Court of Queen's Bench of Alberta

Citation: Haymour v Condominium Plan No 802 2845, 2016 ABQB 393

Date: 20160712
Docket: 1503 04312
Registry: Edmonton

Between:

Anis Haymour

Plaintiff

- and -

The Owners Condominium Plan No. 802 2845, Jeff Gunther, Breezy Bay Holdings Inc., Consolidated Civil Enforcement Inc. Brian S. Sussman, Biamonte Cairo Shortreed LLP

Defendants

Reasons for Judgment
of the
Honourable Madam Justice J.M. Ross

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[1] The Defendants in this action (other than the Defendant Jeff Gunther, who I am advised was not served with the Statement of Claim) bring this application to summarily dismiss the Plaintiff's claims against them.

[2] There is a lengthy history to this matter, which commenced with an action brought by The Owners: Condominium Plan No. 802 2845 [the Condo Corporation] against the Plaintiff [Haymour] (Action 1303 03371 [the Condo Corporation Action]). In brief, the matter arose from a dispute between Haymour and the Condo Corporation regarding outstanding condominium fee arrears. The Condo Corporation obtained summary judgment against Haymour and eventually sold the condominium unit owned by him in enforcement proceedings. The purchaser of the condominium unit was Breezy Bay Holdings Inc. [Breezy Bay]. Haymour brought an application to set aside the summary judgment and the sale of the condominium. His application was dismissed on May 30, 2014 [the Clackson Order].

[3] Haymour filed a caveat against Breezy Bay's title to the condominium unit. Breezy Bay commenced an application to reduce the time for taking proceedings on the caveat. After repeated applications and cross-applications, I heard the matter on November 13, 2014 and issued a written decision on December 10, 2014: ***The Owners: Condominium Plan No. 802***

22845 v Haymour, 2014 ABQB 758 [the Ross Decision]. The Ross Decision includes a lengthy summary of the protracted proceedings to that date.

[4] I dismissed Breezy Bay's application. While I permitted Haymour to bring an action to prove the caveated interest in land, I noted that his conduct in the court proceedings had played a significant role in the sale of the condominium unit. As I stated in the Ross Decision at paras 48-49:

> [48] Haymour has been his own worst enemy in these proceedings. His approach to service is a predominant problem. The address for service which he provided, the Post Box and fax number, does not respect the intent of the Alberta Rules of Court, which contemplate in Rule 11.15 that service on an address for service may be made by leaving a document at the address or sending it by recorded mail to the address. Haymour has been made aware on numerous occasions of service difficulties with this address for service and has refused to provide a physical address. He claims that service under the terms of the substitutional service order of November 8, 2013 at the 166A Avenue address, is not reaching him, but has not explained why that is the case when the residence is owned by him and apparently listed on his driver's license. He has challenged orders claiming lack of notice, but has not provided details as to how or when these orders came to his attention. Even his own counsel was unable to serve him. Over and over again, Haymour has attempted to use the Rules of Court to frustrate service, rather than to facilitate it.
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> [49] In addition to service issues, Haymour has been held in civil contempt twice. He has failed to purge his contempt. He has repeatedly sought and obtained adjournments of applications based on representations to the Court that he is obtaining counsel, and has repeatedly failed to do so. He has brought the same application on repeated occasions on very short notice, to the point that he was made subject to an order prohibiting filing further applications without leave of the Court.

[5] Given this background, I placed conditions on the action on the caveat, as set out in the Ross Decision at paras 72-75:

> [72] I conclude that Master Breitkreuz correctly set aside Master Schulz's Order and reinstated the Second Caveat. Haymour should have the opportunity provided in section 138 of the Land Titles Act to take proceedings to prove the interest in land asserted in the Second Caveat. However, in view of Haymour's prior conduct in these proceedings, that opportunity comes with conditions.
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> [73] Counsel for Breezy Bay is directed to prepare the Order resulting from this decision. Rule 9.4(2)(c) is invoked in relation to Haymour. I will sign the Order personally. The Order will provide that it may be served substitutionally by ordinary mail at both the I 66A Avenue address and the Post Box, with service deemed effective seven days after mailing. The Order will state that Haymour has 60 days from service of the Order to take proceedings to prove the interest claimed in the Second Caveat. Given the complexity of a constructive trust claim and of the facts that may be relied on in support, I am directing that the proceedings should take the form of an action commenced by Statement of Claim,

> rather than an application. The normal filing fee will apply. If Haymour is represented by counsel in the action, the usual rules regarding address for service will apply. If Haymour is self-represented in the action, he is required to provide as his address for service a physical address where documents may be either mailed or left for service. If Haymour fails to commence an action within the stipulated time period or fails to provide an address for service as stipulated herein, the Second Caveat will be discharged.
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> [74] The action to be commenced must include a claim in respect of the interest in land that is the subject of the Second Caveat. Apart from that, the content of the action will be governed by the Rules of Court. The action may include additional claims and parties, subject to the Rules regarding joinder.
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> [75] I have been appointed as case manager of the within proceeding. If Haymour commences an action as described, that action will be included in the scope of the case management. The parties will be required to comply with my case management directions. Haymour is cautioned that a failure to do so may result in the dismissal of the action and discharge of the Second Caveat.

[6] At the time that I issued the Ross Decision, Haymour had appealed the Clackson Order to the Court of Appeal. That appeal was struck on December 18, 2014 and deemed abandoned on June 18, 2015. Haymour's application to restore his appeal was dismissed by Justice Wakeling on July 9, 2015: ***The Owners: Condominium Plan No. 802 22845 v Haymour***, 2015 ABCA 234 [the CA Decision]. Justice Wakeling held that Haymour had not explained the reason for delay in prosecuting the appeal, and that his appeal had no reasonable prospect of success. Schedule A to the CA Decision provides a detailed Timeline of Events leading to the application before the Court of Appeal.

[7] The within action was commenced on March 20, 2015. It was not brought in compliance with my directions in the Ross Decision. Haymour is self-represented, and was required to provide as an address for service "a physical address where documents may be either mailed or left for service." The reason for this requirement was that the post box and fax number he had previously provided as an address for service had led to numerous difficulties with service. The address for service provided by Haymour on the Statement of Claim is: "In care of Anis Haymour 31141, 16504 – 95 Street Edmonton, Alberta T5Z 3P3 Telephone/Fax 780 457-1729." While not indicated, this is in fact "a rented mailbox in a Canada Post outlet in Shoppers Drug Mart at 16504-95 Street, Edmonton, Alberta" (Affidavit of Greg J. Biamonte dated May 12, 2015).

[8] Statements of Defence were filed by the Defendants as follows:

April 27, 2015: Sussman and Biamonte Cairo Shortreed LLP [Sussman and the Law Firm]

April 28, 2015: Breezy Bay;

May 6, 2015: Consolidated Civil Enforcement Inc [Consolidated];

May 8, 2015: Condo Corporation.

[9] The court file is replete with Affidavits of Attempted Service. Canada Post tracking indicated that documents sent to the address for service were not successfully delivered.

Attempts to serve by fax at the number provided were also unsuccessful. Efforts to serve at other locations believed to be associated with Haymour were undertaken without success. On June 18, 2015, Master Smart granted a Substitutional Service Order providing that documents served at the address for service by regular mail would be deemed to have been received 7 days after posting.

[10] The Defendants set the within applications for hearing on May 11, 2016. Haymour appeared on that date, apparently having learned of the application by coincidence when he got in touch with the Court to schedule a case management meeting. Haymour denied being served with application documents, claimed to be ill, and sought an adjournment. I granted an adjournment to June 3, 2016, a date proposed by Haymour, on a number of conditions including the payment into court of $6000 in respect of costs and filing a formal notice of address for service that is not a post office box, where he can be personally served with Court documents. Deadlines were also provided for Haymour to file any affidavit or brief that he intended to rely on at the hearing.

[11] The costs were not paid; the notice of address for service was not filed; no affidavit or brief was filed. Haymour did not appear on June 3, 2016. By correspondence dated May 30, 2016, he sought a further adjournment, due to a family emergency and continuing illness. He did not provide details or evidence of either. His request was denied at the hearing for reasons stated on the record.

[12] There are four applications for summary dismissal. They are addressed separately below.

Application of Sussman and the Law Firm

[13] The application is brought on the grounds that the claim against Sussman and the Law Firm is an abuse of process, and that there is no cause of action against these Defendants.

[14] Sussman and the Law Firm acted as legal counsel for the Condo Corporation. They never represented Haymour. In the Statement of Claim Haymour raises procedural complaints about the Condo Corporation Action that were previously raised by him in his application in the Condo Corporation Action. His application was dismissed by the Clackson Order, the appeal of which was dismissed in the CA Decision. The claims against Sussman and the Law Firm are an attempt to relitigate those matters and therefore an abuse of process: ***Ernst & Young v Central Guaranty Trust Co***, 2006 ABCA 337, at para 52; ***Burcevski v Ambrozic***, 2011 ABCA 178, at para 9; leave to appeal to SCC refused, 2011 CarswellAlta 2054.

[15] In view of this determination, it is unnecessary to consider the second ground raised, that there is no cause of action against Sussman and the Law Firm.

[16] The claims against Sussman and the Law Firm are dismissed.

Application of Consolidated

[17] Consolidated carried out enforcement proceedings on the instructions of Sussman and the Law Firm, on behalf of the Condo Corporation. All proceedings taken by Consolidated were pursuant to the *Civil Enforcement Act* or by Orders of the Court in the Condo Corporation Action.

[18] The Consolidated application is brought on the same grounds as the application of Sussman and the Law Firm. The claims against Consolidated, like the claims against Sussman and the Law Firm, are based on procedural complaints raised and dismissed in the Condo Corporation Action.

[19] The claims against Consolidated constitute an abuse of process and are dismissed on that ground.

Application of the Condo Corporation

[20] The Condo Corporation was represented by Sussman and the Law Firm in the Condo Corporation Action. Claims in the Statement of Claim as against the Condo Corporation that are based on alleged procedural shortcomings in the Condo Corporation Action are dismissed as an abuse of process.

[21] There are also allegations in the Statement of Claim that Haymour had attempted to remit condominium fees to the Condo Corporation before the Condo Corporation Action, and that he in fact paid fee arrears during the course of the Condo Corporation Action (there is no suggestion, however, that he paid the costs amount of the judgment against him). These are also matters that could have been, and to at least some extent were raised in the Condo Corporation Action. These issues were determined as between Haymour and the Condo Corporation in that Action. It would not only be an abuse of process, but contrary to the principle of *res judicata*, to permit their relitigation.

[22] The claims against the Condo Corporation are dismissed.

Application of Breezy Bay

[23] The claims against Breezy Bay, and Breezy Bay's application for summary dismissal, raise somewhat different issues.

[24] In addition to procedural objections to the sale process, the Statement of Claim alleges that Breezy Bay is "closely connected" to Jeff Gunther, who was a member of the board of directors of the Condo Corporation. It is alleged that Jeff Gunther purchased the condominium unit on behalf of Breezy Bay, and that "Breezy Bay was used as proxy to unjustly transact a non-arm's length sale, without required court approval to a purchaser that is not a bona fide purchaser, for an amount significantly below value".

[25] Breezy Bay's application is supported by the Affidavit of Jamie Lott, shareholder and officer of Breezy Bay. He explains the circumstances of the purchase in paras 6 through 10 of the Affidavit:

> 6. The condominium property that is the subject of this action and which was the subject action of Queen's Bench Action Number 1301 03371 was listed for sale pursuant to an Order of the Alberta Court with a Court approved list price of $155,000. Attached to this my Affidavit and marked as Exhibit "A" is a copy of the listing of the subject property with the stated list price of $155,000.
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> 7. On or about December 30, 2014, an offer was advanced on behalf of Breezy Bay (through Jeff Gunther) to purchase this property with a proposed purchase price of $145,000 which equated to an offer to Court approved list price of 94%.

> Attached to this my Affidavit and marked as Exhibit "B" is a copy of the Real Estate Purchase Contract in respect of this property.
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> 8. The offer to purchase in the sum of $145,000 was made conditional upon a property inspection to the buyer's satisfaction. This condition was set out in paragraph 8.1(c) of the Real Estate Purchase Agreement attached hereto as Exhibit "B".
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> 9. After the Real Estate Purchase Contract was signed, we were unable to gain access to inspect the property in order to satisfy condition 8.1(c). In light of the fact that Breezy Bay was purchasing the property "sight unseen", the offer to purchase price was subsequently reduced to $135,000 to allow for a contingency in respect of any repairs that might be required if the transaction proceeded. As a consequence, the property inspection condition was removed by the purchaser.
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> 10. Section 8.2 of the Real Estate Purchase Contract provided the seller's conditions. These seller conditions addressed the need for the sale to be approved in accordance with the provisions of the Civil Enforcement Act, including the need for Court approval. I understand that the $135,000 offered was $5,000 higher than the stipulated minimum sale price.

[26] Haymour has not filed an affidavit in response to the Breezy Bay Application.

[27] To the extent that the claim against Breezy Bay is alleged to arise from the sales process that was approved by the Court in the Condo Corporation Action, it is an attempt to relitigate these issues and therefore an abuse of process.

[28] With regard to the allegation that the sale was for less than market value, Breezy Bay has responded in substance to this allegation. The original offer from Breezy Bay was for 94% of the list price. The original offer was reduced because the purchaser was unable to gain access to the property, and thus was forced to purchase it "sight unseen". The list price and the sale price were approved by the Court. Haymour's opportunity to challenge the Court-approved prices was in the Condo Corporation Action. Without any evidence that Breezy Bay or anyone else did anything improper outside the court process, this aspect of the claim against Breezy Bay is simply another attempt to relitigate the issues already dealt with in the Condo Corporation Action.

[29] Breezy Bay also seeks dismissal of the claims against it due to undue delay. Given my conclusion that the claims constitute an abuse of process it is not, strictly speaking, necessary to deal with this argument. However, in view of the nature and cause of the delay that has occurred in this litigation, I choose to do so.

[30] Rule 4.31 of the *Rules of Court* provides"

Application to deal with delay

> **4.31(1)** If delay occurs in an action, on application the Court may
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> (a)dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
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> (b)make a procedural order or any other order provided for by these rules.

> **(2)**Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

[31] Rule 4.31 can address delay less that the timeframe of 3 years set out in Rule 4.33. The Court is to consider the established three part test: is the delay inordinate; is it inexcusable; and has it resulted in serious prejudice. However, the emphasis under Rule 4.31 is on prejudice: ***Franchuk v Schick***, 2013 ABQB 532, at paras 18-20, and cases cited therein.

[32] Is there inordinate delay?

[33] The Statement of Claim was filed on March 20, 2015. There is no Affidavit of Service on the Court file in relation to service of the Statement of Claim. Statements of Defence were filed between April 27 and May 8, 2015. There were numerous attempts at service at the Plaintiff's address for service and other locations. In his June 18, 2015 Order, Master Smart deemed service of the Statement of Defence of the Condo Corporation to be effective on May 6, 2015. On July 2, 2015, Haymour was personally served at the Law Courts with all four Statements of Defence.

[34] Haymour has not served an Affidavit of Records on the Defendants. Rule 5.5(1) required that he do so within 3 months of being served with the first Statement of Defence.

[35] Since serving the Statement of Claim, over a year ago, Haymour has done nothing to advance his action.

[36] Delay is inordinate when it exceeds what is reasonable having regard to the nature of the issues in the action and the circumstances of the case: ***Franchuk v Schick***, at para 22, and cases cited therein.

[37] The delay in serving an Affidavit of Records is not reasonable, in view of the 3 month time limit provided in Rule 5.5. There is nothing to suggest that a longer period would be required for Haymour to prepare an Affidavit of Records. He presumably has most, if not all, of the relevant records in his possession, given the close connection between this litigation and the prior Condo Corporation Action.

[38] Taking no steps to advance his action over the last year is also not reasonable, particularly given the history of delay that Haymour was responsible for in the Condo Corporation Action.

[39] It is also noteworthy that there was delay in the filing of the Statement of Claim. The Ross Decision provided that Haymour should take proceedings within 60 days from the service of the Order. It also provided that the Order would be served substitutionally by ordinary mail at the Post Box (his address for service) and at another address, with service deemed effective 7 days after mailing. On March 5, 2015, Breezy Bay applied for discharge of the caveat on the ground that no proceedings had been taken within 60 days of service of the Order. Haymour appeared at the hearing and advised that he had received neither the Order nor the Ross Decision. He was given an extension until March 20, 2015 to commence this action, on the condition that he deliver a certified cheque in the amount of $5000 payable in trust to the solicitors for Breezy Bay, to pay solicitor and clients costs as described in the extension Order, with any remaining funds to be held as security for costs of the within action. Notwithstanding this further evidence of the consequences of service issues and resulting delay, when Haymour filed the Statement of Claim, he failed to comply with the direction to provide a physical address for service where documents could be mailed or left for service.

[40] In the Court of Appeal Decision issued on July 9, 2015, Justice Wakeling observed that, "Mr. Haymour's dilatory prosecution of his appeal has prejudiced the Respondent. It may reasonably expect that an appeal which the Rules deem to be abandoned may not be restored in the absence of compelling reasons. Finality is of value in the litigation process." Despite this further clear warning regarding the consequences of delay, in the nine months that ensued between the Court of Appeal Decision and this application, Haymour took no steps to prosecute his action.

[41] I conclude that the delay is inordinate.

[42] Is the delay inexcusable?

[43] Haymour has provided no evidence and no explanation for the delay, other than his statements in court that he did not receive documents and that he was trying to schedule a case management meeting.

[44] To the extent that he did not receive documents, this is completely due to his own actions in choosing an address for service where he could not be served by mail or personally, despite my directions otherwise. Of course, he did, in fact, receive the Statements of Defence, when they were served personally on him on July 2, 2015.

[45] As to his purported efforts to schedule a case management meeting, these seem to have been limited to leaving unspecified voicemail messages at the offices of the law firm representing Breezy Bay. A legal assistant with that firm has provided an affidavit detailing her extensive and unsuccessful efforts to respond to his voicemails. Further, case management of an action does not remove the obligations imposed by the Rules of Court and the responsibility of a plaintiff to advance the action.

[46] I conclude that the delay was inexcusable.

[47] Did the delay cause prejudice?

[48] Inordinate and inexcusable delay is presumed to have resulted in significant prejudice to the party bringing the application for dismissal of the action. In this case, there is further evidence of actual prejudice as Breezy Bay's title to the condominium unit has remained subject to Haymour's caveat.

[49] The claims against Breezy Bay are dismissed on grounds of delay, as well as abuse of process. Breezy Bay has also sought an Order directing the removal of all registrations made by Haymour against title to the condominium unit. That Order is granted.

Costs

[50] A number of the Defendants sought solicitor and client or enhanced costs against Haymour. They submit that Haymour's failure to comply with my direction regarding his address for service, and his failures to comply with court orders in the Condo Corporation Action, constitute positive misconduct deserving of enhanced costs.

[51] The costs awarded in this action should respond to Haymour's conduct in this action, not in the previous litigation. Haymour's failure to comply with my directions regarding the address for service does call for a costs consequence, however, I have already awarded enhanced costs for the adjournment of this application. Those enhanced costs stand. Costs occasioned by service problems will likely be reflected in disbursements to process servers, which Haymour is responsible for. In my view these costs consequences are a sufficient response to Haymour's conduct in this action. Having succeeded in their applications, the Defendants are entitled to costs for the application and action, however these costs (apart from the enhanced costs for the adjournment) will be governed by the tariff amounts in Schedule C.

Heard on the 3rd day of June, 2016.
Dated at the City of Edmonton, Alberta this 8th day of July, 2016.

J.M. Ross
J.C.Q.B.A.

Appearances:

Anis Haymour
Self-Represented Litigant
for himself

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