SUPREME COURT OF YUKON

Citation: *Gregory et al.* v. *Minister of the Environment for the Yukon* and *Government of Yukon*, 2012 YKSC 78

Date: 20120924
Docket: S.C. No. 06-A0003
Registry: Whitehorse

BETWEEN:

STELLA GREGORY and LLOYD "TIM" GREGORY and STELLA GREGORY and LLOYD "TIM" GREGORY operating as NORTHERN SPENDOR REINDEER FARM

PLAINTIFFS

AND:

MINISTER OF ENVIRONMENT FOR THE YUKON TERRITORY and GOVERNMENT OF YUKON

DEFENDANTS

Before: Mr. Justice L.F. Gower

Appearances:

Stella Gregory	Appearing on her own behalf
Lloyd Gregory	Appearing on his own behalf
Zeb Brown	Counsel for the Defendants

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the defendants to have the proceeding dismissed for want of prosecution. The defendants rely on Rule 2 of the *Rules of Court*, and principally upon Rule 2(9)(b) which reads:

> "The court, except in a family law proceeding, shall dismiss so much of the proceeding that relates to the applicant where for five or more years no step has been taken that materially advances the action or proceeding."

[2] The action in this case was commenced under the former *Rules of Court* by way of a writ of summons, which had an endorsement as to the nature of the cause of action, essentially claiming that the defendants were liable for damages for conversion or unlawful expropriation of the plaintiffs' reindeer herd, and also seeking damages for interference with their economic interests, as well as certain negligent misrepresentations, and finally nervous shock and mental anguish arising from the destruction of the plaintiffs' reindeer herd on May 21, 2005.

[3] The affidavit provided in support of the defendants' application suggests that initially there were some discussions between the defendants and the plaintiffs about options for resolving this matter. However, it appears that those discussions came to an end on December 11, 2006, when counsel for the defendants advised the plaintiffs - and at that time the plaintiffs were represented by legal counsel - that the government was reluctant to proceed further without specifics that would normally be set out in the statement of claim. That was, I gather, a without prejudice discussion and, as Mr. Brown has pointed out today, he was very careful in choosing his wording, or rather the wording of the deponent to the affidavit, Mr. Koprowsky, in describing the nature of that communication.

[4] In any event, there has been no suggestion whatsoever by either of the plaintiffs that there was a standstill agreement allowing them to put the litigation on hold for a specific period of time, and if there was, then it appears that that came to an end with the correspondence of December 11, 2006. Again, there is no suggestion from either of the plaintiffs to the contrary.

[5] The present application was filed April 2, 2012, and as I indicated in the case of *Ron Will Management & Construction Ltd.* v. *10532 Yukon Ltd., 202 Motor Inn and Tip Mah,* 2012 YKSC 70, the calculation of the five year time period in Rule 2(9) then runs backwards from the date of the application, which would take it back to April 2, 2007. There has been no suggestion of any step whatsoever being taken by the plaintiffs, let alone any step that has been taken that materially advanced the action or proceeding.

[6] There was initially some reference to the plaintiffs having difficulty with their original counsel. This is from the affidavit of Stella Gregory, filed May 15, 2012, where she deposed that she had initially engaged the firm of Davis and Company in Whitehorse, but became dissatisfied with that representation and terminated the solicitor-client relationship sometime in the week of May 1, 2012. She further deposed that she and Mr. Gregory had been making attempts to obtain alternate counsel prior to that week, including making inquiries with law firms in Vancouver, British Columbia, and Edmonton, Alberta, but had not been successful, to the date of that affidavit, in obtaining replacement counsel. There were further representations made today at the hearing of this application by both Mr. and Mrs. Gregory about their difficulties in obtaining counsel, but those representations have not been reduced to any form of evidence. I refer to the affidavit of both of the plaintiffs, filed August 31, 2012, which is a lengthy 36-page affidavit containing a number of paragraphs and numerous exhibits. There is no reference whatsoever anywhere in that affidavit to the nature of the difficulties that the plaintiffs were experiencing in retaining counsel to prosecute this action. So I am left with the conclusion that the plaintiffs have taken no step to materially advance the action for five years or more.

[7] That triggers what ordinarily would be the mandatory application of Rule 2(9), which requires this court to dismiss the action unless there are circumstances where it may not be in the interests of justice to apply the rule strictly. I refer here, as I did in *Ron Will Management,* to Rules 1(6), 1(14), and 2(1) of the *Rules of Court*. However, as was the case in *Ron Will Management*, no such circumstances have been raised by either of the plaintiffs in the current application.

[8] In the event that I am in error in applying Rule 2(9), the defendants have applied in the alternative under Rule 2(7) for dismissal for want of prosecution, and that sub-rule reads:

> "If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed."

That sub-rule was addressed by me in *Secerbegovic* v*. Media North Ltd. et al.,* 2010 YKSC 49, and previously by Deputy Justice O'Connor in *SAAN Stores Ltd. v. 328995 Alberta Ltd. et al.,* 2006 YKSC 46 decision. In the latter case, Justice O'Connor summarized the applicable principles under the sub-rule as being:

i) whether there has been inordinate delay;

ii) if so, is the delay inexcusable?

iii) if so, has the delay caused serious prejudice to the defendants or is it likely to do so? and

iv) even if all three of the above questions are answered in the affirmative, does the balance of justice demand that the action be dismissed?

[9] With respect to inordinate delay, here there is a delay of approximately six years since the filing of the writ of summons. In fact, it is slightly over six years and that, on its face, would appear to be inordinate.

[10] Secondly, is the delay inexcusable? Once again, I refer to the fact that the plaintiffs have offered no justification for the delay other than making some vague references to having difficulties in retaining alternate legal counsel. I note on this point that the matter came before Judge Veale of this Court on May 23, 2012 for a case management order. At that time, the plaintiffs were seeking a period of six months to respond to the application by the defendants to dismiss for want of prosecution. Veale J. allowed them until August 31st to file their response to the notice of application and any supporting affidavits and scheduled this matter to be heard today, which is September 24, 2012. So, the plaintiffs were given approximately four months to consider their response to the material and they have provided no explanation for the delay that I can discern, beyond their difficulties with legal counsel, which have not been detailed in any significant way.

[11] I also note in this regard that the plaintiffs will have had the outline of the defendants, from either late July or early August 2012, which details in no uncertain terms the specific argument that the defendants intended to make and did make today. Again, there has been no explanation for why the lengthy affidavit filed by the plaintiffs on August 31, 2012 did not address the nature of those arguments. There was some suggestion today verbally that the plaintiffs received legal information or advice from the Law Line as to how to respond to the application, but, again, that is not addressed anywhere in evidence. That was simply an oral submission, and, in any event, it would

be a matter between the plaintiffs and that counsel, and not an issue which I can take into account here. So, that is a lengthy explanation for my conclusion that the delay is, on its face, inexcusable.

[12] As for the third point, whether there has been serious prejudice to the defendants, Mr. Brown submits correctly that I can presume there has been prejudice to the defendants by virtue of this lengthy delay. There has been no suggestion in the evidence by either of the plaintiffs to conclude otherwise. In other words, neither plaintiff has made any submission, nor have they deposed to any fact in any of the affidavit material which suggests that the defendants did not suffer serious prejudice as a result of this delay. What evidence there is on behalf of the defendants in the affidavit of Mr. Koprowsky is that, since the lawsuit was commenced, some of the key government personnel who were involved in the destruction of the herd have resigned from the government's employment or have retired, and some have left the Yukon. So, even in the absence of the presumption, there is additional evidence that the defendants have been prejudiced as a result of the delay, and that has not been countered in any way by either of the plaintiffs.

[13] Taking all of those circumstances into account, I now turn to the fourth principle under Rule 2(7), and that is whether the balance of justice demands that the action be dismissed. In this regard, I am persuaded that the balance of justice does demand that the action be dismissed for all the reasons that I have just given.

[14] Now, Mr. Brown, did you wish to return to the issue of costs?

[15] MR. BROWN: We are just seeking the normal order of costs in the way that would ordinarily follow the events, Your Honour.

[16] THE COURT: All right. Now, I come back to you, Mr. and Mrs. Gregory. The application filed April 2nd seeks two orders. One is an order dismissing the lawsuit for want of prosecution and, secondly, costs. What "costs" it is referring to there is the court costs, which are identified in the *Rules of Court*. There is a tariff at the back of the *Rules of Court,* which you are free to look at if you have not already. It talks about certain steps in a proceeding and how much the successful party can claim. It is based on numbers of units and a dollar value is assigned to the units and so on. Now, for a case like this, I am guessing, but the court costs which could be awarded in favour of the defendants could be in the neighbourhood of $1,000, perhaps as much as $1,500 or $2,000. I do not know. I am just guessing. And I will say to you as well that ordinarily, costs follow the event according to the *Rules of Court*. So, they are ordinarily awarded to the successful party on an application. Now, this is your opportunity to address the issue and tell me whether you disagree with that and if so, why. In other words, if you feel the Government should not get its costs on this application, please explain why you feel that way.

[17] STELLA GREGORY: I really feel that they shouldn't, Your Honour, because I mean, they have taken our whole lives away and I don't feel that after they have taken our lives like this, and the lives of the deer, that we should have to pay them. I don't think so. It's not fair. Everything that they have done to us and the reindeer was not fair, was not just. I don't feel that we should have to pay them for killing our reindeer and damaging our lives.

[18] THE COURT: Mr. Gregory? Do you have anything to add?

[19] LLOYD GREGORY: The only thing I can say, Your Honour, is we know we're at fault, and we could prove that, but we are negligent in how we handle things and I do not feel my wife is going to have closure over this, and she's obtained a hole in her heart over this, which is pretty substantial, so. But as far as the law's concerned, the law is the law. We were ignorant to the law, and that's our fault. That has nothing to do with the law. Whether it's fair, that's entirely a different matter.

[20] THE COURT: Well, the issue of costs is a difficult one in these circumstances because I can appreciate how deeply you are involved with the nature of this case and the emotional attachment that you have to the issues that were raised when you commenced the lawsuit. So, to a certain extent, I am sympathetic with that.

[21] On the other hand, as Mr. Brown points out, once the litigation was commenced in 2006 there continued to be a media campaign by either or both of you which targeted specific individuals who were employees of the Yukon Government involved with the destruction of the herd, on a very personal level, disparaging their character, and making very, very serious personal allegations against them of unlawful activity and wrongful behaviour, and so on. Those individuals were not in a position to respond to your allegations precisely because there was pending litigation before the Court and they would have received advice from their legal counsel not to say anything. As I indicated in the *Chambers-Boss v. Falkingham and Attorney General of Canada* case, 2009 YKSC 60, when a plaintiff makes serious allegations, particularly of a personal nature, there is a "particular" duty on the plaintiff to pursue the claim diligently and

expeditiously. That is so the matter can be resolved one way or the other, either proven or not proven. That simply did not happen here, and for years and years these allegations were allowed to languish because you did not take diligent and expeditious steps to prosecute the action.

[22] So, for those reasons, it is my decision that it would be appropriate to award costs in favour of the Government, and I do so.

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GOWER J.