Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce, 2003 ABCA 259

Date: 20030918
Docket: 0203- 0131-AC

2003 ABCA 259 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MADAM JUSTICE PICARD

BETWEEN:

TROUT LAKE STORE INC.

APPELLANT
(Plaintiff)

\- and -

CANADIAN IMPERIAL BANK OF COMMERCE, GEORGE JADOT,
and GEORGE JADOT carrying on business as RED EARTH STORE

RESPONDENTS
(Defendants)

BETWEEN:

GEORGE JADOT

RESPONDENT
(Plaintiff by Counterclaim)

\- and -

TROUT LAKE STORE INC., LEONARD BELLEROSE
and GLADYS BANVILLE

APPELLANTS
(Defendants by Counterclaim)

APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE B.E. MAHONEY
DATED THE 6TH DAY OF FEBRUARY, 2002

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE CONRAD
CONCURRED IN BY THE HONOURABLE CHIEF JUSTICE FRASER
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD

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COUNSEL:

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REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE CONRAD

I. INTRODUCTION

[1] This appeal concerns the proper application of Rule 244.1(1) of the *Alberta Rules of Court* (the "*Rules*"). The question raised is whether a party to an action can extend the lawsuit by taking a unilateral action, without the other party's consent, when nothing has been previously done to materially advance the action for five years or more.

[2] The appellant, Trout Lake Store Inc. ("Trout Lake"), unsuccessfully applied to strike a counterclaim brought by the respondent, George Jadot ("Jadot"), for want of prosecution. It now appeals.

II. ISSUES

[3] Trout Lake advanced the following grounds of appeal:

1. The learned justice erred in concluding that Jadot, after doing nothing for five years, could escape dismissal of its application by applying to compel discoveries.

2. The learned justice erred in failing to review the master's decision not to dismiss the counterclaim pursuant to Rule 244.

[4] At the hearing of the appeal, argument focussed on the interpretation of Rule 244.1, and the question of whether a party who has failed to do anything to materially advance an action for more than five years can avoid the application of the Rule by taking a material step prior to an application being made to dismiss.

III. DECISION

[5] The appeal is allowed and both Trout Lake's claim and Jadot's counterclaim are dismissed for want of prosecution.

[6] More than five years had passed without Jadot doing anything which materially advanced the action. At that point, Trout Lake was entitled to a dismissal of the action, and that dismissal could not be defeated by Jadot's attempt to advance the action without the consent or acquiescence of Trout Lake.

[7] Trout Lake agreed that it would be inequitable to leave its claim extant while striking Jadot's counterclaim.

IV. BACKGROUND

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A. The Facts

[8] In 1995, the appellant, Trout Lake, sued the Canadian Imperial Bank of Commerce ("CIBC"), and the respondents, Jadot, and George Jadot carrying on business as Red Earth Stores. The dispute arose over a small grocery store owned by Trout Lake where Jadot, through Red Earth, had been employed. Jadot defended and counterclaimed against Trout Lake and its shareholders and directors.

[9] Initially, the parties seemed intent on pursuing their claims. Trout Lake filed its affidavit of documents on June 11, 1996, and Jadot's affidavit of documents was filed on June 18, 1996. Trout Lake then examined Jadot's co-defendant, CIBC, on October 24-25, 1996. Neither Jadot nor his counsel were present at these discoveries, and no agreement was ever made that the product of these discoveries could be used in Jadot's action.

[10] After this initial flurry of activity, however, all action in the litigation ceased. Trout Lake discontinued against the CIBC in 1998. It did not discontinue against Jadot at the same time, apparently because of the outstanding counterclaim, but it took no further steps to advance the lawsuit. Jadot appeared to be taking the same approach until July 16, 2001, when, having secured new counsel, he served an appointment for examination-for-discovery on Trout Lake.

[11] Trout Lake responded with surprise to this new interest in the counterclaim and refused to attend for examination. It argued that more than five years had passed since any steps had been taken on the counterclaim and that the action was now dead due to Rule 244.1. In response, on September 11, 2001, Jadot filed an application to force attendance at examinations-for-discovery. This caused Trout Lake to bring an application to dismiss the counterclaim under Rules 244 and 244.1. Both applications went before the master.

B. The Master's Decision

[12] The master applied ***Filipchuk v. Ladouceur*** (2001), 277 AR 192, [2001] A.J. No. 96 (C.A.), and found that to successfully invoke Rule 244.1, the court must look back five years from the date the notice to dismiss was filed to see if anything had been done to materially advance the action. He looked backwards from September 20, 2001, the date of the motion to dismiss, and concluded that the motion to force attendance at discovery, filed on September 11, 2001, materially advanced the action and Rule 244.1 did not apply. He found, as well, that the examinations-for-discovery of the CIBC, conducted by Trout Lake in 1996, could be considered as steps in the counterclaim, and that this, too, materially advanced the action within the five-year period.

[13] Finally, the master refused to strike the claim under Rule 244 as constituting an unreasonable and unexplained delay on the basis that Trout Lake had not proven it had been prejudiced by the delay. He dismissed Trout Lake's application and directed that examinations proceed.

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C. The Chambers Judge's Decision

[14] Trout Lake appealed the master's decision to a justice in chambers. The chambers judge agreed with the master that Rule 244.1 requires looking back five years from the date of the application to dismiss. He concurred, therefore, with the master that the application of September 11, 2001 to compel attendance at examinations-for-discovery was a step that materially advanced the action. He also agreed with the master that one could look at the steps taken by either party.

[15] The learned justice, however, disagreed with the master on one point. He found Trout Lake's examination of the CIBC was not a step in Jadot's counterclaim. He held the counterclaim was an independent action, and because Jadot did not participate or attend at the examinations of the CIBC, nor enter into an agreement that he could use any of those examinations in the counterclaim, there was nothing about those examinations that would advance Jadot's action.

[16] In the end, the chambers judge concluded that Rule 244.1 did not apply. He also refused to interfere with the master's exercise of discretion in refusing to dismiss the appeal under Rule 244 because there was no prejudice.

V. STANDARD OF REVIEW

[17] The proper interpretation of the *Rules* is a matter of law which is reviewable on the standard of correctness. The application of the *Rules* to a set of facts is a matter of mixed fact and law and subject to the standard of palpable and overriding error.

VI. ANALYSIS

A. The Interpretation of Rule 244.1

[18] This appeal turns primarily on Rule 244.1(1) which reads:

> 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.

[19] Rule 244.2 also applies on the facts of this case and provides:

> Notwithstanding Rule 244 or 244.1, where in an action

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> (a) there are cross actions, or
>
> (b) there is a counterclaim or a plea of set-off,
>
> any order made under Rule 244 or 244.1 may be made subject to those terms or directions that the Court considers necessary to prevent any substantial injustice.

[20] The five-year deadline for action provided in Rule 244.1 was added to the *Rules* in 1994 as part of a general overhaul of the law dealing with the dismissal of actions for want of prosecution. Prior to these changes, a party could bring an application to dismiss for want of prosecution if the other party had not taken a "step" within a year. This prior legislation resulted in numerous applications to extend the time for taking a step or to dismiss an action. Moreover, there was uncertainty as to what constituted a "step" and what period of delay should justify dismissal.

[21] The old rule was extinguished and replaced with the right to bring an application to dismiss in the case of inordinate and inexcusable delay, disclosing serious prejudice, and a rule that provided for the dismissal of an action where a time lapse of five years or more existed between "things" done in the action.

[22] These rule changes were designed to expedite and bring finality to litigation. The new rules avoid the frequent applications for extensions previously made under the old rules. Moreover, the new rules add definition to the type of thing a party must do to preserve an action, namely, a thing that materially advances the action. In addition, the new rule provides some certainty as to the outside time an action should ever lie dormant, namely, five years.

[23] Rule 244.1 quickly became known as the "drop dead" rule. Its general effect was described by this court in ***Petersen v. Kupnicki*** (1996), 187 AR 251, [1996] A.J. No. 862. Speaking for the court, Chief Justice Fraser noted that the purpose of the new rule was to impose a five-year limit on delay. She held, at para. 3:

> This does not mean, however, that a plaintiff now has an unlimited period of time within which to advance an action. Indeed, under [Rule 244.1(1)], sometimes referred to as the "drop dead" Rule, this Court is mandatorily obliged to dismiss an action if nothing that materially advances the action has occurred within five years.

[24] This court expressed a similar view in ***Morasch v. Alberta*** (2000), 250 A.R. 269, (2000), 75 Alta. L.R. (3d) 257. In that case, the court set out the principles to guide the interpretation and application of Rule 244.1. Fruman J.A. noted that to invoke the rule an applicant needed to show a five-year gap between "things" done to materially advance the action. Provided this could be

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shown, the court was bound to dismiss the action once an application had been made. She stated, at para. 5:

> The rule is written in absolute terms and is mandatory: **Petersen v. Kupnicki et al.** ... Once it is established that a "thing" has not been done in five years to materially advance the action, the court "shall" dismiss the action. The absence or presence of prejudice to another party is not a consideration: **Volk v. 331323 Alta. Ltd.** ... Similarly, the sterling reputation of the litigant, the strength of his action or defence, and the justification for the delay are all irrelevant to a rule 244.1 application. Of course, although mandatory, a rule 244.1 dismissal is not automatic. A party must apply to the court to trigger the dismissal.

She characterized the rule as a "five-year clock" [see para. 14], implying that once five years have passed, time has run out. According to this logic, while the defendant still has the obligation of bringing the application to dismiss, all the plaintiff can do to avoid dismissal of the action is show that something has actually been done to materially advance the action during the alleged five-year gap.

[25] Neither of these cases, however, dealt with the specific situation where, after the five-year period had passed, and before the other side had brought an application to dismiss, a delaying party attempted to avoid the application of Rule 244.1 by unilaterally doing a "thing" to materially advance the action. A panel of this court was faced with this factual situation in ***Filipchuk***, *supra*. In that case, the plaintiff noted the defendant in default after more than five years had passed since a previous thing had been done in the lawsuit. An application was brought under Rule 244.1 to dismiss the action. In a brief oral judgment, the panel held that the five-year period was calculated by looking back from the date the application to dismiss was filed. Thus, a "thing" done before the application was filed, such as the noting in default, allowed the lawsuit to continue, even though there was a gap of five years or more between previous "things" done to materially advance the action. The panel based this decision on the presumption that where there are two equally plausible interpretations of a statute, the court should choose the one that preserves the right to litigate.

[26] It was argued before us that the decisions below were correct because ***Filipchuk*** allows a lawsuit to continue, even after an extensive delay, provided the delaying party can do something meaningful to advance the action before the other side brings an application under Rule 244.1. Unfortunately, that interpretation creates a foot race to the courthouse, which was surely not the intent of the Rule. Moreover, such an interpretation conflicts with the very purpose of the Rule which is to encourage expeditious litigation.

[27] ***Filipchuk*** must be examined on its own facts. It was an application for default judgment. Obviously, the fact that the defendant had taken no action to protect its rights by even filing a defence may have been influential in determining that case. ***Filipchuk*** was a brief oral judgment and

I do not read it as allowing a delaying party to avoid the mandatory five-year rule by taking an action before the other side files its application to dismiss.

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[28] In my view, the *Rules* are intended to expedite litigation by giving the court a discretion to dismiss an action for want of prosecution, in the appropriate circumstances. Rule 244.1 provides an outside limit of five years during which a party must do some thing that materially advances an action or the action shall be dismissed. Notwithstanding this mandatory language, the dismissal is not automatic. A party must still apply for the dismissal. No doubt an application is formally required to finalize the litigation and to ensure that there has been a five-year period without such a thing being done. In my view, the application also protects from the possibility of an injustice, such as would occur if a party acquiescing in the delay or participating in the action after the five-year period of inaction could seek to strike for want of prosecution.

[29] For instance if, following a five-year period of inaction, the parties participated in extensive examinations-for-discovery, exchanged expert reports, and obtained a trial date, striking the action based on the previous five-year gap would be unfair and inequitable. There could be other less obvious examples of where the non-delaying party may have acquiesced in the delay. I am satisfied that a judge could refuse a dismissal in such a case. There is some obligation on the defending party to make its application to dismiss on a timely basis.

[30] This interpretation is consistent with Rule 244.2 which applies in the case of cross-claims, where it is expressly noted that a court must ensure there is no substantial injustice. The potential for injustice is obvious in the case of counterclaims and cross-claims where one party may be ready for trial, but have to sit doing nothing while the other parties prepare. To dismiss that action would be unfair.

[31] But I am satisfied that once it is shown that there is a gap of five years or more between meaningful things done to advance the litigation, the court is obliged to dismiss the action, subject to the situation described. A delaying party cannot extend the five-year period referred to in Rule 244.1 by unilaterally taking an action before the application to dismiss is made. Even so, the lawsuit survives until an application is brought, and, in the appropriate circumstances, the application may be denied. If a party, therefore, does nothing to enforce its rights under Rule 244.1 on a timely basis, and the opposing party continues to take meaningful steps outside the five-year gap, it may reach a stage where the right to an automatic dismissal is lost. This will encourage a defendant to act quickly and, at the same time, avoid the situation which occurred in this case, where the successful party was the one who filed first at the courthouse.

[32] Thus, to the extent that there may be any lack of clarity in the case law regarding the interpretation and application of Rule 244.1, I am of the view that the law, correctly stated in ***Morasch***, supports dismissal of the action in this case. In addition to the approach taken by this court in ***Morasch*** and ***Petersen***, this court was asked in ***Hnatiuk v. Shaw*** (1996), 193 AR 76, [1996] A.J. No. 966, whether inaction, prior to the implementation of the rule in September of 1994, could be

considered in calculating the five-year period. We held that it could, on the basis that the purpose of the rule was to discourage delay in litigation. Similarly, in ***Howard v. Calgary (City) Police Service*** (2001), 302 AR 266, [2001] A.J. No. 1374, Brooker J. conducted a comprehensive review of the existing authorities. He concluded at para. 5, synthesizing these various cases, that "the general idea behind the Rule is to encourage and mandate the timely pursuit of litigation." All of these authorities suggest the Rule is aimed at certainty and expeditious litigation. It was never intended to allow a delaying party to preserve an action by extending the five-year period by unilaterally doing a "thing" before the application is brought. Rule 244.1 imposes a five-year, "drop dead," time line for the prosecution of a lawsuit.

[33] In summary, I believe the appropriate approach on a 244.1 application to dismiss is as follows:

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.

These steps will avoid the foot race to the courthouse and it will encourage the party seeking to process its claim to proceed in an expeditious manner throughout. At the same time, it will encourage the non-delaying party to act in a timely basis and, at a minimum, to object to any further action taken by the delaying party at the first opportunity.

B. Rule 244.2

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[34] As noted above, Rule 244.2 deals with cross claims and counterclaims. Rule 244.2 is created as an exception to the general rule set out in Rule 244.1. It specifically allows the court to prevent injustice where the litigation is confused by related actions.

[35] The facts in the present appeal are apposite. Trout Lake is seeking the dismissal of Jadot's counterclaim even though its action against Jadot is still alive. Trout Lake's action remains alive, however, not because of a thing done pursuing the claim against Jadot, but because of Trout Lake's discovery of Jadot's co-defendant, the CIBC, a process the chambers judge held Jadot was precluded from relying on in his action against Trout Lake. This is potentially unfair to Jadot. If the court did not have the power to remedy the inequity inherent in this kind of situation, Rule 244.1 would create injustice rather than remedy it.

C. The Application of Rules 244.1(1) and 244.2 to the Present Appeal

[36] I agree with the learned chambers justice that Trout Lake's discovery of the CIBC did not constitute a thing that materially advanced the counterclaim. These were different actions and there was no agreement in place that allowed for Jadot to use the discovery of CIBC in the counterclaim. Thus, on July 16, 2001, when Jadot served the appointment on Trout Lake, over five years had passed since June 18, 1996, the date Jadot filed his affidavit of documents. As Trout Lake immediately advised Jadot's lawyer that it was taking the position that the action was dead under Rule 244.1(1), there was no suggestion of acquiescence on Trout Lake's part.

[37] Here the action Trout Lake sought to have dismissed was a counterclaim. At the time, Trout Lake's action against Jadot remained outstanding. Trout Lake made clear through Mr. Bellerose's affidavit, filed in support of the applications below, that it had no further interest in pursuing its action against Jadot. It may well create a substantial injustice to dismiss Jadot's claim while leaving Trout Lake's claim outstanding. Trout Lake agrees to a dismissal of its claim against Jadot. Thus, the proper disposition, under the circumstances, is to dismiss both actions and end the litigation.

[38] Although Jadot served his appointment with conduct money and brought an application to dismiss (both being things that materially advance the action) these things were done after a five-year period of inaction. He could not avoid dismissal simply because he did these things shortly before the application to dismiss.

[39] In my view, the master and the chambers judge erred in law in their interpretation of Rules 244.1 and 244.2.

[40] Given my decision above, it is unnecessary to discuss whether either the master or the chambers judge erred in considering the possible application of Rule 244.

VII. CONCLUSION

[41] The appeal is allowed and both the action and the counterclaim are dismissed.

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APPEAL HEARD on MARCH 31, 2003,

REASONS FILED at EDMONTON, Alberta,
this 18th day of September, 2003

CONRAD J.A.

I concur:

FRASER C.J.A.

I concur:

PICARD J.A.