In the Court of Appeal of Alberta

Citation: Brost v Kusler, 2016 ABCA 363

Date: 20161116
Docket: 1501-0257-AC
Registry: Calgary

Between:

Myron Frederick Brost

Respondent
(Plaintiff/ Defendant by Counterclaim)

- and -

Deborah Ann Kusler

Appellant
(Defendant/ Plaintiff by Counterclaim)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D. Miller
Dated the 28th day of September 2015
Filed on the 15th day of October, 2015
(Docket: 4806-016074)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal is from a chambers order striking the appellant's September 5, 2006 statement of defence and counterclaim for divorce and division of matrimonial property because three or more years passed without a "significant advance" in the action contrary to rule 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*).

[2] The appeal raises two issues. First, does the long delay rule apply to divorce and matrimonial property proceedings? Second, if so, did the chambers judge err in determining that the statement of defence to the counterclaim did not significantly advance this action?

[3] We allow the appeal.

II. Background

[4] There has been little progress on the corollary relief aspect of this divorce action since the parties separated after a 13-year marriage. The appellant, Ms. Kusler, suffered from pancreatic cancer and passed away in April 2014. Her estate is continuing the action. The relevant dates are as follows:

Date	**Step Taken**
August 2006	The husband filed a Statement of Claim for divorce only
September 5, 2006	The wife filed a defence and counterclaim, claiming spousal support and a division of matrimonial property
January 30-31, 2008	Both parties were examined for discovery
February 2011	The wife provided partial responses to undertakings
November 2011	The divorce was severed from corollary relief (by consent)
June 14, 2012	The divorce judgment was granted
February 2013	The husband provided responses to undertakings
April 21, 2014	Ms. Kusler died
December 2014	The wife's estate demanded that a statement of defence be filed and the respondent filed a statement of defence to counterclaim

March 2015	Personal representative of the wife's estate appointed
July 31, 2015	The personal representative filed a notice to disclose
September 1, 2015	The respondent applied to have the counterclaim struck for delay
September 28, 2015	The action was struck

[5] The wife's position is that the December 2014 statement of defence to counterclaim was a significant advance in the action. The husband contends that the last significant step in the action occurred January 30 and 31, 2008 when he and the appellant were examined for discovery. His position is that the steps taken thereafter did not significantly advance the action.

[6] The chambers judge noted that "there was an understanding between [then] counsel that no defence to the counterclaim was required". However, this position changed in December 2014 when the wife's estate demanded that a defence be filed or the husband would be noted in default.

[7] The chambers judge was referred to *Trout Lake Store Inc. v Canadian Imperial Bank of Commerce*, 2003 ABCA 259, 330 AR 379 and *Krieter v Alberta*, 2014 ABQB 349 at para 33. In brief reasons he held:

> Having reviewed [those] decision and others, I am satisfied that the defendant by Counterclaim did not lie in the weeds. I am satisfied that the Statement of Defence as filed by the defendant by Counterclaim was not a "material step" to advance the action.
>
> This is a case of simple interpretation of the rules and, specifically, rule 4.33. And the clear and unambiguous record before me is that there has been well in excess of three years' delay; and the rule must be applied. Clearly and accordingly the application of Myron Brost under 4.3 is granted. The Counterclaim is struck.

[8] "A chambers judge's decision under Rule 4.33 is reviewed for correctness when a pure question of law is involved, such as the interpretation of the *Rules of Court*, and for palpable and overriding error when a question of mixed fact and law arises, such as determining whether the established facts satisfy the legal test set out in the *Rules*: *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 11": *Canada (Attorney General) v Delorme*, 2016 ABCA 168 at para 21.

III. Analysis

Issue 1 - Does the long delay rule apply to divorce proceedings?

[9] The short answer to this question is "yes."

[10] The wife submits that the long delay rule does not apply to *Divorce Act* proceedings. She distinguishes recent cases from this court on the basis that none involved family law proceedings governed by statute.

[11] The "Family Law Rules" in Part 12 of the *Rules* provide a complete answer. The following information note appears between rules 12.34 and 12.35. "Part 4 [which includes r 4.33, the long delay rule] of these rules applies to proceedings listed in rule 12.2." Rule 12.2(b) is "a proceeding under the *Divorce Act* (Canada)".

Issue 2 - Was the statement of defence to counterclaim a "significant advance"?

[12] The husband contends that there has been no significant advance in the action since the January 2008 examinations for discovery. Although the wife submits that several steps significantly advanced the action (severance of corollary relief and the divorce), the argument before the chambers judge and this court was that it was the statement of defence to counterclaim in 2014 which constituted a significant advance in the action.

[13] The chambers judge did not have the benefit of recent case law from this court which held, among other things, that there must be a functional review of the steps taken to determine whether they significantly advanced the action: *Canada (Attorney General) v Delorme*, 2016 ABCA 168; *XS Technologies Inc v Veritas DGC Land Ltd*, 2016 ABCA 165; *Weaver v Cherniawsky*, 2016 ABCA 152; *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135; and *Ro-Dar Contracting Ltd. v Verbeek Sand & Gravel Inc.*, 2016 ABCA 123.

[14] *Ursa* held that a functional analysis was necessary even if the step relied on was a mandatory step under the *Rules*. *Ursa* suggests in *obiter*, "For example, a statement of defence will normally significantly or substantially advance an action because it narrows the issues and enables the plaintiff to know the case it must meet": para 20.

[15] Accordingly, the issue is whether the substance of the step taken to advance the action (not its form) significantly advanced the action: *Ursa* at para 3. "[U]nder the delay *Rules* the functional approach requires the chambers judge to determine whether the step said to be a "significant advance in an action" actually moves the lawsuit forward in a meaningful way considering its nature, value, importance and quality. The genuineness and the timing of the step are also relevant. The focus is on the substance of the step taken and its effect on the litigation, rather than on its form": *Weaver* at para 18.

[16] The record reveals that when the counterclaim was issued, there was an agreement between counsel that no defence was necessary. The lawsuit continued with notices to disclose, disclosure of documents, examinations for discovery and undertaking responses all in the absence of a statement of defence. There were also attempts to settle the action. From the husband's perspective

this supports his position that this statement of defence did nothing to advance the action because progress was made without it. He deposed that any steps taken to move matters toward a final resolution were taken by him. The wife's sister, who is the personal representative of the wife's estate, deposed that long after the separation the parties continued to go on holidays and manage investments together. From her perspective the fact that no one pushed the divorce forward emphasized to her that neither party truly intended to divorce. However, once the divorce was granted on June 14, 2012 the parties turned their minds to dealing with the matrimonial property but by this time the wife's health was deteriorating.

[17] Whatever can be said for the wife's failure to move matters along, it is clear that after her death, her estate was proactive in getting the litigation back on track. The personal representative's initial efforts were stalled when the husband refused to recognize her authority and insisted upon the grant of probate. Once this occurred, there was a clear demand that the husband file a statement of defence. He obliged although he says he only did so under threat of default judgment. He did not bring the application to dismiss at that time. We note as well that although it has been over 10 years since this action commenced, the husband did not bring an application alleging inordinate and inexcusable delay under rule 4.32.

[18] The husband submits that the statement of defence did not advance the action; it is an innocuous document which does not narrow the issues. He contends that from a functional perspective, it is boiler plate and does nothing to advance the action, let alone significantly advance it. We disagree.

[19] As regards the matrimonial property claim, the first paragraph of the statement of defence agrees to a distribution of the matrimonial property. The husband also pleads that he has significant exemptions to which the wife is not entitled. He urges an unequal division because of his superior efforts in acquiring property during the marriage. Importantly, he joins issue as to the separation date and therefore the wife's entitlement to after-acquired property. The wife's counterclaim alleges that they separated in 1999. The husband alleges the separation occurred in 1993. The wife also claimed unjust enrichment. The statement of defence pleads that the wife made no contribution financial or otherwise to the property, provided no labour or money for which she had not been adequately compensated, and has no *quantum meruit* claim.

[20] Both the context and a functional analysis of this pleading lead us to conclude that the statement of defence to counterclaim was a step which significantly advanced this action. The issues are now joined and subject to some remaining undertaking responses, the litigation can be moved toward trial or other resolution.

IV. Conclusion

[21] The functional analysis mandated by rule 4.33 was not completed by the chambers judge. Our analysis leads to the conclusion that the statement of defence to counterclaim significantly advanced this action.

[22] We allow the appeal and urge the parties to proceed expeditiously to trial or other resolution.

Appeal heard on November 7, 2016

Memorandum filed at Calgary, Alberta
this 16th day of November, 2016

Rowbotham J.A.

Authorized to sign for: Greckol J.A.

Authorized to sign for: Martin J.A.

Appearances:

L.G. Andreachuk, Q.C.
for the Respondent

D.P. Castle and J.M. Hegberg
for the Appellant