In the Court of Appeal of Alberta

Citation: Loncikova v Goldstein, 2021 ABCA 390

Date: 20211130
Docket: 2001-0203AC
Registry: Calgary

Between:

Jana Loncikova

Appellant
(Plaintiff)

- and -

Dr. Martin Goldstein

Respondent
(Defendant)

The Court:

The Honourable Justice J.D. Bruce McDonald
The Honourable Justice Ritu Khullar
The Honourable Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice K. M. Horner
Dated the 29th day of September, 2020
Filed on the 13th day of November, 2020
(Docket: 1101-01840)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant, Jana Loncikova, appeals the chambers judge's preliminary jurisdictional order that held that a master has the jurisdiction to hear an application to dismiss for delay after a scheduled trial has been adjourned *sine die*. For the reasons that follow, the appeal is dismissed.

Background Facts

[2] The appellant filed a statement of claim in 2011 alleging that the respondent was negligent in providing dental treatment. A Form 37 was filed in August 2014 and a trial was set for ten days, to commence on June 1, 2015.

[3] On March 23, 2015, the appellant's then lawyer forwarded to respondent's counsel a new expert report from a doctor who had not been listed as one of the appellant's expert witnesses. In light of this, the trial had to be adjourned. Chief Justice Wittmann (as he then was) endorsed a consent order dated April 21, 2015 which provided that the trial would be adjourned *sine die* and the parties had leave to set the matter down again for a further trial date once the issues that required the adjournment were resolved (Consent Order). The parties exchanged additional expert reports and in February 2017, they participated in an unsuccessful judicial dispute resolution.

[4] On May 10, 2017, appellant's counsel forwarded a new Form 37 "to obtain another trial date". Counsel for the respondent agreed "we should get this matter scheduled for trial" subject, inter alia, to one further questioning of the appellant.

[5] However, on September 7, 2017, the appellant's counsel served respondent's counsel with a Notice of Withdrawal of Lawyer of Record. Subsequently on January 2, 2019, respondent's counsel was served with a Notice of Change of Representation indicating that the appellant's present counsel had been retained as counsel of record. On many subsequent occasions, respondent's counsel attempted to obtain the agreement of appellant's counsel to reschedule this matter for trial. However, these efforts were unsuccessful. As a result, no new trial date was ever obtained.

[6] On February 25, 2020, the respondent applied for an order dismissing the action for long delay.

[7] The application to dismiss for long delay was scheduled for morning master's chambers on August 20, 2020. However, at that time, the appellant raised a preliminary issue of her own, namely, that the master did not have the jurisdiction to hear such an application. The appellant

argued that the delay application was essentially an application to vary or rescind the Consent Order, which is contrary to section 9 of the *Court of Queen's Bench Act*, RSA 2000, c C-31 (the *Act*), and also because a Form 37 had been filed, a master lacks jurisdiction to deal with an application to dismiss for long delay.

Master's Decision on Jurisdiction

[8] After hearing oral submissions from counsel for both the appellant and the respondent, Master Mason in brief oral reasons held that a master does have jurisdiction to hear an application to dismiss for long delay under these circumstances. Specifically, she stated:

> I'm just going to give a quick decision with respect to the preliminary issue that you have raised, Mr. Tawkin, that the master has no jurisdiction to deal with the application brought by your friend under Rule 4.33 and 4.31 on the basis that it amounts to an attempt to vary or rescind the existing order of a justice, and the second ground that because a Form 37 has been filed, a master lacks jurisdiction to deal with the matter.
>
> I don't agree that the order of Justice Wittmann adjourning the trial, Chief Justice Wittmann adjourning the trial, sine die so that the parties could deal with further matters dealing with experts amounts to a prohibition against a defendant from bringing an application to strike the application – or strike the action for long delay or a prejudicial delay as they have here.
>
> This application under these Rules it does not amount to a variation or rescission of – an attempt in that regard of the April 2015 order of our former Chief Justice. The trial was adjourned sine die five years ago. It did not adjourn or stay the action. It's not a judicial standstill agreement. I do not consider that the Form 37 that was filed in advance of that adjourned trial operates as a prohibition from a master dealing with a subsequent application under the Rules such as we have here based on an inactivity in the file.
>
> So I reject your jurisdictional argument, Mr. Tawkin.
>
> (Master's Order)

[9] Master Mason went on to direct that the application to dismiss the action for delay was to be argued on its merits by way of a special hearing before a master. On September 4, 2020, the appellant appealed the Master's Order.

[10] Subsequently, the application to dismiss for long delay was argued on its merits in November 2020. By written endorsement dated September 10, 2021, Master Mattis granted the application and dismissed the action for long delay pursuant to Rule 4.33 (Merits Decision). In

light of her ruling regarding dismissal for long delay, Master Mattis held that she "need not consider the alternate relief sought for dismissal for prejudicial delay pursuant to Rule 4.31". This Court was advised that the Merits Decision has now been appealed by the appellant.

Chambers Judge's Decision

[11] Counsel for the appellant appealed the Master's Order to regular morning justice chambers on September 29, 2020.

[12] In brief oral reasons, the chambers judge dismissed the appeal of the Master's Order. Specifically, she stated:

> So, Mr. Lawson, I appreciate that a Master cannot vary or otherwise make directions in opposition or in contrary to a Judge's order because of a – you know, because obviously the hierarchal jurisdiction. I, however, agree with Master Mason, and I agree with Mr. Bodnar, that in my view the application by Mr. Bodnar to strike your client's claim, if successful, would not be a variation or otherwise an amendment to Chief Justice Wittmann's consent order of May or June of 2015. Simply put, when the trial was adjourned, it is adjourned, that is it. The trial is usually the end product of the action, Mr. Lawson, so if the action, right, if the action is struck for delay, then there is no trial. There is – Justice Wittmann's order can no longer be outstanding. It is automatically – the leave to the parties to set the matter down for trial is vacated by the fact – well, vacated is too strong a word. It simply no longer exists because the action no longer exists. It is not a collateral attack, in my view, on Chief Justice Wittmann's consent order to have the application proceed by – for delay in front of a Master. Mr. Bodnar's client has chosen the appropriate jurisdiction to start with that application and, as you are aware, your client has a right to appeal whatever the outcome of the November Special might be.
>
> So, I am dismissing your application, with costs to be determined at the application on November 5th, by the Master's office. All right?
>
> Thank you, Gentlemen.
>
> (Chambers Judge's Order)

Grounds of Appeal

[13] The appellant appeals the Chambers Judge's Order on the following grounds:

> (a) The chambers judge's refusal to consider or read the written brief of the appellant was contrary to the rules of natural justice.

> (b) The chamber judge erred in law in finding that a master has jurisdiction to hear a delay application that would have the effect of varying or rescinding an order of a justice, contrary to section 9(1)(a)(i) of the *Act*.
>
> (c) The chambers judge erred in law in finding that a master has jurisdiction to hear a delay application in a trial matter, contrary to section 9(3)(a) of the *Act*.
>
> (d) The chambers judge erred in law in not finding that the effect of the Consent Order was that the action had been adjourned by order within the meaning of Rule 4.33(2)(a).
>
> (e) The chambers judge erred in law by allowing a pre-trial application to dismiss for delay after both parties had certified and filed a Form 37.

Standard of Review

[14] The interpretation of the *Rules of Court*, as a question of law, is reviewed on a standard of correctness: *Stuve v Stuve*, 2020 ABCA 467 at para 22, citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8. Statutory interpretation is a question of law reviewable on the correctness standard: *Warkentin Building Movers Virden Inc v LaTrace*, 2021 ABCA 333 at para 13, citing *Pauli v ACE INA Insurance Co*, 2004 ABCA 84, 346 AR 263 at para 5. Questions of mixed fact and law are subject to the standard of palpable and overriding error: *Housen* at para 36.

[15] Questions of procedural fairness are reviewed, having regard to the context, to determine whether the appropriate level of fairness required by the common law has been afforded: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77.

Parties' Submissions

[16] First, the appellant submits that the chambers judge erred when she declined to adjourn the hearing until the chambers judge had read the appellant's written submissions.

[17] Second, the appellant submits that a master does not have jurisdiction to hear an application to dismiss for delay that would have the effect of varying or rescinding the Consent Order, contrary to section 9(1)(a)(i) of the *Act* which provides:

> 9(1) In regard to all matters brought or proposed to be brought in the Court, a master in chambers
>
> (a) has the same power and may exercise the same jurisdiction as a judge sitting in chambers except in respect of
> (i) appeals, applications in the nature of appeals, applications concerning the hearing of appeals and applications to vary or rescind an order made by a judge…

[18] The appellant submits the Consent Order adjourned the trial and gave leave to set a trial date. A dismissal of the action would have the effect of no longer adjourning the trial and the parties would no longer have leave to set the matter for trial. The appellant submits that if a master grants an application dismissing the action for delay, the effect is to rescind the Consent Order.

[19] Third, Section 9(3)(a) of the *Act* provides that the power and jurisdiction of a master does not include the trial of actions. The appellant submits the Consent Order dealt with a trial adjournment and therefore a master has no jurisdiction to deal with any matter touching upon trial issues.

[20] Fourth, Rule 4.33 does not apply if the action has been stayed or adjourned by order. The appellant submits the Consent Order adjourned the trial and therefore, the exception provided in Rule 4.33(2)(a) applies.

[21] Finally, the appellant argues that the effect of certifying a Form 37 is a binding mutual representation that the issues are joined and no further steps will be taken by either party save to proceed to trial, and no party will take further pre-trial steps. The appellant submits that no pre-trial steps, including bringing an application under Rule 4.33, are permitted.

[22] In response, the respondent submits the appeal of the chambers judge's denial of an adjournment is not properly before this Court because the appellant failed to obtain permission to appeal as required by Rule 14.5(1)(b). In any event, the respondent submits that the chambers judge had all the evidence before her and reviewing the written brief would not have made a difference to the outcome.

[23] Second, the respondent submits the chambers judge did not err in finding the respondent's application to dismiss the action for delay, if successful, would not constitute a variation or rescission of the Consent Order. The Consent Order clearly stated it was adjourning the trial, not the action. The Consent Order did not stop the clock for the purposes of Rule 4.33.

[24] Third, the respondent submits that section 9(3)(a) of the *Act* does not apply because an application to dismiss an action for delay when the trial has been adjourned *sine die* is not a trial issue.

[25] Fourth, the respondent submits the master and the chambers judge did not err in concluding that the Consent Order did not stay or adjourn the action for the purposes of Rule 4.33(2)(a). The Consent Order providing for the adjournment did not adjourn the action, and even if it had provided for an adjournment of the action, the appellant was obliged to work with the respondent to set the matter down for trial. Having failed to do so, the respondent submits the appellant cannot rely on the adjournment to claim protection under Rule 4.33(2)(a).

[26] Finally, the respondent submits the Form 37 was inoperable because after the trial had to be adjourned due to the appellant filing a late expert report, a new and updated Form 37 was

required to reflect the new expert witnesses and to obtain a new trial date. The Form 37 filed in August 2014 was effectively vacated by the Consent Order.

Analysis

a) Was the chambers judge's refusal to consider or read the written brief of the appellant contrary to the rules of natural justice?

[27] The respondent takes the position that the first ground of appeal is not properly before this Court because permission to appeal pursuant to Rule 14.5(1)(b) was never obtained. The respondent argues that in this ground of appeal, the appellant is simply appealing the chambers judge's refusal to grant an adjournment in order to read the appellant's previously filed written brief.

[28] We disagree. This ground of appeal in substance raises the issue of procedural fairness since the chambers judge expressly refused to read the appellant's written brief before dismissing her appeal. Assuming for the sake of argument that the chambers judge's refusal to read the brief is a breach of natural justice, we need not decide that question as the Appellant raises four further grounds of appeal, all of which are characterized as errors in law, for which the standard of review is correctness.

[29] That being so, this Court is in a proper position to hear and adjudicate upon the remaining four grounds of appeal. Indeed, the parties agree to that. As such, any breach of natural justice has no material effect on the substantive outcome of this appeal.

b) Did the chambers judge err in finding that a master has jurisdiction to hear a delay application in the face of the Consent Order such that it would have the effect of varying or rescinding the Consent Order, contrary to section 9(1)(a)(i) the Act?

[30] In our opinion, there is no merit to this ground of appeal. The Consent Order expressly provided in part:

> IT IS HEREBY ORDERED THAT:
>
> 1. The trial of this matter which has been set for June 1, 2015 for a period of two weeks shall be adjourned *sine die*;
>
> 2. The Parties are given leave to set this matter down for a further trial date once the issues that have required the adjournment are resolved.

[31] It is clear from the above provision in the Consent Order that the parties were required to take positive action to have the matter set down for a new trial date once the issues that required

the adjournment in the first place had been resolved. This never occurred ultimately due to the inaction of the appellant, as described above.

[32] The effect of the Consent Order was that from the date it was granted, the action was in the same position as it had been prior to being set down for trial in 2014. By its very terms, the Consent Order provided the action needed to be rescheduled for trial or some other significant advance had to occur for the purposes of rule 4.33, failing which the action could be subject to dismissal for delay.

[33] An order by a master dismissing the action would not vary or rescind the Consent Order adjourning the trial. The chambers judge did not err in concluding a master has jurisdiction to dismiss the action even in light of the Consent Order.

c) Did the chambers judge err in law in finding that a master has jurisdiction to hear a delay application in a trial matter, contrary to section 9(3)(a) of the Act?

[34] The appellant argues that hearing an application to dismiss for delay in these circumstances, after the Consent Order adjourned the trial, is a trial matter. This argument was not raised before the master nor the chambers judge.

[35] We disagree that an application to dismiss an action for delay involves a trial matter, even if it is heard after a trial date has been adjourned. The application is a pre-trial matter. In this case, no trial had commenced; in fact, the trial remains to be re-scheduled.

[36] Further support that an application to dismiss for delay is a pre-trial matter can be found in the organization of the *Rules of Court*. As stated in the Information Note to the *Rules*, the organization in general tracks the same sequence as a legal action in court proceedings. Rules such as those providing for an application for delay are pre-trial matters, not a trial matter, as Rule 4.33 appears under Part 4: Managing Litigation, while trial matters are under Part 8: Trial.

[37] More significantly, the appellant's interpretation would disrupt the policy behind the *Rules*, and particularly Part 4 of the *Rules*, which seeks to govern and remedy delay. This will be addressed further under ground e.

d) Did the chambers judge err in law in not finding that the effect of the Consent Order was that the action had been adjourned by order within the meaning of Rule 4.33(2)(a)?

[38] Rule 4.33(2)(a) provides an exception to the application of Rule 4.33(1) when "the action has been stayed or adjourned by order". The appellant submits the Consent Order constitutes an adjournment of the action.

[39] As discussed above when dealing with the second ground of appeal, we conclude that the terms of the Consent Order adjourned the trial and not the action itself. It left the parties to resolve

the issues which had necessitated the adjournment in the first place, namely, to deal with the appellant's late expert report. In other words, the parties were to carry on with the litigation, whether by conducting cross-examination on the late expert report, filing a rebuttal report or more questioning.

[40] We reject the argument that the master has no jurisdiction to hear an application to dismiss an action for long delay in these circumstances. We leave to the Court on the substantive appeal to determine whether in the unique circumstances of this matter, the adjournment of the trial *sine die*, in effect, was an adjournment of the action. The parties agree this issue is not *res judicata*.

e) Did the chambers judge err in law by allowing a pre-trial application to dismiss for delay after both parties certified and filed a Form 37?

[41] The appellant submits that once the Form 37 was certified and filed, the only step the parties could take, without further court order, was to proceed to trial. The appellant relies upon the decision of this Court, *Benc v Parker*, 2016 ABCA 82, and cites the statement from paragraph 11 that a Form 37 "constitutes a binding mutual representation to the opposite party that the issues are joined and that no further steps will be taken by either party save to proceed to trial (or as otherwise disclosed)".

[42] The above quoted statement from *Benc v Parker* does not apply in this case. Here, the parties had filed a Form 37 and obtained a trial date, but then agreed that in light of the appellant filing a new expert report, they needed to take further steps before the parties could proceed to trial. They obtained the Consent Order adjourning the trial date and were granted leave to set the matter down for a further trial date, once the issues that had required the adjournment were resolved. They failed to do this. Had they sought a new trial date, the procedures under the *Rules* required them to file a new Form 37 if for no other reason than the old Form 37 did not include the witness through whom the new expert report would be adduced at trial.

[43] In other words, the Form 37 filed in August 2014 was inaccurate as well as ineffective to provide a new trial date, and clearly no longer functioned, as described in *Benc*, as "a binding mutual representation to the opposite party that the issues are joined and that no further steps will be taken by either party save to proceed to trial". The Consent Order changed the terms of any "mutual agreement" as reflected in the Form 37.

[44] The appellant's argument that *Benc* applies in these circumstances must also be rejected as a matter of principle. The appellant's position means that once a Form 37 has been filed and an order adjourns the trial date *sine die*, a party could wait for longer than three years, do nothing and suffer no consequences. The appellant's position, in effect, would permit a Form 37 to be used as a shield against applications for delay and other pre-trial applications.

[45] An interpretation of the *Rules* that would permit such a delay is contrary to the foundational rules of the *Rules of Court* which state the purpose and intent include timely resolution, and would

fail to give effect to the purpose stated in Rule 1.2(2)(e) "to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments".

[46] The chambers judge did not err in finding that the filing of the Form 37 did not deprive a master or a Queen's Bench justice of jurisdiction to hear an application to dismiss for long delay pursuant to Rule 4.33.

Conclusion

[47] We dismiss the appeal and hold that the chambers judge did not err in concluding on the preliminary jurisdictional issue that a master has jurisdiction to hear and dismiss an action for delay after a scheduled trial has been adjourned *sine die*. The issue as to whether these unique circumstances might allow that the adjournment of the trial *sine die* to be considered to be an adjournment of the action is not *res judicata*.

Appeal heard on October 13, 2021

Memorandum filed at Calgary, Alberta
this 30th day of November, 2021

McDonald J.A.

Khullar J.A.

Feehan J.A.

Appearances:

E. Tawkin
M.I. Lawson
for the Appellant

E.J. Bodnar
for the Respondent