COURT OF APPEAL FOR ONTARIO

CITATION: Laczko v. Alexander, 2012 ONCA 803
DATE: 20121120
DOCKET: M41762

Weiler J.A. (In Chambers)

BETWEEN

Janos Laczko

Plaintiff (Responding Party)

and

Edwin Alexander and Mercedes Property Management Ltd.

Defendants (Moving Parties)

William G. Scott, for the moving parties

Richard A. Wellenreiter, for the responding party

Heard: November 13, 2012

On a motion to extend the time to appeal the order of Justice Jane A. Milanetti of the Superior Court of Justice, dated May 22, 2012.

Weiler J.A. (in chambers):

[1] The moving parties seek an order to extend the time for filing a notice of appeal from an order striking out their statement of defence.

[2] In deciding whether to extend the time, the following factors are relevant: (1) whether the moving parties formed an intention to appeal within the relevant period; (2) the length of and explanation for the delay; (3) any prejudice to the

responding party; (4) the merits of the appeal; and (5) whether the justice of the case requires it: *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23 C.P.C. (5th) 35 (Ont. C.A.).

[3] The individual moving party, Edwin Alexander, is a paralegal and a real estate agent. He is also the directing mind of the corporate moving party, Mercedes Property Management Ltd. The moving parties are the defendants in the underlying action.

[4] The responding party, Janos Laczko, a carpenter and handy man, did work on a number of properties managed by the moving parties. He says he was not paid for this work. In addition, the responding party owns rental property in partnership with Alexander. He claims to have performed repair and renovation services on those properties for which he has also not been paid. The partnership properties are managed by Alexander and his company, Mercedes. The responding party is the plaintiff in the underlying action.

[5] The underlying action primarily involves a claim by Laczko against Alexander for breach of their partnership agreement. In addition, Laczko was permitted to amend his statement of claim to incorporate eight small claims court actions for services provided and four construction lien claim actions he had previously brought against the moving parties.

[6] On May 22, 2012, Milanetti J. struck the moving parties' statement of defence "due to the failure of the Defendants to comply with outstanding orders for disclosure and the Defendants' failure to comply with their disclosure obligations under the *Rules of Civil Procedure* (as well as Justice Lococo's costs order)." An order striking out a statement of defence is final for purposes of appeal: *Four Seasons Travel Ltd. v. Laker Airways Ltd.* (1974), 6 O.R. (2d) 453 (Div. Ct.).

[7] The moving party, Alexander, failed to file his notice of appeal within the requisite time period for final orders. He explains the delay on the grounds that his lawyers erroneously believed that Milanetti J.'s order was interlocutory, and therefore subject to a longer time frame for filing. He has provided an affidavit from his lawyer to this same effect. He did file a notice of motion for leave to appeal on June 20, 2012, within thirty days of Milanetti J.'s order.

[8] For the purposes of this motion, I am prepared to accept that the moving parties formed an intention to appeal within the time for bringing an appeal, and that a satisfactory explanation for the delay in filing a notice of appeal has been given. The motion, therefore, turns on the remainder of the factors in the *Kefeli* test: whether the responding party would be prejudiced, the merits of the appeal, and the justice of the case. In order to discuss these factors, it is necessary for me to review the history of the proceedings. After doing so, I will comment on each factor in the circumstances of this case.

[9] In March, 2010, the responding party Laczko's lawyer wrote to both Alexander and James Scott, Alexander's lawyer at the time, requesting certain disclosure relating to the dispute between the parties. On April 8, 2010, he again wrote Mr. Scott, requesting the annual financial statements relating to the partnership and the operation of the property so that his client, Laczko, could complete his income tax returns. Laczko alleges that at that time no statements had been produced by the moving parties since 2008.

[10] On June 28, 2011, the Laczko's lawyer sent Mr. Scott a report dated June 27, 2011 prepared by Larry Joslin, a forensic accountant. The June Joslin report provided a detailed list of required disclosure.

[11] On October 24, 2011, the Laczko's lawyer brought a motion to compel production of the moving parties' affidavit of documents.

[12] In response to the motion to compel, Alexander swore an affidavit in November, 2011 disputing the relevance of certain productions. In that affidavit, he expressly acknowledged the June Joslin report.

[13] At the return of the Laczko's motion to compel on November 24, 2011, the two parties signed Minutes of Settlement. The Minutes substantially incorporated the disclosure outlined in the June Joslin report, and set a new production deadline of January 31, 2012. Although Alexander states in his affidavit that he was not provided with a copy of the Minutes of Settlement until December 20,

2011, he personally signed the Minutes of Settlement on November 24, 2011. He, therefore, must have been aware of the January 31, 2012 deadline, as well as the fact that the June Joslin report had been substantially incorporated into the Minutes. Alexander also knew of the June Joslin report as of early November, 2011. He did not need to wait for a copy of the Minutes of Settlement to know what production he was required to make.

[14] Alexander turned over 1,500 pages of disclosure to his lawyer, Mr. Scott, either on Sunday, January 29, 2012 (according to Scott) or "four or five days" prior to the January 31 deadline (according to Alexander). Alexander states that his lawyer did not tell him a significant amount of time would be required to organize and bind the disclosure. The deadline was missed.

[15] Despite follow-up correspondence between Laczko's lawyer and Mr. Scott, production was not made. As a result, on February 24, 2012, Laczko brought a motion returnable March 13, 2012 to strike the moving parties' statement of defence or to compel production.

[16] On the return date, Lococo J. granted a further indulgence to the moving parties and adjourned the motion to March 22, 2012, "peremptory to the Defendants, subject to availability of Plaintiff's counsel," thereby allowing further time for production. He also ordered costs payable to Laczko in the amount of $1,500 for delay.

[17] The Alexander asserts that he did not attend the motion, and again blames his lawyer for not advising him of the outcome.

[18] On March 21, 2012, Laczko received an unsworn affidavit of documents from the moving parties. The responding party's affidavit reflects that the motion was adjourned *sine die* to be brought back, if necessary, once Laczko had had an opportunity to review the disclosed documents.

[19] On April 3, 2012, Joslin provided a second report detailing omissions in the affidavit of documents provided by the moving parties. The April Joslin report indicated that Alexander had failed to produce a substantial number of the documents agreed to in the Minutes of Settlement, including bank statements and financial statements relating to the partnership property. In addition, very few copies of negotiated cheques were provided to substantiate expenses charged to the partnership property.

[20] Laczko brought the motion to strike back on May 8, 2012. According to Laczko, it was adjourned from May 8 to May 22, 2012 at the request of the moving parties' lawyer. Although Alexander was aware that the motion was being heard May 22, he provided no responding material.

[21] Alexander swears that his lawyer told him "it would be a good idea" for him to attend the May 22 hearing, but that he did not say why. He also swears that his lawyer never gave him a copy of the April Joslin report. According to his

affidavit, Alexander was simply aware that the motion to strike was coming back before the court, by reason of alleged deficiencies in disclosure.

[22] However, he was aware of the disclosure required by the June 2011 Joslin report and the November 2011 Minutes of Settlement, which he had signed. More generally, Alexander should have been aware, as a paralegal, of his obligation to provide disclosure in relation to an ongoing litigation. Even if he did not have a copy of the April 2012 Joslin report, he must therefore have known, for example, that he had not produced such basic disclosure as the financial statements for the joint venture for 2008.

[23] In her endorsement, the motion judge made the following statement:

> [N]o sworn statement is provided by the defendant explaining why the doc. has not been provided. If Mr. Joslin is wrong in his assessment, a response should have been filed by the defendant; it was not. When the parties sign Minutes, it should not be so difficult to obtain compliance. The defendant is not proceeding in a fair or appropriate fashion.

[24] She granted the motion, and ordered that the statement of defence of Alexander and of Mercedes be struck. As discussed in greater detail below, I do not believe she erred in principle in exercising her discretion to grant the motion.

[25] Alexander filed a further affidavit in support of this motion in which he says that he does not specifically recall when his lawyer gave him a copy of the April Joslin report, but that he did not have sufficient time to respond to it by way of

further production or other answer prior to May 22, 2012. He provides no explanation as to why he did not file materials on the motion to this effect.

[26] In his further affidavit, Alexander undertakes to produce all of the additional documents specified in the April Joslin report in his possession or control. He states that he emailed the financial statements for the joint venture to 2008 to the Laczko's lawyer on October 31, 2012. The respondent acknowledges receipt of some financial documentation relating to 2008 in early November, 2012. No explanation has been provided as to why these documents weren't provided earlier.

[27] Alexander also states that the first time he learned about the outstanding $1,500 costs order of Lococo J. was at the May 22 hearing. He says that his lawyer told the court that he would need another sixty days to pay the costs order, and that his attempt to speak to his lawyer to correct this misstatement was rebuffed.

[28] Alexander left before Milanetti J. delivered her decision. He alleges that despite attempts to find out the result of the May 22, 2012 hearing from his lawyer, it was not until June 5, 2012 that he learned his defence had been struck.

[29] The non-payment of the costs order clearly figured in the decision of the motions judge, considering the following statement in her endorsement:

> Each time the plaintiff has to come back to Court, he has to pay his LLB [lawyer]. Even if I did not strike, I'd

> need to impose timelines and costs of today would be payable. Based on the track record before me, I have no confidence that such Orders would be complied with. The defendant provided me no solace in this regard; seeking, rather an additional 60 days to pay the 1st costs Order.

[30] The order of May 22 was a document of public record that Alexander, as a paralegal, certainly would have known how to access had he cared to do so. Further, although a lawyer's conduct may be relevant in assessing a party's explanation for delay, the opposing party is not responsible for the alleged shortcomings of the other party's lawyer.

[31] A solicitor is an agent of his client: *Birjasingh v. Coseco Insurance Co.* (2000), 182 D.L.R. (4th) 751, at para. 11. This principle is often invoked in support of a lawyer's capacity to act on behalf of his or her client. However, it also means that, vis-a-vis the other party, it is generally the client who is responsible for the actions of the client's lawyer. This is not an overly harsh approach, especially in the circumstances of this case. As noted by this court in *Machacek v. Ontario Cycling Assn.,* 2011 ONCA 410, at para. 10, "the appellants are not left without a remedy as they still have recourse through an action in solicitor's negligence."

[32] Alexander states that the striking of his statement of defence has deprived him of a legitimate defence in the matters originally before Small Claims Court, and that he has now become personally liable for the payment of these contested

invoices. He is prevented from bringing third party actions against the owners of property where the plaintiff alleged he had done work in his invoices.

[33] Insofar as the merits of the small claims matters are concerned, Alexander made the following statement in a letter to Laczko, dated June 18:

> If you retract your last two claims I will pay you for all of the invoices that you have submitted to me to this day. We both know that you deserve to be paid for the work invoices you submitted to me, but the last two small claims are nonsense and I am not paying for them. Otherwise, expect to gain nothing without a fight and be ware [sic] that I will refute all your claims whatever they may be…expect these lawsuits to go on for years and get nothing from Cathcart!

Cathcart is a partnership property. These statements diminish, to say the least, the strength of Alexander's position with regard to the small claims matters.

[34] As to prejudice, the moving parties submit that the motion judge failed to consider the question of prejudice to the responding party – or lack thereof, according to the moving parties – before striking their statement of defence and exposing them to a claim for $50,000. I disagree. The motion judge's comments concerning the cost to Laczko of the court appearances necessary to enforce its right to disclosure in the Minutes was an assessment of prejudice. One might also infer that the motion judge was of the opinion that prejudice was accruing from her comment that "[t]he defendant is not proceeding in a fair or appropriate fashion."

[35] Indeed, there is significant evidence before me that the moving parties' failure to make timely disclosure has caused and is causing prejudice to the responding party. Alexander states that the joint venture has been insolvent since August 4, 2009. The documentation to support this statement has not been provided. The certificate of outstanding realty taxes on the property shows taxes in arrears of $32,316.87. Alexander states that he has an arrangement in place with the City of Hamilton to pay $750 a month, which he has been doing. While the joint venture may be insolvent, why make these payments unless there is some equity in the property?

[36] Alexander also states in his supplementary affidavit:

> In order to complete the original purchase of the property, I borrowed $52,000 on a line of credit. This was registered in the form of a second mortgage on the joint venture property. The project did not generate sufficient funds to make payments on this mortgage. I assigned this mortgage to a numbered company owned by my wife who has issued a Notice of Sale.

[37] While Alexander complains that the striking of his statement of defence has exposed him to a judgment for $50,000 and that his legitimate set-offs claimed will not be accounted for, the moving parties' delay and lack of disclosure has denied the responding party the opportunity to finalize his actions against them. It has also exposed the responding party to a continuing deterioration of his interest in the partnership property.

[38] When this history is considered as a whole, I am of the opinion that to grant the relief requested by the moving parties would cause prejudice to the responding party, that there is little merit to the appeal, and that the justice of the case does not require that leave be granted. Accordingly, for the reasons given, the motion to extend the time to appeal is dismissed.

[39] The responding party is entitled to his costs of the motion before me and may make submissions in writing of no more than two pages concerning its bill of costs. The responding party's submissions are to be made within five days of the release of these reasons. The moving parties shall have five days from the filing of the responding party's submissions to respond in writing and shall similarly limit their submissions to two pages.