
CANADA / JUDGMENT

George v. McMahon

2008 BCCA 497

COURT

British Columbia Court of Appeal

DECIDED

3 December 2008

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2008 BCCA 497 George v. McMahon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

George v. McMahon,

2008 BCCA 497

Date: 20081203

Docket: CA034433

Between:

Theresa Louise George and Lorraine Marlene Dowding

Respondents

(Petitioners)

And

Brian Allan McMahon and Wendy Isobel McMahon

Appellant

(Respondents)

Before:

The Honourable Madam Justice D. Smith

(In Chambers)

K. Simmons

Counsel for the Appellant

K.L. Grant

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

November 20, 2008

Place and Date of Judgment:

Vancouver, British Columbia

December 3, 2008

Reasons for Judgment of the Honourable Madam Justice D. Smith:

- [1] The respondents on the appeal, Theresa George and Lorraine Dowding, apply for an order pursuant to s. 10(2)(e) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 (the "Act") that the appeal be dismissed as abandoned, with costs of the appeal awarded to them. They filed their notice of motion on November 12, 2008.
- [2] The appellants, Brian McMahon and Wendy McMahon, apply to have their appeal removed from the inactive list and for leave to proceed with the appeal. If they are granted that order, they propose to file an application for directions as to whether they require leave to appeal. They filed their notice of motion on November 14, 2008.
- [3] I propose to address these applications in the order in which they were filed.

Background

- [4] This matter concerns a mortgage, executed in 1997, as security for an accumulated \$250,000 debt owed to the late Ernest Dowding by the appellants, Wendy McMahon and her husband Brian. Wendy was Ernest's step-daughter. Ernest Dowding died in late 2003. Following his death, on July 15, 2005, the mortgage was transferred to Ms. George and Ms. Dowding, Ernest's daughter and daughter-in-law respectively, as the named beneficiaries in his will.
- [5] This appeal is from the August 14, 2006 order of Mr. Justice Myers (in Chambers), pronounced on August 14, 2006 and entered on September 27, 2006. The order granted the petition of Ms. George and Ms. Dowding for an order nisi with respect to the mortgage and dismissed the application of Mr. and Ms. McMahon for an order dismissing the debt as statute-barred pursuant to the provisions of the Limitation Act, R.S.B.C. 1996, c. 266.
- [6] The fact of the mortgage was never in dispute. However, no payments were ever made on the mortgage amount. Although the petition to collect the debt was commenced after the six-year limitation period, Myers J. concluded that two letters written by the appellants to the respondents had acknowledged the debt, thereby postponing the limitation period to include the period in which the petition was commenced.

- [7] On September 12, 2006, the McMahons filed a notice of appeal, a notice of application for leave to appeal, and a notice of motion for leave to appeal, along with a supporting affidavit. The application for leave to appeal has not been set for hearing. No further steps have been taken on the appeal since the filing of these documents.
- [8] The property against which the mortgage was registered was sold on December 15, 2006. The net mortgage proceeds of \$369,551.62 were paid into the trust account of the respondents' counsel pending the outcome of the appeal.
- [9] On September 27, 2007, the Court of Appeal registry wrote the appellants advising them that, pursuant to s. 25(1) of the Act, their appeal had been placed on the inactive list. They were advised that if no steps were taken, the appeal would stand dismissed as abandoned on March 12, 2008.
- [10] The appellants responded with an affidavit from their counsel. Their counsel deposed that the delay in proceeding with the appeal was entirely his fault and had been the result of staff problems in his law office. On March 11, 2008, Lowry J.A. ordered that the appeal be removed from the inactive list.
- [11] Again, the appellants took no further steps in the appeal. On September 12, 2008, the Court of Appeal registry again wrote the appellants advising them that their appeal had been placed on the inactive list and, if no steps were taken, the appeal would stand dismissed as abandoned on March 10, 2009. Following this second notice, the respondents filed their application to have the appeal dismissed as abandoned.
- [12] Between the first and second notices from the Court of Appeal registry, counsel for the respondents had attempted to contact the appellants' counsel on at least seven occasions for the purpose of prompting them to proceed with the appeal. Five of those occasions were by written letter and two were by phone. None of the inquiries were answered. Moreover, the appellants have still taken no steps to comply with any of the relevant deadlines and have neglected to file the amended notices that Lowry J.A. gave them leave to file in March 2008.

Parties' positions

- [13] Counsel for the respondents submits that the appellants' delay is inordinate, inexplicable, and prejudicial to the respondents, who have been waiting for their funds for over two years.
- [14] Counsel for the appellants submits, by affidavit, that once again the delay is entirely his fault, not the fault of his clients, whom he advised have never instructed him to cease working on the file. He deposes that his capacity was limited over the last 12 months because of serious ongoing problems in his law office and latterly, after September 2008, because of pressing personal circumstances. In particular, he states that between April and September 2008, he was plagued with ongoing staff shortages that included the serious illness of an assistant and difficulty in finding her replacement. Since September 2008, he advises that his wife has suffered from an ongoing serious illness that required his attention.

Eventually, in order to address this application, he retained another lawyer.

- [15] He proposes that, if the appeal is removed from the inactive list, the applications for directions and leave to appeal will be delivered to the respondents by December 12, 2008, and the matters will be set down for hearing at the earliest opportunity. He submits that appeal books would be filed within 30 days of the decisions in those applications and the appellants' factum within 30 days thereafter.
- [16] Counsel arguing this application on behalf of the appellants' counsel could not advise the Court if she would be retained to act for the appellants in the appeal. On behalf of the appellants, she asks this Court to give them one last opportunity to perfect their appeal.

Dismissing an appeal as abandoned

- [17] Section 10(2)(e) of the Act provides that a justice may "dismiss an appeal as abandoned if the appellant has failed to comply with a provision of this Act or the rules or an order extending or shortening time". Section 28 of the Act provides that the Court or a Justice may dismiss an appeal as abandoned if a party fails to comply with the Act or the Rules.
- [18] In *Frew v. Frew* (1990), 44 C.P.C. (2d) 34 (B.C.C.A.), the late Chief Justice McEachern sets out the test as follows:

I think the tests for this sort of thing are that there must first be inordinate delay; secondly the delay must be unexplained or inexplicable; and thirdly there must be prejudice. In my view, the only question here is whether there is prejudice. It seems to me that a delay of the nature we are concerned with in this case, of over a year after the matter is brought to the attention of the parties in the way that it was, must lead to prejudice in the failure of parties to have their rights settled in a timely and reasonable way by the procedures that are provided by the Rules of Court and by the Statute.

Removing an appeal from the inactive list

- [19] Section 25(2) of the Act provides:
- (2) An appeal or application for leave to appeal referred to in subsection (1) must be removed from the inactive appeal list when a justice grants leave to the appellant or the applicant to proceed with the appeal or application for leave to appeal.
- [20] By the effect of s. 25(5), an order to remove an appeal from the inactive list must be obtained before the appeal has been inactive for 180 days, at which point it stands dismissed as abandoned. The test for reinstatement of an appeal standing dismissed as abandoned is significantly more rigorous than the test for removing an appeal from the inactive list.

- [21] The applicant bears the onus of establishing that his appeal should be removed from the inactive list. While there is no rigid test, the overriding issue is whether it is in the interests of justice to grant the application. Considerations often include the extent of the delay, the explanation for the delay, the existence of any prejudice arising from the delay and the likelihood of success on appeal.
- [22] Where the delay is caused by counsel, and not by the appellant, and the appellant has always had the intention to continue with the appeal, it may not be in the interests of justice to prevent the appellant from proceeding with the appeal: *Rossmo v. Vancouver (City) Police Board*, 2003 BCCA 234 (Chambers) *Finch C.J.B.C.*, at para. 13; *Jacobsen v. Lumberland Building Materials Ltd.* (1998), 115 B.C.A.C. 72 (Chambers) *Hall J.A.*, at para. 4.
- [23] Circumstances in which there is no prejudice, and the delay is explained, weigh in favour of removing the appeal from the inactive list. The Court may still disapprove of and discourage delay by ordering costs to the respondent on the motion: *Jacobsen* at para. 6.

Discussion

- [24] There is no dispute that the delay in this appeal is inordinate. The only formal step taken by the appellants in the two years, since the filing of the appeal, has been the removal of it from the inactive list; that action was only undertaken in response to notice from the Court of Appeal registry. The respondents characterize this situation as a "pattern of inaction" by the appellants since December 2006.
- [25] The delay cannot be satisfactorily explained. In my view, the preoccupation with staff problems on the part of counsel for the appellants between April and September 2008 is not a reasonable explanation for the failure to take any steps toward resolution of this relatively simple appeal. Counsel's explanation for this second instance of delay amounts to a repeat of the same excuse relied upon in the first application. Although this Court can be sympathetic to his obligations in attending to his wife's serious health problems, in my view, they were not the primary reason for the significant delay which triggered the second notice from the registry. It remains unclear why it took appellants' counsel so long to retain outside counsel, or to bring an application for reinstatement of the appeal.
- [26] This is the second time this appeal has been allowed to become inactive and the second time that the appellants have argued that their lawyer's mistakes should not be visited upon them. While appellants' counsel attempts to shoulder the blame for this state of affairs, the appellants themselves must accept responsibility for not ensuring the appropriate steps were taken following the first notice that the appeal had become inactive. In light of the admitted difficulties their counsel was having at that time, those steps may well have included the retention of new counsel to pursue their appeal. Moreover, by March 2008, when they were made aware of the same problem which they now face, they continued to take no immediate steps to remedy the problem.

- [27] The respondents submit that the two-year delay is sufficient to establish prejudice to them and that they need, and are entitled to, a final resolution of the matter. I agree.
- [28] In addressing the issue of prejudice to the respondents, I am not persuaded that the grounds of appeal are strong. The core issue in the appeal is the appellants' submission that the chambers judge erred in finding, as a fact, that the letters the respondents wrote amounted to acknowledgments of the debt. The standard of review for findings of fact is a high one; the error must be overriding and palpable: *Housen v. Nikolaisen*, 2002 SCC 33, 2 S.C.R. 235.
- [29] The other grounds of appeal include a submission that the letters were not admissible because they had not admitted their authenticity, that the trial judge was "clearly wrong" in failing to refer this matter to the trial list because of conflicting or incomplete evidence, and that the trial judge failed to apply an objective test in interpreting the letters. I have reviewed Myers J.'s reasons for judgment and am of the view that these additional grounds of appeal have no merit.

Conclusion

- [30] The prejudice to the respondents, in this case, is significant. The appellants have taken no steps to advance this appeal, including the ordering of the appeal books, even when faced with this second notice placing their appeal on the inactive list. They offer little to diminish the prejudice caused by their delay. What little they offer if their appeal is reinstated is uncertain and is, in my view, "too little too late".
- [31] The respondents' application to dismiss the appeal as abandoned is granted.

"The Honourable Madam Justice D. Smith"

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