In the Court of Appeal of Alberta

Citation: Hudson v. Garreck, 2012 ABCA 111

Date: 20120405
Docket: 0901-0075-AC
Registry: Calgary

Between:

Leslie James Hudson

Appellant
(Plaintiff)

- and -

Allan Dale Garreck and Don Jepsen Trucking Ltd.

Respondents
(Defendants)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Clifton O'Brien

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice T. F. McMahon
Dated the 13th day of January, 2009
Filed on the 3rd day of March, 2009
(Docket: 9901-06496)

Memorandum of Judgment
Delivered from the Bench

Paperny J.A. (for the Court):

[1] This appeal arrises from a motor vehicle accident that occurred in December 1997. The appellant, Hudson, filed a statement of claim on April 16, 1999 seeking damages for personal injury. The respondents, Garreck and Don Jepsen Trucking Ltd., filed their statement of defence on May 5, 1999. In the eleven years since, there has been some progress in the action, but it has been largely marked by delay and missed deadlines on the part of the appellant that ultimately culminated in dismissal for delay pursuant to Rule 244 of the former *Alberta Rules of Court*, now Rule 4.31. The appellant appeals that order.

[2] Examinations for discovery were conducted in 1999, 2000 and 2004. Pre-trial conferences were conducted in 2002, 2003 and 2005, mostly initiated by the defendants, each of which resulted in the imposition of deadlines. The appellant failed to meet those deadlines and at least two trial dates in January 2006 and March 2007 have been lost as a result of the failure of the appellant to meet deadlines set by the court or by the rules.

[3] The respondents twice brought applications to dismiss the claim under Rule 244, one in May 2003 and another one in December 2005. On both occasions, the court declined to dismiss the action but set clear deadlines for the taking of further steps to ready the matter for trial. The appellant failed to comply with those dates as well.

[4] In March 2008 a consent order was filed severing the issues of liability and quantum and ordering that a trial on liability would be set following a further pre-trial conference. That pre-trial conference was held June 13, 2008 at which time it was directed that an agreed statement of facts and exhibit book would be filed by July 31, 2008 and that the appellant would serve his expert report by July 15, 2008. The appellant failed to comply with those dates.

[5] The respondents filed a third application to dismiss under Rule 244 on December 10, 2008. At that time, appellant's counsel advised the chambers judge that the appellant had suffered a heart attack in June 2008 and had not been in a position to give instructions for several months. Respondents' counsel noted that this situation, as he understood it, had existed at the time of the June pre-trial and appellant's counsel had not contacted him regarding this possible problem. No evidence was filed to support the explanation.

[6] The chambers judge concluded that on the face of the court record there had been an inordinate and unexcused delay. He further concluded that the appellant failed to discharge his onus to explain those delays. He inferred prejudice to the respondents' case with the passage of 11 years from the date of the accident. For those reasons he dismissed the action under Rule 244.

[7] The appellant raises three grounds of appeal. He argues first that the chambers judge failed

to take into account that steps were taken in the proceedings in the year preceding the motion to dismiss. He also submits that the three-part test for want of prosecution was not satisfied and finally that the chambers judge failed to consider that the dismissal of the action was a final determination and that the parties should be permitted to present their case in court.

[8] We disagree. First, the reasons made clear that the chambers judge was aware of all the steps taken in the action, including the filing of the consent order in March 2008 and the pre-trial conference in June 2008 and the deadlines imposed at that time. The chambers judge expressed concern about the earlier unexplained delays and the overall time that the action had been outstanding. In considering the motion to dismiss, the chambers judge took into account the events that occurred in the year prior to the application. He did not however, limit his consideration to those events nor was he required to do so. The appellant did not suggest that the respondents somehow waived their right to rely on the delays that preceded the events of 2008 nor could he, given the two earlier applications to dismiss.

[9] The chambers judge was correct to take those earlier delays and missed deadlines into account in considering whether there was an inordinate, inexcusable delay in the prosecution of the claim as a whole that caused prejudice to the respondents. The argument that the chambers judge misapplied the relevant legal test in considering whether to dismiss for delay cannot be sustained. The parties agree that the test is as set out in *Volk v 331323 Alberta Ltd.*, 1998 ABCA 54, 212 AR 64: inordinate delay which is inexcusable and is likely to seriously prejudice the applicant. The chambers judge was alive to the test and concluded that considering the lack of progress in the action since it was begun in 1999, the delay had been inordinate and inferred that the delay had caused serious prejudice to the respondents' ability to defend the claim. Both conclusions were reasonable based on the record before the court. The chambers judge had concluded that the appellant had failed to discharge his onus to provide an excuse. There is no basis to interfere with that conclusion.

[10] Finally, the appellant argues that the chambers judge improperly exercised his discretion because dismissal for want of prosecution is a final determination of the action. To the extent that this can be seen as a discretionary decision, this court does not interfere unless that decision is unreasonable or unless a chambers judge has proceeded on a wrong principle or there is likely to be a failure of justice. See *Decock v Alberta*, 2000 ABCA 122, 255 AR 234 and *Metropolitan Life Insurance Co v Hover*, 1999 ABCA 123, 237 AR 30. No such error exists here.

[11] For these reasons the appeal is dismissed.

Appeal heard on January 11, 2011

Memorandum filed at Calgary, Alberta
this 5th day of April, 2012

Paperny J.A.

Appearances:

D.J. Salmon
for the Appellant

S.P. Jeffers
for the Respondents