In the Court of Appeal of Alberta

Citation: Rahmani v 959630 Alberta Ltd., 2021 ABCA 110

Date: 20210322
Docket: 2001-0060-AC
Registry: Calgary

Between:

Samad Rahmani

Respondent

- and -

959630 Alberta Ltd., Weidner Investment Services Ltd. and Verda Linfield

Appellants

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Ritu Khullar
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.K. Miller
Dated the 14th day of February, 2020
Filed on the 10th day of March, 2020
(Docket: 1206 00040)

Memorandum of Judgment

The Court:

I. Introduction

[1] This is an appeal from the chambers judge's refusal to dismiss an action for long delay under r 4.33(2) of the *Alberta Rules of Court*, Alta Reg 124/2010. That rule requires the court to dismiss an action if three or more years have passed without a significant advance. The appellants also challenge the chambers judge's decision to set a partial schedule for the litigation.

[2] The appeal is dismissed, for the reasons that follow. The respondent is directed to serve on the appellants a litigation plan in accordance with r 4.4(2) within 60 days of the date of these reasons. If the parties cannot agree on a litigation plan, they may apply to the Court of Queen's Bench for direction.

II. Background

[3] The appellants, 959630 Alberta Ltd., Weidner Investment Services Ltd. and Verda Linfield (Weidner Investment), who are the defendants in the underlying action, own and operate a number of rental properties in Lethbridge. The respondent, Samad Rahmani (Rahmani), who is the plaintiff in the underlying action, rented an apartment from Weidner Investment starting in October 2009.

[4] In October 2010, Rahmani went on vacation to the United States where he had previously lived and worked. He was detained by the United States Investigative Services, as it turns out improperly, on suspicion of being a terrorist. Upon being detained, he was able to phone his employer in Lethbridge to advise him of the situation and he asked his employer to contact Weidner Investment to explain that he was detained and that he would make up payment of the rent due on November 1, 2010 and any other missed rent when he was released. It turned out that Rahmani was detained for almost 60 days until mid-December 2020. When he returned to Canada, he learned that Weidner Investment had disposed of the entire contents of his apartment, sold them to Value Village for $485.00 and rented out the apartment to another tenant.

[5] On January 17, 2012, Rahmani issued a statement of claim alleging wrongful seizure and disposal of his personal property. He claimed damages for the sold personal property and for the pain, suffering and loss of income caused by Weidner Investment's conduct. In due course, a statement of defence was filed, affidavits of records were exchanged, the parties conducted questioning and provided answers to undertakings. The parties agreed that the last uncontroversial significant advance in this action occurred on July 8, 2014, when Rahmani completed his answers to undertakings. This meant that the three year period under r 4.33 would expire on July 8, 2017, unless there was another significant advance before that date.

[6] During the period July 8, 2014 to July 8, 2017, there were two potential steps that might have significantly advanced the action. Before the chambers judge, Rahmani argued that there were others (such as obtaining an order compelling a potential expert witness to provide a CV, obtaining a functional capacity evaluation, and filing an application to schedule a trial date) but, the chambers judge, and the parties on appeal, focussed on the two steps.

[7] First, on April 21, 2015, Rahmani sent to Weidner Investment a copy of a letter from his treating psychiatrist, Dr Kellerman, dated March 27, 2015 with a covering letter stating, "[f]urther to the above noted matter, please find enclosed correspondence from Dr Kellerman regarding our client".

[8] The two page letter from Dr Kellerman opined that there is a causal connection between Rahmani's mental health status and the Weidner Investment's alleged conduct in removing and disposing of Rahmani's personal effects. Weidner Investment's position is that receipt of this letter did not significantly advance the action because (a) it came with no explanation or indication that it would be tendered as an expert report and (b) Weidner Investment had already received Dr Kellerman's patient chart which contained much of the information in the letter.

[9] The second is a letter dated November 1, 2016 sent by Rahmani to Weidner Investment enclosing a "draft Schedule of Loss-Replacement Appraisal by JG Kohn Enterprises". Rahmani indicated that the appraisal showed the value of all his destroyed or lost property, which would be essential to proving his claim. Weidner Investment says that receipt of this letter did not significantly advance the action because its purpose was unclear (there being no indication that it would form part of an expert report) and Weidner Investment had already received an earlier version of this document in Rahmani's answers to undertakings.

[10] On May 15, 2017, Rahmani brought an application to set a trial date. Weidner Investment responded by letter asking about the status of Dr Kellerman's letter dated March 27, 2015 and the JG Kohn draft Loss-Replacement Appraisal provided on November 1, 2016. Weidner Investment stated that if documents were to be tendered as expert reports, they would have to be accompanied by a Form 25 (the form prescribed by r 4.34 for expert reports). At the same time, it asked Rahmani to adjourn the application to set the matter for trial, while counsel sought instructions on a number of potential applications, including a security for costs application and an application under r 4.33. Rahmani's application to set a trial date was adjourned *sine die* by consent.

[11] On December 14, 2017, Rahmani served Dr Kellerman's report and the JG Kohn Enterprises Loss-Replacement Appraisal on Weidner Investment together with Form 25, clearly indicating that both would be experts at trial. Weidner Investment acknowledged receipt but says, correctly, that the reports were provided outside the three year period between July 8, 2014 and July 8, 2017.

[12] On July 13, 2018, Weidner Investment brought an application under r 4.33 to dismiss the underlying Rahmani action for long delay. The two applications (to set the matter down for trial and dismiss for long delay) were heard together by the chambers judge on February 14, 2020.

[13] The main issue for the chambers judge was whether providing Dr Kellerman's letter to Weidner Investment in April 2015 and/or providing JG Kohn Enterprise's Loss-Replacement Appraisal to Weidner Investment in November 2016 significantly advanced the action for the purposes of r 4.33. He concluded that they did and dismissed Weidner Investment's long delay application.

III. Applicable Law and Standard of Review

[14] The legal principles governing r 4.33 applications were recently summarized in ***Patil v Cenovus Energy Inc***, 2020 ABCA 385 at paras 7-8:

> Several legal principles can be discerned from decisions of this Court interpreting r 4.33:
>
> - The rule must be applied within the context of the foundational rule (r 1.2) to resolve claims fairly and justly in a timely and cost-effective way.
> - Plaintiffs bear the responsibility of prosecuting their claims in a timely way: ***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at para 7.
> - Defendants are obliged (pursuant to r 1.2) to not obstruct, stall or delay an action that the plaintiff is advancing: ***Janstar Homes Ltd v Elbow Valley West Ltd,*** 2016 ABCA 417 at para 26.
> - A functional, as opposed to a formalistic, approach is appropriate to determine if a step constitutes a significant advance: ***Ursa Ventures Ltd v Edmonton (City),*** 2016 ABCA 135 at para 19.
> - The functional approach to r 4.33 is context-sensitive: "[C]ases that have considered a particular advance in an action will be useful precedents, but they are not determinative": ***Ursa Ventures*** at paras 19, 23.
> - A significant advance is one that moves the action forward in an essential way, having regard to the nature, quality, genuineness and timing of the advancing action: ***Ursa Ventures*** at para 19; ***Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc.,*** 2016 ABCA 123 at para 21.
> - Rule 4.33 functions like a limitations period. It only requires one significant advance within the three-year period, not "continuous significant advancement". Rule 4.33 is not designed to determine what a "reasonably diligent litigant" would do over the course of the three-year period: ***Ursa Ventures*** at para 11.

- Whether an agreement between counsel constitutes a significant advance is context-dependent. Rule 4.33 was not designed to encourage an "ambush" by one side after the parties had agreed to take a particular step: ***Turek v Oliver***, 2014 ABCA 327 at para 6.
- Courts assessing whether an action is a significant advance under r 4.33 should focus on substance, not form. As an example, agreement to participate in a judicial dispute resolution process may not constitute a significant advance if it was merely an agreement to schedule a JDR, which was not carried out: ***Weaver v Cherniawsky***, 2016 ABCA 152 at paras 20-21.

Importantly, r 4.33 is "not designed to regulate the efficient prosecution of actions, but rather to prune out actions that have truly died": ***Ursa Ventures*** at para 10.

[15] The parties agree on these legal principles. Weidner Investment essentially takes issue with how the chambers judge applied them to the facts set out above. The application of the law on r 4.33 to a set of facts is a finding of mixed fact and law, reviewable for palpable and overriding error, absent some extricable error of law: ***Janstar Homes Ltd v Elbow Valley West Ltd***, 2016 ABCA 417 at para 21; ***Patil v Cenovus Energy Inc*** at para 6; ***McKay v Prowse***, 2020 ABCA 131 at para 11. An appellant cannot just reargue the application on appeal. A reviewable error must be demonstrated.

IV. Analysis

A. The drop-dead rule

[16] First, it is necessary to address the rules for calculating time. When counting time, one counts forward from the date of the last uncontroversial significant advance, not backward from the date on which the r 4.33 application was filed. This is clear from the wording of r 4.33(2); "if three or more years have *passed* without a significant advance in an action" (emphasis added). The time has to be measured *from* a date and so must be measured from the last significant advance: ***Trout Lake Store Inc v Canadian Bank of Imperial Commerce***, 2003 ABCA 259 at paras 25-33; ***Barath v Schloss***, 2015 ABQB 332 at para 9. In this case, the last uncontroversial significant advance was the provision of answers to undertakings on July 8, 2014.

[17] When counting time following a significant advance, the count stops on the date the r 4.33 application was *filed*, not the date that the application was heard. The time between the application being filed and the application being heard does not count against the respondent: ***Flock v Flock Estate***, 2017 ABCA 67 at para 17(8); ***Ma v Kwan***, 2018 ABQB 852 at paras 11-14. Therefore, the relevant window of time in this case is July 8, 2014 to July 13, 2018, when the application to dismiss for long delay was filed. Was there a three year period between these dates without any significant advance in the action?

[18] The first argument under this ground of appeal is that the chambers judge made an error when he stated that *throughout* 2015 "Dr Kellerman's information was flowing to" Weidner Investment. We agree that this was an error, however it does not affect the outcome. The issues in the appeal relate to the two impugned steps.

[19] The remainder of Weidner Investment's argument under this ground of appeal is that the chambers judge did not properly assess whether the steps significantly advanced the action. There is no sign in the chambers judge's reasons that he did not apply the correct law – i.e. the contextual and functional analysis of whether conduct significantly advanced Rahmani's action. So, the issue is whether the conclusion that there was no three year gap between significant advances in this action discloses palpable and overriding error.

[20] There is no such error in the finding that Weidner Investment's receipt of Dr Kellerman's letter on April 21, 2015 significantly advanced the action. Weidner Investment argues that the contents of the letter are just a summary of Dr. Kellerman's chart notes which it already had. The chart notes were not in the record below or on appeal. The chambers judge did not accept this bare assertion. No error has been shown in his approach.

[21] In any event, on its own that finding is not enough to defeat the r 4.33 application. There were more than three years between April 21, 2015 and July 13, 2018 (date of filing of the long delay application) and if there was no further significant advance during that period, Rahmani's action would have to be dismissed. But there was another significant advance. The chambers judge found that Weidner Investment's receipt of the JG Kohn Enterprise's draft Loss-Replacement Appraisal on November 1, 2016 also significantly advanced the action. The information that had been provided quantifying the loss in answer to undertakings in 2013 had been compiled by Rahmani. The November 2016 report represented a third party's assessment of the value of loss. Weidner Investment acknowledges that the November 2016 report contained updated information in a different format. But it was more than that; it was from an outside appraiser. There was no error in concluding that providing this information advanced the litigation. The combination of the significant advances on April 21, 2015 and November 1, 2016 means that during the relevant window of time - July 8, 2014 and July 13, 2018 – there was no three-year period without a significant advance.

[22] During argument before the chambers judge, Weidner Investment took the position that the provision of Dr Kellerman's letter on April 25, 2015 and the draft Loss-Replacement Appraisal on November 1, 2016 were not significant advances because the purpose of the documents was not clear. It submitted that if Rahmani had provided those documents with the proper Form 25, indicating they were expert reports then they would have been significant steps. This argument puts form ahead of substance, which is contrary to the principles governing r 4.33: ***Weaver v Cherniawsky***, 2016 ABCA 152 at para 18; ***Covey v Devon Canada Corporation***, 2020 ABCA 445 at para 8. Further, in the context of this litigation, it is difficult to accept that Weidner Investment

did not understand that Rahmani was providing information to advance his claim. What other purpose could there be?

[23] In summary: the reasons of the chambers judge, when read in the context of submissions of counsel and the exchange with counsel during submissions, reveal that the chambers judge understood the legal principles and the task before him, namely assessing whether there was a three-year gap in this action without a significant advance. He applied the functional approach, considered the context of the litigation, examined the contents of the relevant records and reasonably concluded that provision of the documents to Weidner Investment on April 15, 2015 and November 1, 2016 significantly advanced the action. No reviewable error has been shown.

B. Procedural direction

[24] The second issue raised in this appeal is whether the chambers judge erred by setting a schedule for steps to be taken in the litigation. Weidner Investment argues that he did so without hearing from the parties.

[25] The chambers judge dismissed the application to set the matter for trial and there is no appeal from this decision. However, at the conclusion of his oral decision, in an effort to get the matter moving, he set some deadlines for the exchange of expert reports and questioning on those reports.

[26] Permission is required to commence an appeal from "any pretrial decision respecting adjournments, time periods or time limits": r 14.5(1)(b). Permission will generally only be granted if an appeal is a serious question of general importance and has a reasonable chance of success: ***Ozark Resources v TERIC Power Ltd***, 2020 ABCA 51 at paras 33-34.

[27] Weidner Investment argues that the appeal is about procedural fairness, that the parties were caught off-guard by the procedural direction because neither party asked for it, nor did it logically flow from the r 4.33 application. Further, it is argued that complying with a procedural order while the merits is under appeal would render the appeal moot; and that the dates are impossible to be met given the global pandemic. In any event, the parties entered into a consent stay pending this appeal, so the dates cannot now be met.

[28] In our view, the application for permission to appeal fails.

[29] First, the test for permission to appeal has not been met because the appeal does not raise an issue of general importance. It is clear that all parties who come before the courts are entitled to an appropriate level of procedural fairness, so the appeal lacks jurisprudential significance.

[30] Second, Weidner Investment's argument that the procedural directions were unfair lacks a reasonable chance of success. Rule 4.33(3) states: "if the Court refuses an application to dismiss an action for delay, the Court may make whatever procedural order it considers appropriate". The

very rule relied upon by Weidner Investment put it on notice that if the application to dismiss was unsuccessful, the Court could make a procedural order in an effort to ensure that the litigation either stayed on track or got back on track. This is so especially since there was a cross-application to set the matter for trial.

[31] At the conclusion of his oral decision on February 14, 2020, the chambers judge ordered Rahmani to perfect the service of all expert reports he intended to file by the close of business on February 28, 2020. He then asked counsel for Weidner Investment how much time it would need to respond. After some discussion, the chambers judge said "I am prepared to give you as much time as you ask for a response" and then suggested the end of May, which was over 90 days later. Counsel for Weidner Investment then said, "[m]ay I have a moment to seek direction from senior counsel on that? Then I guess I will accept the 90 days." The chambers judge then set a deadline of June 30, 2020 for Weidner Investment to retain and instruct its own experts and serve response reports. He also set further deadlines for the questioning of experts. There was nothing unfair about this process.

[32] One party wanted the matter set down for trial while the other party wanted the matter dismissed. Both parties were unsuccessful in their applications, so the chambers judge had to come to grips with how to move this matter forward. He made some proposals, consulted with counsel and set a schedule. This was a completely foreseeable outcome of the application.

[33] However, in light of the passage of time the dates set by the chambers judge have now become moot. It is clear that some sort of litigation plan is necessary and we direct Rahmani to serve on Weidner Investment a litigation plan in accordance with r 4.4(2) within 60 days of the date of these reasons. If the parties cannot agree on a litigation plan, they may apply to the Court of Queen's Bench for directions.

V. Disposition

[34] This appeal is dismissed.

Appeal heard on March 10, 2021

Memorandum filed at Calgary, Alberta
this 22nd day of March, 2021

Authorized to sign for Veldhuis J.A.

Khullar J.A.

Authorized to sign for Antonio J.A.

Appearances:

M.S. Gal
R.F. Llewellyn (no appearance)
for the Respondent

T.J. Boyle/R.L. Henning
for the Appellants