Court of King's Bench of Alberta

Citation: Hawreschuk v Condominium Plan No 782 2678, 2024 ABKB 350

Date: 20240617
Docket: 1203 16475
Registry: Edmonton

Between:

Patricia Hawreschuk

Plaintiff/Appellant

- and -

The Owners: Condominium Plan No. 782 2678

Defendant/Respondent

Corrected judgment: A corrigendum was issued on June 18, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice N. Whitling

I. Introduction and Overview

[1] This is an appeal from the Order of Applications Judge Smart of September 23, 2023, which granted the Respondent's application to dismiss the Appellant's action for long delay pursuant to r. 4.33 of the *Alberta Rules of Court*.

[2] For the reasons which follow, I find that this appeal must be allowed. The learned Applications Judge erred in determining that "3 or more years have passed without a significant advance in an action" for the purposes of r. 4.33(2) since a significant advance in this action occurred on February 3, 2023. On that date, Applications Judge Schlosser granted an Order summarily dismissing the Appellant's claim as against a number of Defendants other than the Respondent. Although that Order only applied to the claims against the other Defendants, it did constitute a significant advance in the action as a whole, which is all that the rule requires.

[3] It bears emphasis that throughout these proceedings, the Appellant has been self-represented, and the Respondent has been represented by counsel. Under these circumstances, I have found it necessary to approach the issues in this appeal in light of the Canadian Judicial Council's *Statement of Principles on Self Represented Litigants and Accused Persons*, including rules 1, 2 and 3 for the Judiciary.[1] As explained below, I have found it necessary and appropriate to consider arguments not raised by the Appellant, and to advise her of procedural options that she was not otherwise aware of, while endeavouring to maintain fairness to the Respondent.

II. Factual Background

[4] The Appellant's claim began as two Civil Claims filed in the Provincial Court of Alberta in 2009. Those claims have since been transferred to this Court and have been consolidated under the within action number.

[5] The Appellant is the owner of a certain condominium unit. Her claim is grounded in certain alleged deficiencies in that unit and in the common areas of the condominium complex, which deficiencies have allegedly caused the presence of mold. The Appellant pleads that she suffered damages from these deficiencies since she had to reside elsewhere and could not sell or rent her unit. Her claim is for $290,000 in damages.

[6] Originally, the Defendants in this action included both the Respondent, being the condominium corporation, and several of the condominium corporation's individual directors.

[7] The Appellant filed a request with the court for a trial date on December 19, 2019. The Respondent points to this event as the last significant advance in the action for the purposes of r. 4.33(2).

[8] However, on October 5, 2021, the other Defendants filed an application for summary dismissal of the action as against themselves. The Respondent did not participate in that application.

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[1] "For the Judiciary

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.
3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons."

[9] The other Defendants' summary dismissal application was heard and granted on February 3, 2023, by Applications Judge Schlosser.

[10] On July 25, 2023, the Respondent filed its application to dismiss the Appellant's action pursuant to r. 4.33 for long delay. It will be noted that this event occurred less than 6 months after the date of the Order summarily dismissing the claim as against the other Defendants.

[11] The Respondent's delay application came before Applications Judge Smart on September 13, 2023, in the hurried context of morning chambers. In the Respondent's brief oral submissions, counsel submitted that nothing had been done to advance the action against the Respondent since the request for a trial date on December 19, 2019. Counsel did advise the Court that the summary dismissal Order had been granted on February 3, 2023, but submitted: "[T]hat was not a material advance at all as regards the condo corporation. There were no factual issues involving the condo corp that were decided there." Despite the fact that the Appellant was self-represented, counsel for the Respondent did not bring any case law on this point to the Court's attention.

[12] The Appellant argued in response to the delay application that she disagreed with Applications Judge Schlosser's decision but could not afford an appeal, that she did not know about any delay rules, that she had been advised by various unnamed persons that there were no such rules, that the delay was attributable to the COVID-19 pandemic, and that she had certain health problems.

[13] In granting the Respondent's application, Applications Judge Smart ruled as follows:

> THE COURT: Okay. I understand the world has thrown challenges at everyone. I cannot do anything about the order of Judge Schlosser. That was not appealed. That really does not impact the circumstances from my mind.
>
> Rules 4.33 says that if there has not been anything significantly dine over a period of 3 years that the court must strike the action, so I have no discretion.
>
> I appreciate there were challenges that you faced, and still face as an individual, but those are not the things that I can consider under the rule to simply say, It does not apply.
>
> So, I do not know what your lawsuit is about and it does not really matter. It may be an extremely meritorious claim, but that is not a consideration either from the standpoint of this court under this particular rule.
>
> So, although I appreciate the challenges and the frustrations that you have had over the last number of years, I really do not have any choice but to dismiss the action.
>
> Form of order, counsel.

[14] Following Applications Judge Smart's decision, the Appellant missed the 10-day appeal period contained in r. 6.14(2). That deadline expired on October 2, 2023. On October 10, 2023, the Appellant filed a Notice of Appeal with the Court of Appeal of Alberta. After being informed by the Court of Appeal that she had filed in the wrong Court, she filed a Notice of Appeal in this Court on October 12, 2023. The Appellant served the Notice of Appeal upon the Respondent by email on October 17, 2023. In all, the Appellant was 15 days late in filing and serving her Notice of Appeal.

III. Preliminary Objection – Late Filing

[15] I will deal firstly with the issue of the late filing of the Appellant's Notice of Appeal. The Respondent argues in its written submissions that this appeal must be dismissed since the Appellant failed to meet the mandatory filing deadline in r. 6.14(2) and since the Appellant has not sought a time extension.

[16] The Appellant did not seek a time extension prior to the hearing of this appeal, and no such request was included in her written materials. However, since the Appellant is self-represented, and since it was apparent to me that she was unaware of her ability to seek a time extension pursuant to r. 13.5(2), I invited her to request a time extension at the oral hearing of this appeal, which she did. I then heard from both the Appellant and the Respondent as to whether such a time extension ought to be granted. Very fairly, counsel for the Respondent did not strongly oppose the Appellant's request, and indeed advised me that the Appellant had expressed an intention to appeal at the time of Applications Judge Smart's decision.

[17] In accordance with the test in ***Cairns v Cairns***, [1931] 4 DLR 819 (ASCAD) at pp. 826-27, I have considered the following circumstances. The Appellant formed an intention to appeal within the 10-day appeal period. She was self-represented and was not aware of the deadline in r. 6.14(2). Her lack of familiarity with the rules is evidenced by her attempt to commence her appeal in the wrong Court. The total delay in filing and serving her Notice of Appeal was 15 days which is relatively brief. The Respondent was not prejudiced by the delay. Although there is no merit to the grounds of appeal articulated in the Appellant's materials, there exists a serious issue as to whether the summary dismissal order in favour of the other Defendants constitutes a "significant advance in an action" for the purposes of r. 4.33(2).

[18] Having considered these circumstances, I find it just and appropriate to grant the Appellant's oral request for a time extension to commence her appeal, and the Respondent's preliminary request to dismiss this appeal for late filing is denied.

IV. Standard of Review

[19] Appeals to this Court from the decisions of Applications Judges are heard and determined *de novo*.

V. The Appellant's Stated Grounds of Appeal

[20] The Appellant appeals Applications Judge Smart's Order on the basis that she did not know about the deadline contained in r. 4.33, that she was given bad advice about whether there was such a deadline, that she is elderly and suffers from health problems, that she could not access the courts during the COVID-19 pandemic, and that various emails were exchanged in relation to this action during the three years prior to the filing of the r. 4.33 application.

[21] Like Applications Judge Smart, I do not find the Appellant's lack of legal knowledge to constitute a valid response to the Respondent's r. 4.33 application. In this regard, I adopt the following statements of Justice Marion in ***Shaaban v Baljak***, 2024 ABKB 28:

> **66** While courts understand the challenges facing self-represented parties, the bottom line is that self-represented litigants are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case and to

comply with the *Rules*, including in the context of delay dismissal applications: *Owaise v Condominium Corporation 8310969*, 2023 ABCA 88 at para 16; *Municipal District of Foothills No 31 v Alston*, 2023 ABCA 46 at para 3; *Morrison* at para 27; *AF v Alberta*, 2020 ABQB 268; *Alston v Haywood Securities Inc*, 2020 ABQB 107 at para 114. The standards and requirements of rule 4.33 are not relaxed, bent, or ignored for self-represented litigants, as that would be tantamount to having one set of rules for litigants with counsel and a different set for self-represented litigants: *Gjergji v Hyatt Mitsubishi*, 2017 ABQB 500 at paras 20-21 and 32; *Vanmaele Estate* at para 32; *Lofstrom v Radke*, 2020 ABQB 122 at para 93.

[22] Regarding the occurrence of the COVID-19 pandemic, Ministerial Order 27/2020 suspended the operation of the time limits under the *Alberta Rules of Court* from March 17, 2020, to June 1, 2020. The Ministerial Order applies to r. 4.33(2) thereby ensuring that that 75-day period is not included in the calculation of the three-year time period prescribed by that rule: ***Pilon v Lavoie***, 2024 ABKB 177 at para. 18. However, given that the delay period relied upon by the Respondent in the present case is 3 years and 288 days, subtracting the 75 days as required by the Ministerial Order does not assist the Appellant.

[23] Regarding the Appellant's general health difficulties, she has not established that she was disabled to such a degree that she was relieved from the requirements of r. 4.33: ***AF v Alberta***, 2020 ABQB 268 at para. 118; ***Pilon*** at paras. 35-36.

[24] For these reasons, the grounds of appeal raised by the Appellant are dismissed.

VI. Was the Summary Dismissal Order a Significant Advance in the Action?

[25] I turn next to a ground of appeal not raised by the Appellant, but which is briefly identified and addressed in the Respondent's Brief at paragraphs 33-34. That ground of appeal pertains to the other Defendants' summary dismissal application of October 5, 2021, and the Order of February 3, 2023, granting that application. As noted above, the latter event occurred within 6 months of the filing of the Respondent's r. 4.33 application on July 25, 2023.

[26] The Respondent submits that the Order of February 3, 2023, was not a significant advance in the action against the Respondent since it only affected the Appellant's claim against the other Defendants. The Respondent emphasizes that it did not participate in the other Defendants' summary dismissal application, and argues that there is no evidence that that application served to narrow any of the issues between the Appellant and the Respondent. As occurred before Applications Judge Smart, the Respondent has not referred the Court to any of the case law respecting this point.

[27] Given the potential significance of this issue, and to alleviate any potential unfairness in raising it myself, an email was sent to the parties the day before the hearing of this appeal drawing to their attention to Justice Marion's decision in ***1499925 Alberta Ltd. v NB Developments Ltd***., 2023 ABKB 114 at paras. 54-57. Unfortunately, responsibility for the appeal had by then been re-assigned to other counsel at the firm, the Court's contact information had not been updated, and the Court's email was not forwarded to the responsible counsel.

[28] In all the circumstances, I find it just and appropriate to raise and consider the issue raised by the Order of February 3, 2023, as an additional ground of appeal. I do so since the

Appellant is self-represented, and since it is apparent from the Respondent's submissions at both levels of court that its counsel is aware of this issue.

[29] Turning to the merits of that new ground of appeal, it has been clear since 2011 that "a significant advance in an action" for the purposes of r. 4.33(2) is one which advances the action as a whole. It is not necessary for the party resisting dismissal to have initiated the event, and the event need not have directly involved the party seeking dismissal.

[30] Prior to 2011, there existed conflicting lines of authority on this issue. The first line of authority required that the action be materially advanced as against each defendant: ***Aircare Respiratory Homecare Services Ltd v Alberta (Treasury Branches)*** (2003), 350 AR 43 (QB); ***Continental Earthmovers Ltd v Midwest Furnishing & Supplies Ltd.***, 2006 ABQB 543; ***Danek v Calgary (City of)***, 2006 ABQB 807. The second line of authority held that a thing done in an action materially advancing it as a whole is sufficient: ***Protasiwich v. Archer Memorial Hospital***, 1999 ABQB 595 ***Crowfoot Recreational Association v Mackin***, 1999 ABQB 299, ***393008 Alberta Ltd v Basiuk***, 2004 ABQB 239. This conflict was identified and resolved by the Court of Appeal in ***Heikkila v Apex Land Corp.***, 2011 ABCA 87, where McDonald J.A. wrote:

> **32** In my view, the proper interpretation of Rule 244.1 is represented by the second line of authority, namely that the thing need only materially advance the action as a whole.
>
> […]
>
> **34** The wording does not mean that the thing must materially advance the action against the individual defendant bringing the Rule 244.1 application. Rule 244.1 describes the thing only as "the last thing [that] was done that materially advances the action", not "the last thing [that] was done that materially advances the action against the party bringing the application to dismiss".

[31] Although ***Heikkila*** was decided under the old r. 244.1, its reasoning has been consistently been applied to the current r. 4.33: ***1499925 Alberta Ltd.*** at para. 57. In one such case, ***Neitz v Jordan***, 2015 ABQB 732, Justice Nixon held that a certain decision by the WCB which had the effect of eliminating one of the defendants to the action was a significant advance in the action as a whole:

> **40** Applying this principle [in *Heikkila*] to the present action, I find that the WCB decision which reduced the defendants from two individuals to a single person, being Ms. Jordan, was a significant advance in the action as a whole. The reason is that the WCB decision identified the sole party to the litigation, which impacts how the action is conducted against the remaining defendant, Ms. Jordan. This meets the test in Rule 4.33(1).

[32] Similarly, in ***M.H. v Roman Catholic Diocese of Calgary***, 2020 ABQB 397, Master Schlosser (as he then was), wrote:

> **14** The decided cases have been more generous than the narrow interpretation sought by the applicant. A multi-party lawsuit can be significantly advanced by the efforts of only some of the parties. Even an act done by the person complaining of the delay will count (eg *Flock* [*v Flock Estate*, 2017 ABCA 67], at para 17: leave denied [2017] S.C.C.A. No. 161, Oct 2017). In a multi-party lawsuit, a bystander-party can benefit from the efforts of other parties and be

> immunized from the effects of the rule, without having done anything for it. An event in an inextricably linked lawsuit can count as an advance (see, for example, Stevenson & Côté, *Alberta Civil Procedure Handbook*, Juriliber, 2019, p 4-80 and the cases cited in footnote 2).

[33] Applying the above reasoning to the circumstances of the present case, I find that Application Judge Schlosser's Order of February 3, 2023, was "a significant advance in the action" for the purposes of r. 4.33(2) since it identified the sole defendant in this litigation, thereby significantly narrowing the matters in dispute.

[34] I therefore conclude that the learned Applications Judge erred in finding that there had been no significant advance in the action for 3 or more years. In fairness to the Applications Judge, the cases on this subject were not brought to his attention.

VII. Order Granted

[35] The appeal is allowed, Applications Judge Smart's Order is set aside, and the Respondent's application to dismiss the Appellant's claim is denied.

[36] Applying Items 7(1) and 8(1) of Column 3 of Schedule C of the *Alberta Rules of Court*, the Appellant is awarded costs for the proceedings before the Applications Judge and before this Court in the all-inclusive amount of $3,375.

[37] Counsel for the Respondent shall prepare the Order and r. 9.4(2)(c) is invoked.

[38] I acknowledge and appreciate the assistance of Mr. Smith, counsel who argued this appeal for the Respondent. Mr. Smith did not present the r. 4.33 application to the Applications Judge or prepare the materials for the present appeal, and he was placed in a difficult position by the late introduction of the additional ground of appeal.

Heard on the 12th day of June, 2024.
Dated at the City of Edmonton, Alberta this 17th day of June, 2024.

N. Whitling
J.C.K.B.A.

Appearances:

Patricia Hawreschuk
Self Represented Litigant

Brad Smith
Student-at-Law
Reynolds Mirth Rchards & Farmer LLP
for the Respondent Condominium Plan No 782 2678

Corrigendum of the Reasons for Decision
of
The Honourable Justice N. Whitling

Heading VII – Corrected to reflect Order Granted.