Court of King's Bench of Alberta

Citation: McLeod v McLeod, 2024 ABKB 719

Date: 20241203
Docket: 1306 00921
Registry: Lethbridge

Between:

Allen McLeod and Sharon McLeod

Appellants

- and -

Maury McLeod

Respondent

Reasons for Judgment
of the
Honourable Justice S.A. Moore

I. INTRODUCTION

[1] This is an Appeal by Allen McLeod and Sharon McLeod (the "Appellants"), who were the Plaintiffs in the original action, of the June 30, 2023, Order by Applications Judge M. Park to dismiss the within action for long delay pursuant to Rule 4.33(2) of the *Alberta Rules of Court (the Rules)*.

[2] The Respondent, Maury McLeod [the "Respondent"] is the son of the Appellants.

II. BACKGROUND

[3] The Appellants started a trucking business in 1993 known as Allen McLeod Trucking [the "Business"]. The Business transported feed and shavings and served agricultural operations in Southern Alberta.

[4] Between 1993 and 2005, the Appellants purchased several trucks, trailers and trucking related equipment (collectively referred to as "Equipment").

[5] Between 2006 and 2009, the Appellants started to transport Equipment for oilfield reclamation projects and the Respondent was hired as an independent contractor.

[6] In the underlying action, the Appellants argued that the Respondent was to purchase the Equipment from them at a fair market value. The Appellants further argued that they were unaware that the Respondent claimed to be the owner of the Equipment and that he used the Equipment to operate his own business.

[7] The Respondent argued that he had an agreement with the Appellants to transfer the entirety of the Business and Equipment, which he had ownership and/or possession of since about January 2011.

[8] A procedural timeline was set out in the Respondent's Memorandum of Arguments.

[9] That Respondent's timeline outlines the following:

(a) The Appellants filed their Statement of Claim on December 6, 2013.

(b) The Respondent filed his Statement of Defence on March 17, 2014.

(c) Between August and October 2014, the parties exchanged records listed in their respective Affidavit of Records.

(d) Questioning of the Appellants and Respondent was conducted by opposing counsel in June 2015. Answers to Undertakings were exchanged between the parties thereafter.

(e) In November of 2018, Counsel for the Appellants questioned the Respondent on his prior Undertaking responses.

(f) On May 16, 2019, a Consent Order was granted by Master J.B. Hanebury directing that:

(i) *"Within twenty-one (21) days from the Registrar of Motor Vehicle Services (The Registrar) accepting the completed Request Package attaching this Order as a supporting document, the Registrar shall produce to Legal counsel for the Plaintiff VIN based Vehicle Confirmation Letters confirming the history of the registration of the vehicles identified by the VIN listed below that embed copies of the Vehicle Registration Application (CRA) forms and any supporting documents presented to the Registrar to register the vehicles, if achieved, for the specific periods provided below for each vehicle."* and;

(ii) *"Upon receipt of the Records, legal Counsel for the Plaintiffs will forward a copy of the Records to Legal Counsel for the Defendant" and that "The information to be released by the Registrar may be used only for Court*

> *purposes with respect to this Action N. 1306 00921 filed in the Court of Queen's Bench of Alberta, Judicial Centre of Lethbridge."*

(g) On July 17, 2019, Former counsel for the Appellants provided a letter to counsel for the Respondent, attaching a CD of the records that had been provided by the Registrar in response to the May 16, 2019, Order.

[10] On February 24, 2020, the Appellants' former counsel filed a Notice of Withdrawal of Lawyer of Record.

[11] On September 14, 2022, newly retained counsel for the Appellants filed an Application for a Procedural Order and on September 22, 2022, the parties entered into a Standstill Agreement.

[12] On November 17, 2022, counsel for the Respondent filed an Application seeking to dismiss this action for long delay pursuant to Rule 4.33(2). The Respondent's Application first appeared before the Court on December 1, 2022. On that date, Applications Judge J.L. Mason adjourned the matter *sine die* to allow the parties to provide evidence to assist the Court with the substance of the documents provided.

[13] The timeline is not disputed.

III. ISSUE

[14] The issue on appeal is whether the last significant advance in this action was the May 16, 2019, Order or the July 17, 2019, letter from the Appellants' former counsel to counsel for the Respondent, providing the Court ordered Registrar's records.

[15] With the additional 76 days as per the Ministerial Order in relation to COVID-19, the time frame is extended accordingly.

IV. STANDARD OF REVIEW

[16] The interpretation of the *Rules* is a question of law, and the standard of review is correctness (***Housen v Nikolaisen***, 2002 SCC 33 at para 8).

[17] Both parties agree that the standard of review is correctness as in ***Bahcheli v Yorkton Securities Inv***, 2012 ABCA 166 at para 30, and more recently discussed in length in ***Sewak Gill Enterprises Inc v Bedaux Real Estate Inc***, 2018 ABQB 823 at para 15.

[18] The parties further agree that 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.

V. ANALYSIS

[19] 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.

[20] Rule 4.33 is a mandatory, bright-line rule as "...it has only to do with timing, not merits."

[21] The Alberta Court of Appeal recently summarized the legal principles governing Rule 4.33 in ***Rahmani v 959630 Alberta Ltd***, 2021 ABCA 110 at para 14 **[*Rahmani*]**.

> [14] The legal principles governing r 4.33 applications were recently summarized in ***Patil v Cenovus Energy Inc.***, 2020 ABCA 385 at paras 7-8:
>
> 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 ["***XS Technologies***"].
> - 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 [***Ursa Ventures***].
> - 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[***Ro-Dar***].
> - 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 [JDR] 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.

Importantly, r 4.33 is "not designed to regulate the efficient prosecution of actions, but rather to prune out actions that have truly died": ***Ursa Ventures*** at para 10.

[22] When counting time, one counts forward from the date of the last uncontroversial significant advance, not backward from the date on which the r 4.33 application was filed. This is clear from the wording of r 4.33(2); "if three or more years have *passed* without a significant advance in an action" (emphasis added). The time has to be measured *from* a date and so must be measured from the last significant advance***:*** ***Rahmani*** at para 16. ***Trout Lake Store Inc v Canadian Bank of Imperial Commerce***, 2003 ABCA 259 at paras 25-33; ***Barath v Schloss***, 2015 ABQB 332 at para 9.

[23] As noted in ***Matthews v Lawrence***, 2021 ABQB 776 at para 18: "Our modern Rules are not concerned with whether parties have done things on checklists. Rather, they ask whether truly substantial steps have taken place. This is often referred to as the "functional approach" to assessing "the nature, quality, genuineness, timing and outcome of the steps taken": ***XS Technologies Inc*** at paras 8-9; ***Ro-Dar*** at para 21].

[24] When assessing whether the act of providing the opposing party with information, documentation or when complying with a court is a significant advance in the action under a r 4.33 analysis, the test is a functional one where the court must determine through a qualitative assessment whether whatever purported advance was done or delivered can be characterized as "significant": ***Ro-Dar***, at para 21.

[25] A functional analysis under r 4.33 requires a conclusion that what was delivered or done advanced the action in a significant way, rather than being described as merely "perfunctory", where nothing hinges on the response, or is duplicative of information or documentation already exchanged between the parties: ***Nash v Snow***, 2014 ABQB 355 at paras 42-43 [***Nash***]; ***Edinburgh Tower Development Ltd v Curtis***, 2021 ABQB 239 at paras 62-63.

VI. APPLICATION

[26] When this court counts forward, the issue is whether the court starts counting from the May 16, 2019, Order of Master J.B. Hanebury or from the July 17, 2019, letter that was sent from prior counsel to the Respondent's counsel with a CD containing documents from the Registrar.

[27] As outlined in his decision, and not disputed in the Application before Applications Judge M. Park, the records provided by the Registrar in response to the May 16, 2019, Order were a

duplication of documents that the parties had exchanged between August and October 2014 through their mutual filed Affidavits of Records.

[28] The CD contained no new records.

[29] The Affidavit of Sharon McLeod that was filed with the court on May 26, 2023, reads at para 7:

> Many of the enclosed records in the CD attached to the Disclosure Letter where duplicate documents already provide by the Defendant, but myself and Allen as Plaintiffs, were unsure that this would be the case at the time of entering into the Consent Order, and needed to be sure what documents were in their possession before proceeding to mediation and/or trial. This is because, as mentioned, the action centers around the alleged misappropriation of the trucking equipment at issue.

[30] Neither of the Appellants identified any new records.

[31] The Appeal did not raise the issue of any new records being disclosed.

[32] Counsel for the Appellants was also unable to identify any new records. He confirmed during oral submissions that he had not done an assessment of what was provided beforehand and what was provided now.

[33] It is not disputed that many of the documents are material, meaning that they substantively relate to issues in this action. However, not one of the documents provided by the Registrar in response to the May 16, 2019, Order was new. The parties had previously exchanged all the documentation through the Affidavit of Records process in 2014, now a decade ago.

[34] Also noted in the July 17, 2019, letter from previous counsel was the fact that she was still seeking instructions from her clients in relation to the scheduling of a JDR that was previously proposed by the Respondent.

[35] The Appellants bear the onus of demonstrating a significant advance in the action within three (3) years and 76 days beyond the May 16, 2019, Order, being July 31, 2019.

[36] The Appellants must satisfy this Court of the significance of any advance on a functional analysis, where the advance is one that moves the action forward in an essential way considering its nature, value, importance and quality. ***Ursa Ventures***, at para 19

[37] The Appellants argue that this court order was a mandatory step and brought the matter closer to trial.

[38] The Appellants rely on ***Darby v Citifinancial***, 2022 ABQB 9 when argued that "a step does not occur until a party actually does what they have been planning".

[39] However, the Alberta Court of Appeal emphasized that with any step a functional approach is to be followed to determine whether whatever was done or provided can be characterized as a significant advance in the action, moving the parties closer to resolution. ***Ursa Ventures***, at para 20.

[40] The Respondent highlighted the fact that his delay application was first brought before the Court on December 1, 2022. At that time, Applications Judge J.L. Mason adjourned the Application *sine die* to allow the parties to provide evidence to assist the Court with the

substance of the documents provided by the Registrar in response to the May 16, 2019, Order, to determine their importance to the litigation within a functional context: ***Rahmani***, at para 27; ***Ro-Dar,*** at para 23.

[41] The Respondent further argued that the July 17, 2019, letter was a "housekeeping" step or a "perfunctory" response and did not move the parties closer to resolution. ***Déjà vu Holdings Ltd v Securex Master Limited Partnership***, 2018 ABQB 597 at paras 33, 34 and 37; ***Ro-Dar,*** at para 9; ***Nash*** at paras 42-43.

[42] The July 17, 2019, letter also did not move the parties closer to a JDR as counsel was still seeking instructions from the Appellants.

[43] Nothing new came because of the July 17, 2019, letter. There were no new records. There were no instructions to engage in a JDR. There were no significant steps that moved the matter closer to trial or resolution.

[44] This Court finds that the Appellants have failed to discharge their onus.

[45] The Appellants have failed to show that any significant step was taken after the May 16, 2019, Order.

[46] Adding the additional 76 days, the final date of consideration was July 31, 2019.

[47] With that, the Application for a Procedural Order filed by the Appellants on September 14, 2022, falls beyond the three (3) year and 76-day deadline under Rule 4.33 and the relevant Ministerial Order.

[48] The Appeal is dismissed.

VII. COSTS & RELIEF

[49] Costs will be payable by the Applicants/Plaintiffs and will be awarded to the Respondent. If the parties are unable to agree on costs, they can come back before this Court for argument. They will be required to file written submissions no longer than five (5) pages that shall be filed in advance of the hearing.

[50] Additionally, the Respondent is entitled to retain possession and ownership of the Equipment in dispute in this action which he has held since prior to the commencement of these proceedings, more than a decade ago.

[51] This Court further Declares that the Interim Preservation and Inspection Order granted and filed herein on February 13, 2014, restraining the Respondent from selling, renting, leasing, encumbering or otherwise disposing of the Equipment be vacated.

[52] Finally, there will be a Direction that the trust funds currently held by counsel for the Respondent in the sum of $41,000.00, being insurance proceeds for the damaged 2000 Kenworth truck, and held by agreement between counsel for the parties pending the resolution or conclusion of this action, be releasable to the Respondent.

Heard on the 19th day of November 2024.
Dated at the City of Lethbridge, Alberta this 3rd day of December 2024.

S.A. Moore
J.C.K.B.A.

Appearances:

Clint G. Docken, K.C. (Napoli Shkolnik Canada)
for the Appellants.

T. Jesse Wilde (Huckvale LLP)
for the Respondent