Date: 2012 02 03
Docket: S-1-CV-1999-008574

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

943639 N.W.T. LTD. operating as
LENLELA ENTERPRISES and 943639 N.W.T. LTD.

Plaintiffs/Respondents

-and-

THE DOMINION OF CANADA GENERAL INSURANCE
COMPANY and ARCTIC INSURANCE BROKERS LTD.

Defendants/Applicants

MEMORANDUM OF JUDGMENT

[1] This is an application by the Defendants (herein "Dominion" and "Arctic") for an order dismissing the Plaintiffs' action pursuant to Rule 327 of the *Rules of the Supreme Court of the Northwest Territories*. Should the action not be dismissed, the Defendants seek an order for security for costs.

[2] The Plaintiffs claim damages for alleged breach of insurance contract by Dominion and negligent misrepresentation by Arctic, among other things. The loss, stemming from water damage to the Plaintiffs' property, is alleged to have occurred on December 8, 1998. The Statement of Claim was filed exactly one year later, on December 8, 1999. Dominion filed a Statement of Defence on March 2, 2000. Arctic filed its Statement of Defence on April 11, 2000. Arctic and Dominion filed their Statements as to Documents in 2000 and 2001, respectively. The Plaintiffs filed their own Statement as to Documents and conducted examinations for discovery of Dominion's officer in 2003. Examinations for discovery of the Plaintiffs were held in 2005, at which time the Plaintiffs gave a number of undertakings. The Plaintiffs have not conducted examinations for discovery of Arctic.

[3] Nothing further happened until late 2008, when the Defendants each brought applications to strike out the cause of action under Rule 327(1)(a). Those applications were dismissed, but an order was granted directing the Plaintiffs to provide answers to undertakings, failing which the Defendants could apply to have the action struck. The Plaintiffs complied and provided answers to undertakings within the deadline imposed in the order, in February of 2009.

[4] Rule 327(1) provides:

> 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
>
> (a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or
>
> (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.

[5] The Defendants argue that the action can be dismissed under Rule 327(1)(b). They assert that the last step taken by the Plaintiffs without compulsion was in March of 2005, when the Plaintiffs conducted examinations for discovery. For this to succeed, I must find that the Plaintiffs' compliance with undertakings in February of 2009 further to the order is not step a that materially advanced the action.

[6] A step that materially advances an action is one that moves an action towards trial in a meaningful way. Generally, it will take the form of a procedural step under the *Rules of Court* or some replacement for a procedural step. *Alberta v. Morasch*, [2002] A.J. No. 41, paragraph 13; *Muckpaloo v. Mackay* [2002] N.W.T.J. No. 10, 2002 NWTSC 12, paragraphs 20 and 21.

[7] The fact that the Plaintiffs supplied answers to undertakings only after being ordered to do so is immaterial (although this is, in my view, highly relevant in considering an application under rule 327(1)(a)). Rule 327(1)(b) requires only that the step be taken: steps taken under compulsion are still steps. The key question is whether or not supplying answers to undertakings was a step that materially advanced the action.

[8] Alberta has an almost identical Rule to 327(1)(b) and so case law from that province is useful. The courts there have considered whether or not supplying answers to undertakings provided at discovery is a "thing" (the word used instead of "step" in the Alberta rule) that materially advances an action. In *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (CanLII), Wittman, J.A. found (at paragraph 34) that while providing answers to undertakings could constitute a thing which materially advances an action, providing the answer to only *one* undertaking was not, without more, sufficient. This was also considered in *Morasch, supra*, where Fruman, J.A. stated:

> Acts which satisfy prior commitments, such as delivering documents one has previously promised to supply, are often not things which, in and of themselves, materially advance an action. The spirit of R. 244.1 would be circumvented if one party delayed completion of an agreement or undertaking and thereby restarted the five-year clock at a later date. . .

[9] Presumably, a party conducting examinations for discovery seeks information through undertakings because it deems the information necessary to put its case forward properly. It is reasonable to assume as well that, in most cases, actually getting the information allows that party to move closer to trial readiness and thus, complying with undertakings and concluding the procedural step of discoveries may be a step that materially advance the action. This is a determination that must be made by looking closely at the facts of each particular case (see, *Gresiuk v. Wawanesa Mutual Insurance Co.*, [2002] A.J. No. 948 (Q.B.)).

[10] Dominion submitted a summary of the twelve undertakings given by the Plaintiffs at examinations for discovery. The accuracy of that summary is not disputed. The Plaintiffs undertook to provide certain information and documents relating to the property in question, including water and utility bills, rental agreements, renovation plans and development permits. The Plaintiffs were also to provide calendar and day-timer notes to assist in determining travel dates and to produce a file that was created and maintained on the property. They provided the information and documents for all but two undertakings. These two undertakings were to produce a file kept about the property and to search calendar and day-timer records relating to certain travel. In both of these instances, the Plaintiffs responded that they were unable to locate the records after a diligent search.

[11] It is reasonable to conclude that Dominion considered the information sought through the undertakings to be important for its case. It appears on its face to be relevant to the issues of what may have led to the water damage as well as the *quantum* of damages. Moreover, the sufficiency and completeness of the

Plaintiffs' answers have not been challenged. In all of the circumstances, I conclude that fulfilling the undertakings in February of 2009 constituted the completion of a step that materially advanced this action and therefore, the five-year clock has not yet run.

[12] I now turn to the analysis of the application to dismiss under Rule 327(1)(a), which is discretionary. An application under this rule requires consideration of three questions:

(a) has there been inordinate delay?
(b) is the delay inexcusable?; and
(c) is the defendant likely to be seriously prejudiced by the delay?

[13] The applicant bears the onus of proving that the delay is ordinate and inexcusable. Should the court make this finding, serious prejudice to the applicant is presumed, pursuant to Rule 327(4). It is then up to the respondent to rebut that presumption. *Kell v. Senych Estate,* 2003 NWTSC 65; *Watsyk v. Northwest Territories (Financial Board Secretariat),* 2010 NWTSC 74, [2010] N.W.T.J. No. 68.

[14] What is "inordinate" delay depends on the circumstances of each particular case, "but it should not be too difficult to recognise inordinate delay when it occurs." *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 1 All E.R. 543 (C.A.) at 561, per Salmon, L.J.

[15] The delay in this case is inordinate. It has moved slowly and is going into its thirteenth year. The alleged loss occurred over fourteen years ago. The events that would have to be examined in relation to the claim for negligence against Arctic date back even longer. There are large gaps in time between the steps that have been taken and the Plaintiffs have initiated nothing since 2005. The Plaintiffs have yet to conduct examinations for discovery with Arctic, which they indicate they would have to do before setting this for trial.

[16] The Plaintiffs argue that once the answers to undertakings were provided, any party could have set this matter down for trial. That may be the case, but it is the Plaintiffs, and not the Defendants, who bear the onus of moving this matter to trial. *Muckpaloo, supra*, paragraph 18; *Watsyk, supra*, paragraph 46. Further, this is wholly inconsistent with the Plaintiffs' stated desire to conduct examinations for discovery on Arctic before going to trial.

[17] The Plaintiffs have offered no reasons for the delay and in fact, concede in their written argument that the action has languished. Older affidavit material filed by Dominion for the 2008 application indicates that the Plaintiffs' officer was incarcerated for a brief period of time in 2006. The Plaintiffs' previous counsel ceased acting in 2007 and was then retained again, briefly, in 2009. There is no evidence that shows that the Plaintiffs were unable to retain new counsel after 2009. In the end, there is nothing before the court that accounts for the delay, and so I conclude it is inexcusable.

[18] The final consideration is whether or not the Plaintiffs have rebutted the presumption of serious prejudice. The Plaintiffs filed affidavits indicating that many of the potential witnesses, including those from whom statements were taken in 1998, remain in Inuvik and that two witnesses whose whereabouts were unknown in 2005 have now been located. This is the only evidence offered with respect to the prejudice issue. The Plaintiffs' counsel also put forward in argument that this is a "paper" case which, as I understand the argument, implies that witnesses' memories may be less critical. Both of these points are speculative, however, as they are based on assumptions about how the Defendants will run their cases and what evidence and witnesses they might call. Something more concrete than what the Plaintiffs have suggested is required to displace the presumption of serious prejudice and it has not been rebutted. Accordingly, the Defendants' application under Rule 327(1)(a) is granted.

[19] An order will issue dismissing this action. The Defendants will have costs of the action. If counsel wish to address costs they may do so by making written submissions to the Court within 30 days of the date these reasons are filed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
3rd day of February 2012

Counsel for the Applicants/Defendants: Craig D. Boyer
Jack Williams
Counsel for the Respondents/Plaintiffs: Robert Kasting

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