SUPREME COURT OF YUKON

Citation: *Ron Will Management & Construction Ltd. v. 10532 Yukon Ltd.*, 2012 YKSC 70

Date: 20120828
S.C. No. 99-A0286
Registry: Whitehorse

Between:

RON WILL MANAGEMENT & CONSTRUCTION LTD.

Plaintiff

And

10532 YUKON LTD., 202 MOTOR INN and TIP MAH

Defendants

S. C. No.: 00-A0069

Between:

DARRELL WILLIAMS, carrying on business Under the name and style of WILLIAMS HOLDINGS/YUKON

Plaintiff

And

TIP MAH and 10532 YUKON LTD., carrying on business under the name and style of 202 MOTOR INN

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Meagan Lang — Counsel for the Applicants (Defendants)
James Tucker — Counsel for the Respondents (Plaintiffs)

REASONS FOR JUDGMENT

INTRODUCTION

[1] The defendants have applied to dismiss these two proceedings for want of prosecution. The applications in each case state that the defendants will rely on Rules 2(7) and 2(9)(b) of the *Rules of Court*. However, in oral argument, counsel for the defendants relied principally upon Rule 2(9)(b). The two proceedings at issue are related in that they both arise out of the construction of the 202 Motor Inn in the fall of 1999. Both actions were commenced in 2000. The claim by Darrell Williams ("Williams") seeks damages for breach of contract and negligence, as well as an entitlement to a builder's lien. The claim by Ron Will Management & Construction Ltd. ("Ron Will") is a debt action which also claims entitlement to a builder's lien.

[2] Rule 2(9)(b) states:

> "The court…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."

[3] The Rule is mandatory, except perhaps if there has been an agreement between the parties that the Rule should not apply: *Alberta v. Morasch*, 2000 ABCA 24; and *Muckpaloo v. Mackay*, 2002 NWTSC 12.

[4] There is no dispute that the last step in the Williams action was the filing of an Amended Statement of Defence and Counterclaim on September 9, 2002. It is also undisputed that the last step in the Ron Will action was the production of a list of documents by the defendants on October 12, 2000.

[5] The defendants' counsel correctly submits that in each case the five-year period under Rule 2(9)(b) runs backward from the time of the filing of the respective applications to dismiss. In the Williams matter, the application was filed March 13, 2012;

therefore the relevant time period to examine is from March 13, 2007 to the filing date. Similarly, the application in the Ron Will matter was filed March 8, 2012, and so the relevant time is from March 8, 2007 to the date of filing.

[6] Counsel for the plaintiffs does not assert that a step was taken after the relevant date in either proceeding which materially advanced the actions. Rather, he makes three arguments in response:

1) That Rule 2(9)(b) came into force in September 2008, and as it affects his clients' vested or substantive rights, it should not be given retrospective effect;
2) That there was a "standstill (settlement) agreement" between each plaintiff and defendants that the respective actions would not proceed; or
3) That it would be unfair in the circumstances of each action to dismiss them.

[7] Rule 2(9)(b) was modeled after Rule 244.1(1) of the Court of Queen's Bench of Alberta and Rule 327(1)(b) of the Supreme Court of the Northwest Territories, which fact will become relevant when I refer to some of the authorities on point. Counsel were unable to locate any previous decisions in this jurisdiction on Rule 2(9)(b).

ANALYSIS

1. *Retrospective Effect*

[8] Rule 2(9)(b) came into effect on September 15, 2008. Therefore, as I understand the argument, in order for this court to grant the applications by the defendants, I will have to apply the Rule retrospectively, because the relevant time periods go back to March 13 and 8, 2007, before the Rule came into effect. Counsel relies on *Angus v. Sun*

Alliance Insurance Co., [1988] 2 S.C.R. 256, as authority for the proposition that an enactment (which would include our *Rules of Court*) is presumed not to have retrospective effect if it affects the substantial or vested rights of the parties: see *Angus*, at para. 19. Counsel submits that the builder's liens filed by the respective plaintiffs against the defendants' property "created a vested right" upon which they relied in their dealings with the defendants. A representative of each plaintiff swore an affidavit explaining that one of the reasons they had not taken any steps to advance their respective lawsuits was because they each felt that their interests were "secured" by the builder's lien filed against the subject property. Counsel further submitted that, should this Court grant the applications to dismiss, then the liens will be discharged and the ability of each plaintiff to recover the claimed debts will be lost.

[9] Perhaps I have failed to appreciate fully the argument of the plaintiffs' counsel here, but it seems to me that one of the initial flaws in his reasoning is his position that the mere filing of a builder's lien created a "vested" right. And if it did, then counsel failed to explain precisely what the nature of this vested right is. With respect, a claim of lien is ultimately nothing more than that - a claim, in the same way that each of the Statements of Claim is a "claim" that the defendants owe them money. In order to prosecute these claims, the plaintiffs are obliged to proceed according to the procedure and practice prescribed by the *Rules of Court*. While there was an alteration to the mode of procedure in applications to dismiss for want of prosecution with the coming into force of Rule 2(9)(b) in 2008, that did not remove entirely the ability of the plaintiffs to defend against the prospect of such applications by taking steps to materially advance each action. Rather, the enactment of the Rule simply identified a specific time

period within which such steps had to be taken. In this sense, the Rule does not affect the content or existence of a possible defence to an application to dismiss, but only the manner of the enforcement or use of such a rule.

[10] In *Angus*, cited above, the Supreme Court was satisfied that the enactment in question eliminated a complete defence to an action, and therefore was substantive and could not have retrospective effect. However, at paras. 20 and 21, the Court was also clear to distinguish such an enactment from those which affect only the procedure and practice of the courts. In the latter case, the judicially created presumption against retrospective construction has no application:

> "20 In the present case, it is difficult to see how procedure is being affected at all. The provision in question provides a complete defence to an action. Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a complete defence to an action, just as much as the creation of a cause of action itself, is a substantive matter.
>
> 21 Even if one assumes that the provision in question is procedural in some sense, the judicially created presumptions regarding the retrospective effect of procedural rules were not devised with this sort of distinction in mind. Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. P. St. J. Langan, Maxwell on *Statutory Interpretation* [page266] (12th ed. 1969), at p. 222, puts the matter this way:
>
> > The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to that altered mode.

> Alteration of a “mode” of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. The latter is in essence an interference with a vested right.” (my emphasis)

[11] In *Persaud v. Royal Bank of Canada* (1994), 18 O.R. (3d) 595 (Gen. Div.), the claimants alleged that they had deposited money with a bank in term deposits in 1977 and 1978. The bank had no records of the deposits and the only evidence of them were the claimants’ photocopies of the deposit certificates. The bank relied on s. 159(2) of the 1985 *Bank Act*, which stated that the bank's liability in an action was to be determined with reference to documents coming into existence within 10 years of an action being commenced. The claimants relied upon s. 74(2) of the 1970 *Bank Act*, which was in force at the time of the alleged deposits, and provided that documents coming into existence within 15 years of an action being commenced could be relied upon in determining the bank's liability. Accordingly, the claimants argued that their 1978 photocopies should be admissible and probative. The bank was successful in applying to have the action dismissed on the basis that the 1985 *Bank Act* applied. Winkler J., as he then was, applied a decision of the High Court of Australia in *Maxwell v. Murphy* (1957), 96 C.L.R. 261, which had also been relied upon by the Supreme Court of Canada in *Martin v. Perrie*, [1986] 1 S.C.R. 41. *Maxwell* similarly considers the question of retrospectivity and the distinction between statutes of limitation which are procedural and those which have more substantive effect. At paras. 11 and 12 of *Persaud* (Q.L.), Winkler J. quoted from *Maxwell* and concluded as follows:

> “Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation

> may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights. (Emphasis added)

> Thus if an amendment is made to a limitation period abridging the time in which an action must be brought and the only effect on the potential plaintiff is that he or she has less time in which to bring the action, then he or she is bound by the new, abridged limitation period because it does not affect the parties' substantive rights. The amendment may be said to have retrospective effect." (my emphasis)

[12] *Persaud* was upheld by the Ontario Court of Appeal (1996), 31 O.R. (3d) 415, where, at para.4, that Court quoted from *Maxwell*:

> "… In *Maxwell v. Murphy*, supra at pp. 277-8 it is said that 'if the time is abridged whilst such person is still left with time within which to institute a cause of action the abridgment might again be classed as procedural'. …"

[13] I find that the reasoning in *Persaud* is applicable here. The factual context of *Persaud* is analogous to the establishment of a five-year period within which a step

must be taken under Rule 2(9)(b). As noted, this Rule supersedes the earlier, more general provisions dealing with applications to dismiss for want of prosecution in Rules 2(7) and 3(5) of the predecessor British Columbia *Rules of Court* (adopted by this Court), which made no reference to any specific time period. The only effect on a plaintiff resulting from the establishment or "abridgment" of the time within which a step must be taken is that he or she has less time within which to take that step. However, this does not affect the plaintiff's substantive rights. Referring to the above passage from the Court of Appeal in *Persaud,* one could substitute "institute a cause of action" with "take a step" in the present case. Therefore, I conclude Rule 2(9)(b) may be said to have retrospective effect.

[14] I find further support for the retrospectivity of Rule 2(9)(b) in Rule 1(18), which states:

> "Unless the court otherwise orders, all proceedings, whenever commenced, shall be governed by these rules." (my emphasis)

2. *Standstill Agreements?*

[15] The second argument advanced by the plaintiffs' counsel is that there were settlement agreements between the parties which provided that it was not necessary for either action to proceed according to the *Rules of Court*. Such agreements are otherwise known as a "standstill agreements".

[16] In the Williams action, Darrell Williams deposed that "shortly after the commencement" of his lawsuit he reached an agreement with the defendant, Tip Mah, that he would pay the principal amount owed with no interest, but that Mr. Mah would require some time to start making regular payments. Mr. Williams further deposed that

he did not take any steps to advance the lawsuit because he relied upon this agreement and because he felt his interests were “secured” by the builder’s lien.

[17] In the Ron Will action, William Bayer, a shareholder and officer of Ron Will, similarly deposed that “within the first couple of years of commencing” that lawsuit he reached an agreement with Mr. Mah that he would pay the principal amount and would start making payments as soon as he was able to do so. Mr. Bayer further deposed that he had a subsequent discussion with Mr. Mah in 2007 in which Mr. Mah confirmed his commitment to this agreement. Like Mr. Williams, Mr. Bayer explained that he did not take any steps to advance the lawsuit because he was relying upon this settlement agreement and because he felt that his interests were “secured” by the builder’s lien.

[18] The defendant, Tip Mah, denies the settlement agreement alleged by Mr. Williams and deposed that no demands were ever made of him to make any payments pursuant to such an agreement and that he did not make any such payments. This allegation was unopposed by Mr. Williams. Mr. Mah further deposed that he has had no contact with Mr. Williams since prior to September 2002.

[19] With respect to Mr. Bayer, Mr. Mah deposed that he has had no contact with him since about May 2000, when he paid Ron Will $40,000 to settle the lawsuit. Mr. Mah further deposed that there was no settlement agreement, as alleged by Mr. Bayer, that no demands were ever made to make payments pursuant to such an agreement, and that no payments were made beyond the initial $40,000. Mr. Mah also denied confirming the alleged settlement agreement in 2007. He did however acknowledge being contacted by the plaintiff in February 2012 and being asked whether he would

“agree to settle this matter”. At that time, Mr. Mah deposed that he told the plaintiff he thought the matter had been settled in May 2000 when he paid the plaintiff $40,000.

[20] The evidence and the argument of the plaintiffs fail to persuade me that the parties reached a standstill agreement in either action.

[21] Firstly, Mr. Williams did not clearly depose that there was an implied standstill agreement between the parties and he failed absolutely to provide any evidence of an expressed standstill agreement.

[22] Secondly, Mr. Williams’ evidence is that the alleged agreement was made “shortly after the commencement” of his lawsuit. The original Writ of Summons and Statement of Claim was filed by Mr. Williams personally on June 26, 2000. It was not until April 3, 2001, almost a year later, that Mr. Williams retained counsel who filed an Amended Writ of Summons and Statement of Claim. This raises the question of why an amended pleading was necessary if the matter had already been settled. Further, the Amended Writ of Summons and Statement of Claim makes absolutely no reference to any settlement agreement. That suggests that any such discussions would have taken place after April 3, 2001, which can hardly be said to be “shortly after the commencement” of the lawsuit. Either eventuality raises a question about Mr. Williams’ credibility.

[23] Lastly, Mr. Williams filed his builder’s lien against the defendants’ property on January 27, 2004, in the amount of $192,368.84. By the time he filed his original Writ of Summons and Statement of Claim, the amount of the alleged debt had been reduced to $121,852.95, plus interest and other damages. Yet, remarkably, Mr. Williams does not deny Mr. Mah's assertions that no demands for payment were made pursuant to the

alleged settlement agreement and that no payments were made. It strains credulity to accept that Mr. Williams would have simply done nothing to take steps to enforce the alleged settlement agreement when such a large sum of money was apparently owing to him. It seems more likely that there was no such agreement and that Mr. Williams simply failed to take the necessary steps to enforce what he now says is a claim "secured" by the builder's lien.

[24] The evidence of Mr. Bayer, on behalf of Ron Will, shares the same weaknesses as that of Mr. Williams. Firstly, Mr. Bayer's evidence that a standstill agreement was implied is weak and it is clear that such an agreement was never expressed. Secondly, he is equally vague about when the alleged settlement agreement was reached. Thirdly, he absolutely fails to address the assertion by Mr. Mah that there were never any demands for payment nor payments made pursuant to the alleged settlement agreement. That is so, even though the amount claimed was substantial: $43,639.53, as of March 8, 2000.

[25] However, the most significant weakness in Ron Will's argument here is the un-contradicted allegation by Mr. Mah that this plaintiff contacted him in February 2012 to ask whether he would agree to settle the matter. Once again, that raises the question of why such conversation would be necessary if the matter had already been settled in or before 2002.

[26] Lastly on this point, it is significant to me that both plaintiffs were represented by counsel around the times that they say their respective settlement agreements were reached. If that were the case, then one would logically expect counsel to have documented such an agreement, and yet there is no such evidence.

3. *Fairness*

[27] The third argument raised by the plaintiffs' counsel is that it would be unfair to the plaintiffs in the circumstances to dismiss their actions. Counsel submits that the builder's liens filed by each plaintiff against the defendants' property gave them some comfort that their respective interests had been secured. Counsel then argues that both plaintiffs relied upon the alleged settlement agreements. Finally, counsel points to the fact that each plaintiff eventually lost the services of their respective lawyers. In the case of Mr. Williams, the counsel who prepared and filed the Amended Writ of Summons and Statement off Claim on April 3, 2001 left his then law firm sometime prior to September 2002, when the file was taken over by another lawyer from the same firm. Mr. Williams later filed a Notice of Intention to Act in Person on June 7, 2004. Much the same can be said of Ron Will. The counsel who prepared and filed the original Writ of Summons and Statement of claim on March 8, 2000 was replaced by other counsel within the same firm by October 22, 2003.

[28] The plaintiffs' counsel suggests that these changes of counsel somehow contributed to the delay of each of the plaintiffs in taking steps to materially advance their respective actions. Yet, why that would prevent either plaintiff from taking <u>any</u> step within the last five years was not made clear to me.

[29] The other problem with this argument is that Rule 2(9)(b) appears to be mandatory and the reasons for the delay are irrelevant. The Alberta Court of Appeal in *Morasch*, cited above, clearly addressed this in the context of Alberta Rule 244.1 at para. 5:

> "R. 244.1 is mandatory and permits no discretion.
>
> 5 The rule is written in absolute terms and is mandatory: *Petersen v. Kupnicki* (1996), 44 Alta. L.R. (3d) 68 at 70 (C.A.). Once it is established that a "thing" has not been done in five years to materially advance the action, the court "shall" dismiss the action. The absence or presence of prejudice to another party is not a consideration: *Volk v. 331323 Alta. Ltd.* (1998), 212 A.R. 64; 168 W.A.C. 64 at 65 (C.A.). Similarly, the sterling reputation of the litigant, the strength of his action or defence, and the justification for the delay are all irrelevant to a R. 244.1 application. Of course, although mandatory, a R. 244.1 dismissal is not automatic. A party must apply to the court to trigger the dismissal." (my emphasis)

[30] *Morasch* was applied by Vertes J. in *Muckpaloo*, cited above, where he addressed Northwest Territories Rule 327(1)(b), which is almost identical in its wording to Yukon Rule 2(9)(b). At paras.15 and 16, Vertes J. concluded:

> "15 The purpose behind a "drop dead" rule (that being the not too subtle, but accurate, label applied to this provision) such as Rule 327(1)(b) is, like all rules dealing with delay, to try to resolve civil matters in an expeditious and efficient manner. Subrule (b) is simply a more forceful manifestation of that aim. It provides a direct message that excessive delay will not be tolerated. The concern with delays in the civil justice system has been well documented. This subrule provides a clear and certain method of terminating inactive actions.
>
> 16 Under the Rule, the only question to ask is whether there has been delay. …"

[31] On its face then, Rule 2(9)(b) would appear to be mandatory. However, our *Rules of Court* include provisions which allow departure from Rule 2(9)(b) in circumstances where it may not be in the interests of justice to apply it strictly. I have

regard here to Rules 1(6), 1(14) and 2(1). Having said that, no such circumstances exist here.

CONCLUSION

[32] The defendants' applications are granted with costs.

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Gower J.