Date: 2007 09 26
Docket: No. 6101-02555

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LINDA DARLENE ROWE

Petitioner
(Respondent)

- and -

MICHAEL WILLIAM ROWE

Respondent
(Applicant)

Application to dismiss the action for want of prosecution. Application granted.

Heard at Yellowknife, NT, on September 24, 2007.

Reasons filed: September 26, 2007.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Petitioner: D. Jane Olson

Counsel for the Respondent: Katherine R. Peterson, Q.C.

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REASONS FOR JUDGMENT

[1] This is an application by the respondent to dismiss this action for want of prosecution. The respondent relies on the so-called "drop dead rule", whereby an action shall be dismissed if no step has been taken that materially advances the action for five years or more.

[2] The application is based on Rule 327(1)(b) of the Rules of Court:

> 327.(1) A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court ...
>
> (b) shall dismiss so much of the action or proceeding as relates to the applicant, where for five or more years no step has been taken that materially advances the action or proceeding.

[3] This rule, which came into force in 1996 as part of a comprehensive new set of Rules of Court, has been consistently interpreted as being mandatory. If no step has been taken for five years or more then the action must be dismissed: *Gorf Holdings Ltd.* v.*Treeshin*, [2002] N.W.T.J. No. 3 (S.C.); *Muckpaloo* v. *MacKay*, [2002] N.W.T.J. No. 10 (S.C.); *Kell* v. *Senych Estate*, [2003] N.W.T.J. No. 74 (S.C.).

[4] Prior to the enactment of this rule, the Rules of Court provided only a discretionary power to dismiss for delay in the prosecution of an action. If a party had not taken a step within a year of being entitled to do so, leave was required before the next step could be taken. If there was delay a party could apply to dismiss the action for want of prosecution. Absent inexcusable delay and proven prejudicecaused by the delay, the court could let the action proceed even after long periods of inaction.

[5] The present rule was enacted with the objective of encouraging the expeditious and efficient resolution of civil matters. It is similar to the rule in Alberta which also mandates dismissal after 5 years of inactivity. The Alberta Court of Appeal has had numerous occasions to comment on the application of their rule. In particular, the court referred to it as a "five-year clock", implying that once five years have passed, time has run out. While a defendant has the obligation of bringing the application to dismiss, all the plaintiff can do to avoid dismissal of the action is show that something was done to materially advance the action during the five-year gap: *Trout Lake Store Inc.* v. *Canadian Imperial Bank of Commerce*, [2003] A.J. No. 1151 (C.A.), at para. 24. The absence or presence of prejudice to a party is not a consideration, nor are the strength of the action and any justification for the delay: *Alberta* v. *Morash*, [2000] A.J. No. 41 (C.A.), at para. 5. The rule in Alberta, as in the Northwest Territories, makes no provision for any residual discretion on the part of the court to extend time or ignore the delay: *Petersen* v. *Kupnicki*, [1996] A.J. No. 862 (C.A.), at para. 11.

[6] One of the principles that is common to both the old and new rules, however, is that it is up to the plaintiff to keep the case moving. There is no duty on a defendant to move the action along in the face of delay on the part of the plaintiff: *Lethbridge Motors Co.* v. *American Motors (Canada) Ltd.* (1987), 79 A.R. 321 (C.A.), at para. 19.

[7] In the present case no one disputes the fact that there has been a delay in these proceedings of more than five years. The petitioner concedes as well that Rule 327(1)(b) is mandatory. She submits, however, that since this action was commenced prior to the enactment of the rule, this application ought to be governed under the former discretionary rule. She relies on the transitional provisions of the Rules of Court found in Rule 736:

> 736(1) Subject to subrule (2), these rules apply to all proceedings, whether commenced before or after these rules come into force.

> (2) Where a proceeding has been commenced before these rules come into force, the Court may order, subject to such terms as the Court considers just, that the proceeding or a step in the proceeding be conducted under the rules of court that governed the matter immediately before these rules came into force.

[8] As noted by my colleague, Schuler J., in *Gorf Holdings* (*supra* at para. 23), the presumption is that the new rules apply. The onus is on the party seeking to deviate from that presumption to satisfy the court that it would be just to do so. The petitioner's counsel argues, however, that there are compelling reasons in this case to deviate from the presumption and she referred me to a comment I made in an earlier case on this topic, *Fullowka et al* v. *Royal Oak Mines Inc. et al*, [1998] N.W.T.J. No. 42 (S.C.), where I said (at para. 22):

> ... the transitional provision in subrule 736(2) gives the court a broad discretion to order that the old Rules apply to steps in an action, a discretion that has to be exercised on the basis of fundamental fairness to all parties. Counsel referred me to the previously noted *Petersen* case from the Alberta Court of Appeal. There, Fraser C.J.A. wrote (at page 79) that the application of new procedural rules should be deferred if applying them would "cause an injustice or disadvantage a litigantin what the Court considers to be an unfair or arbitrary way."

[9] These proceedings commenced in March, 1995, with the filing of a Petition for Divorce. The parties were married in 1971 and separated in 1990. Earlier divorce proceedings had been commenced in 1992 but they were discontinued. The Petition sought, in addition to a divorce, child and spousal support and a division of matrimonial property. There are three children of the marriage but by now they are all self-supporting.

[10] The respondent filed an Answer promptlyin responseto the Petition. In August, 1995, the petitioner brought a motion for interim child and spousal support. An order was issued on September 13, 1995, directing the payment of child support for a limited period of time and adjourning the issue of spousal support. The judge at the time directed the parties to proceed to discoveries and trial. Financial statements were filed by both parties and an examination for discovery of the respondent was held on September 18, 1996. In February, 1998, the petitioner filed a motion seeking an order compelling the respondent to file a Statement as to Documents. That application was apparently never heard but on March 26, 1998, the respondent filed a Statement as to Documents. That was the last activity on the court file until June 1, 2007, when the

petitioner filed a motion seeking financial disclosure and transfer of the former matrimonial home. This resulted in the respondent filing the present application to dismiss.

[11] At best, it is clear that no substantive step has been taken in this action since the filing of the Statement as to Documents in 1998. That is a delay of nine years, all of them coming after the enactment of the current Rules of Court.

[12] The petitioner was represented by counsel at every one of the steps noted above. Indeed, according to the court file, she had one solicitor of record from the commencement of the proceedings up until June, 2002, when a Notice of Change of Solicitor was filed by her present counsel. The petitioner, however set out in an affidavit how, over the years, she has been represented by and consulted a succession of lawyers, and how for long periods of time her case languished because she was dependent on legal aid and there was no one willing or able to take on her case. Her present solicitor, who had undertaken her representation in 2002, left the jurisdictionin 2003 and did not resume representing her until legal aid approved it in 2005.

[13] The petitioner says that she has always been concerned about the delay in bringing this action to trial. Although she made repeated requests to have the matter concluded, things stalled because of the inability of legal aid to secure representation for her. But, even if I accept this assertion, and I have no reason not to, there are still significant gaps that are left unexplained and there is little evidence provided by the petitioner as to what she was doing to try to move the case along.

[14] The main point of the petitioner's submission is that the respondent deliberately misstated his financial position and corporate interests so as to defeat her claim for division of property, something that her previous lawyers failed to investigate. The respondent denies this. Both parties point to different parts of the respondent's discovery evidence to buttress their arguments.

[15] The petitioner casts this as a matter of fundamental fairness. The respondent answers that the rules are explicit and the delay in this case has been inexcusable. The petitioner says that the respondent has had the benefit of the matrimonial property since separation. On the other hand, the petitioner has had exclusive use of the former matrimonial home since separation (albeit at her expense). The petitioner points out

that no spousal support has ever been paid; but, as the respondentnoted, none was ever ordered.

[16] The most significant issue is the fact that the limitation period for a matrimonial property action has expired: see s. 38(3), *Family Law Act*, S.N.W.T. 1997, c. 18. But the former matrimonial home is in joint names so the petitioner may still have a remedy for partition and sale (or possibly a transfer of title). There is, of course, no limitation impediment with respect to a divorce action and a claim for corollary relief. I note in passing, however, that the court records reveal another matrimonial property action, commenced by the petitioner by a Statement of Claim issued in August, 1995 (reference to this action is made in the petitioner's motion filed in June of this year). The order I make in this case has no effect on that action (at least not for the time-being).

[17] In my opinion, there is no compelling reason in this case to not apply the current rule. That rule came into force over eleven years ago so counselshould have been well aware of the consequences of a lengthy delay even if an action was commenced previously. There is nothing in this case that makes the application of the rule either unfair or arbitrary. It cannot be said that the parties either relied on a certain state of affairs because of the old rules or that the enactment of the new rules affected any rights that either party had at the time they were enacted.

[18] For these reasons, the applicationis grantedand this actionis dismissedpursuant to Rule 327(1)(b). The respondent is entitled to his party-and-party costs, should they be demanded.

J.Z. Vertes
J.S.C.

Dated this 26th day of September, 2007.

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Counsel for the Respondent: Katherine R. Peterson, Q.C.

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