NOVA SCOTIA COURT OF APPEAL
Citation: Hiscock v. Pasher, 2008 NSCA 101

Date: 20081028
Docket: CA 292378
Registry: Halifax

Between:

Florence M. Hiscock

Appellant

v.

Mary M. Pasher

Respondent

Judges: Roscoe, Bateman and Hamilton, JJ.A.

Appeal Heard: September 11, 2008, in Halifax, Nova Scotia

Held: Appeal is allowed, clause 1 of the order of the chambers judge and the prothonotary's order dismissing the action are set aside, with costs to the respondent, per reasons for judgment of Roscoe, J.A.; Bateman and Hamilton, JJ.A. concurring.

Counsel: Blair Mitchell, for the appellant
Clarence A. Beckett, Q.C., for the respondent

Reasons for judgment:

[1] Florence Hiscock appeals from a decision of Justice Frank Edwards dismissing her application to set aside a prothonotary's order made pursuant to **Civil Procedure Rule** 28.11 striking out her action. The decision under appeal is reported as 2008 NSSC 36.

Background:

[2] Ms. Hiscock was injured in an automobile accident on April 28 1998. Ms. Pasher was the driver of the other vehicle. The day after the accident Ms. Hiscock retained lawyer Neil F. McMahon to represent her. After dealing initially with Ms. Pasher's insurance company, Mr. McMahon filed an originating notice action and statement of claim on April 28, 2000. On March 15, 2002 Mr. Clarence Beckett, Q.C. was retained to act on behalf of Ms. Pasher. Mr. Beckett advised Mr. McMahon that it was necessary to have the originating notice renewed prior to service. That was done and the defendant was served on August 16, 2002. The defence was filed on August 27, 2002.

[3] Discoveries were held in March 2003 and August 2003. Following the discoveries, Mr. Beckett telephoned and wrote to Mr. McMahon several times seeking fulfilment of the undertakings Mr. McMahon had made at discoveries and attempting to advance the file. Mr. McMahon did not respond.

[4] On September 12, 2005 Mr. McMahon received a notice from the prothonotary pursuant to **Rule** 28.11(5) advising him that the action would be dismissed after 21 days. As a result Mr. McMahon filed a notice of intention to proceed on October 3, 2005. A second notice of order dismissing action was sent by the prothonotary to Mr. McMahon on April 4th, 2006. Mr. McMahon failed to respond and as a result on May 25, 2006 an order dismissing the action was issued.

[5] Mr. McMahon failed to do anything following the dismissal of Ms. Hiscock's action or advise her of the status of her file. Eventually, later in 2006 Ms. Hiscock consulted another lawyer, Chris Conahan, who tried unsuccessfully to have Mr. McMahon turn the file over to him for review. In August, 2006 Ms. Hiscock contacted the Nova Scotia Barristers Society about Mr. McMahon's lack

of progress with her file. In November 2006, Mr. McMahon contacted Ms. Hiscock to apologize for his inaction and asked her to reconsider and allow him to finish the case. Ms. Hiscock did permit Mr. McMahon to continue and did not proceed with her complaint at that time.

[6] In January 2007, not having heard anything further from Mr. McMahon, Ms. Hiscock retained a new lawyer, Mr. Tony Mozvik. Mr. Mozvik learned about the dismissal order in March 2007. Ms. Hiscock then filed a written complaint against Mr. McMahon with the Bar Society and as a result the Lawyers Insurance Association of Nova Scotia retained Mr. Guy LaFosse, Q.C., to apply to set aside the prothonotary's dismissal order of May 25, 2006. The application dated September 10, 2007 was heard by Justice Edwards in January 2008.

The decision under appeal:

[7] Justice Edwards summarized his reasons for dismissing the application to set aside the prothonotary's order in the opening paragraph of the decision:

> [1] ... I have dismissed the application because the delays in question stemmed from the wilful neglect of Plaintiff's Counsel. The Plaintiff will not be left without a remedy; she has an excellent cause of action against the lawyer. The lawyer is solely responsible for what occurred and should therefore bear the consequences.

[8] Justice Edwards applied a test for a motion to set aside an order for dismissing an action for delay as discussed in **Scaini v. Prochnicki and Winn**, [2007] O.J. No. 299 (C.A.). In that case the motions judge had applied a test developed in **Reid v. Dow Corning Corporation** (2001), 11 C.P.C. (5th) 80 (Ont. Master) which required the plaintiff to satisfy four criteria: that there was an explanation for the delay; that the deadline was missed due to inadvertence; that the motion was brought promptly; and that there was no prejudice to the defendant. In **Scaini**, Goudge, J.A. for the court wrote:

> 23 In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1)(c) and (2). The latter invites the court to make the order that is just in the circumstances.

> A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.
>
> 24 That is not to say that there are no criteria to guide the court. Indeed I view the criteria used by the motion judge as likely to be of central importance in most cases. While there may be other relevant factors in any particular case, these will be the main ones. The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[9] Justice Edwards examined the four criteria from the **Reid** case and found that there was no explanation for the delay other than willful neglect of Mr. McMahon; that the dismissal was not the result of mere inadvertence but was due again to the willful neglect of Mr. McMahon; that the motion to set aside the order was not brought promptly; and that there was no prejudice to the defendant. He concluded as follows:

> 46 **Conclusion**: What does the interest of justice require in this case? Obviously, allowing the Dismissal Order to stand would be an extreme remedy. But are the circumstances here so egregious that an extreme remedy is appropriate? I believe they are.
>
> 47 I take comfort from the fact that Hiscock will not be left without a remedy. McMahon's conduct exposes him to liability to Hiscock. I am confident she will have no difficulty making a case against him.
>
> 48 Second (to paraphrase **Marché**)[**Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.**, [2007] O.J. No. 3872 (C.A.)], McMahon's conduct amounts to more than that kind of lapse or inadvertent mistake that the legal system can countenance. This type of conduct must be emphatically denounced and discouraged.
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> 49 Third (again as in **Marché**), excusing this delay and this conduct risks undermining public confidence in the administration of justice. "... Excusing a delay of this kind would throw into question the willingness of the courts to live up to the stated goal of timely justice." (**Marché** paragraph 32)
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> 50 There is no justification for putting this back on the Defendant. Ms. Pasher had this matter hanging over her for eight years prior to the Dismissal Order. Although she was ably represented by Counsel retained by her insurer, she still had to be available to testify at the trial, to meet with Counsel, and, if necessary, undergo further discovery examination. Since the Dismissal Order, she has no

> doubt experienced a sense of closure and has gotten on with her life without this cloud hanging over her. Litigants are entitled to finality after the passage of a reasonable amount of time. For Ms. Pasher, that time has long since passed. Neither she nor her Counsel are in any way responsible for the present state of affairs.
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> 51 There is only one person who is responsible for this situation. I see no reason in logic or in law why he alone should not bear the consequences. Defendant's counsel went out of his way to encourage McMahon to pursue Hiscock's claim. There is no reason to deflect any of the blame from McMahon.
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> 52 The application is dismissed with costs to the Respondent in the agreed amount of $1,500.00.

Issues:

[10] The appellant states the grounds of appeal as follows:

> 1. The learned Chambers Judge erred in law and in principle in determining whether to exercise the Court's jurisdiction to set aside a Prothonotary's **Rule** 28.11 Order dismissing the Appellant's action.
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> 2. Alternatively, the learned Chambers Judge erred in law and in principle applying the test with speculation, and in the absence of evidence of, whether the Plaintiff would have any effective, enforceable right to recover from some other person on the dismissal of her action. In doing so, the learned Chambers Judge erred in law and in principle.

Standard of Review:

[11] Since the chambers judge's order is one which has a final or terminating effect, the standard of review is not that usually applied to discretionary orders of an interlocutory nature, but rather whether there was an error of law resulting in an injustice. See: **Jeffrey v. Naugler**, 2006 NSCA 117; **Purdy Estate v. Frank**, [1995] N. S.J. No. 243 (C.A.); **Clarke v. Sherman**, [2002] N.S.J. No. 238 (C.A.); **Binder v. Royal Bank of Canada**, 2005 NSCA 94; **MacNeil v. Bethune**, 2006 NSCA 21.

Analysis:

[12] This court has not previously articulated a specific test for setting aside a prothonotary's order made pursuant to **Rule** 28.11. The **Rule** provides:

> General List of proceedings for trial
>
> 28.11.
>
> (1) Each prothonotary shall maintain a General List that lists all proceedings in which the pleadings are closed and for which no date of trial has been fixed.
>
> (2) Where a proceeding has been on a General List for a period of three (3) years, the prothonotary shall give the parties notice in Form 28.11A that they have thirty (30) days to file a notice of intention to proceed.
>
> (3) Where the parties do not indicate their intention to proceed within the time set out in subsection 2, the prothonotary shall issue an order in Form 28.11C dismissing the proceeding.
>
> (4) Where the parties do file a notice of intention to proceed, they shall, within six (6) months from the date thereof or such further time as ordered by the court, file with the prothonotary a Notice of Trial in accordance with rules 28.08 and 28.10.
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> (5) Where the parties fail to file a Notice of Trial pursuant to rule 28.11(4) and where no extension of time has been granted by the court, the prothonotary shall give the parties twenty-one (21) days notice in Form 28.11B before issuing an order in Form 28.11C dismissing the proceeding.

[13] In **Goodwin v. Rodgerson**, 2002 NSCA 137, this court determined that the Supreme Court had the inherent jurisdiction to set aside a **Rule** 28.11 order since there was no specific provision for a review of such an order. The court found (¶ 20) that in the circumstances of that case, the interests of justice required setting aside the order to correct the non-compliance with procedural requirements and that setting aside the order caused no injustice to the defendant.

[14] After the decision in **Goodwin v. Rodgerson**, in July 2003, **Rule** 51.05(3) was amended to add a reference to **Rule** 28.11(3), to provide for an appeal of a dismissal order made by the prothonotary. It now states:

> (3) Any person affected by an order of a prothonotary made pursuant to Rule 51.05(1)(b), Rule 51.05(1)(c) or Rule 28.11(3) may appeal therefrom to a judge in chambers within ten (10) days after the order complained of has been served upon him in cases where service is required, and within ten (10) days after the making of the order in all other cases, and the judge may make such order as is just.

[15] In this case it appears that neither the parties nor the judge was aware of the change in the **Rules** and the matter proceeded on the basis that the court was exercising its inherent jurisdiction to review an order made pursuant to **Rule** 28.11. When the amendment was pointed out to counsel on appeal, neither argued that the procedural irregularity or the failure to apply for an extension of time for the appeal of the 28.11 order should affect the outcome of the appeal to this court. It was submitted that the same test should apply whether the plaintiff brings an application to set aside the prothonotary's order or an appeal of the order.

[16] **Civil Procedure Rule** 2.01 provides:

> Non-compliance with Rules
>
> 2.01.
>
> (1) A failure in a proceeding to comply with any requirement of these Rules shall, unless the court otherwise orders, be treated as an irregularity and shall not nullify the proceeding, any step taken in the proceeding, or any document, or order therein.
>
> (2) Where there has been a failure in a proceeding as mentioned in paragraph (1), the court may, subject to paragraph (3) and such terms as it thinks just,
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> (a) set aside, either wholly or in part, the proceeding;
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> (b) set aside any step taken in the proceeding or any document, or order therein;
>
> (c) allow any amendment to be made under Rule 15;
>
> (d) make such other order as it thinks just.

[17] It is clear that the plaintiff should have brought an application to extend the time to appeal and an appeal pursuant to **Rule** 51.05(3) rather than an application to set aside the prothonotary's order relying on the court's inherent jurisdiction. Therefore the **Rules** were not fully complied with. However, no objection has been taken, no application was made to set aside the proceedings and it is unlikely the procedural irregularity affected the result. In these circumstances, I would apply **Rule** 2.01 and treat this as an irregularity which does not nullify the proceedings. (See: **Nova Scotia (Minister of Community Services) v. W.L.W.**, 2002 NSCA 129; **Family and Children's Services of Kings County v. C.R.**, [1992] N.S.J. No. 531; 118 N.S.R. (2d) 1) For the purposes of the appeal, I will address the matter as if the plaintiff had brought an appeal pursuant to **Rule** 51.06(3).

[18] The issues become what is the test that should be applied by a chambers judge on an appeal of a prothonotary's order dismissing an action for failure to respond to a notice pursuant to **Rule** 28.11(2)? And concomitantly, did the chambers judge err by requiring the plaintiff to satisfy the criteria listed in the **Reid** case?

[19] It is clear that the issuance of the prothonotary's order is entirely administrative. It is not a decision on the merits of the case or based on any evidence concerning the intentions of the plaintiff. The purpose of the **Rule** is to clear cases which have settled or have been abandoned from the docket. (See: **Goodwin v. Rogerson**, *supra*.,¶ 19) The purpose of an appeal from the **Rule** 28.11 order must be to allow the court to reassess the situation in a case where some error has resulted in a striking-off where the plaintiff did not intend to abandon the case.

[20] In my view it makes sense for the test on an appeal of a **Rule** 28.11 order to be similar to the test the court applies when the defendant applies to dismiss a proceeding for want of prosecution pursuant to **Rule** 28.13. That **Rule** allows a defendant to seek the dismissal of a case the plaintiff has unreasonably delayed, which also assists the court in clearing the docket of cases that are not likely to proceed. There is no obvious rationale for having a stricter test for reinstatement after the prothonotary's administrative dismissal than the applicable standard on an application made by the defendant to dismiss for delay.

[21] In **Hurley v. Co-operators General Insurance Co.**, [1998] N.S.J. No. 184; 160 D.L.R. (4th) 645; 169 N.S.R. (2d) 22, Flinn, J.A., for the court, summarized the law and set out the following principles:

> 28 The principles of law with respect to the dismissal of a plaintiff's action for want of prosecution, pursuant to **Civil Procedure Rule** 28.13, were recently reviewed by this Court in **Savoie v. Fagan** ([1998] N.S.J. No. 27 (N.S.C.A.)). Justice Bateman confirmed that the principles which govern the exercise of a judge's discretion, in deciding whether to grant an application to dismiss an action for want of prosecution, are those set out in **Martell v. Robert McAlpine Ltd.** (1978), 25 N.S.R. (2d) 540 (N.S.C.A.).
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> 29 In Martell, Justice Cooper set out a two-fold test:
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> > 1. There must, first, have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and
> >
> > 2. That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause, or to have caused, serious prejudice to the defendants.
>
> 30 These principles are set out in helpful detail by Lord Justice Salmon in **Allen v. Sir Alfred McAlpine & Sons Ltd. et al**, [1968] 1 All E.R. 543, at p. 561, and cited with approved by Justice Hallett in **Moir v. Landry** (1991), 104 N.S.R. (2d) 281 (N.S.C.A.) at p. 282:
>
> > A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
> >
> > (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.

> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled. [Emphasis added]

[22] As the cases dealing with **Rule** 28.13 indicate, dismissal for want of prosecution is an extreme remedy and the plaintiff should not lightly be deprived of her day in court. (See: **Goodwin v. Rodgerson**, ¶ 19 and **Moir v. Landry,** p.284). It is important to distinguish between the neglect and delay caused by the plaintiff's solicitor and the plaintiff's own failure to pursue her rights. Even in cases where the solicitor's conduct is exceptionally careless, if the plaintiff is entirely blameless, the defendant's motion to dismiss may be unsuccessful if there is an absence of prejudice to the defendant. For example, in **Clarke v. Sherman** 2002 NSCA 64, there had been a 13 year delay due in part to the plaintiff's solicitor being suspended from the practice of law. Since the plaintiff was not personally responsible for any of the delay, and the defendants had not been prejudiced, the appeal court found that the application should have been dismissed.

[23] Under **Rule** 28.13, the defendant bears the burden as the applicant. On appeal from a prothonotary's **Rule** 28.11 order, the plaintiff, as the appellant, ought to bear the burden of proving:

1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the plaintiff personally who is to blame for the delay;

2. That the plaintiff has always intended to proceed with the action and was either unaware of the **Rule** 28.11 notice or her solicitor's failure to respond to it;
3. That the defendant has not likely been prejudiced by the delay; and,
4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the prothonotary's order.

[24] The application of this test, in my view, leads to the conclusion that it is in the interests of justice that the plaintiff's action should be reinstated and the prothonotary's order be set aside. The almost 10 year delay from the date of the accident in April 1998 to the date of the hearing of the application before Justice Edwards in January 2008 could easily be labelled as inordinate. However, as found by Justice Edwards, the plaintiff was not personally responsible for the delay. She attempted unsuccessfully to have her lawyer advance the file and twice retained other counsel for assistance.

[25] Furthermore, it is also clear that the plaintiff always intended that her action proceed and she was not aware of the notices being sent to Mr. McMahon or his lack of response thereto.

[26] Of critical importance is the fact, as found by Justice Edwards, the defendant has not been prejudiced by the delay in this case.

[27] Although in some cases the negligence and ineptitude of the plaintiff's lawyer might be a pivotal consideration, especially in a case where the plaintiff is more experienced, it should not become the predominant factor in balancing the relevant circumstances on an appeal of a **Rule** 28.11 order. With respect, the chambers judge erred by over emphasizing Mr. McMahon's neglect and in failing to consider the plaintiff's lack of blameworthiness in attempting to balance the interests of the parties.

[28] I would allow the appeal and set aside clause 1 of the order of the chambers judge and the prothonotary's order dismissing the action. As for costs, the respondent is entitled to retain the costs paid on the chambers application and shall also have her costs of the appeal in the amount of $1,500 including disbursements, paid by the appellant.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.