

COURT OF APPEAL FOR ONTARIO

CITATION: Labelle v. Canada (Border Services Agency), 2016 ONCA 187

DATE: 20160307

DOCKET: C60307

Laskin, Pardu and Roberts JJ.A.

BETWEEN

Suzan Labelle and Dennis Labelle

Plaintiffs (Appellants)

and

Canada Border Services Agency, Attorney General of Canada, Abitibi
Consolidated Inc., and International Bridge Company

Defendants (Respondents)

William G. Scott, for the appellants

Helene Robertson, for the respondents

Heard: November 23, 2015

On appeal from the order of Justice H.M. Pierce of the Superior Court of Justice, dated March 25, 2015, with reasons reported at 2015 ONSC 1943.

L.B. Roberts J.A.:

Overview

[1] The appellants appeal from the dismissal of their motion under the former r. 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to set aside the

registrar's order, which dismissed the appellants' action for delay.¹ The appellants ask to set aside both the motion judge's order and the registrar's dismissal order, and to reinstate the action.

[2] The appellants commenced their action against the defendants in April 2008. Appellants' counsel received a status notice in March 2012. Although appellants' counsel instructed staff to do so, they failed through inadvertence to request a status hearing from the court. The registrar dismissed the appellants' action in June 2012. Appellants' counsel promptly obtained the respondents' position that they would not oppose the motion to set aside the dismissal order.

[3] More than two years went by before appellants' counsel brought a motion to set aside the registrar's dismissal order. By that time, the respondents opposed the motion. The motion judge refused to set aside the dismissal order, finding that the respondents were significantly prejudiced by the appellants' delay.

[4] The appellants submit that the motion judge erred in her assessment of prejudice to the respondents because any prejudice pre-dated any delay in these proceedings or resulted from the respondents' own inaction.

¹ The former r. 48.14 required that an action be set down for trial within two years after the filing of the first statement of defence. On January 1, 2015, O. Reg. 170/14, s. 10, came into force and substituted a new rule 48.14, notably changing the timeline for a dismissal for delay to five years from the commencement of the action.

[5] I agree that the motion judge erred in her assessment of prejudice, which was at the heart of her decision to dismiss the appellants' motion. Accordingly, I would allow the appeal.

Procedural History

[6] The appellants' claims arise from the alleged slip and fall of the appellant, Suzan Labelle, in January 2008, at the border crossing plaza in Fort Frances, Ontario.

[7] Notice of the appellants' claim was given to Canada Border Services Agency ("CBSA") in April 2008. The statement of claim was issued in December 2009 and served on all defendants in March 2010. By May 2010, the respondents had delivered a statement of defence and crossclaim against Abitibi Consolidated Inc. ("Abitibi").

[8] Following service of the appellants' statement of claim, Abitibi and International Bridge Company ("International Bridge") advised that they were both subject to an order made in Quebec under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"), effective April 2009, and that the appellants' claims against them were automatically stayed. The appellants subsequently settled their claims against Abitibi and International Bridge in December 2014.

[9] There was little progress on the file after pleadings were closed. In October 2011, appellants' counsel sought to schedule examinations for discovery. Respondents' counsel asserted that they required a discovery plan before scheduling examinations. No plan was sent and the examinations never took place.

[10] The file languished until March 2012 when the court issued a status notice. Appellants' counsel received the status notice and instructed staff to have the matter placed on the status hearing list. Unfortunately, although the date was diarized, through inadvertence staff did not notify the court of the appellants' request for a status hearing. On June 27, 2012, unbeknownst to the appellants or their counsel, the registrar dismissed the action for delay.

[11] Upon receipt of the notice on June 29, 2012 that the action had been dismissed for delay, appellants' counsel sprang into a flurry of activity, seeking the respondents' consent to set aside the dismissal, proposing a timetable, and sending Ms. Labelle's medical records to the respondents. On July 27, 2012 respondents' counsel advised appellants' counsel in writing that the respondents took no position on the case being reinstated.

[12] However, no steps to bring the motion were taken until June 2014 when a notice of motion was served but then withdrawn, and the motion was not argued

until March 2015. By then, the respondents opposed the reinstatement of the action.

Reasons Below

[13] The motion judge dismissed the appellants' motion on March 25, 2015. As is clear from a reading of her reasons, while noting the appellants' litigation delay, as well as their delay in bringing the motion, the main reason for the motion judge's refusal to set aside the registrar's dismissal order was her finding of significant prejudice caused to the respondents by the appellants' delay in taking steps to advance these proceedings.

[14] The motion judge began by setting out the well-known test governing motions to set aside a registrar's order, noting the contextual approach required to be applied in considering all relevant circumstances as described in *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179, at paras. 23-25.

[15] Among the various factors that she considered, the motion judge analyzed the circumstances of this case according to the four oft-cited criteria from *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80, at para. 41 (Ont. S.C.J.), rev'd on other grounds, (2002), 48 C.P.C. (5th) 93 (Ont. Div.Ct.): explanation of the litigation delay; inadvertence in missing the deadline set out in the status notice; promptly moving to set aside the registrar's dismissal order; and no substantial

prejudice to the respondents because of the delay. She correctly observed that it was not mandatory that the appellants satisfy all four factors: *Scaini*, at para. 23.

[16] As to the fourth criterion of prejudice to the respondents, the motion judge stated:

Prejudice is often key to deciding whether to set aside the Registrar's dismissal order. The onus is on the plaintiff to show that the defendant is not prejudiced by an extension of time to set the matter down for trial. However, where the defendant alleges prejudice, there is an "evidentiary obligation to provide some details." See: *Chiarelli v. Wiens*, (2000) 46 O.R. (3d) 780 (C.A.), para. 14. The Court of Appeal also noted that the defendant cannot *create* prejudice by failing to take steps to defend the case, such as interviewing witnesses or conducting surveillance: para. 15. [Emphasis in original.]

[17] The motion judge listed the appellants' reasons for the litigation delay and their failure to promptly move to set aside the dismissal order. These reasons included appellants' counsel's financial and operational issues, along with the wind-up of his firm, as well as the CCAA proceedings involving Abitibi and International Bridge. The motion judge concluded that the litigation delay and delay in promptly bringing the motion to set aside the registrar's dismissal order resulted primarily because appellants' counsel "did not know what to do about the [CCAA] order in Quebec" and because of its effect on the appellants' claims against Abitibi and International Bridge.

[18] The respondents conceded and the motion judge accepted that the appellants had demonstrated inadvertence.

[19] After balancing all of the relevant factors, as she was required to do, the motion judge determined that in the circumstances, “[t]he key issue in this case [was] whether there [was] prejudice to the [respondents]”.

[20] With this in mind, the motion judge concluded that the motion ought to be dismissed because the appellants’ delay caused significant prejudice to the respondents, as follows:

- i. The respondents’ crossclaim against Abitibi disappeared when the action was dismissed for delay and the respondents were beyond time to make a third party claim against Abitibi and International Bridge. As owner, Abitibi was responsible for the maintenance of the premises where Ms. Labelle fell. The respondents had therefore lost the benefit of s. 6 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), because Abitibi was no longer a party to the proceedings.
- ii. The respondents had lost the ability to defend themselves because evidence concerning the maintenance of the building was no longer available. Abitibi was unable to locate any maintenance records or maintenance employees from the time of Ms. Labelle’s

fall. The appellants' claims were not insured because of the size of Abitibi's deductible of \$500,000; Abitibi's insurer carried out no investigation of Ms. Labelle's claim and no relevant reports remain in the insurer's file.

iii. The respondents were entitled to finality in the proceedings.

Analysis

(i) What is the standard of review?

[21] The decision of a motion judge made pursuant to r. 37.14 is discretionary, and entitled to deference on appeal. That decision, however, may be set aside if the motion judge proceeded on an erroneous legal principle, made a palpable and overriding error as to the facts, or gave no or insufficient weight to relevant factors: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, 330 O.A.C. 378, at para. 19.

(ii) Did the motion judge err in finding that the appellants' delay caused substantial prejudice to the respondents?

[22] In my view, the motion judge erred in finding that the appellants' delay caused substantial prejudice to the respondents. This finding was central to her decision not to grant the appellants' motion.

(a) The assessment of prejudice

[23] In starting this analysis, it is important to recall the general principle that only prejudice to the respondents caused by the appellants' delay in these proceedings is a relevant factor in determining whether the registrar's dismissal order should be set aside: *Habib v. Tunaj*, 2012 ONCA 880, at para. 5. Prejudice to the defence that exists regardless of the appellants' delay is not relevant: *Chiarelli*, at para. 16. Further, as noted by this court in *Chiarelli*, at para. 15, "[T]he defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done", such as interviewing witnesses, conducting surveillance, or otherwise preserving relevant evidence.

[24] The motion judge's findings of prejudice to the respondents, however, did not arise from the appellants' delay but from factors either pre-dating any delay or stemming from the respondents' failure to take appropriate steps to alleviate the prejudice that they now assert.

[25] First, the respondents' inability without leave to pursue crossclaims or third party claims against Abitibi and International Bridge arose from those parties' insolvencies and not from the appellants' delay. Abitibi and International Bridge were under CCAA protection by April 2009, prior to the issuance of the appellants' statement of claim in December 2009. By the time the respondents served their statement of defence and crossclaim against Abitibi in May 2010,

their crossclaim under s. 6 of the *Customs Act* was already automatically stayed by the CCAA proceedings.

[26] Second, the respondents failed to take any steps to preserve or pursue any claims that they may have had against Abitibi or International Bridge in the CCAA proceedings. While the CCAA order required any claims to be filed by November 13, 2009, prior to the service of the appellants' statement of claim, it also provided for the discretionary consideration of any claims filed after that deadline and up to the date of the implementation of the plan of arrangement on December 9, 2010. After that deadline, leave to pursue a claim could be sought from the Superior Court of Quebec, however the process was costly and the likelihood of any recovery from Abitibi or International Bridge was doubtful.

[27] Third, the unavailability of evidence related to maintenance of the premises in issue was not a product of the appellants' delay but arose because of the insolvency of Abitibi and International Bridge and the failure of the respondents to preserve such evidence once they became aware that Abitibi and International Bridge were under a CCAA order.

[28] The respondents were made aware of Ms. Labelle's claim as early as April 2008, prior to the April 2009 effective date of the CCAA protective order. However, there is no evidence that they took any steps to investigate Ms.

Labelle's claim or preserve relevant evidence until after the effective date of the CCAA order.

(b) The effect of the error

[29] The motion judge's error concerning prejudice went to the heart of her decision to refuse to set aside the registrar's dismissal order. It played an essential part in the reasoning process that led to her dismissal of the appellants' motion.

[30] The motion judge's focus on prejudice to the respondents is consistent with the approach suggested by this court in *Scaini*, at para. 25: "It may be that in a particular case, one factor on which the appellant comes up short is of such importance that, taken together with the other factors, the appellant must fail. What is important is that the analysis be contextual to permit the court to make the order that is just."

[31] The importance in the contextual analysis of the factor of prejudice to a defendant's ability to defend the action was summarized most recently by this court in *MDM Plastics Limited v. Vincor International Inc.*, 2015 ONCA 28, 124 O.R. (3d) 420, at para. 24:

The issue of prejudice "invariably is a key consideration on a motion to set aside a dismissal order": *Finlay v. Van Paassen*, 2010 ONCA 204, 101 O.R. (3d) 390, at para. 28. While an action may be dismissed even in the absence of prejudice (see *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d)

67, at para. 32), in most cases, the question of prejudice figures largely in determining whether to set aside a dismissal for delay.

[32] However, the motion judge's error that the appellants' delay caused prejudice to the respondents was fundamental to her decision. Without the finding of prejudice to the respondents, a contextual analysis results in the conclusion that the order be set aside.

[33] The factor of delay by itself was not sufficient in the circumstances of this case to deny the appellants' request to reinstate their action. Certainly, if appellants' counsel had promptly followed through on the proposed motion to set aside the registrar's dismissal order, the motion would likely have been granted at that time.

[34] Moreover, there is no evidence that the appellants' delay was the product of a deliberate decision not to take any steps in these proceedings. According to the motion judge's findings in the present case, the main reason for the delay was because of appellants' counsel not knowing what to do about the CCAA status of Abitibi and International Bridge. Given that Abitibi and International Bridge were defendants to these proceedings, the delay related to sorting out their status and the effect of their insolvency on the appellants' claim was not wholly unrelated to this action.

[35] As such, this case is distinguishable from the circumstances of *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, where the plaintiffs' solicitors had deliberately put the file in abeyance because there was no money in the file.

[36] Moreover, the inadvertent failure of appellants' counsel to request a status hearing favours the reinstatement of the appellants' action. The appellants should not suffer the "irrevocable loss of the right to proceed by reason of the inadvertence of [their] solicitor": *Marché*, at para. 28; *Finlay*, at para. 33.

[37] The motion judge properly considered the significant public interest in the finality of the proceedings: *Habib*, at para. 10; *Marché*, at para. 25. As Sharpe J.A. noted in *Marché*, at para. 38, "[E]ven when the party relying on the order could still defend itself despite the delay ... at some point the interest in finality must trump the opposite party's plea for an indulgence."

[38] However, the present case is not an instance where finality must trump the preference of having the action heard on its merits. The respondents suffered no prejudice from the delay and did not rely on the finality of the dismissal order. While the appellants have the responsibility of moving the action along, the respondents' lack of display of any sense of urgency undercuts the claim of prejudice: *H.B. Fuller Company*, at para. 42.

[39] First, the fact that the respondents indicated that they would not oppose the appellants' setting aside of the dismissal order suggests that there was no actual prejudice to their ability to defend the action at that point as a result of the delay or the dismissal.

[40] Further, respondents' counsel never indicated that their position had changed until receipt of the appellants' notice of motion. Although the appellants should have brought their motion more promptly, the lack of any warning by the respondents that their position had changed also belies any presumption of prejudice to them or their reliance on the dismissal of the action.

[41] There is no suggestion that the motion judge viewed the litigation delay as a sufficient basis in itself for refusing to set aside the dismissal order. Inadvertence in missing the deadline was conceded. In the absence of any actual or presumed prejudice to the respondents or their reliance on the dismissal order as final, the justice of the case requires that the dismissal order be set aside and the action reinstated.

[42] That being said, the appellants are being granted an indulgence. They must complete the outstanding steps in this action and then set it down for trial without further delay.

Disposition

[43] Accordingly, I would allow the appeal and reinstate the appellants' action.

[44] The appellants ask that the costs ordered by the motion judge be set aside. As they have been granted an indulgence, they seek no costs of their motion to set aside the registrar's dismissal order or appeal.

[45] As a result, the motion judge's costs order is set aside and there shall be no order as to costs with respect to the appellants' motion to set aside the registrar's dismissal order and the appeal.

Released: March 7, 2016

"L.B. Roberts J.A."

"I agree John Laskin J.A."

"I agree G. Pardu J.A."