Volk v. 331323 Alta. Ltd., 1998 ABCA 54

Date: 19980213
Docket: #97-16998

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE PHILLIPS

BETWEEN:

CARL VOLK and CHRISTINE VOLK

Plaintiffs
(Respondents)

- and -

331323 ALBERTA LTD. AND THE SAID 331323 ALBERTA LTD.
CARRYING ON BUSINESS AS CENTRAL AIRE HEATING
AND AIR CONDITIONING

Defendant
(Appellant)

- and -

WAYCON HOMES LTD.

Defendant
(Not a party to appeal)

APPEAL FROM FORSYTH, J. IN CHAMBERS

MEMORANDUM OF JUDGMENT

COUNSEL:

J. G. Hanley,
for the Respondents

M. G. McGovern
for the Appellant

MEMORANDUM OF JUDGMENT

THE COURT:

[1] The Defendant 331323 Alberta Ltd., carrying on business as "Central Aire Heating and Air Conditioning" ("Central Aire"), applied to strike out the Plaintiffs' claim on the ground that it was statute-barred under s. 51 of the ***Limitation of Actions Act,*** R.S.A. 1980 c. L-15, or, alternatively, for delay pursuant to Rules 244.1(1) or 244 of the *Alberta Rules of Court* which were introduced on September 1, 1994: Alta.Reg. 234/94. The Master dismissed the action under Rule 244. The Chambers Judge set aside the order and dismissed the application. Central Aire appeals.

[2] We agree with the decision of the Chambers Judge and dismiss the appeal. Our reasons follow.

[3] The Plaintiffs purchased a new home from the other Defendant, Waycon Homes Ltd., which is now bankrupt and noted in default. Central Aire installed the heating system shortly before the Plaintiffs took possession on September 29, 1988. In the latter part of 1988 the Plaintiffs noticed discolouration of the walls, ceilings and floors and began experiencing drowsiness, headaches and other physical ailments. The Plaintiffs claim they were not informed until February, 1991 that the problems were caused by faulty installation of the furnace exhaust and intake system. Central Aire was first notified of the circumstances and that a claim might be made against it between February and July, 1991, more than two years after completion of their work.

[4] The Statement of Claim was issued on July 3, 1991 claiming damages from Waycon and Central Aire. Central Aire filed its Statement of Defence on July 31, 1991. An officer of Central Aire was examined for discovery on October 8, 1991. The examinations for discovery of the Plaintiffs were concluded on July 23, 1992

subject to undertakings. On August 25, 1993, the Plaintiffs attended for independent medical examinations as requested and arranged by counsel for Central Aire. Counsel for the Plaintiffs then suggested that the matter be set down for trial, however it was made clear by counsel for Central Aire that she would not sign a Certificate of Readiness or consent to the matter being set down for trial until all undertakings given on discovery had been complied with.

[5] The undertakings remained unfulfilled in August, 1994, more than two years after the examinations for discovery. An application by Central Aire to compel compliance with the undertakings was adjourned *sine die* in March, 1993. In early August, 1994, counsel for the Plaintiffs requested consent to an order granting leave to take the next step in the action (old Rule 243 required leave where no step had been taken for more than one year). Counsel for Central Aire replied on August 12, 1994 as follows:

> The action has been at a standstill for so long that we were given to believe that your clients had abandoned their claim. Nonetheless, if your instructions are to proceed, then we shall require fulfilment of the outstanding undertakings within 10 days from the date of this letter or we shall reinstate our application for fulfilment of undertakings to the Chambers list.

[6] This was followed by a further letter from counsel for Central Aire dated September 28, 1994 advising that until the undertakings were met she would not execute a Certificate of Readiness, and warning that if the Plaintiffs "are serious about proceeding with this litigation, we require they do so in a diligent manner.".

[7] There was no further correspondence between counsel and no steps were taken in the matter until August 31, 1995. On that date the Plaintiffs' new solicitors wrote to counsel for Central Aire suggesting that "there is nothing further to be done prior to trial" and indicating that a Certificate of Readiness would be forthcoming. In reply, Central Aire's counsel advised that her position was as set out in prior letters to the Plaintiffs' former counsel in which she insisted that the undertakings be completed before she would consent to having the matter set down for trial. Nothing was said in any of the earlier correspondence about moving to

dismiss the action for delay. The undertakings were fulfilled in March, 1996 and Plaintiffs' new counsel then forwarded a Certificate of Readiness. The Certificate was not signed and in May, 1996, the Plaintiffs applied for and obtained an Order setting the matter down for trial for an unspecified date, with leave to Central Aire to move to strike the action. This application was made by Notice of Motion issued on September 5, 1996 returnable on September 23, 1996.

Limitation

[8] The Plaintiffs allege that the negligence of Central Aire caused damage to the house and furnishings as well as personal injury to them. They claim they were exposed to carbon monoxide and other toxic gases and as a result suffered personal injury, including, "Drowsiness and Listlessness over a period of two and a half years.".

[9] Section 51 of the ***Limitation of Actions Act*** bars an action for damages based on negligence unless it is commenced within two years from the date the cause of action arose. Here, the Statement of Claim was issued in July, 1991, more than two years after the heating system was installed and the Plaintiffs first experienced problems. There is an issue of when the Plaintiffs did or should have discovered the source of the problem and thus the commencement of the limitation period: ***Central Trust Co. v. Rafuse and Cordon*** (1986), 69 N.R. 321 (S.C.C).

[10] The Chambers Judge found the evidence before him insufficient to determine the underlying factual issue of discoverability. He dismissed this part of the application saying that the issue could only be decided after a trial.

[11] In our view, the Chambers Judge correctly disposed of this issue. The evidence consisted of the affidavits of the Plaintiffs and extracts from their examinations for discovery, as well as affidavits from agents of Central Aire. The question of discoverability is, in these circumstances, uniquely suited to resolution on the basis of *viva voce* evidence of the full history of the matter.

Rule 244.1 (1)

[12] 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.

[13] This Court has held that delay both before and after September 1, 1994 may be considered in applying Rule 244.1(1): ***Honeywell Ltd. v. Richardson,*** (Unreported, December 5, 1994, Calgary Appeal #15058), ***Hnatiuk v. Shaw***, [1996] A.J. No. 966. But that may not always be so: ***Petersen v. Kupnicki*** (1996), 44 Alta. L.R. (3d) 68 (C.A.). For the purpose of this case we will assume that time elapsed before the Rule became effective may be considered.

[14] The Chambers Judge found that Central Aire had not established the delay necessary to justify invoking this Rule. We agree with him.

[15] Rule 244.1(1) has been referred to as the "drop dead" rule. Upon a finding that five or more years have expired since "the last thing was done in an action that materially advances the action", the court must dismiss the action or that part of it relating to the party applying for dismissal.

[16] Rule 244.1(1) has two notable features. First, the question of prejudice to the applying party from the delay is irrelevant. If no "thing" has been done to materially advance the action for a period of five years or more, the Court must dismiss the action on the application of a party. Prejudice to the party applying need not be established and no inquiry into that issue is necessary. Second, the Rule introduces the concept of a "thing that materially advances" the action. The previous rules concerning delay referred to a "step" in the action. Under old Rule 243 leave was necessary to proceed if no "step" had been taken for more than one year. It is fair to assume that the drafters of Rule 244.1(1) intended that "thing" mean something different than "step". We need not consider the difference in meaning because we are satisfied that events occurred within five years of this application which materially advanced the action and qualify as "things".

[17] The selected officer of Central Aire was examined for discovery by the Plaintiffs on October 8, 1991. That was clearly a "thing" that materially advanced the action. It occurred within five years of this application. Further, the Plaintiffs were examined for discovery in July, 1992, and in August, 1993, they submitted to independent medical examinations at the request of Central Aire's counsel. Although it is not necessary for our decision, we are of the view that each of these procedures was also a "thing" that materially advanced the action. Rule 244.1(1) does not say that things done by the complaining party that materially advance the action are excluded from consideration.

Rule 244

[18] Central Aire submits that the delay after commencement of the action was inordinate and inexcusable and resulted in prejudice to it sufficiently serious to warrant dismissal of the action pursuant to Rule 244. It is argued that the Plaintiffs have failed to overcome the presumption of serious prejudice raised by sub-rule (4) of Rule 244.

[19] It is necessary to set out Rule 244 in full:

> (1) Where there has been a delay in an action, the Court on application by a party to the action may, subject to any terms prescribed by the Court,
>
> > (a) dismiss the action in whole or in part for want of prosecution, or
> >
> > (b) give directions for the expeditious determination of the action.
>
> (2) If the Court denies the relief sought under subrule (1)(a), the Court
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> > (a) shall prescribe terms or give directions that, in the

> opinion of the Court, are sufficient to substantially prevent or remedy, as the case may be, any non-trivial prejudice caused to any adverse party by reason of the delay, and
>
> (b) may prescribe terms or give directions that, in the opinion of the Court, will prevent further delay in the action.
>
> (3) If in the opinion of the Court it is unable to devise terms or directions that are sufficient to satisfy subrule (2)(a), the Court shall find that there has been serious prejudice to the party moving to dismiss the action.
>
> (4) Where, in determining an application under this Rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay shall be prima facie evidence of serious prejudice to the party that brought the application.

[20] The law with respect to delay in litigation was articulated by the Court of Appeal of England in ***Allen v. Sir Alfred McAlpine and Sons Ltd.***, [1968] 1 All E.R. 543, and applied by this Court in ***Lethbridge Motors Co. v. American Motors (Canada) Ltd.*** (1987), 53 Alta. L.R. (2d) 326, and ***Demarco Oil & Gas Inc. v. 309506 Alberta Ltd.*** (1993), 135 A.R. 233. New Rule 244 has not affected the relevance of the three-part test for dismissal for want of prosecution set out in ***Allen v. McAlpine***, supra, namely, (i) inordinate delay, (ii) which is inexcusable, and (iii) likely to seriously prejudice the applicant.

[21] The new Rule does, however, create a form of presumption of serious prejudice to the applying party where the other party has been guilty of inordinate and inexcusable delay. By sub-rule (4) such delay "is prima facie evidence of serious prejudice". This does not shift the overall burden of proof. The applicant must still establish a likelihood of serious prejudice before the action will be struck under this Rule. The presumption may lead to dismissal unless there is evidence that at least raises a legitimate doubt about the existence of serious prejudice to the

applicant attributable to the delay. In the absence of such evidence, the delay alone is sufficient proof of serious prejudice to warrant dismissal for want of prosecution.

[22] The Plaintiffs did nothing to further their action between August, 1993, when they complied with a request to submit to independent medical examinations, and early March, 1996, when their new counsel complied with the undertakings which had then been outstanding for close to four years. In our view, that was inordinate delay. When the discovery undertakings were finally dealt with, the proceedings had been in progress for nearly five years and more than seven and one-half years had elapsed since the negligence alleged of Central Aire occurred.

[23] The Plaintiffs do not offer an acceptable excuse for the delay. Their former counsel has not given any evidence to assist the Court. There is a suggestion that counsel for Central Aire is partly responsible. Her only contribution was to insist on compliance with the undertakings before having the action entered for trial. No doubt defendants have some responsibility to co-operate in ensuring that litigation proceeds to final resolution without inordinate delay. In our view, no fault can be attributed to Central Aire or its counsel in this case, unless it can be said that they were too lenient. It is obvious from the circumstances that the delay in prosecuting this action was the procrastination of Plaintiffs' former solicitor. That is not sufficient to excuse the delay.

[24] The inordinate and inexcusable delay is prima facie evidence of serious prejudice to Central Aire which, standing alone, would support dismissal. Here, there is evidence of the actual prejudice allegedly suffered by Central Aire. In our view, that evidence places in doubt the existence of prejudice of a quality warranting dismissal. The evidence of actual prejudice must be considered along with all the circumstances of the case, including the prejudice presumed from inordinate delay, to determine if Central Aire has been prejudiced to a degree sufficient to mandate striking the action.

[25] Central Aire alleges two elements of prejudice. First, it says a key witness, the individual who actually installed the heating system, moved to Germany in approximately 1993 and cannot be located. Second, the Plaintiffs' Alberta Health

Care Statements of Benefits for a portion of the relevant period cannot be obtained because they are retained for a limited period of time.

[26] The inability to locate the witness cannot, however, be attributed to the delay by the Plaintiffs that occurred after August, 1993. When the witness moved to Germany in 1993, this action had been in progress for some time. Even if the Plaintiffs had prosecuted the action expeditiously it is unlikely it would have come to trial before the witness left Canada. The claim of faulty installation should have immediately alerted Central Aire to the importance of the witness and motivated it to obtain a statement from him and to ensure his availability for consultation and for trial. There is no causative relationship between the delay and the inability to locate the witness.

[27] The Chambers Judge suggested, but did not order, that the parties co-operate to locate the missing witness. There was no evidence of any efforts made to find the installer and thus no evidence that the process suggested by the Chambers Judge would prove fruitless.

[28] We are not persuaded that the inability to obtain a formal record of the physicians and other health care practitioners consulted by the Plaintiffs during a portion of the relevant period is a matter of significant prejudice to Central Aire. The information contained in the government records can be obtained by examination for discovery of the Plaintiffs and disclosure of medical reports. The inability to obtain this secondary documentary evidence does not raise serious prejudice.

[29] The actual prejudice alleged does not constitute serious prejudice. Neither the circumstances of the case or the prejudice presumed from long delay warrant dismissal for want of prosecution.

[30] Where an application like this is denied, Rule 244 mandates the imposition of terms or directions to remedy the effect of past delay and to prevent further delay and for the expeditious determination of the action. The Chambers Judge did not specifically impose terms but he noted that by virtue of the Order made on May 22, 1996, the matter had been set down for trial for an unspecified date, and

observed that further interlocutory applications may be necessary. We will not set any terms or give directions. These matters are for Queen's Bench. We simply direct that the parties apply forthwith for case management with a view to resolving any outstanding preliminary matters and proceeding to trial without further delay.

[31] We dismiss the appeal.

APPEAL HEARD September 9, 1997

JUDGMENT DATED at CALGARY, Alberta,
this 13th day of February,
A.D. 1998

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O'LEARY, J.A.

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PICARD, J.A.

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PHILLIPS, J.