In the Court of Appeal of Alberta

Citation: Young v. A. Dei-Baning Professional Corporation, 1996 ABCA 213

Date: 19960506
Docket: 95-16220
Registry: Calgary

Between:

Ryan Paul Young by His Next Friend Marianne Young and Donna Young

Plaintiffs
(Respondents)

- and -

A. Dei-Baning Professional Corporation, Dr. Alfred Dei-Baning and Salvation Army Grace Hospital Governing Board of the Salvation Army, Canada West

Defendants
(Appellants)

The Court:

The Honourable Mr. Justice Kerans
The Honourable Madam Justice Conrad
The Honourable Madam Justice Russell

Memorandum of Judgment

COUNSEL:

C. Langlois, for the Plaintiffs (Respondents)

J.G. Martland J.W. Rose, for the Defendants (Appellants)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from a decision of a chambers judge dismissing the appellant's application for dismissal of an action for want of prosecution. The action, which was commenced in 1988, involves allegations of negligence in the provision of medical services to an infant at birth in 1987. The application for dismissal was made after a

certificate of readiness had been served and the matter had been entered for trial pursuant to the direction of a case management judge.

[2] The statement of claim was renewed and served on the appellants in January, 1990. In March, 1990 the physician appellant warned the respondent that he was being prejudiced by the lengthy delay before the matter was brought to his attention. In June, 1990 an application was made by the appellants to set aside the order renewing the statement of claim after it had expired. In those proceedings, the hospital appellant also claimed prejudice because a number of employees who attended to the respondent were no longer employed and it was unlikely they could be contacted or would cooperate in the action. The application was denied, but costs were awarded personally against the respondent's former solicitor.

[3] Statements of defence were issued in June and July, 1990. No replies were given by the respondents to the appellant's requests for production of documents in July, November and December, 1990. In September, 1991 the physician appellant advised the respondent that because one year had passed since taking the next step, leave of the court would be required. That resulted in a consent order in December, 1991, with conditions requiring the respondent to file and serve an affidavit of documents, complete examinations for discovery, answer undertakings, and file a certificate of readiness by September, 1992. Those conditions were not met within the prescribed periods. Nonetheless, the appellants conducted examinations for discovery in October, 1992.

[4] In October, 1993 the appellants advised the respondent they would not waive the provisions of the Alberta Rules of Court dealing with dismissal for want of prosecution.

[5] The certificate of readiness was circulated by the respondent in October, 1993, and signed by the appellant hospital. In January, 1994, the appellants consented to an amended statement of claim. The appellant physician postponed signing the certificate of readiness, but proposed instead the appointment of a case management judge, which occurred in May, 1994. The case management judge directed that a certificate of readiness be completed by June, 1994, that all examinations and undertakings be completed by November, 1994, and that the trial be scheduled in May or June, 1995. Those deadlines were later extended. The respondent did not fully comply with the undertakings.

[6] In March, 1994, the appellants requested an independent medical examination of the respondent, and in August, 1994 they examined the respondents on undertakings which had been answered 15 months previously. There is no explanation from the

appellants for that lengthy delay. In October, 1994, the appellants requested further medical assessments of the respondent. The respondent contends that these actions induced the respondent to infer that the appellants were willing to have the action proceed, and thus to incur further expense in the prosecution of the action.

[7] In January, 1995, the respondent discharged her former counsel. In the same month, the case management judge gave further directions regarding compliance with the undertakings and serving a certificate of readiness, and granted the appellants leave to apply for dismissal of the action for want of prosecution. Several of the respondent's undertakings were still outstanding at that time despite earlier directions of the case manager. At the time leave was granted to commence that application, the action had not been set down for trial.

[8] The applications for dismissal were commenced in June, 1995 and alleged damages to the reputation of the appellants, and that their ability to defend the action had been compromised by fading memories and the departure of many of the witnesses.

[9] The chambers judge found that although the respondent's former counsel had been dilatory and disorganized, the applications for dismissal were ill-timed, ill-advised and without merit. Because the appellant had encouraged further case management, and as a result, the matter was ready to proceed to trial, the chambers judge was of the view there had been a waiver or an acquiesence by the defendant appellants. The appellants contend that, having warned the respondent of prejudicial delay, their subsequent diligence in expediting the progress of the action should not be construed as acquiescence in the plaintiffs tardiness.

[10] We do not endorse the notion that a defendant should nurture delay, with a view to discouraging diligent prosecution of an action. Nonetheless, we adopt the statement of Diplock L.J. in ***Allen v. Sir Alfred McAlpine and Sons Ltd****.* [1968] 1 All E.R. 543, that a defendant will be precluded from relying on delay to seek dismissal where his own action intimates agreement that the action may proceed. But, one should not be too quick to criticize a defendant who tries to move a case along, even though a defendant, as here, is guilty of poor judgment in asking for more case management at a time when his motion to strike for want of prosecution was pending. A waiver of a claim of prejudice arising from a delay does not necessarily waive future delay. In our view, the chambers judge may have erred in failing to consider whether any waiver was still extant when leave was obtained to apply for the dismissal.

[11] The first warning by the appellants of prejudicial delay occurred in 1990, and preceded the consent order for leave to take the next step in December, 1991. That consent clearly intimated their agreement that the action may proceed. In initially proposing and participating in the case management process, the appellants also intimated their agreement that the action should proceed.

[12] Following completion of examinations for discovery in August, 1994, the appellants made inquiries to determine the status of the matter, sought compliance with the order of the case management judge, requested the names of the respondent's experts, and completed examinations on available answers to undertakings in compliance with the order of the case management judge. In our view, the defendant made his position clear that he was not endorsing the final delay.

[13] However, in October, 1994, the appellants obtained leave to have the respondent further medically assessed. The chambers judge evidently considered that action to be the sort that intimated agreement that the matter could proceed, for he referred to those assessments as a reason for concluding that the application for dismissal was a wholly inappropriate response. We agree that the action of requesting further medical assessments conveyed the message that despite earlier delays the appellants expected the matter would be proceeding to trial.

[14] But when leave was obtained in January, 1995 to apply for dismissal for want of prosecution, 8 months after the appointment of the case management judge, some of the respondent's undertakings were still incomplete for reasons which were not explained, the certificate of readiness had not been served, and no agreement had been reached regarding the further medical assessments of the respondent. It was evident then that delays were continuing to occur despite the best efforts of both the appellants and the case manager to expedite the matter. There was no acquiescence in this delay. Moreover, the fact that the respondent was finally in compliance with directions of the case manager, and that the action had been entered for trial, did not obviate the delay that had occurred in complying with those directions.

[15] The appointment of a case management judge was prompted by frustration with the delay that had occurred till then. It was only when it became apparent that process was not achieving the desired result, that the appellants felt compelled to take a different step. Their cooperation in case management should not have negative consequences for them. Rather, any delay on the part of the respondent occurring after the implementation of that

process warranted special consideration and censure. Thus, in our view, the chambers judge erred in concluding that the appellants had waived or acquiesced in the delay.

[16] The chambers judge held that even if there was no waiver or acquiescence, despite recent amendments to Rule 244(1)(a) of the Alberta Rules of Court, the three part test articulated by this Court in ***Lethbridge Motors Co. v. American Motors (Can.) Ltd***. (1987) 53 Alta. L.R. (2d) 326 remains the law. There, Laycraft C.J.A. held that prejudicial delay caused by fading memories may affect some cases more than others, but the inevitability of some such prejudice seems to be contemplated in prescribed limitation periods. Though the chambers judge found inordinate and inexcusable delay on the part of the respondent or her former counsel, he did not find that any serious prejudice had been suffered by the appellants. In doing so, the appellants argue that the chambers justice failed to have regard to Rule 244(4) of the recently amended Alberta Rules of Court which deems inordinate and inexcusable delay ***prima facie*** evidence of serious prejudice. They contend that the new subsection has upset the statement of law in ***Lethbridge Motors*** concerning prejudice caused by fading memories, and reversed the onus of proof.

[17] We are of the view the chambers judge did err in failing to consider the issue of prejudice in the context of the totality of the delay. In the circumstances of this case, an inference of prejudice could properly be drawn from the length of the delay itself: ***K.M.W. v. J.G.C.*** (1990) 112 A.R. 81 at 84 (C.A.).

[18] In any event, the new rule presumes prejudice from delay. The explanatory note of the Rules Committee on 244(1) reads as follows:

> It will be noticed that the key words of Rule 244(1) and paragraph (a) are the same as they have been since 1968. So it is expected that the Courts will continue to apply to those words the familiar 3-part test: inordinate delay, which is inexcusable, and likelihood of serious prejudice.

Subrule (4) then offers a rebuttal presumption of serious prejudice from the fact of inordinate or inexcusable delay. In our view, that presumption was not rebutted by the respondent in this case. Accordingly, we are satisfied that the three part test established in ***Allen v. Sir Alfred McAlpine & Sons Ltd***. was met, and that delay within the meaning of Rule 244 was established. That conclusion does not satisfy the onus on the applicant of proving that the prejudice is such that a dismissal is required.

[19] Not only was the delay inordinate and without excuse, but the appellant was giving notice throughout that he wanted the file to move. He applied for case management, which is appropriate and should be encouraged. The appellant should not suffer prejudice for making an application for case management; neither should a defendant be rewarded

for doing nothing. In our view, it is incumbent on both parties to attempt to keep the action moving. We encourage parties to apply for case management rather than moving for a remedy under Rule 244, and to that extent we are sympathetic with the reasoning of the trial judge. However, in this case the defendants had tried both to cooperate and yet make their position clear. Nevertheless, the delay continued.

[20] However, in our view, the onus rests on the party seeking the dismissal to prove sufficient prejudice to warrant a dismissal. The prejudice presumed here is insufficient to warrant that remedy. We acknowledge that there will be some prejudice as a result of fading memories. But, the mere fact that the nurses are no longer in the employ of the appellant hospital docs not mean they will be less truthful witnesses. There is no presumed advantage simply from the fact that a witness is an employee, and the fact that subpoenas may have to issue to ensure attendance should not change their testimony.

[21] An important change offered by the new Rule relates to the scope of remedy as opposed to the conditions for relief. The rule docs not mandate dismissal in all cases of serious prejudice. On the other hand, it docs mandate enough relief to undo the harm done. On the facts of this case we are of the view that one of the alternative remedies should be imposed. One of those new remedies is the imposition of a penalty to help compensate for the delay.

[22] Much of the responsibility for the delay was attributed by the chambers judge to the respondent's former solicitor who was found to be dilatory and disorganized. We are reluctant to impose the full burden of that irresponsibility on the respondent herself, even though we recognize she could pursue other remedies in that event. As well, we recognize that although the chambers judge found inordinate, inexcusable delay on the part of the respondent, he also found that the appellants had taken considerable time to complete their examinations. For these reasons, we believe this is a proper case to redress the prejudice caused by the delay through an award of solicitor and client costs, and by restricting any claim for pre-judgment interest costs.

[23] In the result, the appeal is allowed. We direct that any claim for pre-judgment interest be restricted to a period of 3 years. We award the appellant solicitor and client costs for this application, and all steps relating to case management after January 1, 1995. The appellant will also have the costs of this appeal, but not on a solicitor-client basis.

JUDGMENT DATED at CALGARY, Alberta,
this 6th day of May,
A.D. 1996