Court of King's Bench of Alberta

Citation: Derrick Concrete Cutting & Construction Ltd. v Nexxt Concrete Cutting & Construction Ltd., 2024 ABKB 190

Date: 20240403
Docket: 1703 16538
Registry: Edmonton

Between:

Derrick Concrete Cutting & Construction Ltd.

Plaintiff

- and -

Nexxt Concrete Cutting & Construction Ltd., Travis James Lega, Don Myroon, 1989247 Alberta Ltd. as Amalgamation Successor to 1577542 Alberta Ltd.

Defendants

Appeal from the Decision by
The Honourable Applications Judge B.W. Summers

Dated the 9th day of December, 2022

Reasons for Decision
of the
Honourable Justice James T. Neilson

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[1] This is an appeal by the Defendants from a decision by Applications Judge B.W. Summers dated December 9, 2022, dismissing the application by the Defendants to dismiss this Action pursuant to *Rule* 4.33(2) of the *Alberta Rules of Court*. The Defendants brought application to dismiss the Action on the basis that three or more years have passed without a significant advance in the Action.

The Decision Under Appeal

[2] On the return of the application by the Defendants, counsel for the Defendants, Nexxt Concrete Cutting & Construction Ltd., and the other named Defendants, other than Travis James Lega (the "Nexxt Concrete Defendants") submitted that, although applications for summary judgment and summary dismissal had been filed in this Action, none of the applications proceeded to a hearing and ruling by the Court within the time period mandated by *Rule* 4.33(2). Counsel for Travis James Lega ("Lega") concurred. In these circumstances, because the filed applications for summary judgment or summary dismissal did not result in a hearing and ruling by the Court, these cannot be considered a significant advance in the action, and the action must accordingly be dismissed. This follows the reasoning of the Alberta Court of Appeal in ***Jacobs v McElhanney***, 2019 ABCA 220.

[3] In response to these submissions, the Applications Judge stated as follows:

> ... Thank you all for your submissions. Frankly, I found them enlightening, interesting. I agree with Ms. MacLennan that I am bound by the Court of Appeal's decision in ***Jacobs***, and the question is, is that decision distinguishable on any basis such that it would not apply in this case? As I indicated in my earlier comments, I am surprised, frankly, that the ***Jacobs*** decision would still be good law after the significant shift the Court has taken in ***Weir-Jones*** [2019 ABCA 49] and ***Medicine Hat*** [2020 ABCA 343] and so many other cases that deal with summary proceedings, and I do say it surprises me because I think that what is sought in a summary proceeding could be an [sic] informative as what is sought in a questioning for a discovery.

[4] Counsel for the Plaintiff, Respondent had cited foundational *Rule* 1.2, that there is an obligation on the Plaintiff to prosecute their claim in a timely fashion and the reciprocal obligation on the Defendant to not obstruct, stall or delay an action that the Plaintiff is advancing. Counsel cited the case of ***994552 NWT Ltd. v Bowers***, 2017 ABQB 741 at para 7, to the effect that a person in breach of a court order to do something that if completed would count as a significant advance, cannot rely on *Rule* 4.33.

[5] The Applications Judge stated:

> I am bound by this case [***Jacobs***], but I find that it is distinguishable. I think that the particular circumstances of this case as outlined by Mr. Matour, but as refined by Ms. MacLennan and Mr. Thompson, still makes this distinguishable. I think that the point made by Master Schlosser in the ***Bowers*** case creates an element of distinction, or identifies an element of distinction, that was not before the Court of Appeal in ***Jacobs***, and consequently, I dismiss the application for summary dismissal. I am prepared to provide further directions as far as moving this matter. Although, I do say in a way this is sort of a novel point of law because of ***Weir-Jones*** being later than the ***Jacobs*** decision. It may very well not stop with me. I appreciate that, I understand that, but I am prepared to provide further directions in proceeding this action if that is of help to the parties.

Procedural History

[6] On October 2, 2017, the Plaintiff filed its Amended Statement of Claim against the Defendants, alleging that its former employee Lega, a key employee, had breached duties owed to the Plaintiff by accepting employment with the Defendant, Nexxt Concrete, disseminating essential information and materials obtained by him from the Plaintiff, contacting former employees and soliciting them to leave their employment with the Plaintiff, and soliciting and obtaining suppliers and customers of the Plaintiff. The Amended Statement of Claim also alleges that the other Defendants caused Lega to breach his fiduciary obligations, thereby causing loss and damage to the Plaintiff. The Plaintiff claims against the Defendants, jointly and severally, damages in the amount of $3,000,000.00, plus punitive damages, interest, and costs.

[7] Comprehensive Statements of Defence of 1989247 Alberta Ltd., Nexxt Concrete Cutting & Construction Ltd., and Don Myroon were filed on October 17, 2017. The Defendant, Lega, filed his Statement of Defence on October 31, 2017.

[8] The Plaintiff's Affidavit of Records was provided on December 22, 2017. The Nexxt Defendants provided their Affidavit of Records on February 13, 2018, and Lega provided his Affidavit of Records on February 22, 2018.

[9] Notices to Admit Facts were served by the Plaintiff on the Defendants in or around May 31, 2018 and Replies to same were provided on or around June 12, 2018.

[10] On August 27, 2018, the Defendants jointly filed an application for a summary dismissal, returnable September 10, 2018. This was adjourned.

[11] On October 1, 2018, Master Schlosser dismissed the Plaintiff's Application requiring Lega to attend questioning pursuant to *Rule* 6.38. The Master further ordered that questioning of Lega shall not proceed until judgment is issued in the summary dismissal application filed on August 27, 2018.

[12] Of note, the parties entered into a Consent Procedural Order filed on February 7, 2019, setting out steps to be followed concerning cross examination on affidavits, and undertakings in relation to the application for summary dismissal by the Defendants.

[13] Paragraph 7 of the Consent Procedural Order provided that the parties will book the earliest available mutually agreeable date for a special application for the summary dismissal application by October 15, 2019, provided that there is no need to cross examine on any undertakings produced; otherwise, the special application will be booked as soon as reasonably possible after that cross examination has completed. The Order further provided that any dates set out in the Order can be amended by written agreement of all parties or by court order.

[14] No further order was sought to vary the Consent Procedural Order. The Defendants did not proceed further with their application for summary dismissal. It never proceeded to a hearing.

[15] On May 30, 2019, the Plaintiff filed an application seeking an order granting summary judgment in favor of the Plaintiff against the Defendants, jointly and severally, with respect to liability. This application was not pursued further by the Plaintiff.

[16] The Defendant, Don Myroon, was questioned for discovery on September 24, 2018, and provided answers to undertakings between October 9, 2018 and February 2019. Myroon was questioned on answers to those undertakings on February 19, 2019, and provided further undertaking responses as a result of that undertaking on March 13, 2019.

[17] Neither the Plaintiff, nor Lega, have been questioned for discovery.

[18] The Nexxt Defendants submit that the undertaking responses provided by the Defendant, Myroon, on March 13, 2019, arising out of his questioning on undertakings, was a significant advance in the Action, but that nothing further significantly advanced the action.

Steps Taken After March 13, 2019

[19] Lega was cross examined on his Affidavit filed in support of the summary dismissal application on February 28, 2019.

[20] Lega provided his answers to undertakings from that cross examination on May 21, 2019. There was one response, and the balance of the undertakings were refused.

[21] On June 17, 2019, the Court ordered Lega to supply copies of text messages and emails relating to his communications with other employees.

[22] On October 2, 2019, Lega provided some further responses to undertakings. As part of his responses, he stated that he was unable to obtain or locate copies of cellphone records from the provider, Bell Mobility.

[23] Counsel for the Plaintiff sent a follow up correspondence on October 6, 2021, seeking adherence to the disclosure obligations under the June 17, 2019 Order.

[24] On December 5, 2021, counsel for Lega provided telephone records received from Bell Mobility. Counsel for Lega took the position that these records did not form part of the matters compelled in the June 17, 2019 Order, but they were produced anyway. Counsel for the Plaintiff took exception to the answer to undertakings on October 2, 2019, that Lega was unable to obtain/locate copies of cellphone records from the provider, given that the emailed records from the provider were sent to counsel on September 30, 2019.

[25] On December 15, 2021, counsel for the parties had a telephone conference to discuss the next litigation steps.

[26] On February 16, 2022, in-house counsel for the Plaintiff sent an email to counsel for the Defendants setting out the next legal steps including addressing Lega's breach of the June 17, 2019 Order and moving the matter to trial.

[27] Counsel for the Defendants made no substantive response to this correspondence.

[28] The Nexxt Concrete Defendants filed their application to dismiss the action pursuant *Rule* 4.33(2) on June 2, 2022. The Defendant, Lega, filed his application to dismiss the Action as against him on October 28, 2022.

The Issue on Appeal

[29] In these Reasons, I consider whether there has been a significant advance in the Action within the mandatory time period in *Rule* 4.33(2), and if not, whether the appeal should be allowed, and the Action, dismissed.

Timing of the Applications

[30] The wording of *Rule* 4.33 is mandatory. If three or more years have passed without a significant advance in the action, the Court on application must dismiss the action as against the applicant; ***St Jean Estate v Edmonton (City of)***, 2014 ABCA 47. The exceptions in *Rule* 4.33(2)(a) and (b) are not applicable in these applications.

[31] *Rule* 4.33 has been characterized as functioning like a limitation period; ***Rahmini v 959630 Alberta Ltd.***, 2021 ABCA 110 at para 14.

[32] However, the time period prescribed in *Rule* 4.33(2) was extended by Ministerial Order number 27/2020, which was issued by the Minister of Justice and Solicitor General during the early stages of the COVID-19 Pandemic. The parties agree that, pursuant to this Ministerial Order, the extension of the three-year period has the effect of adding 75 days to the time limit set out in the *Rule*. That extension of 75 days is also mandatory.

[33] The Court must look at the three-year (and 75 day) period back from the filing of the applications under *Rule* 4.33 to determine if any significant advances have occurred since that date: ***Jacobs*** at paragraph 102. As a result, with respect to the application filed by the Defendants other than Lega, on June 2, 2022, yields an operative period of three years and 75 days beginning March 19, 2019. With respect to the application filed on behalf of Lega on October 28, 2022, the applicable three-year period plus 75 days to be considered by the Court begins October 14, 2019.

[34] The issue is whether a significant advance in the action has been made within those periods. If not, the action must be dismissed.

Standard of review

[35] The standard of review by the Appeal Court from the decision of the Applications Judge is correctness: ***Bahcheli v Yorkton Securities Inc.***, 2012 ABCA 166 at para 30.

Legal Principles of *Rule* 4.33

[36] The Alberta Court of Appeal in ***Patil v Cenovus Energy Inc.***, 2020 ABCA 385 reviewed the legal principles of *Rule* 4.33 at para 7 of its reasons, as follows:

> [7] 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.

Analysis

[37] As delineated by the Court of Appeal in ***Patil***, a functional, as opposed to a formalistic, approach is appropriate to determine if a step constitutes a significant advance. The functional approach to *Rule* 4.33 is context sensitive. 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.

[38] In reviewing the steps taken in this litigation after March 13, 2019, counsel for the Plaintiff submits that there were steps taken to advance the litigation, including answers to undertakings provided by Lega arising from the cross examination on affidavit, the Court Order of June 17, 2019 ordering Lega to provide further documents and information, and the late production of the Bell Mobility telephone records on December 5, 2021.

[39] However, each of these steps relate to matters arising out of the application by the defendant Lega for summary dismissal of the action as against him. None of these steps relate to the Nexxt Concrete Defendants and their application for summary dismissal. Also, none of these steps relate to any questioning for discovery under Part 5 of the *Rules of Court*.

[40] As the Alberta Court of Appeal has ruled in the ***Jacobs*** decision, an application for summary judgment cannot be considered to be a significant advance in the action if the application is not subsequently heard by the Court and decision rendered. I consider that the same principle applies to an application for summary dismissal. At that point, the Court could assess whether an application, even if dismissed, could in the circumstances be a substantial advance in the action. Before such a ruling, no such assessment could be possible.

[41] As the Court of Appeal reasoned in ***Jacobs*** at paras 85 and 86:

> [85] Taking into account the context – an application for dismissal for long delay, "significant advance" means important or notable progress towards the resolution of an action.
>
> [86] To determine whether there is a significant advance – important or notable progress – a court must assess at the start and end points of the applicable period the degree to which the factual and legal issues dividing the parties have been identified and the progress made in ascertaining the relevant facts and law that will affect the ultimate resolution of the action. Has anything that happened in the applicable period increased by a measurable degree the likelihood either the parties or a court would have sufficient information – usually a better idea of the facts that can be proven – and be in a better position to rationally assess the merits of the parties' positions and either settle or adjudicate the action? Are the parties at the end of the applicable period much closer to resolution than they were at the start date?

[42] The Court further elaborated its reasoning at paras 104-109 as follows:

> [104] It is difficult to conceive of a fact pattern in which an unheard summary judgment application could be characterised as a significant advance in an action.
>
> [105] A summary judgment application usually is based on allegations that are contained in a statement of claim and legal principles that are expressly or implicitly embedded in a statement of claim. They present nothing new.
>
> [106] A supporting affidavit generally documents a version of facts more or less reflective of factual allegations advanced in the statement of claim. It may provide some elaboration.
>
> [107] The fact that the plaintiff has devoted resources to filing an application for summary judgment and produces a product that identifies with more precision the important facts on which it relies is of minimal value until it is tested by a court hearing.
>
> [108] A summary judgment application that is dismissed may be characterized as a significant advance factually and legally.
>
> [109] This is because both the moving and non-moving parties have probably filed affidavits, cross-examined the deponents, and filed briefs. Both sides have a

> better understanding of the facts-in-issue and the legal differences that divide them. A dismissed summary judgment application may advance the parties understanding of the facts that may be proven and how the law applies to the facts.

[43] Furthermore, it must be noted that the steps referred to after March 13, 2019 relate specifically to the application for summary dismissal by Lega, and not to the Nexxt Concrete Defendants. Also, all of those steps took place before the period under consideration in the Lega application, beginning October 14, 2019.

[44] Counsel for the Plaintiff asserted that Lega had been in breach of the previous Consent Procedural Order, in that his undertakings from cross examination on affidavit were submitted three weeks after the court-ordered deadline. However, in the context this cannot be considered to be obstruction by the Defendant in breach of the Court Order.

[45] The production of the Bell Mobility phone records, in and of itself, could not be classified as a significant advance in the litigation. The Court of Appeal has determined that the provision of a new document, in this case, the cellphone bills provided by Lega in 2021, would not be considered a significant advance if it doesn't narrow the issues or assist in the assessment of the merits of the case. In order for the cellphone bills to be considered a significant advance, this must move the matter closer to resolution. However, there was no questioning by the plaintiff on the cellphone bills and as such it is not considered an important document and would not be a significant advance: ***Weaver v Cherniawsky***, 2016 ABCA 152 at paras 23-26.

[46] The Defendants are criticized for not proceeding with their applications for summary dismissal, and for not providing any timely response to a later request by in-house counsel for the Plaintiff to agree on next steps required to get the action ready for trial.

[47] Faced with the circumstance that the Defendants were not proceeding with their applications for summary dismissal, then the *Rules of Court* could have allowed the Plaintiff to consider different steps to advance the litigation during the three year and 75-day period mandated by *Rule* 4.33(2). The Plaintiff could have, in the absence of agreement with counsel for the Defendants, served appointments for questioning on discovery pursuant to Part 5 of the *Rules of Court*, including any required questioning on answers to undertakings and any application for an order to compel production of any relevant and material records in the possession of the Defendants or any of them that had not yet been disclosed in their affidavits of records. The Plaintiff could have applied to vary the order of Master Schlosser dated October 1, 2018, which had directed that questioning of Lega shall not proceed until judgment is issued in the summary dismissal application filed on August 27, 2018. A variation would have been merited given that the Defendants ultimately did not proceed with the summary dismissal application.

[48] Pursuant to *Rule* 4.4(2), the Plaintiff could have served on the Defendants a proposed litigation plan or proposal for the completion or timing of any stage or step in the action, and if no agreement is reached, the Plaintiff could apply to the Court for a procedural or other order respecting the plan or proposal. The Plaintiff could also have considered an application for a case conference pursuant to *Rule* 4.10, seeking the Court's direction on further steps to be required in order to ready the case for trial.

[49] In short, the Plaintiff's were not without their remedies to take steps to significantly advance the litigation during the time period mandated by *Rule* 4.33(2).

Conclusion

[50] I find that the Applications Judge erred in dismissing the applications by the Defendants to dismiss the Action pursuant to *Rule* 4.33(2). Accordingly, I allow the appeal by the Defendants and this Action is dismissed.

[51] The Defendants collectively are entitled to a single Bill of Costs, under Column 5 of Schedule C of the *Rules of Court*, for this appeal, and for the original application to dismiss before the Applications Judge, together with all reasonable disbursements and other charges relating thereto.

Heard on the 11th day of October, 2023.
Dated at the City of Edmonton, Alberta this 3rd day of April, 2024.

James T. Neilson
J.C.K.B.A.

Appearances:

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