COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Unrau v. McSween,*
2013 BCCA 343

Date: 20130717
Docket: CA040345
and CA040885

Between:

William Unrau

Appellant
(Plaintiff)

And

Robert D. McSween and James Gordon and Jeremy Gomersall and Douglas W. Hargrove and Harold C. Nordan and Isaac Brouwer Berkhoven and Stephen Godfrey and John Doe and Richard Roe carrying on business under the firm name and style of The Most Worshipful Grand Lodge of Ancient and Free and Accepted Masons of British Columbia and Yukon

-and-

Robert D. McSween and James C. Gordon and Jeremy Gomersall and Douglas W. Hargrove and William Ord Walls and Alan Tomlins and Harold C. Nordan and Isaac Brouwer Berkhoven and Stephen Godfrey and John Doe and Richard Roe

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson

On appeal from: An order of the Supreme Court of British Columbia, dated October 9, 2012 (*Unrau v. McSween*, Vancouver No. S073804) and from an order of the Supreme Court of British Columbia, dated April 10, 2013 (*Unrau v. McSween*, Vancouver No. S073804)

Oral Reasons for Judgment

Appellant appearing In Person:	William Unrau
Counsel for the Respondents:	G.E.H. Cadman Q.C. L. Bussoli
Place and Date of Hearing:	Vancouver, British Columbia July 17, 2013
Place and Date of Judgment:	Vancouver, British Columbia July 18, 2013

Summary:

The plaintiff appeals from an order dismissing his defamation action for want of prosecution. He also appeals from a judgment upholding a registrar's assessment of costs. Held: Appeal from the dismissal of the action dismissed. The chambers judge made no reviewable error in finding that there had been inordinate delay for which no adequate explanation had been provided and in finding that the defendants had suffered prejudice as a result of the delay. Appeal from the assessment of costs to be determined only after receipt of the judge's reasons.

[1] **GROBERMAN J.A.:** This is an appeal by the plaintiff from an order dismissing a defamation action for want of prosecution.

[2] On June 25, 2005, at an annual meeting of the Grand Lodge, the defendants presented reports on the plaintiff's term as Grand Master of the Freemason's Grand Lodge. The plaintiff contends that some of the statements made in the reports were defamatory. He filed a writ of summons and statement of claim on June 4, 2007. Statements of defence were filed on February 5, 2008, and the plaintiff filed a reply on February 25, 2008.

[3] A case management conference was held on May 20, 2008 and the court ordered that the defendants provide lists of documents by June 16, 2008, that the plaintiff deliver any interrogatories by June 30, 2008, and that examinations for discovery be concluded by October 31, 2008. The defendants delivered their lists of documents in accordance with that schedule. Interrogatories were delivered to two of the individual defendants, and responses were delivered on September 2, 2008. Appointments for examinations for discovery of four defendants were set for October 28 and 29, 2008, and the defendants sought to examine the plaintiff, as well, on those dates. It appears that one of the defendants was seriously ill and his examination could not have gone ahead at that time. In any event, the examinations were cancelled by plaintiff's counsel a few days before they were to take place, possibly because of difficulties in obtaining copies of documents.

[4] The claim was amended in late in 2008 to add two defendants. On January 29, 2009, a second case management conference was held. The court ordered that the plaintiff provide counsel for the defendants a list setting out which defendants

were to be examined for discovery no later than March 2, 2009. On February 25, 2009, counsel for the plaintiff advised that he wished to examine all of the defendants for discovery. While there was some exchange of correspondence between counsel in anticipation of setting discoveries, no dates for those examinations were ever set.

[5] On July 12, 2010, the defendants made what appears to be a gratuitous demand that the pleadings be amended to comply with the new Supreme Court Civil Rules, and the plaintiff complied by filing a notice of civil claim (which contained no substantive amendments) on August 4, 2010. Counsel for the plaintiff advised counsel for the defendants on August 6, 2010 that the plaintiff would be retaining new counsel. He filed a notice of withdrawal of lawyer on September 1, 2010.

[6] Nothing further happened in the litigation until July 27, 2012, when former counsel for the plaintiff returned a copy of a recording to counsel for the defendants, advising that he had yet to be contacted by anyone with respect to continuing with the prosecution of the matter. On August 22, 2012, the defendants applied to have the action dismissed for want of prosecution.

[7] In dismissing the action for want of prosecution, the judge said:

> [3] There is very little explanation as to why [the plaintiff] had not advanced this case more aggressively. Such explanation as there is involves blaming his [lawyer] for not being aggressive. The fact of the matter is that as of today very little has happened on this matter, except for an exchange of pleadings, a fair amount of … correspondence between counsel, and no discoveries.

[8] It seems to me that that is a reasonable summary of the state of affairs.

[9] In deciding the application, the judge referred to *0690860 Manitoba Ltd. v. Country West Construction Ltd.,* 2009 BCCA 535. In that case, this Court reviewed the jurisprudence and summarized the factors to be considered on an application to dismiss an action for want of prosecution:

> [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:

> (1) the length of the delay and whether it was inordinate;
>
> (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
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> (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
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> (4) whether, on balance, justice requires dismissal of the action.

[10] Applying those principles, the chambers judge found that the delay in this case was inordinate, particularly given that the claim is not a complex one. He was of the view that it should have been brought to trial within eighteen months of the filing of the writ.

[11] He found no adequate explanation for the delay. While acknowledging that the plaintiff blames his former counsel, the judge rejected that as a basis for denying the application on the facts of this case:

> [8] … [I]t remains the plaintiff's responsibility to advance the case against the defendant in a timely manner and … a lawyer's delict is not an excuse that [the plaintiff] can rely on in failing to bring the matter on as quickly as he should have. I am satisfied that that excuse is not such as to warrant the court's interference with what should otherwise happen in this application.

[12] The judge found that the delay had resulted in serious prejudice to the defendants. One defendant, James C. Gordon, died in the spring of 2009. He would have been a key witness in this matter. Other defendants are now of advanced age. The judge considered that the memories of the parties would be important at trial. He noted that the events at issue occurred in 2004 and 2005.

[13] In the result, he found that justice required the dismissal of the action.

[14] On this appeal, Mr. Unrau argues that the delay was excusable. He suggests that the chambers judge failed to conduct a "meticulous examination" of the evidence, and therefore erred in his assessment that the delay was inordinate. Mr.

Unrau points to a number of disagreements between counsel which resulted in delay in setting discovery dates, for example. He also notes that the defendants did not respond to the notice of civil claim by filing new documents.

[15] I am not persuaded that the chambers judge erred in the manner suggested by Mr. Unrau. The judge appreciated that there was considerable correspondence between counsel up until 2010. He, rightly in my view, formed the opinion that the disagreements between counsel did not amount to a justification for the plaintiff's failure to move the action forward.

[16] I note, as well, that the plaintiff's only explanation for doing nothing in the two years after his counsel withdrew is that he has not succeeded in retaining counsel to take over the case. He remains without counsel, and provides no basis for believing that the case would, if reinstated, be prosecuted to a conclusion in the near future.

[17] Mr. Unrau also contends that the judge erred in finding that the defendants have suffered serious prejudice as a result of the delays. He contends that this is, effectively, a "documents case" and that the testimony of individual defendants is of little import. Again, I am not persuaded by the argument. I see no basis on which this court could interfere with the judge's finding that the recollections of the individual defendants are important to the case. While the words that allegedly constituted the defamation were recorded, other issues will require a reconstruction of surrounding circumstances from the memories of the parties.

[18] Finally, Mr. Unrau says that the defendants have been responsible for delay because they did not respond to the notice of civil claim filed in August of 2010. The argument is purely technical, but it is difficult to criticize it given that the defendants required the plaintiff to file a notice of civil claim without any apparent reason for doing so. Even as a technical argument, however, the contention must fail. It was not necessary for the defendants to file responses to civil claim, because Rule 24-1(6)(b) deemed their statements of defence to be responses. If the plaintiff wished the statements of defence to be replaced by actual responses to civil claim, he should have demanded such pleadings under Rule 24-1(10).

[19] The chambers judge's decision to dismiss the action for want of prosecution was a discretionary one, and this Court must defer to his decision unless it is shown that he proceeded on an improper basis or made palpable and overriding errors of fact. I am unable to detect any reversible error in the chambers judge's reasons. I would, therefore, dismiss the appeal.

[20] The appellant has also brought an appeal from an order of a Supreme Court judge upholding the assessment of costs by the registrar. Mr. Unrau disputes many of the details of the costs awarded by the registrar. We considered that it would be efficient to hear that appeal together with the main appeal and, with the agreement of the parties, did so yesterday.

[21] Unfortunately, the reasons of the Supreme Court judge are not yet available to us. While the parties are largely in agreement as to the gist of those very brief reasons, it would be imprudent for us to decide the appeal without having seen them. Accordingly, I am of the view that the second appeal should not be decided until such time as we have received a transcript of the Supreme Court judge's reasons. The parties may have brief submissions arising out of the transcript, and should be afforded an opportunity to make such submissions in writing. I would suggest that a period of two weeks after receipt of the transcript should be sufficient time for the parties to file those submissions. I would, therefore, direct that the parties have leave to file additional written submissions on the second appeal within two weeks of being advised that a transcript of the judge's reasons have been received by the court.

[22] **SAUNDERS J.A.**: I agree.

[23] **HINKSON J.A.**: I agree.

[24] **SAUNDERS J.A.**: The appeal of the order of Mr. Justice McEwan is dismissed.

[25] The appeal of the order of Mr. Justice Cohen is adjourned on the basis described by Mr. Justice Groberman, that is, after obtaining the transcript of the

reasons of Mr. Justice Cohen, the parties have leave to file within two weeks brief written submissions on any matter that may arise from that transcript and, thereafter that appeal will be before us for judgment.

"The Honourable Mr.Justice Groberman"