

COURT OF APPEAL FOR ONTARIO

CITATION: Erland v. Ontario, 2019 ONCA 689

DATE: 20190905

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Paciocco, Harvison Young and Zarnett JJ.A.

BETWEEN

Michael Erland

Plaintiff (Appellant)

and

Her Majesty the Queen in right of Ontario, City of Ottawa, R.W. Tomlinson Ltd.,
Rideau Valley Conservation Authority

Defendants (Respondent)

Tim Gleason, for the appellant

Derek V. Abreu and Trevor J. Buckley, for the respondent

Heard: August 13, 2019

On appeal from the judgment of Justice Calum U. C. MacLeod of the Superior Court of Justice, dated January 17, 2019, with reasons reported at 2019 ONSC 462.

REASONS FOR DECISION

A. OVERVIEW

[1] In July 2013, Michael Erland, the appellant, sued R.W. Tomlinson Ltd., the respondent, for damages relating to the flooding of his property. He also sued the Crown in right of Ontario, the City of Ottawa, and the Rideau Valley Conservation

Authority in the same action for contributing to the flooding. In June 2018, the appellant brought a motion for a status hearing under r. 48.14(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. He sought to extend the time to set the matter down for trial beyond its fifth anniversary, at which point the registrar would generally be required to dismiss the action for delay pursuant to r. 48.14(1). On January 17, 2019, after the status hearing, the motion judge dismissed the action pursuant to r. 48.14(7)(a), as he found that the appellant had not reasonably explained the delay.

[2] The appellant appeals the order dismissing his action. The heart of his argument is that while the motion judge articulated the correct test to be applied, he fell into error by applying a much more stringent test, misapprehending the evidence, ignoring relevant evidence, and drawing unreasonable inferences. He says that the motion judge did not consider the effect of a pending summary judgment motion and should have only required the appellant to explain the delay since September 19, 2016. The appellant also submits that the motion judge failed to adequately consider that the other defendants had consented to the action continuing on a proposed timetable.

[3] We would dismiss the appeal for the following reasons.

B. THE APPLICABLE LAW

[4] It is common ground that the motion judge correctly identified the applicable law. Subrules 48.14(5)-(7) provide that where the plaintiff seeks to extend the deadline to set an action down for trial, the plaintiff/moving party must show cause why the action should not be dismissed for delay. In order to meet this burden the plaintiff must prove that (1) there is an acceptable explanation for the delay and (2) that allowing the action to proceed would not cause the defendant(s) to suffer non-compensable prejudice: *Kara v. Arnold*, 2014 ONCA 871, 328 O.A.C. 382, at para. 8. This test is conjunctive.

[5] A motion judge's decision to dismiss an action for delay pursuant to r. 48.14(7)(a) is discretionary. In the absence of an error of law or principle or a palpable and overriding error of fact, this decision is entitled to significant deference on appeal: see *Kara*, at para. 8.

C. ANALYSIS

[6] The motion judge concluded that he would exercise his discretion to dismiss the action as the appellant had failed to establish an adequate explanation for the delay. He reviewed the various steps and delays in the litigation. He was acutely aware of the issues and the nature and details of this matter because he had been a regular (though not continuous) case management master and then judge on this file since 2014. He did not, as the appellant submits, conduct a "blaming"

exercise for the delay. In fact, he acknowledged that the respondent contributed to some of the delay, in particular, the “shockingly slow” pace of the summary judgment motion. Having found that the appellant had not shown an adequate explanation for the delay, the motion judge found it unnecessary to consider whether prejudice had been caused to the defendants as a result.

[7] The appellant relied principally on two factors to explain the delay in the action. First, he relied on the fact that his original lawyer had become ill, which necessitated him changing counsel. He argued that this contributed to the delay in advancing the litigation. The motion judge rejected this explanation, stating that he did not “regard the bald assertion that previous counsel was ill as an explanation when that counsel was bringing motions and appearing at case conferences.” The motion judge noted that “[i]n any event, the plaintiff has been represented since December of 2015 by highly competent counsel who is well aware of the steps needed to bring an action to conclusion.” The motion judge’s rejection of this explanation was clear and open to him on the record.

[8] Second, the appellant claimed that the respondent’s outstanding summary judgment motion had caused the delay in setting the matter down. The motion judge found that the summary judgment motion was not an adequate explanation for the delay because the appellant could still have set the action down for trial. He noted that “[u]nless it is done by agreement or order, it is unwise to effectively put an action on hold pending a potential summary judgment motion.” He was not

persuaded “that the plaintiff ha[d] made any reasonable effort to schedule discoveries or to accelerate the process.”

[9] The appellant argues that the motion judge erred in law by suggesting that he should have pressed ahead with scheduling discoveries in light of the pending summary judgment motion. We do not agree. First, as already noted, the motion judge considered the slow pace of the summary judgment motion. In the larger circumstances, he declined to give that factor much weight. Second, this was not a determination of law but rather a highly contextual and fact-specific determination of whether the appellant had met his onus of adequately explaining the delay. The motion judge’s conclusion that the delays related to the summary judgment motion did not adequately explain the delay in setting the matter down for trial was open to him on the record.

[10] The motion judge also considered the delay between October 2016 and December 2017, during which time the appellant failed to comply with an order to make further disclosure relevant to a limitations defence. The disclosure was ordered following a refusals motion argued on October 13, 2016. The appellant’s failure to comply was the subject of a further motion on December 19, 2017. While at this time the motion judge found that the appellant’s response was “disingenuous”, he declined to dismiss the action for breach of a court order and gave him one more opportunity to fulfill his obligations of disclosure. He did so specifically without prejudice to a motion to dismiss the action for delay.

[11] We do not accept the appellant's submission that the motion judge should have confined his inquiry to explanations for delay since September 19, 2016, when Master Champagne made an endorsement adjourning a summary judgment motion. In *Stokker v. Storoschuk*, 2018 ONCA 2, 140 O.R. (3d) 473, this court held that "[w]here delay has been addressed in a prior court order, or consented to, it is any subsequent delay that requires explanation": at para. 5. However, unlike *Stokker*, and the decisions it cites, the order made on September 19, 2016 neither addressed the overall delay in the action, nor was it a consent order from which it can be inferred that the parties were content with the pace of the litigation. Here, the order was focused on the contested question of whether a summary judgment motion should be adjourned in light of the timing of a refusals motion. The motion judge was therefore not required to focus only on delay that occurred after this order was made.

[12] Further, the motion judge did not err by dismissing the action as against all the defendants even though all but Tomlinson had consented to a timetable proposed by the appellant. The motion judge was alive to this fact and noted this in his reasons. There were crossclaims brought by all the defendants. While a timetable signed by all parties can provide relief from dismissal for delay when the requirements of r. 48.14(4) are satisfied, this does not mean that a timetable unopposed by some of the parties in any way binds the motion judge. When a

status hearing is convened pursuant to r. 48.14(5), as was the case here, the motion judge has clear discretion to dismiss the action for delay.

[13] The motion judge concluded that the appellant did not have an adequate explanation for the delay and exercised his discretion to dismiss the action. We see no basis for the intervention of this court. The motion judge considered the factual context, and was mindful of the complexity of the case and the conduct of the defendants, as he was required to be. He nonetheless found the explanations for delay to be incomplete and unconvincing, and hence that the appellant failed to meet his burden under r. 48.14(7). We are not persuaded that in applying the test the motion judge effectively required the appellant to show that he could not have moved the action forward. As we have said, the motion judge correctly articulated and applied the correct legal principles and his decision to dismiss the action was amply grounded in the record before him.

D. CONCLUSION

[14] The appeal is dismissed. Costs of this appeal are to be paid by the appellant in the amount of \$10,000 inclusive of applicable taxes and disbursements.


A. Harrison Young J.A.
B. Bennett J.A.