In the Court of Appeal of Alberta

Citation: Nelson v. Emsland, 2008 ABCA 387

Date: 20081114
Docket: 0703-0340-AC
Registry: Edmonton

Between:

Darryl Nelson and John Nelson Construction Ltd.

Respondents
(Plaintiffs)

- and -

Lyle H. Emsland and Melody D. Moore

Appellants
(Defendants)

And Between:

Lyle H. Emsland

Appellant
(Plaintiff by Counterclaim)

- and -

John Nelson Construction Ltd., Nelson Environmental Remediation Ltd., Nelson Environmental Services, Nelson Environmental Group, Nelson Environmental Remediation Ltd. carrying on business as either Nelson Environmental Group or Nelson Environmental Services, Treeline Wood Products Ltd., Tepp Inc., Western Spill Technologies Inc., and Western Spill Technologies Inc. carrying on business as Cansweep, Cansweep International Ltd., Nelco Farms Ltd., 264135 Alberta Ltd., and Darryl Nelson

Respondents
(Defendants by Counterclaim)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D. Lee
Dated the 13th day of September, 2007
Entered the 2nd day of November, 2007
(2007 ABQB 571, Docket: 9403-23471)

Memorandum of Judgment

The Court:

[1] The appellant, Lyle H. Emsland ("Emsland") appeals the chambers judge's order dismissing his appeal and upholding the master's decision to dismiss Emsland's counterclaim for want of timely prosecution. We conclude this appeal is without merit and dismiss it.

[2] Darryl Nelson and John Nelson Construction Ltd. (the "Nelsons") commenced an action on December 13, 1994, naming Emsland and Melody D. Moore as defendants. Emsland filed a counterclaim against the Nelsons and nine other companies on February 2, 1995. Emsland filed an amended counterclaim on June 25, 1999. An amended defence to counterclaim was filed August 10, 1999.

[3] On December 1, 1999, three of the counterclaim defendants, Darryl Nelson, Nelco Farms Ltd., and 264135 Alberta Ltd., were granted an order for summary judgment against Emsland. Emsland's appeal from that order was dismissed with double costs and, on July 6, 2000, the three counterclaim defendants filed a writ of enforcement against Emsland for costs flowing from those decisions. Thereafter, Emsland filed an appeal of the Queen's Bench order dismissing his appeal from summary judgment, but that appeal was ultimately abandoned on October 17, 2001.

[4] On February 7, 2001, Darryl Nelson filed a notice of motion and affidavit in support, seeking security for costs. Emsland's counsel cross-examined Darryl Nelson on that affidavit on June 5, 2001, obtaining several undertakings from him. Those undertakings were never met, and the security for costs application has never proceeded.

[5] Between July 2003 and December 2004, Emsland's counsel wrote several letters to counsel for the remaining defendants by counterclaim (the "respondents") seeking an agreement on discovery dates. Counsel for the respondents replied, indicating that his clients would not attend at discoveries until Emsland payed the outstanding costs (see for example the letter dated March 16, 2004). The next 'action' taken with respect to the counterclaim occurred on July 14, 2005, when Emsland served an appointment for discovery on respondents' counsel, including conduct money for attendance. Respondents' counsel replied July 25, 2005, again suggesting that the outstanding costs be paid prior to any attendance at discoveries.

[6] On September 12, 2005, respondents' counsel advised Emsland's counsel that his client would not be attending examination for discovery, that more than five years had passed since the last 'thing' that advanced the proceedings had occurred, and that he would therefore be filing an application, pursuant to Rule 244.1(1), or alternatively Rule 244(1) of the Alberta *Rules of Court*, seeking to have the counterclaim dismissed for want of prosecution. On September 13, 2005, the date set out in the appointment for examination for discovery, Emsland attended at his counsel's office. However, the respondents did not attend and the discovery was aborted. Thereafter, Emsland took no additional steps to compel discoveries.

[7] Respondents' counsel filed a notice of motion seeking to dismiss the counterclaim for want of prosecution on October 20, 2006, which resulted in the November 23, 2006 master's order dismissing the counterclaim, pursuant to Rule 244.1(1). That order was upheld by the Court of Queen's Bench chambers judge on appeal, whose decision is under appeal to this Court.

[8] Rule 244.1(1) provides:

> Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

[9] This Court has adopted the following approach to Rule 244.1 applications:

1. The proceedings should be examined as at the date of the application to dismiss for want of prosecution pursuant to Rule 244.1.

2. If at any time in the action there has been a gap of five years or more where no "thing" has been done to materially advance the action, the judge shall examine what has occurred since that five-year gap.

3. If the delaying party has not done a thing to materially advance the action since the five-year gap, the action shall be dismissed, absent agreement to the delay.

4. If the delaying party has done a thing to materially advance the action after the five-year gap, and the other party objected and applied for a dismissal, the action shall be dismissed, absent any agreement to the delay.

5. If the delaying party has done a thing to materially advance the action after the five-year gap, and the applicant has participated in that thing, continued to participate in the action, or otherwise acquiesced in the delay, the action shall continue, and the application for dismissal refused.

Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce, 2003 ABCA 259, 330 A.R. 379.

[10] Unless serving the notice of appointment for discovery in July 2005 is a ‘thing’, no steps were taken by Emsland during a period of more than five years. Moreover, the chambers judge held that even if the appointment was a ‘thing’, there existed a five-year gap in any event.

[11] Emsland argues that the delay is the fault of the respondents because Darryl Nelson failed to fulfill his undertakings from the examination on his security for costs affidavit, and because the respondents failed to attend the examination for discovery set for September 13, 2005. However, we cannot see how the security for costs process advanced the counterclaim. There may be a circumstance in which a security for costs application can be said to advance a proceeding, but this is not one of them. Even if the respondents had proceeded with that application and Emsland had successfully resisted it, he would have been no closer to trial after the application was heard than he was before its hearing.

[12] Moreover, the laches of one party in advancing an adjunct to the court process, brought by the other party for its sole benefit, is not an excuse for delay that ultimately gives rise to an order under Rule 244.1(1). In some cases a court may consider the laches of one party an excuse for the laches of another, but courts should be cautious in doing so. Law suits do not need to be conducted on the basis that advancing the action is accomplished only by waiting for one step to be completed before others can proceed. Even though the respondents had commenced an application for security for costs, Emsland could have forced discoveries. Instead he stood back and waited. He did so at his peril.

[13] A court process that does not materially advance a claim is not a ‘thing’ within the meaning of Rule 244.1(1). The application for security for costs, even if it had proceeded, would not have materially advanced the counterclaim.

[14] We also conclude that service of the appointment for examination for discovery, in this case, is not a ‘thing’ that materially advanced the counterclaim. In order to materially advance an action, the step taken must move the action forward in a meaningful way. In this case, counsel for Emsland knew, well before the appointment was served, that the respondents would not attend an examination for discovery unless Emsland paid the outstanding costs. Seeking an order compelling the respondents’ attendance at discoveries would have properly advanced the action. However, the mere filing of the appointment, in these circumstances, did nothing to advance it. When counsel for a party says that the party will not attend at discoveries, opposing parties do not need to actually go through the charade of an aborted discovery in order to seek and obtain an order compelling attendance. Counsel’s letter is sufficient proof that an order is required.

[15] Furthermore, we consider Emsland’s failure to take any steps to force discoveries, after the respondents failed to attend, to be instructive. This litigation has a history of very sporadic action. It is now more than thirteen years since Emsland filed his counterclaim. If he was intent on forcing the counterclaim to trial, his method of accomplishing this goal defies logic. Even after he was put

on notice that the respondents would bring the application under appeal, he simply sat back and waited for that process to unfold, rather than taking any steps to force the counterclaim forward.

[16] We dismiss this appeal and confirm the chambers judge's order.

Appeal heard on October 31, 2008

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2008

Authorized to sign for: Berger J.A.

Ritter J.A.

Bielby J.

Appearances:

N.A. Pfeifer
for the Respondents (Plaintiffs/Defendants by Counterclaim)

E.J. Erler
for the Appellant (Defendant/Plaintiff by Counterclaim)