IN THE SUPREME COURT OF NOVA SCOTIA
Citation: A.J.M. v. Children's Aid Society of Cape Breton, 2005 NSSC 101

Date: 20050331
Docket: S.N. 101119
Registry: Sydney

Between:

A. J. M., and I. A.
M., an infant, by her mother and joint
custody Guardians ad Litem, E. E.
S. and A. J. M.

Plaintiffs

and

The Children's Aid Society of Cape
Breton, and Frank Sampson, and
Hildegarde O'Neill, and Melina MacLeod

Defendants

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: March 15, 2005, in Sydney, Nova Scotia

Oral Decision: March 31, 2005
Written Release: May 4, 2005

Counsel: Christopher Conohan for the Plaintiff
A. J. M. in Person

By the Court: (Orally)

[1] This is an application by which the defendants seek a dismissal of this action for want of prosecution, pursuant to *Rule 28.13* of the *Civil Procedure Rules*. The style of cause reads A. J. M. and I. A. M., an infant by her mother and joint custody, guardians ad litem, E. E. S. and A. J. M.. I am satisfied that the only plaintiff in this matter is A. J. M., notwithstanding his interest in joining the infant, he did not proceed pursuant to *Rule 6* of the *Civil Procedure Rules***,** and nor has E. E. S. taken any action to have herself declared guardian ad litem pursuant to *Rule 6*. So it is A. J. M.'s action as Plaintiff. The defendants are the Children's Aid Society of Cape Breton, Frank Sampson, Hildegarde O'Neill and Melina MacLeod. And as indicated, it is at this point, an application to dismiss brought by the defendants.

[2] The history of the matter is set out in the affidavit of the defendants' counsel, Philip Chapman. That affidavit was dated back on the 24th day of September, 2004. I am satisfied that the affidavit is accurate on the points that I will cite. I'm going to cite from it so that the history of the matter is set out, will be on record. In that affidavit, paragraph two Mr. Chapman says:

2. This matter involves an action that was commenced on October 7th, 1994 by the plaintiff, A. J. M.. He alleges that the Children's Aid Society of Cape Breton and certain of it's employees acted improperly in reference to proceedings in the Family Court that took place in the years 1992, 1993.

[3] I cite from paragraph four of Mr. Chapman's affidavit:

4. After service of the Originating Notice and Statement of Claim upon the defendants, the following steps took place in reference to the filing of pleadings. On October the 13th, 1994 there was a filing of defence by George Khattar, Q.C.

[4] So a defence was filed in October of 1994:

November the 1st of 1994, the defendants filed a Demand for Particulars. January 11, 1995 an Order requiring that the plaintiff file a reply to the Demand for Particulars was obtained. January 31st, 1995, the plaintiff files a reply to the Demand for Particulars.

5. I was then retained to act on behalf of the defendants and accordingly filed a Notice of Change of Solicitor on June 16, 1995. That Notice of Change of Solicitor was forwarded to A. M. June, 1995 and Mr. M. acknowledged receipt of same by correspondence dated June 26, 1995.

6. During the balance of 1995, I had two telephone discussions with A. M. regarding this claim. During that time, I advised Mr. M. of his obligation to file a List of Documents in the action and was advised by Mr. M. that he had in his possession audiotapes containing taped telephone conversations with the Defendants regarding this matter. I requested that Mr. M. compile those audiotapes and file his List of Documents.

7. By letter dated March the 19, 1996, ... Mr. M. wrote me to indicate that he was then beginning to prepare his List of Documents.

8. After receiving his letter of March 19, 1996, I heard nothing further from Mr. M. until he called my office April 1, 1998. A notice had been issued by the Supreme Court under Rule 28 requiring that he [meaning Mr. M.] file a Notice of Intention to Proceed and he called my office [which is Mr. Chapman speaking] to advise that he had filed a Notice of Intention to Proceed. [Obviously in response to the Rule 28 Notice.]

9. In response to his call to my secretary, I wrote Mr. M. on April 1, 1998 requesting that he forward a copy of all of the audiotapes in his possession and any documents that he had in connection with the matter... I also received from Mr. M. a letter dated April 1, 1998 again advising that he intended to file his documents then produce the cassette tape recordings he advised that were in his possession.

10. In response to Mr. M.'s letter, I wrote him on April 3, 1998 explaining the process of filing a List of Documents.

11. After a further period of inactivity, I wrote Mr. M. on November the 23, 2000 to advise that I would be in Sydney on November 30 and December 1, 2000 and asked whether he wished to meet to discuss the claim. Mr. M. called and agreed and I accordingly met with him on November the 30. We discussed a possible resolution of the claim, but nothing came to fruition: As a follow-up to that meeting, I wrote Mr. M. on April 5, 2001 to advise that I wanted to set the matter down for trial, but before doing so, requested that he advise whether he wanted to proceed to discoveries... After a further period of delay, I was again contacted by Mr. M. in December, 2001 and at his request, a meeting took place with him to discuss possible resolution of the claim, but again, no resolution was achieved.

12. The matter then remained dormant until November 2003. At that time, I had a telephone conversation with Mr. M. to again request that he finalize a List of Documents. As a result of that conversation, I received a letter from him on November the 30, 2003 advising that he would be away in [...] until May the 21, 2004 and that upon his return, he would file a List of Documents as I had been requesting... In response to his letter ,I wrote

> Mr. M. on December the 3, 2003... in which I advised him that I intended to make an application to dismiss the action for want of prosecution.

[5] That was Mr. Chapman's letter to Mr. M. of December the 3rd, 2003.

[6] Mr. Chapman ends the affidavit, paragraph 13 by stating:

> 13. Since forwarding my letter of December 3, 2003, I have not heard from Mr. M. and this matter has proceeded no further. I accordingly depose this my Affidavit in support of an application...

[7] And that affidavit was, I repeat, dated back on the 24th day of September, 2004.

[8] I am satisfied it reasonably sets out the history of the matter up to that time.

[9] Let me make reference to *Rule 28.13* for record purposes, *Rule 28.13* reads:

> Where a plaintiff does not set a proceeding down for the trial, the defendant may set it down for trial or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just."

[10] 'May', a discretionary process.

[11] Mr. M. says, in response to the application, a couple of things of note, a couple of things that I want to make sure the record reflects. In response to the plaintiff's application, he claims that he has responded when ordered to by the court. That he does respond to court orders and he says, I'm making reference to his affidavit of March the 10th, 2005, at paragraph 7. This

information contained in that paragraph was subsequently testified to by Mr. M. at the application hearing. In paragraph 7 of his affidavit Mr. M. says:

> That at all times throughout the course of this litigation, as well as currently, I was and am under the care of a psychiatrist, [and he names that psychiatrist for treatment of schizophrenia] for which I am prescribed a daily anti-psychotic medication and that as a result of this medical diagnosis I am claiming a legal disability.

[12] He testified in the same manner at the hearing and said at that time that his medical circumstances cause him to, and I quote, "have problems with the passage of time", and he gave a description of his medical difficulties as an explanation for why he has taken this period of time to prosecute this matter. He did not produce expert medical evidence, no evidence that any application has ever been made on his behalf for the appointment of the litigation guardian. But he does want this Court to understand that he has a disability and claims that that is the reason, a reason, substantial reason for why we are here today in relation to the prosecution of this matter, or lack thereof.

[13] I note that at the hearing, and I certainly don't mean it to be patronizing, just as a matter of note, what judges do when we listen to people; I note that at the hearing the plaintiff presented as a very intelligent, articulate individual. Evidence was produced that he has represented himself in other litigation

since the commencement of this action, the suggestion by defendants' counsel, being that he is both knowledgeable and able when he pursues these other matters.

[14] I do not find that the plaintiff has been medically unable to proceed with this matter, nor do I find, on the basis of the limited evidence produced, that he is disabled in any manner that effects his ability to have prosecuted this matter more diligently. I find rather, that the evidence discusses that he has been lax in his prosecution of the matter. This matter is ten and a half years old.

[15] I find, on the totality of the evidence provided, that the proceeding has been delayed to an extent that is inordinate and inexcusable, for no justifiable reason. I am going to make a reference to some case law, particularly the *Martell v. Robert McAlpine Ltd.* which is the leading case on dismissal for want of prosecution in the Province of Nova Scotia, (1978) 25 N.S.R. (2d) 540. I am speaking now from the decision of Mr. Justice Cooper, Justice of the Appeal Court at page 445, para. 17 Justice Cooper said:

> I now direct my attention to the principles that should govern the exercise of a judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should be granted.

[16] He is speaking to principles.

> There must first have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers...

[17] First point, first aspect. Inexcusable, inordinate delay. Secondly, as put by Lord Justice Russell in *William C. Parker v. Ham & Sons Ltd.*, [1972] 3 All E.R. 1051 at page 1052, this is Mr. Justice Cooper citing Lord Russell:

> ...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...

[18] So it is a two part test, one requires a finding of "inordinate and inexcusable" delay and two, a finding of prejudice, substantial risk that a fair trial cannot be had or is likely to cause or to have caused serious prejudice to the defendants.

[19] He went on to cite Supreme Court Practices, 1976 and refers to *Allan v. Sir Alfred McAlpine & Sons* Ltd., [1968] 1 All E.R. 543. The cite that Justice Cooper uses from Lord Denning is at page 547:

> The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away...

[20] In that same case, *McAlpine*, *supra*, MacKeigan, chief Justice of the Appeal Court concurring with Cooper, Justice of the Appeal, said at page 542, para. 2:

> The law is clear that when a Plaintiff has delayed so long...

[21] And he says in that instance, nearly ten years.

> ...he cannot successfully resist an application to have the action dismissed for want of prosecution unless he can satisfy the court and the onus is on him to do so, that the defendant has not been seriously prejudiced by witnesses becoming unavailable or their recollections becoming 'eroded'...

[22] So, Justice MacKeigan is saying that, as to second part of the two part test from *McAlpine*, *supra*, when the delay is inordinate and inexcusable, there is a shifting burden to the plaintiff or the party seeking that the matter remain on the trial docket, the trial list, that there has not been prejudice to the other side.

[23] Mr. Justice Chipman of our Court of Appeal in *Saulnier v Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, Chipman, Justice of the Appeal Court confirmed the Cooper test in *Martell* on the question of onus at page 430. This is Mr. Justice Chipman speaking to the onus, I quote:

> All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so

> inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.

[24] And finally in *Moir v Landry* (1991) 104 NSR (2nd) 281 (N.S.C.A.), this was a case involving a three year delay. Mr. Justice Hallett, of the Court of Appeal, writing for the Court, noted that the onus to establish prejudice falls on the defendant except in cases of unusual long delay, such as the ten years in *Martell*. Justice Hallett said at page 284 in *Moir v Landry*, *supra*, and I quote from Justice Hallett:

> A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.

[25] This is one of those cases. I am satisfied that as a result of the inordinate, inexcusable, extreme delay in excess of ten years in relation to this matter, that I can presume serious prejudice to the defendants. I do not find that the plaintiff has satisfied the onus to establish that no such prejudice exists.

[26] The evidence that Mr. M. believes that the defendants are still available and that they should be able to respond to this matter, does not tell the Court anything about how these defendants will be able to respond to allegations

of this nature about events taking place after such a substantial period of time.

[27] And I will say this, firstly let me say that to deprive Mr. M. of his ability to have his day in court in this matter, is a dramatic, draconian action on the part of the court and I do not for one moment exercise that discretion without understanding the dramatic ramifications.

[28] But I will say this also; there are real people on the other end of this matter; people who have had these allegations hanging over their heads without ever having been given an opportunity to respond to the allegations, for too long. To allow this action to go forward, after this substantial period of time, would be to do a grave injustice to the defendants.

[29] I am, of course, and I will repeat, mindful of the fact that a dismissal will deny this plaintiff his day in court, but I think in these circumstances that action is justified.

[30] The application to dismiss for want of prosecution pursuant to *Rule 28.13* is granted. Mr. M. should know that he will have the opportunity to appeal from this decision, should he wish to do so and he should, if he wishes to do so, take that action forthwith.

[31] No costs in this matter.

Chief Justice Kennedy