SUPREME COURT OF NOVA SCOTIA

Citation: *Cutcliffe Kymlicka v. Shipley*, 2021 NSSC 70

Date: 20210225
Docket: Halifax No. 458362
Registry: Halifax

Between:

Karen Cutcliffe Kymlicka, Nik Cutcliffe Kymlicka, a minor, by his litigation guardian, Stephen Kymlicka

Plaintiffs

v.

Paul Shipley

Defendant

AND IN THE MATTER OF AN INTENDED PROCEEDING BETWEEN:

Karen Cutcliffe Kymlicka, N.C.K., a minor, by his litigation guardian, Stephen Kymlicka

Plaintiffs

v.

Paul Shipley

Defendant

Judge: The Honourable Justice Ann E. Smith

Heard: January 19, 2021, in Halifax, Nova Scotia

Counsel: John Rafferty, Q.C., for the Plaintiffs
Lisa Richards, for the Defendant

By the Court:

Introduction

[1] The Plaintiff asks this Court to exercise its discretion to order that the date of issue of the Notice of Action and Statement of Claim originally filed in this matter be amended *nunc pro tunc* to October 26, 2016.

[2] The Plaintiffs' counsel, Gordon Allen, was retained by the Plaintiffs on August 25, 2014. Mr. Allen prepared a Notice of Action and Statement of Claim for two plaintiffs, Karen Cutcliffe Kymlicka and Stephen Kymlicka as litigation guardian of Karen Kymlicka's minor son, Nik Cutcliffe Kymlicka. Mr. Allen identified the minor only by his initials.

[3] Pursuant to Civil Procedure Rule 36, the name of a minor must be given. It was not. A confidentiality order pursuant to Rules 85.04 and 85.05 is required before a minor may be referred to by their initials on a Notice of Action and Statement of Claim. No such order was obtained.

[4] The Deputy Prothonotary rejected the filing in its entirety on this basis.

[5] Mr. Allen did not advise the Prothonotary's office, pursuant to Rule 82.05(1) that the limitation period applicable to Karen Cutcliffe Kymlicka's claim expired on October 26, 2016, the day the Notice of Action and Statement of Claim was filed.

[6] Mr. Allen first became aware of the rejected filings on November 17, 2016. He filed a new Notice of Action and Statement of Claim on December 8, 2016 with the minor's name fully included. Mr. Allen's evidence was that he thought that s. 12 of the *Limitations Act* (new) permitted the Court, in its discretion, to disallow a limitations defence based on certain factors. He expected the limitations defence to be disallowed because of the short period of time that had elapsed between October 26 and December 8, 2016.

[7] The Plaintiff relies upon Rule 2.02(1)(a) and (b) which allow a judge to excuse compliance with a Rule, permit an amendment or grant other relief to correct an irregularity.

[8] The Defendant opposes this motion on various bases but ultimately focuses on the wording of Rule 2.02 which counsel says requires the Court to disallow the relief the Plaintiffs seek.

Background

[9] It is clear on the evidence before the Court that Ms. Cutcliffe Kymlicka and her son were in a motor vehicle accident on October 26, 2013, having been rear-ended while driving their vehicle, by the vehicle driven by the Defendant, Paul Shipley.

[10] The evidence before the Court establishes that Mr. Allen was retained by the Plaintiffs in August, 2014 and had been in contact with adjuster Terri MacDonald on behalf of the Defendant's insurer starting in January 2016.

[11] After filing the Notice of Action and Statement of Claim on October 26, 2016, Mr. Allen wrote to Ms. MacDonald on November 9, 2016 advising that the claim had been filed.

[12] Mr. Allen's evidence is that he became aware of the rejected Notice of Action and Statement of Claim on November 17, 2016.

[13] Mr. Allen then filed a second Notice of Action and Statement of Claim on December 8, 2016.

[14] It was not until August 24, 2017 that Mr. Allen responded to requests from Ms. MacDonald for a copy of the Notice of Action and Statement of Claim. On that

date, Mr. Allen sent Ms. MacDonald a copy of the Notice of Action and Statement of Claim that had been issued on December 8, 2016 and provided his explanation for the late filing. He stated that he considered s. 12 of the *Limitation of Actions Act* as "reasonably applying".

[15] On January 16, 2019, Mr. Allen advised that he would be serving the Statement of Claim. The Defendant filed a Statement of Defence on September 17, 2019 and relied on the limitations defence with respect to the claim of Karen Cutcliffe Kymlicka.

[16] On December 6, 2019, the Defendant's counsel sent a letter to Mr. Allen advising of the decision of Campbell, J. in *Nixon v. Cignecto-Central Regional School Board*, 2019 NSSC 272 holding that the relief available in s. 12 of the *Limitations of Actions Act* was not available in transitional cases such as the within proceeding, and requesting that Ms. Cutcliffe Kymlicka's claim be withdrawn.

Issues:

[17] The sole issue is whether this is an appropriate case for the Court to use its discretion to make an order amending the date of issue of the originally filed Notice

of Action and Statement of Claim which was rejected for filing, to the date it was first filed, i.e., October 26, 2016.

Relevant Civil Procedure Rules

[18] Civil Procedure Rules 2.02 and 2.03 are relevant and provide as follows:

Irregularity or mistake

2.02 (1) A failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.

(2) A judge may do any of the following in response to an irregularity:

(a) excuse compliance under Rule 2.03;

(b) permit an amendment or grant other relief to correct the irregularity;

(c) set aside all or part of a proceeding, step, document, or order, if it is necessary to do so in the interest of justice.

(3) It is not in the interest of justice to set aside a proceeding, step, document, or order on a motion made after an undue delay by the party who makes the motion or after that party takes a fresh step in the proceeding knowing about the irregularity.

General judicial discretions

2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:

(a) give directions for the conduct of a proceeding before the trial or hearing;

(b) when sitting as the presiding judge, direct the conduct of the trial or hearing;

(c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

(2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:

(a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;

(b) require an excused person to do anything in substitution for compliance;

(c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

(3) The general discretions do not override any of the following kinds of provisions in these Rules:

(a) a mandatory provision requiring a judge to do, or not do, something;

(b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;

(c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

[19] Rules 82.05 and 85.04 are also relevant and provide as follows:

Filing documents

82.05 (1) The prothonotary must accept for filing a document that is authorized by a Rule to be filed, and that conforms with a Rule about its content.

(2) The prothonotary may accept for filing a document that does not conform with a Rule about the content of the document and must do so when both of the following are brought to the attention of the prothonotary:

(a) the document is intended to start a proceeding or make a crossclaim, counterclaim, or third party claim in an action;

(b) the person seeking to file the document may lose a substantive right, such as a claim to which the Limitation of Actions Act may apply, unless the document is filed.

(3) A prothonotary who accepts for filing a document that does not conform with a Rule about the content of the document may accept the document conditionally, provide the conditions in writing to the

person who files the document, and return the document if a condition is not fulfilled.

…

Order for confidentiality and interim order

85.04 (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

….

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a hearing.

The Positions of the Parties and Analysis

[20] Defence counsel made substantial arguments about Mr. Allen's actions or inaction in handling the Plaintiffs' case. However, this approach diverts attention from the proper focus of the matter which is Ms. Cutcliffe Kymlicka's legal position created by the procedural error Mr. Allen made with respect to her son's claim. This motion concerns Ms. Cutcliffe Kymlicka's right to advance her proceeding. The focus is not on Mr. Allen's error.

[21] The case law is clear that it is unjust to set aside a party's action because of counsel's mistakes. For example, Saunders J.A. in *Clarke v. Sherman*, 2002 NSCA

64 (NSCA) at paragraphs 21 and 22 addresses the Court's attitude towards mistakes by counsel and their effect on their clients' claims. Saunders, J.A. stated:

> [21] …Having regard to these circumstances and other similar features that are apparent from the record, I am of the opinion that it would be unjust to visit upon the appellant consequences that were not of his own making thereby depriving him of the chance to recover the damages for his injuries to which he would otherwise be entitled.
>
> [22] As Mr. Farrar acknowledged in argument, much of the delay in moving this litigation forward is attributable to Mr. Clarke's solicitors and not to him personally. This distinction is clearly a relevant question to be taken into consideration so that Mr. Clarke is not unfairly deprived of his day in court.

[22] Similarly in *Hiscock v. Pasher*, 2008 NSCA 101 (NSCA) Roscoe J.A., writing for the Court of Appeal, overturned a decision of a motions judge who struck the Plaintiff's action on the basis of delay in prosecution. At paragraph 22 Roscoe J.A. wrote:

> [22]… 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.

[23] In *Atlantic Canada Opportunity Agency v. Ferme D'Acadie*, 2008 NSSC 334 (NSSC), Justice LeBlanc, as he then was, held that a claim should not be struck for failure to prosecute when the delay was caused by counsels' actions, and not by the Plaintiff. Justice LeBlanc stated at paragraph 39:

> [39] If I were to exercise my discretion to stay the proceedings, it would deny the plaintiff the right to present a claim because of the conduct of its legal counsel. In my opinion it would be unjust to so deprive the plaintiff in these circumstances…There is no evidence relating to either counsel that leads me to conclude that their conduct in any way prevented the applicant from fully defending the claim and advancing the counterclaim.

[24] Although these decisions dealt with motions to strike for want of prosecution, the remedy sought in each was the same as the Defendant says applies in the within case – dismissal of Karen Cutcliffe Kymlicka's claim without it being heard on its merits.

[25] There is no evidence before this Court that the Defendant, through delay, has been prevented from fully defending Ms. Cutcliffe Kymlicka's claim.

[26] The Defendant here, if the relief sought is granted, will not have lost any substantive right. He will, however, lose the benefit of a windfall in having a claim against him dismissed without any adjudication of its merits.

[27] The Defendant's counsel describes Mr. Allen's conduct as appearing to be "designed to prevent the Defendant from becoming aware of and availing himself of a legitimate defence to the claim." Counsel goes on to state that the "Court's discretion should be exercised in light of the overall circumstances of the action and the conduct of all parties."

[28] The Defendant's counsel also argued that a potential action against Mr. Allen is an alternate remedy available to Ms. Cutcliffe Kymlicka if the Court permits the limitation defence to stand and dismisses her action.

[29] This Court notes that that approach has been rejected by Nova Scotia Courts in several cases.

[30] In *Anderson and Anderson v. Co-operative Fire and Casualty Company*, (1983), 58 N.S.R.(2d) 163 (NSSC,TD), Hallett, J (as he was then) wrote:

> [17]…The fact that a plaintiff whose action is out of time may have a cause of action against his solicitor is a matter the court should possibly consider in assessing the degree of prejudice to the parties but it must be remembered that the plaintiff might not be successful. In my opinion, the fact that the solicitor may be potentially liable to the plaintiff should not be given much weight by the court in assessing the degree of prejudice to the parties as required on these applications. Counsel for the defendant posed the question whether the amendment to the *Statute of Limitations* was passed for the protection of lawyers. It is irrelevant that the result of granting relief pursuant to the amendment may benefit a lawyer who might otherwise be liable to his client.

[31] To similar effect is the decision of Hall J. in *Greene v. Hines* (1985), 67 N.S.R.(2d) 296 (NSSC,TD) who disallowed a time limitation defence under the *Limitation of Actions Act* in circumstances where a lawyer, through oversight, commenced an action six days after the expiry of a limitation period.

[32] Addressing this argument Hall J. stated:

> [11] As to the question of prejudice to the Plaintiff I do not accept the proposition that she would not suffer prejudice merely because she may be able to recover from her solicitor. To my mind that is a collateral consideration in weighing the relative degrees of prejudice where it is evident that the Defendant has suffered prejudice as a result of the delay in commencing the action.

[33] It is clear that Justice Hall's reference to the Defendant having suffered prejudice should read "has <u>not</u> suffered prejudice" because that is what Hall J. found earlier in his decision.

[34] Farrar J.A., speaking for the Nova Scotia Court of Appeal in *Lord v. Smith*, 2013 NSCA 34 dismissed an appeal from a motion's judge's decision to set aside a dismissal of the Plaintiff's claim for want of prosecution. Justice Farrar confirmed that the Plaintiff's potential alternative action against his former counsel and its potential success "is mere speculation." Justice Farrar stated that it as appropriate for the motions judge to give it little weight in his deliberations (para 52).

[35] The Defendant's counsel also submits that the doctrine of "clean hands" applies. Counsel argues that Mr. Allen made a mistake when he filed the Statement of Claim on October 26, 2016. "However, in his dealings with the other parties and the Court, he did not act promptly or forthrightly."

[36] If this doctrine applies to this motion, it applies not to counsel, but to parties. There is absolutely no evidence that Ms. Cutcliffe Kymlicka acted otherwise than in good faith in instructing counsel to commence the action. The motion before the Court is brought for her benefit, not for the benefit of Mr. Allen. She is not responsible for Mr. Allen's inadvertence.

[37] Further, the evidence before the Court shows that the Defendant was fully aware of all of the relevant facts more than two years before a proposal for settlement was advanced by Mr. Allen. Contrary to what is stated by defence counsel, there is no evidence that Mr. Allen hid the limitation defence from the adjuster, and indeed it was plead when the defence was filed.

[38] In defence counsel's written submissions to the Court of September 22, 2020, she wrote:

> On June 19, 2017…Ms. MacDonald (adjuster) requested a copy of the Statement of Claim. Her request would be repeated by phone on July 26, 2017 (at which time Ms. MacDonald indicates in an email she was advised that the action was filed on time, and by email on August 4, 2017 and August 18, 2017.

[39] The Plaintiffs' counsel disputes the statement that Ms. MacDonald was advised by Mr. Allen in an email after July 26, 2017 that the action was started on time. The Court notes that no such email is in evidence. The only email in evidence relating to the action being started on time is Mr. Allen's November 9, 2016 email

to Ms. MacDonald, which was sent after he had filed the original action, but before he learned that that filing had been rejected.

[40] Defence counsel also submitted that the Court should consider the public perception of the rule of law and the administration of justice. She argues that allowing the Plaintiff to pursue her claim in a particular manner and then "take a new position 1335 days later (calculated from October 26, 2016 when the limitation expired to June 22, 2020 when the within motion was filed), and to ignore the actions of her counsel to actively conceal the deficiency from the Court, counsel and the Defendant, bring the administration of justice into dispute."

[41] If the public perception should be considered, this Court is of the view that the public perception would be that it would be unjust for a Plaintiff to lose a cause of action because of an error on the part of her lawyer in naming <u>another party</u>.

[42] Defence counsel's reference to Mr. Allen's active concealment of the deficiency to the Court is simply wrong. The Court is well aware from the Court file and the evidence on this motion, what steps Mr. Allen took or did not take. There is no evidence that he concealed relevant evidence from the Court.

[43] Defence counsel, Ms. Richards, was appointed in the fall of 2019, at which point she received the entire file. She was well aware of what was happening.

[44] The Defendant also knew what was going on in December 2016 and July 2017. Specifically, the Defendant knew the action was filed because Mr. Allen wrote to her on November 9, 2016 in that regard, before he knew that the prothonotary had rejected the filing. Then, in the summer of 2017, Mr. Allen sent adjuster Ms. MacDonald a copy of the December, 2016 Notice of Action and Statement of Claim. That was two years before a proposed settlement or a defence was required.

[45] It is true that Mr. Allen did not respond with alacrity to requests made by the adjuster for a copy of the Notice of Action. However, he did so well before taking any actions to attempt to settle the claim. Before the Defendant was required to respond to the claim, the adjuster knew that the initial filing was rejected, that a new action was started, and the reason for doing so. Throughout, Mr. Allen and Ms. MacDonald continued to deal with each other as to the merits of the claim. It is correct, as argued by Ms. Richards, that in doing so, the Defendant was not waiving its limitation defence. However, to suggest that Mr. Allen actively concealed the deficiencies from the Defendant, the Court and counsel is simply not borne out by the evidence.

<u>The Application of Rule 2.02</u>

[46] As noted earlier in this decision, Defence counsel's main argument in opposition to this motion, is that the Plaintiff has not brought herself within the requirements for relief mandated by Rule 2.02. Defence counsel argues that litigants must be able to rely upon the Rules, and that upholding the integrity of the Rules in this case should lead to the dismissal of Ms. Cutcliffe Kymlicka's action.

[47] Defence counsel points to Rule 2.02(3) which states that it is not in the interest of justice to set aside a proceeding made after an undue delay by the party who makes the motion or after that party takes a fresh step in the proceeding.

[48] Ms. Richards argues that in November 2016 when Mr. Allen became aware of the rejected October 26, 2016 filing, rather than taking steps to correct the error, he took "a fresh step in the proceeding" by filing a new action, which she argues left "the first one in place and ignored its existence."

[49] Ms. Richards argues that Mr. Allen's "attempt now to correct the initial pleading 1335 days after he first intended to file it must be considered an "undue delay" within the meaning of Rule 2.02(3).

[50] Ms. Richards also argues that filing a new Notice of Action after the limitation had expired "and proceeding as if the first one never existed is surely taking a 'fresh step'." As such, Ms. Richards says that the saving provision of Rule 2.02 is not available.

[51] Ms. Richards argues that the first and second actions are all one proceeding. She refers to Rule 94.10 wherein the definition of a proceeding is as follows:

> "proceeding" means the entire process by which a claim is started in, and determined by, the court, such as an action, application, judicial review, or appeal.

[52] Ms. Richards submits that the definition of proceeding is the entire process whereby a claim is advanced, and includes the first and second notices and statements of claims. She argues that both are one proceeding.

[53] Defence counsel also refers to the definition in Rule 94.10 of "step in a proceeding" which provides:

> "step in a proceeding" means an act in a proceeding required or authorized by a Rule or order, such as filing a document, conducting a discovery, or obtaining execution;

[54] This Court finds that pursuant to Rule 2.02(2)(a) or (b) a judge may excuse compliance under Rule 2.03 or permit an amendment or grant other relief to correct the irregularity without considering Rule 2.02(3). Rule 2.02(1) by way of

introduction states that a failure to comply with the Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.

[55] This Court finds that the "interests of justice" consideration specifically applies to Rule 2.02(2)(c). The words "if it is necessary to do so in the interests of justice", follow the comma after "set aside all or part of a proceeding, step, document, or order", thereby modifying that preceding clause.

[56] This is not to say that a Court should not consider the interests of justice when considering Rule 2.02(2)(a) and (b), but the "interests of justice" argument is not caught by the limiting language of Rule 2.02(3). The Court can look at all of the circumstances, including the interests of justice generally, in applying Rule 2.02(2)(a) and (b) in exercising the Court's discretion.

[57] If Rule 2.02(3) is applicable, this Court rejects the Defence argument that both the first and second filings are the same proceeding.

[58] The definition of "proceeding" is the entire process by which a claim is started in, and determined by the Court.

[59] In this case, there were two claims "started in the Court" – the first on October 26, 2016 and the second on December 8, 2016. The attempted start of the proceeding

October 26, 2016 died on the vine, because it was not accepted for filing. The second claim of December 8, 2016 was started with a new named party, i.e. the correct naming of the minor, Nik Cutcliffe Kymlicka. Those are two separate claims and not the same proceeding.

[60] This finding also affects the definition of a "step in a proceeding". The acts in the second proceeding are not acts in the first proceeding. Nor was there any undue delay in the second proceeding. Accordingly, if Rule 2.02(3) applies, there has been no undue delay, or steps taken when counsel knew about an irregularity. Accordingly, the interests of justice has not been impacted.

Conclusions

[61] This Court finds that the Plaintiff Karen Cutcliffe Kymlicka is entitled to the relief sought pursuant to both Rule 2.02(2)(a) and (b). Her claim was filed on time, but rejected because of Mr. Allen's error in naming another party – her minor son. It would be an injustice in all of the circumstances for her action not to be heard on the merits, especially in circumstances where the Defendant has led no evidence to suggest that it is prejudiced in any way by having to defend her claim on the merits.

[62] Accordingly, the date of issue of the Notice of Action and Statement of Claim originally filed is amended *nunc pro tunc* to October 26, 2016.

[63] Further, I find that there has not been any undue delay on the part of the Plaintiff in advancing the second filings. Nor have fresh steps been taken in that proceeding while knowing about an irregularity. The irregularity was in the first proceeding.

[64] The Plaintiff Karen Cutcliffe Kymlicka is entitled to her costs on this motion. If counsel cannot agree on costs, the Court will accept written submissions on costs within thirty calendar days of this decision.

Smith, J.