In the Court of Appeal of Alberta

Citation: Boland v Carew, 2019 ABCA 202

Date: 20190523
Docket: 1803-0142-AC
Registry: Edmonton

Between:

Corina Alice Boland

Respondent
(Plaintiff)

- and -

Rodney Joseph Carew

Appellant
(Defendant)

The Court:

The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of The Honourable Madam Justice Bielby
Concurred in by The Honourable Mr. Justice O'Ferrall
Concurred in by The Honourable Madam Justice Strekaf

Appeal from the Decision by
The Honourable Madam Justice D.A. Sulyma
Dated the 24th day of April, 2018
(2018 ABQB 317, Docket: 4803 152156)

Reasons for Judgment Reserved of
The Honourable Madam Justice Bielby

Overview of Appeal and Statement of Facts

[1] The appellant, Rodney Joseph Carew, appeals from a decision refusing to dismiss a Statement of Claim for Divorce and Division of Matrimonial Property in an action commenced by his wife, the respondent, Corina Alice Boland, on the basis that there had been no significant advance in the action for more than 3 years: ***Boland v Carew***, 2018 ABQB 317. Despite the Statement of Claim having been filed in 2010, no divorce has yet been granted. There is no limitation period within which separated parties must commence an action for divorce under the *Divorce Act*, RSC 1995, c 3; there is no limitation period on an action for ongoing child support; see ***S v (DB) v G (SR)***, [2006] 2 SCR 231. The two-year limitation period for the matrimonial property claims has not yet started to run; it does not start to run until the date of a "decree nisi, declaration, or judgment": see *Matrimonial Property Act* RSA 2000, c. M-8, s. 6.

[2] The Statement of Claim was filed February 1, 2010 and amended 10 days later. A Statement of Defence and Counterclaim was filed on February 25, 2010. A disclosure application and an application for custody, access and child support were commenced later in 2010 but did not proceed. Counsel for each party ultimately withdrew. No further court proceedings were taken until October 31, 2017 when Ms. Boland applied for child support and spousal support retroactive to the date of separation on December 14, 2009. Mr. Carew responded with this application to strike.

[3] In late 2010 or early 2011, the parties reached an agreement providing for the payment of child support and the resolution of matrimonial property claims but which did not resolve all issues in the underlying action. Mr. Carew admittedly made the $2000 monthly payments he had agreed to make pursuant to that agreement from March 2011 until July 2017 when he unilaterally reduced child support to $666.66 per month. The parties remain married to one another. One child remains dependant.

[4] Rule 4.33(2) provides:

> If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> > (a) the action has been stayed or adjourned by order, an order has been made under sub rule (9) or the delay is provided for in a litigation plan under this Part, or
> >
> > (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the court, warrants the action continuing.

[5] The chambers judge determined that "there were no things done inside Court to materially advance the action". However, she dismissed the application because she found that "the Applicant has continued to participate in the action and otherwise acquiesced in the delay" (para 21), citing ***Trout Lake Store Inc v Canadian Imperial Bank of Commerce***, 2003 ABCA 259.

[6] The chamber judge expressly noted that this Court has not previously addressed the application of the long delay rule where no divorce judgment has been granted to the parties and where there remain children with claims to child support, as here. As there is no limitation period within which a divorce action or support application must be taken, the Chambers judge observed that even if she dismissed the divorce action, there would have been nothing to stop Ms. Boland from simply recommencing her action and applying once again for child and spousal support. The judge concluded that dismissal of the action would only result in delay and wasted costs, as noted by Justice Johnstone in ***Wittenburg v Wittenburg***, 2003 ABQB 154, [2003] AJ No 210. Meanwhile the dependent child would be left without an order for support.

Issue

[7] The question on appeal is whether the chambers judge erred in declining to dismiss the respondent's action against the appellant. In our view, she did not.

Standard of Review

[8] Whether an action has been "significantly advanced" within the meaning of Rule 4.33(2) involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay. This is a question of mixed law and fact, with the result that the decision of the Chambers judge should be treated with deference. "Palpable and overriding error is the standard of review for failing to dismiss an action for long delay when questions are of mixed fact and law": ***Flock v Flock Estate***, 2017 ABCA 67 at para 13, 49 Alta LR (6th) 41 [***Flock***]; ***Weaver v Cherniawsky***, 2016 ABCA 152 at para 15, 38 Alta LR (6th) 39.

Analysis

[9] Mr. Carew submits that Rule 4.33(2) as informed by that authority should have resulted in this action being dismissed. He argues that nothing was done from late 2010 until he brought on his application to dismiss in 2017 that significantly advanced the action. In other words he submits that his participation in reaching an agreement providing for the payment of child support, the resolution of matrimonial property claims through a bankruptcy process, and his honouring of that agreement by making the agreed to $2000 monthly payments from March 2011 until July 2017 did not constitute a significant advance in the action or, alternately, did not create a situation that warrants the action continuing.

[10] We agree with the result reached by the chambers judge, but we arrive at that result without reference to the ***Trout Lake*** decision.

[11] We conclude that Mr. Carew's negotiating, entering into and honouring the settlement agreement "significantly advanced" this action. Settling both matrimonial property and child support issues can only be seen as significantly advancing this action toward resolution notwithstanding that some issues, in particular the divorce itself, remain outstanding.

[12] In ***Canada (Attorney General) v Delorme***, 2016 ABCA 168 at para 27, 401 DLR (4th) 231, this Court agreed with Topolniski J. in her conclusion in ***Nash v Snow***, 2014 ABQB 355 at para 32, 590 AR 198 [***Nash***] that a "'resolution' of disputes rather than a formal step leading to trial should be the premise upon which occurrences are judged as significant advancements". The Court at para 36, echoed her comments at para 30 of ***Nash*** that:

> ...the Court must view the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing and in certain circumstances, the outcome of what occurred.

[13] The parties making a settlement agreement regarding child support, and honouring that agreement for six or seven years falls within the premise upon which occurrences are judged as significant advancements. These actions were in the nature of resolution of the dispute regarding child support for that period of time, saved the parties from expenditure of further time and legal fees, were genuine to the extent that the obligations thereunder were performed without court intervention for years and were brought to an end only when the payor began to breach his ongoing obligations thereunder.

[14] Entry into the settlement agreement in and of itself created a situation of "resolution" of the child support issue, as that term was used in ***Nash***, and thereby constituted a "significant advance" in ongoing family litigation, particularly due to the focus of the current Rules on achieving resolution even where that occurs outside of a formal step leading to a trial. This is particularly important in family law matters where parties should be encouraged to successfully manage their ongoing issues by agreement without resort to the courts without risking having their action struck. Rule 4.33(2) should not be applied in a manner so as to discourage litigants from settling aspects of their ongoing disputes, even where the entire dispute is not settled, for fear that three years later the other party will be able to defeat the resolution of ongoing claims simply by bringing an application to dismiss. This is particularly important in family law matters where parties should be encouraged to successfully manage their ongoing issues by agreement without resort to the courts.

[15] We also note that Mr. Carew did not respond to the argument that to strike the action would lead to unnecessary expense and delay with no resulting benefit as there is nothing to prevent Ms. Boland from recommencing her action for divorce, there being no limitation period on commencing such an action.

[16] The practical result of granting Mr. Carew's application would be to require Ms. Boland to commence a new action and bring a new application in order to pursue her claims for a divorce and

child support, possibly including an action on their earlier settlement agreement. Such support is the right of the child and the obligation of the child's parents. Mr. Carew has not demonstrated that granting the application would be of any benefit to him (beyond perhaps inconveniencing Ms. Boland). This is not a circumstance where Mr. Carew can benefit from the lapse of any statutory limitation period. Had the chambers judge granted the application to dismiss, there would be no bar to Ms. Boland recommencing an action for identical relief.

[17] We observe that to endorse a payor's unilateral decision to stop making the agreed-upon child support payments and to then apply to strike the payee's underlying action for same, arguing that no proceedings had been taken for more than 3 years, would be to permit the payor parent to set a trap to force the payee to go to the expense of recommencing and prosecuting child support; if she could not afford or was otherwise unable to take that step, the payor could practically be absolved from further payment and his child deprived of the benefits of that support. Without suggesting that was Mr. Carew's motivation in applying to strike this action, to endorse his interpretation would effect such a result.

[18] We therefore conclude that the Chambers judge properly declined to dismiss the within action for delay. Mr. Carew has not established that 3 or more years have passed without a significant advance in the action. The parties entered into a settlement agreement with respect to his ongoing child support obligations, which was performed pursuant to its terms up to July 2017. This avoided the need for Ms. Boland to seek enforcement of those obligations through court proceedings throughout that period and should not preclude her from enforcing her child support entitlements thereafter.

Conclusion

[19] The appeal is dismissed.

Appeal heard on October 4, 2018

Memorandum filed at Edmonton, Alberta
this 23rd day of May, 2019

Bielby J.A.

O'Ferrall J.A.

Strekaf J.A.

Appearances:

J.N. Brunet
for the Respondent

C.J. Skrobot
for the Appellant