistake. He became aware of the application while in Cameroon and communicated with Plaintiffs' counsel while in Cameroon. If there was any omission, it was by Mr. Balondona not advising Plaintiffs' counsel of his exact whereabouts and his return date. Counsel for the Plaintiffs was left totally in the dark about this. If one is going to ask the other side for indulgences, one has to be forthcoming about the reasons why. From the evidence, the Plaintiffs would not have known that Mr. Balandona had been unavailable because he was in Cameroon until he served his December 7, 2023 affidavit for this set-aside application.

[17] Furthermore, given the Plaintiffs' history of dealings with Mr. Balondona, it is not unexpected that his protestations of being unavailable and impecunious would have been met with some skepticism by them.

[18] Being unavailable for the Court date on which the other side insists on proceeding behooves the unavailable party to do something. Mr. Balondona had almost an entire month between August 9, 2023 and September 6, 2023 to do something about it. Even with limited internet access, Mr. Balondona was able to effectively communicate with counsel for the Plaintiffs. He could have engaged his own counsel to deal with an adjournment request either before or on September 6, 2023 or made some kind of appearance. That counsel could have fully explained Mr. Balondona's circumstances to opposing counsel and/or the Court to request an adjournment.

[19] I do not accept the mere assertion of impecuniosity as a reason for lack of action. Once Mr. Balondona found out that he had judgment entered against him and that the shares had been seized, he was able to find a lawyer to act.

[20] Besides, impecuniosity or the inability to retain a lawyer are also not a "mistake" within the meaning of Rule 9.15(1)

[21] Even without counsel, Mr. Balondona could have called in to the Court hearing by phone on either August 9, 2023 or September 6, 2023 although, admittedly, it would have been inconvenient due to the time difference. Even if telecommunications in the area are intermittent, as Balondona says, with nearly a month's notice, he could have taken steps to put himself in a position to attend Court if only by telephone on September 6, 2023.

[22] I move next to Mr. Balondona's second ground which is his assertion that Justice Hayes-Richards was operating under a misapprehension induced by Plaintiffs' counsel's incorrect statement that Mr. Balondona was agreeing to holding the hearing on the September 6, 2023 date. It is true, as Mr. Balondona's counsel submitted, that Rule 9.15 does not specify *whose* mistake may serve to engage the Rule. It is suggested that the mistake was on the part of Ms. Cooper in misinterpreting the meaning of "So you decide either" or on the part of Justice Hayes-Richards in relying on Ms. Cooper's erroneous representation that Mr. Balondona had agreed to September 6, 2023.

[23] When I heard argument on this set-aside application back on January 29, 2024, I made the comment that I did not believe that Ms. Cooper had deliberately misrepresented Mr. Balondona's position. Her interpretation of "So you decide either" as meaning a choice between September 6, 2023 and September 13, 2023 is reasonable given the context of the comment and the fact that Mr. Balondona in the immediately preceding sentence acknowledged that both of his choices (late October or November) had been rejected. Why would counsel for the Plaintiffs agree to choose between two dates that had already been rejected by her?

[24] Even if, by some stretch, a factual misapprehension by Justice Hayes-Richards is established, it was not an "interfering event" in that it did not prevent Mr. Balondona from attending Court, at least through counsel or remotely, on September 6, 2023. From the evidence (Exhibit Q in the December 15, 2023 affidavit of Kyle Anderson), it is clear that Mr. Balondona was made aware on August 10, 2023 of Justice Hayes-Richards' Order, that he had until August 25, 2023 to file any response materials and that the hearing was proceeding on September 6, 2023. As stated, Mr. Balondona had almost a month, even from remote Cameroon, to contact a

lawyer to do something to address an event that he now knew for sure was happening on September 6, 2023. Alternatively, he could have attended remotely or in the very least made some attempt to contact the Court (for example, by sending an email to the Clerk's office, which is sometimes done) to advise of his situation and request an adjournment. He did none of these things.

[25] Harsh as it may seem, I find that that there was no "mistake" within the meaning of Rule 9.15(1) that caused Mr. Balondona to miss Court on September 6, 2023. There was no inadvertence resulting in absence from Court as required by ***Hammond*** at paras 9-10. Rather, it was Mr. Balondona's own decision to take no action that resulted in his non-attendance. Such a decision results in the outcome described in ***Hammond*** **at** paras 17 & 18:

> [17] The point of notice is to give the party an opportunity to participate. If it misses that opportunity because of an "accident" or "mistake" (i.e. something interfering with or preventing it from participating), that is one thing. But in the absence of an interfering or preventing factor, there is nothing inherently unfair or unjust in allowing the judgement or order to stand. The non-attending party's "mistake" was either choosing not to attend or, as here (as discussed below), effectively choosing not to attend as reflected in a lack of diligence. That is not the kind of mistake required under rule 9.15.
>
> [18] In such circumstances, the attender does not have to go through a do-over, and the non-attender has to live with the result.

[26] In consequence, the application by Novhaus Inc and Mr. Balondona to set aside my summary judgment Order of September 6, 2023 is dismissed.

E. Costs

[27] Counsel may address costs of this application, if they wish, within 30 days of release of this decision, by way of written submissions in letter form not to exceed two pages in length, excluding exhibits and authorities and supported by a draft Bill of Costs.

Heard on the 29th day of January 2024, with additional written submissions on the 2nd & 8th day of February, 2024.

Dated at Fort McMurray, Alberta this 16th day of February 2024.

Douglas R. Mah
J.C.K.B.A.

Appearances:

Nicola B. Cooper, Cooper & Company
for the Plaintiffs,

Pascal Visentin, Emery Jamieson LLP
for the Defendants, Novhaus Inc and Aurelien Balondona