
CANADA / JUDGMENT

George v. McMahon

2009 BCCA 76

COURT

British Columbia Court of Appeal

DECIDED

13 February 2009

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2009 BCCA 76 George v. McMahon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

George v. McMahon,

2009 BCCA 76

Date: 20090213

Docket: CA034433

Between:

Theresa Louise George and Lorraine Marlene Dowding

Respondents

(Petitioners)

And

Brian Allan McMahon and Wendy Isobel McMahon

Appellants

(Respondents)

Before:

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice K. Smith

The Honourable Mr. Justice Bauman

Oral Reasons for Judgment

P.C.M. Freeman, Q.C.

K.L. Simmons

Counsel for the Appellants

K.L. Grant

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

13 February 2009

- [1] MACKENZIE J.A.: This is an application under s. 9(6) of the Court of Appeal Act to review the order of a justice and to discharge or vary the order dismissing the appellants' application to remove the appeal from the inactive list and dismissing the applicants' appeal as abandoned.
- [2] The underlying appeal is from the order nisi for foreclosure of a mortgage on a residential property in Fairmont Hot Springs, B.C. and a related order dismissing the appellants' application to dismiss the petition for foreclosure on the ground that the cause of action was extinguished by the expiry of the limitation period under the Limitation Act, both orders made by Myers J. on 14 August 2006. The property was sold in December 2006 and the proceeds are being held in trust by the solicitor for the respondents.
- [3] The sole issue before Myers J. was whether there was an acknowledgement of the mortgage debt within six years of the commencement of the foreclosure proceeding. The first payment under the mortgage was due on 1 May 1997 and no payments were ever made. The foreclosure proceeding was commenced on 18 November 2005 and it was conceded that it was statute barred if there was no acknowledgement of the mortgage debt within six years of that date. Myers J. found that there was an acknowledgement of the debt within the limitation period that postponed the running of time and he therefore granted the order nisi for foreclosure.
- [4] The appellants filed a notice of appeal and notices for leave to appeal on 12 September 2006. On 27 September 2007, the Court of Appeal registry wrote advising the appellants that the appeal had been placed on the inactive list and would be dismissed as abandoned on 12 March 2008 if no steps were taken.
- [5] The chambers judge summarized the developments which followed:
- [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.
- [6] The chambers judge said that there were no further steps taken until the respondents applied on 12 November to dismiss the appeal as abandoned. The appellants then applied on 14 November to remove the appeal from the inactive list. The chambers judge granted the order to dismiss the appeal as abandoned and dismissed the application to reinstate.
- [7] Her reasons were:
- [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".
- [8] The test for this Court on an application to review an order of a justice was stated by Levine J.A. in *DeFehr v. DeFehr*, 2002 BCCA 139 at para 6:
- [6] A review of the decision of a chambers judge by a panel of this Court is not a rehearing of the original application. The test for review is: 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; *Ward v. Clark*, [2001] B.C.J. No. 901 (C.A.), 2001 BCCA 264 (Donald J.A.); *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. (5th) 225, [2000] B.C.J. No. 2532 (C.A.) (Lambert J.A.). 4LJqt
- [9] The appellants contend that the chambers judge erred in applying the standard of scrutiny for reinstating an appeal that has been dismissed as abandoned rather than the less rigorous standard applicable to an appeal on the inactive list. The factors are the same. The appellants rely on a reference at para 20 of the chambers judge's reasons to the comparison of the two situations. Throughout her reasons, the chambers judge referred to removal of the appeal from the inactive list and I am satisfied that she applied the standard of scrutiny appropriate to an inactive appeal. In my view, there is no merit in this ground of review.

- [10] The appellants submit that the chambers judge erred in law and principle and misapprehended certain facts. They take issue with certain details of the chronology and with the chambers judge's observation that the delay by appellant's counsel was not explained. They do not question that the delay was inordinate and I do not think that any discrepancies in the chambers judge's chronology are significant. The chambers judge stated that the delay was not "satisfactorily explained", and I take that as a comment on the inadequacy of the explanation rather than the absence of any explanation.
- [11] The appellants contend that there is merit to the proposed appeal. They argue that Myers J. erred in his finding of an acknowledgement of the debt and the chambers judge erred in concluding that the core issue was primarily factual. Myers J. found an acknowledgement of the debt from the combination of two letters which he set out in material part and analyzed at paras 4 to 12 of his reasons:
- [4] The alleged acknowledgement of the debt is contained in a letter from the respondent, Ms. McMahon, to the late Mr. Dowding dated February 20, 2000. The petitioners argue that that letter must be read in the context of an earlier letter from Mr. Dowding to both respondents, dated December 14, 1998.
- [5] The earlier letter from Mr. Dowding stated:

Dear Brian & Wendy,

To bring you up to date on your mortgage executed March 20th, 1997 [the amount of principal and interest is set out here].

In view of the above I think it's about time we discussed this. Hand shake [sic], written comments, and signed documents have been ignored or forgotten. However, if we cannot come to an agreement, I or my estate will foreclose sometime in the year 2000. To arrange a day and time that's convenient for you please call.

I look forward to meeting with you both.

- [6] In the letter of February 20th, 2000, Ms. McMahon stated:

Dear Ernie:

I promised Mom I would write to update you .

I have renewed the Bank of Montreal mortgage for a one year term anticipating a sale. The one year term eliminates the penalties associated with a payout of a longer term mortgage. To do this has increased my monthly payment to \$1,611.61 on a \$128,990.79 mortgage @ 7.6 %. As soon as the contractor has finished working, the hallway tiles are repaired, and the window replaced the house will be listed.

My campaign is going well. I am meeting as lot of nice people If I'm successful with the nomination and the election then financially I will be in a different position particularly if the house sells. My fingers are crossed this will be the case. The worse case scenario is the house won't sell, but I have a good feeling it will this time ...

. Hopefully the B.C. economy will flourish attracting new business and new jobs but it is not likely this will happen until the government changes and even then it will take some time. So one day at a time working towards the common goal of having the house sell! What a relief it will be. I trust this meets with your approval, if you have any questions I would be happy to discuss them with you.

[7] An acknowledgment must be an acknowledgement of the debt, and not merely a claim. That flows from the Court of Appeal's decision in *Podovnikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716, 58 B.C.L.R. 204 (B.C.C.A.) in which Aikins J.A. stated:

[12] I am of the view, following the line of reasoning indicated by Lord Denning, that under our Act, a person may acknowledge as a bare fact that someone has asserted (probably by making the claim) a cause of action against him without acknowledging any liability. However, I am also of the view that such a bare acknowledgment of the existence of a cause of action is quite insufficient to meet the requirements of s.5(2)(a)(i) of the Act. Those provisions provide that a person confirms a cause of action only if he " . acknowledges a cause of action, right or title of another, ". The acknowledgment of a right or title must, in my view, involve the acknowledgment of some liability. The word "acknowledgment" must have the same meaning when used with reference to a cause of action. It follows, therefore, that what binds a defendant and activates s.5(2)(a)(i) is an acknowledgment in writing of a cause of action which admits some liability thereunder.

[8] The relevance of the subjective intent of the person alleged to have made the acknowledgment was recently addressed by Boyd J. in *Brons v. 622943 B.C. Ltd.*, 2006 BCSC 193, 146 A.C.W.S. (3d) 552. She stated:

[27] The Applicants' counsel acknowledges that, while in the past, the test to consider whether or not an acknowledgment has been made under s.5(2)(a)(i) of the Limitation Act was an objective one (see *Podovnikoff v. Montgomery* (1984), 58 B.C.L.R. 204), in recent years that test has been broadened to include consideration of the intention of the party who created the document.

After referring to the Supreme Court of Canada's decision in *Ryan v. Moore*, [2005] 2 S.C.R. 53, 2--5 SCC 38, she went on to say:

[29] Thus, while the parties' intentions are now considered to be relevant, it appears that in keeping with the objective test, the Court must still consider what a reasonable person would determine the intention and purpose to be from an examination of the document.

[9] In the case at bar, there is no evidence of the intent of either Mr. Dowding or Ms. McMahon.

- [10] Counsel for the respondents argue that the letter, when read by itself, does not contain an acknowledgment of the debt. He also says that the time gap between those two letters indicates that the two do not bear any relation to each other and that the interpretation of the second letter should not be informed by the first letter.
- [11] It is my view that the two letters should be read together. Although there is a significant time gap between them, the timing of the February 20, 2000, letter dovetails with the threat of Mr. Dowding, contained in his earlier letter, to commence foreclosure proceedings in 2000 if payments were not made. In her affidavit, Ms. McMahon acknowledges receiving that letter but says she never responded to it. She has provided no explanation for her letter of February 20, 2000, nor for the timing of it. Mr. Dowding was deceased by the time these proceedings were launched. Ms. McMahon could have provided more information regarding the letters but chose not to do so. I can only assume that any evidence she had on the topic would not have been favourable to her.
- [12] Turning to the letter of February 20, 2000, Ms. McMahon took relatively great pains to explain her financial status and the prospect of the home being sold. The letter ends with the words "I trust this meets with your approval". When read together with Mr. Dowding's earlier letter, the only sensible way to interpret Ms. McMahon's letter is that the common goal of selling the house refers to the common goal of the petitioners and the respondents to sell the home in order to re-pay the loan. Therefore, the letter is an acknowledgement of the debt.
- [12] The appellants contend that Myers J. erred in law by applying a subjective rather than objective test to the issue and by drawing an adverse inference against the appellants from the absence of any comment by Ms. McMahon on the letter of 20 February 2000. The appellants also contend that the time interval between Mr. Dowding's letter and the 20 February 2000 letter is too long to support the inference that the latter letter was a response to the former. In my view, there is little merit in these submissions. As I read Myers J.'s reasons he did not draw an adverse inference from Ms. McMahon's absence of direct comment on the 20 February 2000 letter but simply observed that she offers no explanation. The issue then was the interpretation of that letter objectively in the context of the earlier letter. There was no subjective evidence bearing on that interpretation, as Myers J. himself observed. The timing aspect is also a matter of factual inference. Myers J. correctly instructed himself on the applicable law by his references to Podovnikoff and Brons and once having done so the issue of interpretation was essentially one of fact to which a high standard of deference is accorded.
- [13] In my view, the chambers judge was right to characterize the issue as essentially one of fact which can only be disturbed in this court if there is palpable and overriding error. Consequently the prospect of success on the appeal is minimal.

[14] The appellants also challenge the chambers judge's conclusion that the respondents have suffered significant prejudice. In my view, prejudice can be inferred from the delay that has deprived the respondents of the benefit of the mortgage proceeds to which they are presumptively entitled for over two years.

[15] In the result, I am satisfied that there was no error in law or principle or any misapprehension of facts by the chambers that would permit us to disturb her order dismissing the appeal as abandoned. I would dismiss the application for review.

[16] K. SMITH J.A.: I agree.

[17] BAUMAN J.A.: I agree.

[18] MACKENZIE J.A.: The application is dismissed.

"The Honourable Mr. Justice Mackenzie"

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Prepared on 30 October 2026 · Esheria