In the Court of Appeal of Alberta

Citation: Janstar Homes Ltd v Elbow Valley West Ltd, 2016 ABCA 417

Date: 20161223
Docket: 1501-0247-AC
Registry: Calgary

2016 ABCA 417 (CanLII)

Between:

Janstar Homes Ltd., 1111111 Alberta Ltd., and Joe Starr

Appellants
(Plaintiffs)

- and -

Altaf Hirji

Not a Party to the Appeal
(Plaintiff)

- and -

Elbow Valley West Ltd.

Respondent
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice D. B. Nixon
Dated the 22nd day of September, 2015
Filed on the 13th day of October, 2015

(Docket: 080102605)

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Memorandum of Judgment

The Court:

[1] This is an appeal from a decision dismissing a claim for long delay under r 4.33. For the reasons that follow, this appeal is dismissed.

I. Background

[2] On March 6, 2008, the appellants and Altaf Hirji, who is not a party to this appeal, commenced an action against the respondent for specific performance and breach of contract. On April 21, 2008, the respondent filed its statement of defence.

[3] In 2009, the appellants changed law firms. In July 2010, the respondent filed its affidavit of records. In January 2011, the appellant Joe Starr filed his affidavit of records.

[4] On April 7, 2011, the respondent served an application for summary judgment against Janstar Homes Ltd. returnable May 4, 2011. The application was rescheduled as a special application returnable August 18, 2011. By letter dated August 12, 2011 the appellants sought an adjournment.

[5] On August 17, 2011 Master Hanebury granted a consent order which adjourned the application for summary judgment *sine die* and directed that the encumbrances filed by the appellant Janstar Homes Ltd. against certain lands owned by the respondent, be discharged.

[6] By letter dated November 10, 2011 appellants' counsel wrote to the respondent's counsel enquiring as to available dates for questioning on the affidavits that had been filed in support of the summary judgment application. Appellants' counsel followed this correspondence up with a further letter dated December 28, 2011. At no time had respondent's counsel indicated that he intended to re-start the application for summary judgment.

[7] On January 5, 2012 respondent's counsel replied to the December 28, 2011 letter by an email which stated in part:

> The purpose of this email is to respond to your fax correspondence of December 28, 2011.
>
> From your fax it appears that you are desirous of our recommencing our application for summary judgment. Please therefore provide me with dates on which you are available for the hearing.

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> Once I have your dates I will obtain a date from the court for the hearing. Thereafter we will be well positioned to set out a timetable for examinations etc.
>
> In reviewing the file I note that we have only received an affidavit of records from one of your clients. Please ensure all outstanding affidavits are provided within the next three weeks. If we do not receive the outstanding documents within this time period we will be forced to seek an order from the court.
>
> I look forward to hearing from you.
>
> All the best,
>
> …

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[8] On January 11, 2012 appellants' counsel provided copies of the affidavit of records for Janstar Homes Ltd. and 1111111 Alberta Ltd. No affidavit of records appears to have ever been filed on behalf of the plaintiff Altaf Hirji. By letter dated January 12, 2012 appellants' counsel provided to respondent's counsel certain dates in February and March that he would be available for the hearing of the summary judgment application.

[9] Nothing occurred thereafter in this matter until October 3, 2013 when the appellants' counsel wrote to the respondent's counsel advising that this file "has come up in my diary" and confirming that his last correspondence was on January 11 and 12, 2012 wherein the affidavit of records of Janstar Homes Ltd., 1111111 Alberta Ltd. and Joe Starr (again) had been provided. His letter went on to state he had "requested Examination dates. To date we have not had a reply." Nothing contained in the October 3 letter referred to the respondent's summary judgment application.

[10] On October 24, 2013, the respondent's counsel advised by email that he was unavailable until January or February 2014. On March 19, 2014, the appellants' counsel requested dates for questioning and referred to his letter of October 3, 2013. On March 20, 2014, the respondent's counsel advised by email that he was unavailable until June through August 2014. In this email, respondent's counsel also pointed out that he had responded to the October 3, 2013 letter with his October 24, 2013 email.

[11] On June 16, 2014, appellants' counsel sought dates for questioning in August 2014. On June 26, 2014, respondent's counsel responded seeking clarification with respect to the questioning; however he provided no available dates. On July 17, 2014, respondent's counsel emailed appellants' counsel. Respondent's counsel thereafter sent further emails on July 29, 2014 and August 11, 2014 following up on his June 26 email.

[12] There was no response to these four emails until August 21, 2014, when the appellants' counsel sent a letter seeking dates for questioning and indicated three possible dates in October

2014. Respondent's counsel failed to respond to the August 21, 2014 letter and has acknowledged this oversight.

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[13] On January 7, 2015, the appellants' counsel sent a letter seeking questioning dates. On January 19, 2015, the respondent filed an application under rule 4.33 to dismiss the appellants' action.

[14] The wording of rule 4.33 was amended in 2016. At the time the application was brought however rule 4.33 read as follows:

> 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.

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II. Master's Decision

[15] The master held that based on the date of January 2012, although arguably January 2011 could be the start date, three years had passed where nothing significant had occurred to advance the action. She found the exchange of letters seeking dates for questioning accomplished nothing. She therefore dismissed the action.

III. Chambers Judge's Decision

[16] On appeal to the chambers judge, the chambers judge agreed with the master's decision. He found that on January 11, 2015, the three year threshold had expired. The chambers judge further held that the exchange of correspondence and scheduling questioning dates did not significantly advance the action. A functional analysis indicated that the actions in question did not genuinely further the litigation in a meaningful way.

[17] The chambers judge also found no substantive evidence of an ambush. While there were delays in timely responses by both sides, the respondent offered periods when it was available but the appellants did not respond in a timely fashion to these opportunities. Furthermore, the appellants did not push the matter or formalize a significant advance in the action.

[18] The chambers judge held that the foundational rule 1.2 does not override the mandatory nature of rule 4.33. He also found there to have been no acquiescence. To meet that threshold, rule 4.33(d) would have to apply and the chambers judge found no evidence that it did.

[19] The chambers judge accordingly dismissed the appeal.

IV. Grounds of Appeal

[20] In oral submissions before this court, appellants' counsel advanced the following three arguments:

1. The respondent acquiesced to the delay thereby denying the respondent "access" to rule 4.33 as a matter of fairness and justice;
2. There was express agreement to the delay so as to make the exception in rule 4.33(i)(a) applicable; and
3. The action has been significantly advanced so that the requirements of rule 4.33 are not met.

V. Standard of Review

[21] An appeal of a chambers judge's decision on rule 4.33, as a question of mixed fact and law, is reviewed on a standard of palpable and overriding error: *University of Alberta v Chang*, 2012, ABCA 324 at para 14.

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VI. Analysis

A. Did the respondent acquiesce to the delay thereby denying the respondent "access" to rule 4.33?

[22] The appellants argue that the chambers judge should have found that the respondent was responsible for a significant portion of the delay and the respondent should not be allowed to benefit from its own delay. They further argue that rule 4.33 is a discretionary remedy and since there is no evidence of prejudice to the respondent, and that the respondent does not come to court with clean hands, it is fair and just and in the interest of justice and the promotion of courtesies between counsel, that the respondent's summary judgment application should have been denied.

[23] The appellants further argue that the foundational rule 1.2 which states the purpose of the rules is to provide a means to resolve claims fairly and justly puts an obligation on the respondent, as well as the appellants, to advance the lawsuit.

[24] For its part, the respondent submits that rule 4.33 is mandatory, not discretionary, and therefore the appellants' submissions regarding prejudice, clean hands, fundamental justice and equity are inapplicable. The respondent further argues that it was the appellants' lack of initiative that resulted in the delay of this action and that there is no basis whatsoever for claims of improper behaviour by the respondent. The respondent also argues that the appellants' argument regarding foundational rule 1.2 is without merit.

[25] We agree with the finding of the chambers judge that while there were delays in timely responses by both sides, there was no substantive evidence of an ambush on the part of respondent's counsel. We also agree that the facts of this case do not support an argument that the exception contained in rule 4.33(1)(d) applies. Indeed, it was only a matter of days following the expiration of the delay period on January 11, 2015 that respondent's counsel brought his application to dismiss.

[26] With respect to the foundational rule 1.2, two comments are in order. First, it does not override the clear mandatory language of rule 4.33. Second, it does not have the effect of requiring a defendant, in any manner, to assume carriage of an action where the plaintiff is not actively advancing its own claim. The initiative at all times remains with the plaintiff to pursue its lawsuit in a timely fashion: *XS Technologies Inc v Veritas DGC Land Ltd*, 2016 ABCA 165 at para 7. On the other hand, 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.

[27] We agree with the findings of the chambers judge on this ground of appeal.

B. Was there an express agreement to the delay so as to make the exception in rule 4.33(1)(a) applicable?

[28] This argument was not raised in the appellants' factum nor does it appear to have been argued in the court below. In any event, there is no factual foundation to support this ground of appeal and accordingly it too is dismissed.

C. Was the action significantly advanced so that the requirements of rule 4.33 have not been met?

[29] The appellants submit that the communication between counsel, respecting the setting of questioning dates, was done with a goal of significantly advancing the action. They argued that like settlement discussions, this advanced the matter.

[30] On the other hand, the respondent argues that there was nothing that significantly advanced the action during the relevant time period and three years having expired, the requirements of rule 4.33 have been satisfied.

[31] Again we agree with both the master and the chambers judge. The exchange of correspondence with respect to dates for questioning in itself did not significantly advance this action. Accordingly this ground of appeal is also dismissed.

VII. Conclusion

[32] In the result, the appeal is dismissed.

Appeal heard on December 5, 2016

Memorandum filed at Calgary, Alberta
this 23rd day of December, 2016

Authorized to sign for: Paperny J.A.

McDonald J.A.

Martin J.A.

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Appearances:

P. Anic
for the Appellants

E. C. Nuttall/J.D. Ksiazek
for the Respondent

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