In the Court of Appeal of Alberta

Citation: Covey v Devon Canada Corporation, 2020 ABCA 445

Date: 20201208
Docket: 1901-0233-AC
Registry: Calgary

Between:

John Alan Reid Covey

Appellant
(Plaintiff)

- and -

Devon Canada Corporation

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Ritu Khullar
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice C.S. Anderson
Dated the 25th day of June, 2019
Filed on the 16th day of July, 2019
(Docket: 1401-06149)

Memorandum of Judgment

The Court:

[1] The appellant's claim for wrongful dismissal against his former employer, the respondent, was dismissed for long delay under r 4.33 of the *Alberta Rules of Court*, AR 124/2010, by both the Master, and on appeal, the Court of Queen's Bench. That rule requires the court to dismiss an action "if 3 or more years have passed without a significant advance in the action": r 4.33(2). The appellant's appeal to this Court is dismissed for the reasons that follow.

[2] The Master who heard the application for delay found that the last significant advance in the action was the granting of an order to strike portions of the claim on May 12, 2015. Approximately three years later at 5:30 pm on May 11, 2018, counsel for the appellant emailed an affidavit of records to counsel for the respondent. The appellant says that the delivery of the affidavit of records constituted a significant step in the action and was done within the three-year period stipulated by the *Rules*.

[3] The Master concluded that this step did not significantly advance the action in the relevant period, for two reasons. First, since the affidavit of records was emailed after close of business on May 11, 2018, the step should be taken as having occurred on May 12, 2018 and, therefore, three years since the last significant advance. Second, the Master found that serving the affidavit of records did not significantly advance the action because it was incomplete, had the appearance of having been put together in haste at the last minute, and left out numerous relevant material documents that should have been included. The affidavit of records was not adequate to serve the function for which such documents are prepared – to inform the other party of the case it has to face – and within three or four months was supplemented by another affidavit of records which added significant documentation.

[4] The Master's decision was appealed to a Justice of the Court of Queen's Bench, who agreed with the Master's decision and reasoning on both issues. In particular, the chambers judge concluded that the affidavit of records did not significantly advance the action, noting that it was "incomplete, as evidenced by a supplementary affidavit within three or four months that was then filed in draft form, but without any ... interposing discoveries or other event taking place", and it was "inaccessible because of the privileged documents that it contained".

[5] The appellant brings a further appeal to this Court, and again raises the same two issues that were before the chambers judge: (1) the appellant says that, on a proper interpretation of the *Rules*, the date of service of the affidavit of records, May 11, 2018, was within the three year "drop dead" period; and (2) the chambers judge erred in finding that service of the affidavit

of records was not a step that significantly advanced the action under r 4.33. The appellant also makes an argument about r 4.31, which the Master addressed but the chambers judge did not.

[6] It is not necessary to address the submissions relating to r 4.31, as in our view consideration of r 4.33 is sufficient to dispose of the appeal.

[7] The appeal fails because the appellant failed to significantly advance the lawsuit when it served its first affidavit of records. Determining whether an action has been "significantly advanced" within the meaning of r. 4.33 involves "an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the Rules of Court": ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para 11. As this Court has noted, the determination of what constitutes a "significant advance" for purposes of r 4.33 is necessarily fact specific and the chambers judge is entitled to deference: ***Thiessen v Corbiell***, 2019 ABCA 56 at para 18.

[8] In this case, both the Master and the chambers judge concluded that the affidavit of records served by the appellant on May 11, 2018 did not significantly advance the action. It is now well-established that not every step mandated by the rules that will significantly advance an action within the meaning of r 4.33: ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at para 20. The test is a functional one, described in ***Weaver v Cherniawsky***, 2016 ABCA 152 at para 18:

> Under the delay *Rules* the functional approach requires the chambers judge to determine whether the step said to be a "significant advance in an action" actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and timing of the step are also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than on its form: *St Jean Estate v Edmonton (City)*, 2014 ABQB 47 at para 19, 585 AR 81; *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, 2016 ABCA 123; *Ursa Ventures Ltd. v Edmonton (City)*, 2016 ABCA 135, paras 18 and 19.

[9] The chambers judge correctly set out this test in her reasons. The reasons, although brief, make it clear that she applied the test to determine whether service of the affidavit of records significantly advanced this action. She considered the content of the affidavit of records, concluding that it was too incomplete and inaccessible to the respondent's counsel (having inadvertently listed privileged documents) to have moved the action forward in a meaningful way.

[10] As was the case in ***Ursa Ventures***, the chambers judge here considered the nature and extent of the affidavit of records in the context of the lawsuit as a whole. The timing of service

of the affidavit was also relevant. The Master found that the appellant appeared to have prepared the affidavit in haste, at last minute, and that, within three or four months, the appellant provided another affidavit of records with significant additional documentation. From that, the Master inferred that the initial affidavit of records did not advance the lawsuit in any meaningful way. The chambers judge agreed with the Master and adopted his reasoning.

[11] As was noted in ***Ursa*** at para 32, it is not this Court's role to reweigh factors. The decision of the chambers judge is entitled to deference. This ground of appeal is dismissed.

[12] While this is sufficient to dispose of this appeal, the appellant also raised two other issues which we address given the paucity of authority on them. The first relates to the calculation of three years; the second relates to service by email at 5:30 pm.

[13] Rule 4.33(2) states:

> "*if 3 or more years* have passed without a significant advance in the action, the court, on application, must dismiss the action as against the applicant."
>
> [Emphasis added].

[14] It is undisputed that the last significant advance was May 12, 2015. The question is how to count three years from May 12, 2015. This is governed by r 13.4(3): "when counting to or from an event or activity in years, time is calculated from the date on which the activity or event occurs in a year to the same number date in a subsequent or previous year as the case requires". Applying r 13.4(3) to this case, three years from May 12, 2015 would fall on May 12, 2018. The appellant argues that the deadline is therefore May 12, 2018, so whether service was on May 11 or 12, it is still within the three years. The respondent agrees that three years from May 12, 2015 is May 12, 2018, but says that the deadline under r 4.33 is effectively three years less a day, so May 11, 2018.

[15] The respondent's argument is essentially this: under r 4.33, the court "must dismiss" the action if "3 or more years have passed without a significant advance". It does not say "more than 3 years" or that the court must dismiss the action if there is no significant advance "within 3 years". If r 4.33 said either of those things, service of the affidavit of records on May 12, 2018 would have been within the required period. However, r 4.33 sets the drop-dead date, on which the action is out of time, at three years from the last significant advance; therefore, the respondent argues, the significant advance must take place earlier than three years since the last significant advance. The respondent acknowledges that the jurisprudence contains some passing references to the deadline being less than three years, but that no court has addressed the issue head on: see ***Ursa*** at para 11 referring to "prior to the expiration of three years" or ***Maurice v Matchett***, 2016 ABQB 704 at para 49 referring to "3 years less a day"**.**

[16] We disagree with the respondent's position. Under r 4.33, the three years have to "have passed". May 12, 2018 would mark the third-year anniversary, but the three years will not have passed until the end of the day on May 12, 2018. This interpretation is consistent with the plain meaning of the words in the r 4.33. It is also consistent with the foundational rules which, among other things, are concerned that the rules be accessible to all litigants, represented or not, and encourage fair and just resolutions. The interpretation suggested by the respondents is technical, whereas the intent is to simplify and clarify computation of time under the rules as evidenced by rules 13.2-13.5. Therefore, the appellant had until May 12, 2018 to serve the affidavit of records.

[17] This leads to the second issue, the service of the draft affidavit of records by email on May 11, 2018 at 5:30 p.m[1]. The question is when service was effected. The appellant argues that it had until midnight on May 11, 2018 to effect service and service should be found to have occurred on May 11, 2018. The respondent relies on s 22(2) of the *Interpretation Act*, RSA 2000 c I-8, to argue that service is deemed to have been effected on May 12, 2018, at the earliest. Section 22(2) states that if the time:

> … for the doing of anything … falls on a day on which the office or place in which … the thing is required to be … done is not open during its regular hours of business … the thing may be … done on the day next following on which the office or place of business is open.

We do not see how s 22(2) of the *Interpretation Act* supports the respondent's argument. Section 22(2) only applies when an office is "not open during its regular hours of business" and the respondent's counsel's law firm *was* open for business during its regular hours on May 11, 2018. Further, s 22(2) does not *deem* anything to have happened on a certain day. It just says that if an action must be performed at an office on a day when the office is not open during its regular business hours, the action may be done on the following day if the office is open.

[18] Regular office hours were defined under the old Rules of Court as "any time between 8:30 am and 5:00 pm on any day that is not a Saturday, Sunday or holiday": r 28(1)(d) *Alberta Rules of Court*, Alta Reg 390/68. However, neither this definition nor concept were carried over into the current rules. So, the argument that service on May 11, 2018 was after office hours and therefore ineffective on that day, fails.

[19] The relevant factual context in this case was that service was by email. Rule 11.21 permits service by electronic method for a non-commencement document when the receiving party has provided an electronic address for service, the document is sent to that address, the

[1] If we had accepted the respondent's argument that the three-year-drop-dead period expired May 11, this argument in this case would have been key. Given our conclusion about the three year period, it is not.

document is received in usable form, and that the sender "obtains or receives confirmation of the successfully completed transmission": r 11.21(1) and (2). Service is effected when the sender receives confirmation of successful transmission. In this case, we have no evidence if or when the sender received confirmation of the successfully completed transmission. While the officer of the respondent swore an affidavit which acknowledged receipt of the 5:30 pm May 11, 2018 email at its lawyer's office, on this record we cannot say *when* service was effected.

[20] The appeal is dismissed.

Written submissions filed on June 12, 2020 and July 24, 2020

Memorandum filed at Calgary, Alberta
this 8th day of December, 2020

Authorized to sign for O'Ferrall J.A.

Khullar J.A.

Feehan J.A.

Appearances:

C.J. Popowich/K.L. Reiffenstein
for the Appellant

C.G. Jensen, Q.C./R.M. Phillips
for the Respondent