CANADA / JUDGMENT

Duckett v. McKinnon

2013 BCCA 468

COURT
British Columbia Court of Appeal

DECIDED
21 October 2013

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2013 BCCA 468 Duckett v. McKinnon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Duckett v. McKinnon,

2013 BCCA 468

Date: 20131021

Docket: CA040422

Between:

Robert Duckett, doing business as

D & D Mobile Mechanical Service

and Robert Duckett

Respondent

(Plaintiff)

And:

Elizabeth McKinnon

Appellant

(Defendant)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated

October 29, 2012 (Duckett v.MacKinnon, Victoria Docket 09-1652)

Oral Reasons for Judgment

Appellant appearing In Person:

E. McKinnon

Counsel for the Respondent:

W.E. Pedersen

Place and Date of Hearing:

Victoria, British Columbia

October 21, 2013

Place and Date of Judgment:

Victoria, British Columbia

October 21,2013

Summary:

Application for Review of an order of a justice in chambers denying an application for an extension of time to file the appeal record. Held: Application dismissed. The judge applied the correct legal test, made no error in principle, and did not misconceive the facts.

[1] GROBERMAN J.A.: The appellant failed to file an appeal record within the time limit set by the rules and applied to a judge in chambers for an extension of time. The judge considered the application, but found that there was no satisfactory explanation for the delay and that the appeal was without merit. In oral reasons given at the conclusion of the hearing on June 24, 2013, the chambers judge exercised her discretion against granting an extension of time. The appellant applies for review of the chambers judge's decision, asking that the order be varied and that an extension of time be granted.

[2] The role of this court on an application for review an order of a judge in chambers is well-established. It was described as follows in Haldorson v. Coquitlam (City), 2000 BCCA 672, at para. 7:

[T]the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.

[3] The factors to be considered on an application for extension of time have been reiterated by this court on innumerable occasions. They are those discussed in Davies v. C.I.B.C. (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.):

a) Was there a bona fide intention to appeal?

b) When were the respondents informed of the intention?

c) Would the respondents be unduly prejudiced by an extension of time?

d) Is there merit in the appeal?

e) Is it in the interests of justice that an extension by granted?

[4] The fifth factor encompasses the other four, and represents the decisive criterion.

[5] The chambers judge considered each of these factors. In respect of the first factor, it was obvious that the appellant had a bona fide intention to appeal. The notice of appeal was filed and served in a timely manner, and the chambers judge accepted that the appellant never abandoned her intention to proceed with the appeal. The rules required the appellant to file the appeal record within 60 days of serving the notice of appeal. She did not do so, and did not apply for an extension of time until a further 5 months had elapsed. The chambers judge found that the appellant had not provided a satisfactory explanation for the delay.

[6] In respect of the second factor, the chambers judge found that the respondent was advised of the appeal in a timely manner. She found, however, that the lengthy delay in proceeding with the appeal lulled the respondent into thinking that the appeal was not going to go ahead.

[7] With respect to the third factor, the judge found that the respondent was not substantially prejudiced by the delay, but found that the costs and delays resulting from the failure of the appellant to proceed expeditiously had caused some degree of prejudice.

[8] The judge then turned to the fourth factor, the merits of the appeal. The action was one for professional negligence. The plaintiff had sold the assets of a business to a third party, with an agreement that payment for the assets would be made over time. He retained the services of the defendant as his solicitor. His intent was to maintain a security interest in the assets of the business until such time as the third party had fully paid for them. The judge at first instance held that the documents prepared by the defendant did not create an enforceable security interest in the assets, and when the third party defaulted, the plaintiff had no right

to the proceeds of an insurance policy that covered the assets.

[9] The appellant's proposed grounds of appeal were that the action should not have been heard by way of summary trial, that the judge erred in finding that documents prepared by the defendant were registered in the Personal Property Registry, and that the judge erred in finding that the defendant's failures caused damages.

[10] The chambers judge dealt with each of these questions. Ms. McKinnon has not persuaded me that the chambers judge made any error of principle in her analysis.

[11] The action in the Supreme Court was not a particularly complex one, and there do not appear to have been any critical issues of credibility. The critical issue as found by the chambers judge was whether documents prepared by the defendant served to create a security interest. The chambers judge was correct in finding that there is no merit in the argument that the matter was unsuitable for a summary trial.

[12] The chambers judge was also correct in stating that the important question at trial was not whether documents were properly registered in the Personal Property Registry, but rather whether the documents that the defendant prepared sufficed to create an enforceable security interest.

[13] The question of whether the documents created a security interest was a straightforward one of interpretation. The trial judge found that the documents prepared by the defendant did not create a security interest in the business assets. The chambers judge was of the view that an appeal from that finding lacks merit.

[14] The appellant places substantial reliance on 356447 British Columbia Ltd. v. Canadian Imperial Bank of Commerce, (1998) 48 B.C.L.R. (3d) 1 wherein this court said, at para. 6:

[6] Section 2(1)(a) of the [Personal Property Security Act, R.S.B.C. 1996, c. 359] provides some assistance in construing agreements in these circumstances: it states that the Act applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral." Consistent with this, R.C. Cumming and R.J. Wood, authors of the British Columbia Personal Property Security Act Handbook, observed in the first edition of their book in 1990:

The actual label used by the parties is irrelevant: a transaction termed a lease is nevertheless a security agreement if its purpose is to secure payment or performance of an obligation. Nor is any particular form of words required in order create a security agreement. The Act eliminates the need to recite in the agreement that the debtor transfers title to the secured party or that a seller retains title to the goods sold .

The substance test of s. 2 ignores both title and form as factors in characterizing transactions. If a transaction is one under which a party gives or recognizes that someone else has an interest in his or her property in order to secure payment or performance of an obligation, it is a security agreement. [at 29-31]

and further at 34:

The definition of a "security interest" requires that there be an interest created in personal property. This suggests that the creditor must obtain a real right in the property, i.e. a right exercisable not only against the debtor, but against third parties as well. A mere contractual licence to seize and sell the debtor's property does not create an interest in the property enforceable against strangers and therefore should not be regarded as a security agreement.

This wording also appears in the most recent (1996) edition of the Handbook at 47.

[15] She also places reliance on 674921 BC Ltd. v. New Solutions Financial Corporation, 2006 BCCA 49, and particularly on the following passage from para. 1 of that judgment:

The new unified statutory scheme ("PPSA") applies to all interests that "in substance" create security interests on personal property. In the words of D. Doan in British Columbia Personal Property Security Act Practice Manual (The Continuing Legal Education Society of British Columbia, 1996), vol. 1 at §1.3:

The PPSA is based upon a practical, common sense view of obtaining, registering, and protecting security interests. Simply stated, if a security interest is found to exist, the PPSA applies, including the regime for protecting the secured party's rights and enforcing the security interest. Form and labels are rejected in favour of a substance test.

[16] The Supreme Court judge and the chambers judge both found that it was clear that the language of the document the appellant prepared did not create a security interest, but rather created only a contractual right to take over the operation of the business in the event of default. The appellant has not persuaded me that any other interpretation of the document is reasonably possible.

[17] Finally, with respect to damages, the chambers judge noted that the plaintiff could have, but did not, take third party proceedings against the party that defaulted on its obligations to the respondent. She, rightly, in my view, came to the conclusion that this did not form a meritorious ground of appeal.

[18] At the hearing before us, the appellant contended that damages were also overstated by the amount of $5,385, an amount that the plaintiff had to pay new counsel for advice after the problems with security arose. I can see no merit in the suggestion that this expenditure was other than recoverable.

[19] The chambers judge concluded that in light of the appellant's failure to provide a satisfactory explanation for her delay in filing an appeal record and in light of the lack of merit in the appeal, it was not in the interests of justice for the time for filing an appeal record to be extended.

[20] In my view, the chambers judge applied the proper tests to the application before her, and made no error in principle in her assessment. Finally, she did not misapprehend the facts of the case. I am therefore of the view that there is no basis to vary her order. I would deny the application for review.

[21] BAUMAN C.J.B.C.: I agree.

[22] STROMBERG-STEIN J.A.: I agree.

[23] BAUMAN C.J.B.C.: The application to vary the order of Madam Justice Prowse is dismissed. Thank you counsel.

"The Honourable Mr. Justice Groberman"

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Prepared on 29 October 2026 · Esheria