In the Court of Appeal of Alberta

Citation: Flock v Flock Estate, 2017 ABCA 67

Date: 20170301
Docket: 1501-0286-AC
Registry: Calgary

Between:

Doran Alfred Flock

Respondent
(Plaintiff/Applicant)

- and -

William McKen, Litigation Representative of the Estate of Arlene Joy Flock

Appellant
(Defendant/Respondent)

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Frederica Schutz

Reasons for Judgment Reserved of The Honourable Madam Justice Schutz
Concurred in by The Honourable Mr. Justice McDonald
Concurred in by The Honourable Madam Justice Veldhuis

Appeal from the Judgment by
The Honourable Mr. Justice R.P. Marceau
Dated the 27th day of October, 2015
(2015 ABQB 671, Docket: 4801 093808)

Reasons for Judgment Reserved of
The Honourable Madam Justice Schutz

Introduction

[1] The deceased appellant, Arlene Joy Flock, by her litigation representative William McKen, appeals an order dismissing her application under rule 4.33 of the *Alberta Rules of Court* to strike a 1997 matrimonial property statement of claim issued by the respondent, Doran Alfred Flock, who is the appellant's ex-husband: ***Flock v Flock***, 2015 ABQB 671. The appellant has defended the respondent's matrimonial property claim, and counterclaimed.

[2] The parties married in 1982, separated in 1996 and divorced in 1999. On December 19, 2014, the appellant brought the application seeking dismissal of the respondent's claim due to long delay under the "drop dead rule".

[3] The facts as found by the chambers judge are not disputed between the parties. The issue in this appeal strictly concerns the court's interpretation of those facts in the context of the test for dismissal for want of prosecution under rule 4.33. The court found that nothing had taken place to "materially advance" the action in the three years before the appellant's application, nor that the appellant had expressly consented to any delay in writing or otherwise. Despite this however, the appellant's application was dismissed on the basis that the delay was "excused" by the appellant, and that allowing the application would otherwise result in an "inequitable division" of the marital property.

[4] For the reasons that follow, the appeal is allowed.

Decision Below

[5] The chambers judge found that the relevant time period under rule 4.33 was the three years prior to the filing of the appellant's application on December 19, 2014; that is, December 19, 2011 to December 19, 2014.

[6] He further found that examinations for discovery (questioning) held in late July 2009 were the last step that "materially advanced" the respondent's action and, further, that as applications by the respondent to set the matter for trial were adjourned (in 2012) and dismissed for lack of readiness (in 2014), these were "not a significant advance in the action."

[7] The Court found, however, that beginning on November 15, 2012, the appellant's then counsel entered into a course of conduct which "lulled" the respondent's counsel into believing that there would be no proceedings taken to enforce time limits as long as the parties were moving towards mediation, settlement, the setting of a litigation plan and trial. The chambers judge held that this effectively stopped the clock from running with respect to delay from that date until the appellant filed her application for dismissal in December 2014. As a result, the Court determined

that a period of more than two years was "not to be counted against the Plaintiff as unexcused delay", and therefore three years had not passed without a significant advance in the action.

[8] The Court based this finding on a series of communications by letter and email between counsel for the parties. In particular, on November 14, 2012 Nation J adjourned the respondent's application to set the matter down for trial to December 6, 2012 on the basis that the appellant advised she was bringing an application under rule 4.33 for dismissal due to delay. The appellant was directed to file her application by the December 6th date, and the parties were to agree to a litigation plan if the rule 4.33 application was dismissed. The Interim Order to that effect was not filed until November 13, 2013.

[9] On November 15, 2012 however, counsel for the appellant wrote to counsel for the respondent proposing mediation, that "all litigation between these parties be 'put on hold' until the parties complete the arbitration process", and asked the respondent's counsel to advise accordingly. On November 26, 2012, the respondent's counsel wrote to appellant's counsel agreeing to mediation, but did not expressly mention or agree to the proposal to "put the litigation on hold". Communications continued regarding mediation and settlement, but when those discussions proved fruitless by mid-February 2013, a litigation plan was then contemplated which also failed to result in any agreement between the parties. The chambers judge extensively reviewed the correspondence materials, as well as the oral questioning of the respondent and his counsel and undertakings answered on this issue; he ultimately found:

> My conclusion is that the offer made by the Defendant to the Plaintiff to expressly agree to the delay from November 15, 2012 onwards was never formally accepted and the correspondence which followed in December 2012 did not constitute an acceptance of the offer. So there was no formal standstill agreement. (at para 29)

[10] However, the chambers judge then went on to review the case law on standstill agreements, and the notion of acquiescence to delay by a defendant and failing to expeditiously bring a dismissal application. The Court referred to evidence in which the respondent's counsel on September 5, 2014 notified the appellant's counsel that a new application to set trial dates was being brought and set out the respondent's litigation plan of "getting appraisals" completed on contested properties. There were further letters in response by the appellant's counsel on September 10 and 23, 2014, which spoke of the appellant's litigation plan, but nothing was ever formalized or agreed to by the parties. Nothing more was communicated by the appellant until the respondent's counsel was informed of a change of the appellant's counsel at the end of November, 2014, and the application to dismiss was then filed on December 19, 2014.

[11] Based on this evidence, the chambers judge determined that counsel for the respondent was "lulled" by the appellant's counsel into believing that the appellant would not enforce time limits as long as the parties were working towards mediation, settlement or a trial. It was noted that although Nation J had ordered the appellant to file her dismissal application by December 6, 2012, this did not happen until just over two years later. In the meantime, the respondent's application to

set a trial date was adjourned from time to time in response to the appellant counsel's requests to do so. Further, at the time the appellant successfully responded to the respondent's application to set a trial date on September 23, 2014 (which application was dismissed), counsel for the appellant never indicated she was *not* acquiescing to the delay, and later set up a date for further questioning. The Court ultimately found "it would be an abuse of process to permit the Defendant to lead the Plaintiff on and then ambush him" with a dismissal application (at para 54). The appellant's application under rule 4.33 was therefore dismissed.

[12] In the alternative, the Court below found that the appellant's notice of application for an order, *inter alia*, to sever the joint tenancy in the matrimonial home filed on June 23, 2015, some months after the appellant's notice of application to strike under rule 4.33 was filed, was sufficient action or participation on the appellant's part to warrant the action continuing under rule 4.33(1)(d). This was primarily because if the appellant's dismissal application succeeded, the respondent would lose his interest in properties held in the appellant's name, and would only retain a one-half interest in the former matrimonial home, leading to an inequitable division of property under the *Matrimonial Property Act*.

Standards of Review

[13] Articulation and application of the correct legal test to be applied under rule 4.33 attracts review on the correctness standard. Interpretation of the *Alberta Rules of Court* in dismissal for long delay applications specifically raises questions of law: ***Ro-Dar Consulting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 at para 11. 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: ***Weaver v Cherniawsky,*** 2016 ABCA 152 at para 15, such as determining whether the established facts satisfy the legal test set out in the Rules: ***Ro-Dar*** at para 11; see also ***Brost v Kusler***, 2016 ABCA 363 at para 8. Findings of fact are entitled to deference absent palpable and overriding error: ***Housen v Nikolaisen***, 2002 SCC 33 at paras 8 and 10.

[14] I note that the chambers judge did not have the benefit of recent case law from this court which has held, among other things, that there must be a functional review of the steps taken to determine whether they significantly advanced the action: ***Canada (Attorney General) v Delorme***, 2016 ABCA 168; ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165; ***Weaver v Cherniawsky***; ***Ursa Ventures Ltd v Edmonton (City),*** 2016 ABCA 135; and ***Ro-Dar***.

[15] Rule 4.33 in force at the applicable time stated:

> Dismissal for long delay
>
> **4.33(1)** If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> (a) the parties to the application expressly agreed to the delay,

> (b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,
>
> (c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action, or
>
> (d) 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.
>
> **(2)** If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.
>
> **(3)** The following periods of time must not be considered in computing periods of time under subrule (1):
>
> (a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;
>
> (b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (1)(c) and provision of a substantive response referred to in that subrule.
>
> **(4)** *Rule 13.5* does not apply to this rule.

Grounds of Appeal

[16] The appellant raises three grounds of appeal:

1. The chambers judge erred in law in finding that three years did not pass without a significant advance in the action. The basis for the chambers judge's decision was that the respondent had been lulled. Lulling, as it is described by the chambers judge, is not a relevant consideration in the test for a dismissal for long delay, and as such the chambers judge committed reversible legal error by failing to apply the correct legal test for a dismissal application.

2. The chambers judge compounded the legal error by relying on palpable and overriding errors of fact that the appellant's counsel had lulled the respondent's counsel into believing that no proceedings pursuant to rule 4.33 would be taken so long as the parties were working towards mediation, settlement, and then trial.

3. The chambers judge erred in law in finding that the impact of a dismissal on the respondent was a relevant factor to be considered when applying rule 4.33 and finding that the severance application was an application filed since the delay and initiated by the appellant for a purpose and to the extent that warrants the action continuing pursuant to rule 4.33(1)(d).

Analysis

[17] The chambers judge did not have the benefit of the ***Ro-Dar*** decision from this Court, which confirms the following:

1. Whether an action has been "significantly advanced" 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 *Alberta Rules of Court*. The chambers judge's conclusion on that issue is entitled to deference: ***Ro-Dar*** at para 11.

2. The functional approach set out in ***Phillips v Sowan***, 2007 ABCA 101 as approved in the most recent amendments to rule 4.33, means the drop dead rule now clearly requires a functional approach, without overemphasizing formalistic steps that might have been taken. The *obiter* statement in ***Morasch v Alberta***, 2000 ABCA 24 at para 6, that anything required by the rules is deemed or presumed to advance the action, does not correctly state the law: ***Ro-Dar*** at para 14. Even a step mandated by the *Rules* requires the court to analyze that step using the functional approach to determine whether that step significantly advances the action: ***Ursa Ventures Ltd v Edmonton (City)*** at para 35.

3. Rule 4.33(1)(d), now rule 4.33(2)(d), confirms that any three-year period of inactivity will require dismissal of the action, subject only to an exception where the moving party has participated in steps after the expiry of the three years to the extent that it would be unjust to dismiss the action. This wording of the rule entrenches the interpretation placed on the rule in ***Trout Lake Store Inc v Canadian Imperial Bank of Commerce***, 2003 ABCA 259 at para 33: ***Ro-Dar*** at para 17.

In addition to the principles affirmed in ***Ro-Dar***, the following additional principles relating to the interpretation of rule 4.33 maintain effect:

4. The plaintiff bears the ultimate responsibility for prosecuting its claim in a timely manner: ***XS Technologies***, 2016 ABCA 165 at para 7; see also ***Lethbridge Motors Co v American Motors (Canada) Ltd*** (1987), 79 AR 321 (CA) at para 19. A defendant, while never required to actively move the plaintiff's action along,

cannot purposively obstruct, stall or delay the action: ***Janstar Homes Ltd v Elbow Valley West,*** 2016 ABCA 417 at para 26.

5. The rule is mandatory and does not allow for the exercise of discretion: ***Morasch*** at para 5.

6. "If a party, therefore, does nothing to enforce its right under Rule [4.33] on a timely basis, and the opposing party continues to take meaningful steps outside the [three year gap], it may reach a stage where the right to an automatic dismissal is lost": ***Trout Lake*** at para 31.

7. The rule does not exclude the consideration of things done by the complaining party. A step by either party will be taken into account in deciding whether a thing has been done in three years to materially advance the action: ***Volk v 331323 Alberta Ltd***, 1998 ABCA 54, 212 AR 64; see also ***Jondreau v Maclean***, 2006 ABQB 265 at para 13.

8. The relevant period of delay must be determined by looking back from *the date the application was filed*, not heard: ***Steparyk v Alberta***, 2014 ABQB 367 at para 5.

9. The question of prejudice to the applying party from the delay is irrelevant. No inquiry into that issue is necessary: ***Volk v 331323 Alta Ltd*** at para 16; see also ***St Jean Estate v Edmonton (City)***, 2014 ABQB 47 at para 13. "The absence or presence of prejudice to another party is not a consideration . . . Similarly, the sterling reputation of the litigant, the strength of his action or defence, and the justification for the delay are all irrelevant . . . Of course, although mandatory, a [rule 4.33] dismissal is not automatic. A party must apply to the court to trigger the dismissal": ***Morasch*** at para 5.

10. The purpose behind the exception stipulated in rule 4.33(1)(d) "is to enshrine in the rules the ability of the Court to dismiss drop dead applications where defendants have actively participated in an action to an extent and degree that could lead a plaintiff to fairly assume that the defendant has waived the delay": ***Krieter v Alberta***, 2014 ABQB 349 at para 50; see also ***St Jean Estate***.

11. An agreement to excuse time may be oral, but it cannot be implied, and under rule 4.33(1)(a) must be "express"; so, conduct alone or occasional discussion of settlement, does not suffice. An exchange of correspondence will suffice if it is clear and precise enough; parties, start of period, and essential terms must be spelled out: ***Bugg v Beau Canada Exploration Ltd,*** 2006 ABCA 201 at paras 9,

17-18; ***525812 Alberta Ltd v Purewal,*** 2004 ABQB 938 per Slatter J (as he then was) at paras 13-17.

[18] With these guiding principles in mind, I turn to a consideration of the grounds of appeal.

Lulling - Did the appellant lull the respondent into believing that the appellant had waived reliance upon Rule 4.33?

[19] The first and second grounds of appeal can be dealt with together.

[20] First, there is nothing in the evidence that would lead to an inference that the appellant had expressly waived her legal entitlement to rely upon rule 4.33 at the appropriate time.

[21] Second, while the appellant's counsel wrote to the respondent's counsel on November 15, 2012 suggesting mediation and that the litigation be put on hold, this is not the same as a standstill agreement. Regardless, the respondent never advised if this offer was accepted and the appellant did not consent to delay beyond those perimeters; mediation discussions ultimately failed by February 2013, with no significant advance in the action.

[22] After February 2013, there is no evidence or indication, whether by communication or action or participation in these proceedings, that would lead to a reasonable inference that the appellant acquiesced in further delay. Silence is not acquiescence, and acquiescence does not amount to an "express" standstill agreement. Plaintiffs cannot be "lulled" into inactivity by vagueness about the reach of this mandatory rule.

[23] In ***525812 Alberta Ltd v Purewal*** it was held that an implied standstill agreement cannot extend the drop dead deadline (then rule 244.1), and discussions as to "the prospect of mediation" are not enough to find "acquiescence in the delay" as in ***Trout Lake***:

> [14] There is no compelling authority that an implied standstill agreement can extend the time in R. 244.1, in the face of the plain wording of Rule 243.1. There was no express standstill agreement between the Plaintiff and the Defendants. The correspondence in question does not refer to a standstill agreement, or to delay, or to the passage of time, or to the steps required to set the matter down for trial. The correspondence discusses the facts, and the prospect of mediation, but nothing more. Accordingly the action must be struck out unless a thing was done that materially advanced the action.
>
> ….
>
> [17] While most actions are resolved by settlement, and the Court encourages parties to settle their own differences, settlement discussions are not themselves an excuse for not advancing the action. If settlement discussions are unsuccessful, that

> is no excuse for simply doing nothing. In this case there was a period of approximately 20 months between the last settlement discussions and the motion to strike [by the defendants], a delay that cannot be justified under any reasoning. [Emphasis added]

[24] Third, under rule 4.33 it is juridically irrelevant that neither the appellant nor her counsel expressly communicated to the respondent after November 15, 2012 that they did *not* consent to delay in the matter. To be clear, there is no duty upon an applying party to expressly advise a responding party that it does not acquiesce to delay: the rule imports no such duty. Accordingly, it is reversible error to import such a requirement when interpreting the correct test under rule 4.33. Such an error occurred in this matter when mandatory dismissal of the respondent's action was required upon the chambers judge's finding of a sufficient period of inactivity.

[25] Rule 4.33 must be read in light of the foundational rules – rule 1.2(2)(b) stipulates that the *Rules of Court* are intended to facilitate the quickest means of resolving a dispute at the least expense on the merits. Those rules apply to both parties: rule 1.2(3). Rules 4.1 and 4.2 make this clear. For example, rule 4.2(b) provides that all parties are to "respond in a substantive way and within a reasonable time to any proposal for the conduct of an action. Although "a defendant is obliged, pursuant to the foundational rule 1.2, not to engage in tactics that obstruct, stall or delay an action that the plaintiff is advancing," [***Jenstar Homes Ltd v Elbow Valley West***, 2016 ABCA 417 at para 26; ***Turek v Oliver***, 2014 ABCA 327],"a plaintiff bears the ultimate responsibility for prosecuting its claim": **XS *Technologies Inc v Veritas DGC Land Ltd*** at para 7.

[26] In our view, in this case there is insufficient evidence on the record to find that the appellant lulled the respondent into believing there would be no action taken to enforce time limits as long as the parties were moving towards mediation, settlement, or trial. Specifically, there is no evidence to suggest that after mediation efforts collapsed in February 2013, there was any form of consent by the appellant to any further delay.

Did the Court of Queen's Bench erroneously consider prejudice?

[27] The chambers judge considered prejudice, notwithstanding that the presence or absence of prejudice to either party is irrelevant under rule 4.33. Again, the rule is written in absolute terms and dismissal is mandatory once the requisite period is established during which there was no activity that significantly advanced the action. Rule 4.33 is called the "drop dead rule" because it sets the limitation period beyond which delay, whether prejudicial or not, is not accepted. It stands in contrast to rule 4.31, which is the prejudice-based discretionary delay rule that can be resorted to at any time prior to the expiry of the drop dead limitation period.

[28] The Court below decided that it should not allow dismissal of an action which results in a plaintiff being unable to invoke the *Matrimonial Property Act* to divide property, yet leaves it open to the defendant to invoke the *Matrimonial Property Act* to obtain an equitable division of the matrimonial home.

[29] First, the appellant's joint tenancy severance application, as separate and distinct from the plaintiff's matrimonial property action, occurred seven months after her rule 4.33 application was filed and with the objective of dealing with the consequences of a successful rule 4.33 application. Accordingly, there was nothing in this conduct or action that would have led the respondent to assume that enforcement of rule 4.33 had been waived.

[30] Second, any prejudice to the respondent on this appeal that may arise in the context of the severance application must be dealt with in that context, not as a consideration in correctly interpreting and applying rule 4.33 to the circumstances of the delay here.

[31] Several cases [***Brost v Kusler***; ***Metcalf v Metcalf***, 2011 ABQB 186; ***Lord v Bell-Lord***, 2007 ABQB 274; ***Repas v Repas***, 2010 ABQB 569; ***Roe v Roe***, 2007 NWTSC 78] involving actions under the *Matrimonial Property Act* have correctly articulated and applied rule 4.33. I am aware of no principled basis upon which it would be just or appropriate to carve out an exception to the rule when the plain language of rule 4.33 does not.

Conclusion

[32] For all of these reasons, I conclude that the correct interpretation and application of rule 4.33 compels dismissal of the respondent's action.

[33] Accordingly, the appeal is allowed and the statement of claim given the Clerk of the Court of Queen's Bench action #4801 093808, is struck.

Appeal heard on November 7, 2016

Reasons filed at Calgary, Alberta
this 1st day of March, 2017

_____
Schutz J.A.

I concur: _____
McDonald J.A.

I concur: _____
Veldhuis J.A.

Appearances:

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