Court of King's Bench of Alberta

Citation: Stylecraft Developments (1984) Ltd v Carscallen LLP, 2023 ABKB 504

Date: 20230901
Docket: 1401 11941
Registry: Calgary

Between:

Stylecraft Developments (1984) Ltd.

Plaintiff

- and -

Carscallen LLP and Michael J. Whiting

Defendants

Reasons for Decision
of the
Honourable Justice M.H. Bourque

I. Background

[1] The Defendants in the within action were the Plaintiff's prior legal counsel who had commenced an action related to a construction dispute on the Plaintiff's behalf (the "**Prior Action**"). The Prior Action was commenced on September 30, 2008. The Prior Action was dismissed for long delay approximately 6 years after it was commenced. By Statement of Claim filed on November 3, 2014, the Plaintiff then commenced the within action, alleging professional negligence of the Defendants in the Prior Action. In the Statement of Defence, the Defendants deny the allegation of negligence, countering instead that the delay in the Prior Action was due to the Plaintiff repeatedly giving instruction not to advance the action or incur costs.

[2] On November 1, 2022, the Defendants filed an application for dismissal of the within action for long delay under rule 4.33 of the Alberta Rules of Court, AR 124/2010 and on May 8, 2023, Applications Judge Farrington granted the application.

[3] The Plaintiff appealed Applications Judge Farrington's order by filing a Notice of Application returnable on July 17, 2023 in regular Civil Chambers. Though appeals from an Applications Judge are normally adjourned to a special, both parties were prepared to proceed at that first appearance and the matter was heard on the first appearance. After hearing oral submissions from both counsel, I invited them to each provide me with 5-page briefs summarizing their positions.

[4] I have summarized in point form what transpired in the within action in Appendix A.

[5] The Plaintiff's position is that besides the ADR, there were no other steps in the Litigation Plan to be completed, and the parties' cumulative conduct indicates that there was a live action. The Plaintiff asserts that the parties were pursuing settlement/ADR instead of other litigation steps, to be cost-effective and reasonable, as the cost of trial would have been disproportionate to the value of the claim (Plaintiff's letter at p 3). The Plaintiff's position is that the effect of the purported actions brought the parties closer to resolution.

[6] For the reasons discussed in greater detail below, I disagree with the Plaintiff. First, the conduct of the parties never served to narrow or clarify the parties' positions or the issues, and the outcome of each purported step was null. Second, the witness list provided to the Defendant by the Plaintiff lacked the information necessary to make it useful to the Defendant and thus did not "move the action forward in an essential way" (***Patil v Cenovus Energy Inc***, 2020 ABCA 385 at para 7 [***Patil***]; ***Rahmani v 959630 Alberta Ltd***, 2021 ABCA 110 at para 14 [***Rahmani***]). Finally, the parties failed to meet any of the agreed upon deadlines of their Litigation Plan, and there is little evidence that they turned their minds to meeting those deadlines. Planning to take steps does not count as taking a step (***Darby v Citifinancial***, 2022 ABQB 9 at para 39 [***Darby***]). None of these actions were significant advancements.

II. Issue on Appeal

[7] The issue for determination is whether the within action was significantly advanced between June 14, 2019 and November 1, 2022 by any of the following:

a. The conduct of the parties during the period of delay;

b. The plaintiff's provision of a witness list to the Defendant;

c. The consent order setting out a litigation plan.

III. Standard of Review

[8] An appeal from an Applications Judge is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

IV. Analysis

[9] Rule 4.33(2) reads as follows:

> If 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
>
> (a) the action has been stayed or adjourned by order, an order has been made under subrule (9) or the delay is provided for in a litigation plan under this Part, or
>
> (b) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

[10] Rule 4.33 is a mandatory, bright-line rule: "it has only to do with timing, not merits. A decision to dismiss for delay has nothing to do with the strength of [the] claim" (***Chak v Sun Media Corporation***, 2017 ABQB 614 at para 9 . See also ***Patil*** at para 7; Allan A Fradsham, *Alberta Rules of Court Annotated 2022*, (Toronto: Thomson Reuters Canada Ltd, 2021) at 486 [**Fradsham**]).

[11] Assessments under this rule require a functional, contextual analysis (Darren J Reed & Glen H Poelman, *Civil Procedure and Practice in Alberta*, *2022 Ed*, (Toronto: LexisNexis Canada Inc, 2022) at 160 [**Reed & Poelman**]).

[12] The relevant question is whether, during the alleged period of delay, there was a step "that move[d] the action forward in an essential way" (***Patil*** at para 7; ***National Home Warranty Group Inc v Burton***, 2022 ABQB 123 at para 7 [***NHWG***]). This is fulfilled when a plaintiff "has done something in the applicable timeframe that increases by a measurable degree the likelihood that" the court can assess the merits of the case (***NHWG*** at para 8, emphasis added), or that the action will be resolved.

[13] The functional "significant advancement" analysis includes the following considerations:

(a) whether formal steps were taken;

(b) whether issues were narrowed;

(c) whether steps were taken to complete document or information discovery;

(d) whether positions were clarified;

(e) the nature, value, quality, genuineness, and timing of purported development;

(f) the history and nature of the litigation; and

(g) the outcome of the purported advancement.

(***Delver v Gladue***, 2018 ABQB 226 para 2 [***Delver***]; **Fradsham** at 480-81; ***Patil*** at para 7)

[14] The court must consider the purported advancement given the trajectory and character of the litigation before it: "the end goal of "significant advancements" under rule 4.33 is not necessarily trial, but rather resolution" (***Nash v Snow***, 2014 ABQB 355 para 32. See also **Fradsham** at 477; ***Boland v Carew***, 2019 ABCA 202 at para 12).

A. Conduct of parties

[15] The parties communicating intermittently and suggesting mediators for an ADR cannot count to substantially move the action forward. "It is the quality of the step" that determines its significance to the action at hand (**Reed & Poelman** at 158).

[16] Aside from filing form 37 and entering the consent order, no formal steps were taken. These steps did not significantly advance the action. There is no evidence that the parties narrowed the issues or clarified their positions. The purported steps, being the production of the witness list, entering the Litigation Plan, and the planning of the ADR were extremely minimal in nature, did not include the disclosure of meaningful information, and did not move the parties towards resolution. Given that nothing substantial came of any of the purported actions, the matter as a whole has not been "significantly advanced" (***Delver*** at para 2; **Fradsham** at 480-81; ***Patil*** at para 7).

B. Providing the witness list

[17] Providing the witness list was not a significant step. Complying with undertakings given during examination for discovery can significantly advance the action, but providing answers to undertakings generally do not (**Reed & Poelman** at 159-60). Further, if that production "do[es] not significantly help determine one or more of the issues raised in the Pleadings" (***1406998 Alberta Ltd v Dorbandt***, 2017 ABQB 321 at para 13 [***Dorbandt***]; **Reed & Poelman** at 160), then it does not significantly advance the action.

[18] On October 4, 2021, the Plaintiff provided to the Defendants a list of four witnesses that it planned to call at trial, and their contact information (Affidavit of Amanda Paulucci at Exhibit H [**Paulucci affidavit**]). This was nine months after January 15 when the information was originally requested by the Defendants. Notably, the Defendants requested "details about the scopes of work approved or discussed" (Paulucci affidavit Exhibit F), which were not included in the October production.

[19] The Plaintiff's production here can be contrasted with ***Rahmani***, where the action *was* found to have been significantly advanced by a party sharing an expert report and an enumeration of financial loss with the other party, despite lacking the prescribed form (***Rahmani*** at paras 8-10, 13). In the within action, the witness list is the only action that occurred during the alleged period of delay, and it was lacking in substance, not simply in form.

[20] On one hand, the witness list production is noteworthy because it is the only production that occurred throughout the three-year period. On the other hand, it is not meaningful because it did not help to narrow the issues or clarify the Plaintiff's position. The lack of relevant information as requested by the Defendants and the long delay in production weigh against this step being a "significant advancement". Finally, there is no evidence that the production had any effect on the litigation. If the Plaintiff is correct that the Defendants did not follow up by contacting the witnesses, this is attributable to the Plaintiff's failure to provide the necessary information, such that the Defendants could ask relevant questions of these witnesses.

C. Consent Order re Litigation plan

[21] Entering into the Litigation Plan did not move the action forward: "the case law clearly indicates that a step does not occur until a party actually does what they have been planning, [and therefore] talking about, planning or even scheduling a step does not advance the action and is therefore not a step" (***Darby*** para 39).

[22] By the Litigation Plan, the parties agreed to take seven steps. The Plaintiff's position is that six of those steps were irrelevant (Plaintiff's letter at p 3). It is unclear why the Plaintiff entered into an agreement to complete these steps if they were unnecessary or superfluous. In any event, none of the deadlines agreed to in the Litigation Plan were met.

[23] There does not appear to be any substantive effect or outcome of the Litigation Plan. Additionally, "entering into a litigation plan, when not ordered by the court, does not qualify as a step unless the thing required to do by the litigation plan is actually completed" (***Darby*** at para 40). Although this was a somewhat formalized step, it did not serve to narrow the issues or clarify positions (***Delver*** at para 2). Below, I lay out why three actions related to the Litigation Plan did not move the action forward: (1) the witness list production, (2) planning the ADR/ JDR, and (3) filing form 37.

1. Witness list

[24] The witness contact information was provided by the Plaintiff to the Defendants a month prior to the Litigation Plan, and therefore it cannot count as fulfilling the step to "Complete Undertakings" pursuant to the Litigation Plan.

2. Planning the ADR

[25] Although "mediation or settlement conferences can, contextually, be considered to be a material (significant) advancement" (***Delver*** para 5), an agreement to schedule such a mediation is likely not such a step (***Patil*** at para 7).

[26] Planning the ADR/ JDR pursuant to the Litigation Plan had no effect on moving the parties towards resolution. They exchanged a couple of emails regarding the selection of a mediator, and only floated two options between them, before the Plaintiff indicated its preference for a JDR.

[27] The ADR was never scheduled nor was a JDR request form submitted. In my view, the process of planning the ADR/JDR, does not rise to the level of a meaningful step.

3. Filing Form 37

[28] Generally, "the mere filing of a Form 37 […] is also not a significant advancement in and of itself" (***Edinburgh Tower Development Ltd v Curtis***, 2021 ABQB 239 at para 57).

[29] Here, it is not a significant advancement because it did not clarify the parties' positions, narrow issues, or have the effect of bringing the parties closer to resolution. The form filed on April 15, 2020, was never signed by the Defendants and was evidently unsuccessful at setting a date for trial. The deadline to file form 37 in the Litigation Plan, with the deadline being July 15, 2022, was notably also missed.

D. Conclusion

[30] Accounting for the context of the litigation, and using a functional approach, it is clear that none of the purported steps significantly advanced the litigation or brought the parties closer to resolution.

[31] The conduct of the parties overall seems more akin to spinning their wheels. Issues were never narrowed, positions never clarified, and none of the purported developments had a meaningful impact. The Plaintiff's production of the witness list did not contain the information requested by the Defendants. This made the production unusable for the Defendants without the

expenditure of significant resources. The Litigation Plan had no effect on the action and did not bring the parties closer to resolution. The parties failed to take any of the steps laid out in the Litigation Plan and missed every deadline therein. The exchange of a few emails regarding mediation, without making any substantive plan towards scheduling an ADR or JDR did not advance the action.

[32] The Plaintiff bears the higher burden for advancing the action and has failed to do so. As the quality of steps determines their significance, I conclude that the quality of these steps is poor, and that their significance is minimal.

V. Disposition

[33] The Plaintiff's appeal is dismissed. I confirm that the within action is dismissed for long delay. The Defendants are presumptively entitled to costs. If the parties are unable to agree on costs, each may file submissions and a draft bill of costs. Excluding the draft bill of costs, each party's submissions shall not exceed 5 pages.

Heard on the 17th day of July, 2023.
Dated at the City of Calgary, Alberta this 1st day of September, 2023.

M.H. Bourque
J.C.K.B.A.

Appearances:

Dan B. Ramsay
for the Plaintiff

Blake P. Hafso
for the Defendants

APPENDIX A – Litigation Timeline

Pre-Delay Period Activity

- Statement of Claim filed November 3, 2014
- Statement of Defence filed December 22, 2014
- Plaintiff's Affidavits of Records sworn February 19, 2015
- Defendants' Affidavits of Records sworn April 27, 2015
- Questioning of Plaintiff's Corporate Representative takes place March 24, 2016
- Plaintiff's Corporate Representative provides Answers to Undertakings on July 12, 2016
- Questioning of the Defendants takes place January 30, 2019
- Defendants provide their Answers to Undertakings on June 14, 2019

Delay Period Activity

- January 2020: the Plaintiff's position is that it is ready for trial, and informed the Defendant as much (Paulucci affidavit at para 2.e.).
    - Jan 30, 2020: the Plaintiff notified the Defendant that it wanted to set trial date (and file Form 37), no response.
- April 15, 2020: the Plaintiff filed Form 37 to set trial date.
    - Defendant requested a settlement offer and the Plaintiff provided one (Paulucci affidavit at para 2.h.).
    - The Defendant agreed to a trial date on basis that they do an ADR (Paulucci affidavit at para 2.i.).
- December 2020: the Defendant retains new counsel. Requests time for file review (Paulucci affidavit at para 2.k).
- January 15, 2021: the Defendant requests the Plaintiff's witness list (Paulucci affidavit Exhibit F).
- April 2021: the Defendant sends settlement offer; the Plaintiff considers it in bad faith and does not reply (Paulucci affidavit at paras 2.m., 2.n.).
- October 4, 2021: witness list is provided by the Plaintiff (Paulucci affidavit at Exhibit H)
    - the Defendant makes counteroffer. Refuses to sign Form 37.
    - the Defendant sends the Consent Order re Litigation Plan containing additional steps (Paulucci affidavit at Exhibit J).
- November 2021, the parties entered into the consent order.
    - The order included seven deadlines for procedural steps, "all seven deadlines expired [between December 2021 and August 2022] without any of those steps being completed" (Defendant's brief/ letter at p 4).
- December 2021: the Defendant proposes a mediator for the ADR.
- August 2022: the Plaintiff responds proposing a less expensive mediator. Then:

- According to the Defendant, “Stylecraft retracted its prior consent to complete ADR by mediation and instead insisted upon proceeding by JDR” (Defendant letter at p 5).
- Lawyer for the plaintiff’s position is that his client instructed counsel to seek a JDR instead of an ADR, due to concerns about the cost (Paulucci affidavit at para 2.y.).