

IN THE SUPREME COURT OF YUKON

Citation: *Radford v. Kazar Construction Limited et al.*, 2008 YKSC 56

Date: 20080805
S.C. No. 03-A0141
Registry: Whitehorse

Between:

ALLEN RADFORD

Plaintiff

And

KAZAR CONSTRUCTION LIMITED and CHRISTINE LAVERY

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Debra L. Fendrick
No one appearing

Counsel for the plaintiff
for the defendants

REASONS FOR JUDGMENT (Renewal of Writ)

INTRODUCTION

[1] This is an application by the plaintiff to renew an expired writ of summons pursuant to Rule 9(2) of the *Rules of Court*, to permit service on the defendant Christine Lavery.

The solicitor for the defendant Kazar Construction Limited does not object to the renewal application.

[2] The plaintiff sues the defendant aircraft owner in negligence and wishes to examine the defendant Lavery, the pilot at the time of the accident. Counsel for the plaintiff anticipates that counsel for the company will accept service on behalf of the pilot.

[3] I ordered that the writ of summons be renewed for a period of two months on May 6, 2008.

FACTS

[4] On July 14, 2002, the plaintiff suffered injuries in an accident in an airplane owned by the defendant Kazar Construction Limited, and piloted by the defendant Lavery.

[5] Counsel for the plaintiff filed a writ of summons on December 24, 2003. Counsel for the defendant Kazar Construction Limited entered an appearance on January 8, 2004.

[6] Counsel for the plaintiff was unable to locate the defendant Lavery and applied for a renewal of the writ for one year. The renewal was granted for a period of one year from May 26, 2005.

[7] On January 12, 2006, counsel for the plaintiff wrote counsel for the defendant Kazar Construction Limited to determine if defence counsel could accept service on behalf of the pilot. Defence counsel advised by correspondence dated February 15, 2006, that "we do not wish to be technically obstructive in this matter." However, defence counsel could not accept service as the pilot was not properly named on the writ of summons. Defence counsel requested an offer for settlement and supporting documentation.

[8] On April 20, 2006, the court granted the amendment of the pilot's name to "Christine Lavery."

[9] The renewed writ of summons expired on May 26, 2006.

[10] On April 28, 2008, a new counsel for the plaintiff applied to renew the writ of summons to serve the defendant Christine Lavery, or have defence counsel file an appearance.

[11] The failure to renew the writ of summons earlier appears to be the oversight of the former counsel for the plaintiff compounded by the difficulty in locating the pilot.

ANALYSIS

[12] The renewal of writ of summons is governed by Rule 9 of the *Rules of Court* as follows:

9(1) No original writ of summons shall be in force for more than 12 months, but where a defendant named in the writ has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original writ of summons be renewed for a period of not more than 12 months which, unless otherwise ordered, shall commence on the date of the order.

9(2) If a renewed writ of summons has not been served on a defendant named in the writ, the court, on the application of the plaintiff made during the currency of the renewed writ, may order the renewal of the writ for a further period of not more than 12 months which, unless otherwise ordered, shall commence on the date of the order.

9(3) Unless otherwise ordered by the court, a copy of each order granting renewal of a writ shall be served with the renewed writ, and the renewed writ shall remain in force and be available to prevent the operation of any statutory limitation and for all other purposes.

[13] The precise issue in this case is whether the renewed writ is permitted to be renewed for a second time if the application is made after the expiry of the first renewal period. Rule 9(1) clearly provides for renewal after the expiry of the original writ of summons, but Rule 9(2) states that the application be made “during the currency of the renewed writ.”

[14] Rules 2(1) and 3(2) are also applicable:

2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

3(2) The court may extend or shorten any period of time provided for in these rules or in an order of the court, notwithstanding that the application for the extension or the order granting the extension is made after the period of time has expired.

[15] In *Mussell v. Cronhelm* (BCAA), [1994] B.C.J. No. 35, the British Columbia Court of Appeal followed the principle that the intention of Rule 9(1) was to relax the conditions for renewal of writ of summons to ensure the attainment of the object of the rules set out in Rule 1(5), that is “to secure the just, speedy and inexpensive determination of every proceeding on its merits.”

[16] The British Columbia Court of Appeal also approved a principle enunciated in *Simpson v. Saskatchewan Government Insurance Office* (1967), 61 W.W.R. 741 (Sask. C.A.) where, in construing an analogous provision, the court said at paras. 26 and 27:

In an application to renew a writ of summons, I think the basic fact which the Court must keep in mind is that it is primarily concerned with the rights of litigants and not with the conduct of solicitors...

In an application to renew a writ of summons the basic question which faces the Court is, what is necessary to see that justice is done?

[17] The British Columbia Court of Appeal applied Rule 1(5) and Rule 2(1) to find that the failure to adhere strictly to Rule 9(2) was an irregularity and not a nullity. It further decided that Rule 3(2) was permissive and could be applied to Rule 9.

[18] The question that still presented was whether the words "during the currency of the renewed writ" in Rule 9(2) rendered it impossible to grant an extension of the renewal as there was no specific wording similar to the words "made before or after the expiration of 12 months" found in Rule 9(1).

[19] In the end, after considering a similar decision in *Feledichuk v. Turgeon et al.* (1982), 137 D.L.R. (3d) 733 (Alta. C.A.), the British Columbia Court of Appeal preferred the "liberal construction" of Rule 9(2) to see that justice was done and renewed the writ.

[20] I note that the renewal applied for in *Mussell v. Cronhelm* was based on an application where the renewed writ expired on February 1, 1992 and the application for renewal was made on February 5, 1992.

[21] That is substantially different than the period of delay in applying to renew the writ in this case which was almost two years.

[22] However, there are several factors that distinguish this case:

- (1) this case was already in progress and the owner of the aircraft had been served and appeared;

- (2) the lawyer acting for the defendant aircraft owner did not wish “to be technically obstructive in this matter” referring specifically to a request to file an appearance on behalf of the pilot; and
- (3) it appears that the defendant aircraft owner wishes to conclude the litigation and no rights have been prejudiced.

[23] I am compelled to note that the simple solution would have been to apply for substitutional service of the defendant before the expiry of the original or the renewed writ of summons.

[24] I conclude that despite the lengthy delay in application for renewal of the writ of summons, a two month renewal order is appropriate in these unique circumstances.

Veale J.