

COURT OF APPEAL FOR ONTARIO

CITATION: Sioux Lookout (Municipality) v. Goodfellow, 2015 ONCA 223

DATE: 20150407

DOCKET: C59384

Sharpe, van Rensburg and Pardu JJ.A.

BETWEEN

The Corporation of the Municipality of Sioux Lookout

Plaintiff/Defendant by Counterclaim
(Respondent)

and

David Warren Goodfellow

Defendant/Plaintiff by Counterclaim
(Appellant)

Alfred J. Esterbauer and Demetrios Yiokaris, for the appellant

Allan D. McKitrick, for the respondent

Heard: March 30, 2015

On appeal from the order of Justice John S. Fregeau of the Superior Court of Justice, dated August 22, 2014.

ENDORSEMENT

[1] David Goodfellow appeals against the dismissal of his counterclaim for damages against the Municipality of Sioux Lookout. Although he failed without any real explanation to deliver an affidavit of documents, and prepare a discovery plan as required by a status hearing order, he argues that the motion judge erred

in dismissing his claim for delay under rule 48.14, rather than putting the onus on the municipality as would have been the case under Rule 24.

[2] The motion judge held that under rule 48.14, as at a status hearing, the appellant bore “the burden of demonstrating that there is an acceptable explanation for the litigation delay and that, if the counterclaim is allowed to proceed, the defendant by counterclaim will suffer no non-compensable prejudice.”

[3] In contrast, a moving party who seeks to dismiss an action for delay under Rule 24 must establish that there has been inordinate and inexcusable delay that gives rise to a substantial risk that a fair trial will not be possible: *Armstrong v. McCall*, [2006] O.J. No. 2055 (C.A.), at para. 11.

[4] The appellant commenced ten separate Small Claims Court actions against the municipality. The municipality commenced an action in the Superior Court against the appellant, that he defended with a counterclaim. Pursuant to an order in 2010, the actions were consolidated, and the appellants’ claims against the municipality were all required to be asserted as part of his counterclaim in the Superior Court action. Pursuant to another order, in 2011, the appellant was permitted to have dual legal representation, with his insurer’s counsel representing him in the defence of the main action, and another lawyer acting for him in the counterclaim.

[5] On November 21, 2011 the Court issued a status notice. The appellant requested a status hearing. A consent timetable order was issued on January 24, 2012 requiring a Discovery Plan to be prepared by the parties by March 31, 2012 and requiring affidavits of documents to be served by May 15, 2012. The appellant's counsel in the counterclaim did not deliver an affidavit of documents and did not respond to requests for his position on a discovery plan. The municipality brought a motion to dismiss the appellant's claims for delay on April 9, 2014. The municipality had by then delivered a nine volume affidavit of documents, but reasonably would not schedule examinations under oath of the appellant until they had his affidavit of documents on his claims.

[6] The appellant still had not produced an affidavit of documents in the counterclaim by the time of the motion to dismiss for delay.

[7] The motion judge did not err in requiring the appellant to provide some reasonable explanation for his delay in complying with the order made on consent at the status hearing held at his request. The motion judge found that the appellant ignored the timetable. The motion judge observed that there was merit to the municipality's submission that the flood and property damage claims from 2007 as set out in the appellant's claim were now "much more difficult, if not impossible to investigate and defend against in 2014".

[8] Although rule 48.14 does not contain an express provision dealing with the consequences of failure to comply with an order made at a status hearing, rule 60.12 provides that where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by the rules:

- (a) stay the party's proceeding;
- (b) dismiss the party's proceeding or strike out the party's defence; or
- (c) make such other order as is just.

[9] The motion judge clearly considered all relevant circumstances in exercising his discretion to dismiss the counterclaim after the appellant had failed to comply with the court-ordered timetable. We see no basis to interfere with his decision.

[10] The appeal is dismissed with costs to the respondent municipality fixed at \$15,000.00 all inclusive.

"Robert J. Sharpe J.A."

"K. van Rensburg J.A."

"G. Pardu J.A."