Federal Court  Cour fédérale

Date: 20171208

Dockets: T-1015-12
T-1016-12
T-1017-12

Citation: 2017 FC 1120

Ottawa, Ontario, December 8, 2017

PRESENT: The Honourable Madam Justice Kane

Docket: T-1015-12

BETWEEN:

SERGE EWONDE

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AND
MICHEL THERIAULT, CSC EMPLOYEE

Defendants

Docket: T-1016-12

AND BETWEEN:

SERGE EWONDE

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AND

MARC BOURQUE, CSC EMPLOYEE

Defendants

Docket: T-1017-12

AND BETWEEN:

SERGE EWONDE

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AND
SHERYL BREMNER, CSC EMPLOYEE

Defendants

ORDER AND REASONS

[1] The Defendant, Her Majesty the Queen, seeks to dismiss the Plaintiff's actions due to the Plaintiff's inordinate delay in moving his actions forward. The Defendant brought three motions in writing, pursuant to Rule 369 of the *Federal Courts Rules*, to dismiss the Plaintiff's three actions.

[2] The Plaintiff's actions were commenced in 2012 alleging, among other things, negligence and the infliction of mental suffering arising from three events which occurred while he has been serving a lengthy prison sentence in federal penitentiaries. A Case Management Judge was

appointed and several Orders and Directions establishing time limits for the next steps were made to advance the actions, with little compliance by the Plaintiff.

[3] The Defendant's motions to dismiss the actions were granted by the Federal Court on April 4, 2016. The Plaintiff appealed. The Federal Court of Appeal allowed the Appeal, set aside the Orders dismissing the actions and rendered new Orders granting the Plaintiff three weeks from the issuance of its judgment to serve and file in the Federal Court his motion records in the official language of his choice in reply to the Defendant's motions. The Court of Appeal noted that the next step would then be for the Federal Court to reconsider the Defendant's motions.

[4] This Court has now considered the submissions of the Defendant and Plaintiff, the Court of Appeal's decision in *Ewonde v the Queen*, 2017 FCA 112, [2017] FCJ No 546 [Ewonde], and the other relevant jurisprudence. For the reasons that follow, the Defendant's motions to dismiss the Plaintiff's actions are not granted. In other words, the Plaintiff's actions will continue and the Plaintiff will continue to bear the responsibility to move them forward in a timely way in accordance with the *Federal Courts Rules* and the directions of the Case Management Judge.

I. The Background

[5] The Federal Court of Appeal provided a summary in *Ewonde,* at paras 1-9, noting, among other things, that: Mr. Ewonde commenced his actions in English although French is his mother tongue; he was self-represented at various times; and, he failed to follow through with the orders of the Case Management Judge.

[6] With respect to the Defendant's Motion to Dismiss, Mr. Ewonde advised the Court by a letter in French that he could no longer represent himself in English, as he had in the past, with the assistance of fellow inmates. The Case Management Judge agreed with the Defendant that Mr. Ewonde could have initiated his actions in French or made a timelier request to change the language of the proceedings. The Case Management Judge directed Mr. Ewonde to respond to the motions within 14 days. Mr. Ewonde did not do so. As a result, a judge of the Federal Court granted the Defendant's motion to dismiss the actions.

[7] On appeal, Justice Johanne Trudel found that, although there had been an inordinate delay, the crucial issue was the Court's failure to address Mr. Ewonde's language rights, noting at para 14:

> [14] It would be an understatement to say that the appellant's progress in the five years since the commencement of these proceedings has been unsatisfactory. On that ground alone, I could accept that the Judge had evidence supporting his Orders. But this is not the end of the matter, as the Judge and, before him, the Prothonotary, failed to respond to the substance of the appellant's request to continue his actions in French. Neither the Judge nor the Prothonotary addressed Mr. Ewonde's constitutional right to choose French in the context of his Court proceedings. In my respectful view, this omission amounts to an error of law.

[8] With respect to the fact that Mr. Ewonde had previously participated in the proceedings in both English and French and may have appeared to be bilingual, Justice Trudel emphasized that the right to express yourself in the language of your choice prevails, at para 17:

> [17] Bilingual people do not have weaker constitutional language rights than unilingual people. As this Court recently noted in *Industrielle Alliance, Assurance et service financiers inc. v. Mazraani*, 2017 FCA 80 at paragraph 10:

> Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:
>
> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.

[9] Noting the provisions of section 18 of the *Official Languages Act*, Justice Trudel explained, at para 18, that "an individual may elect to institute proceedings against the Crown in either official language, regardless of their mother tongue. An individual may also re-elect, during the course of proceedings, and the Crown will be obliged to switch languages as well, unless the Crown establishes that reasonable notice has not been given."

[10] Justice Trudel found that the Case Management Judge had erred in suggesting that Mr. Ewonde could continue to plead in English because he was capable of doing so in the past, noting that the right to plead in either official language is enshrined in section 14 of the *Official Languages Act* .

[11] Justice Trudel emphasized, at para 26, the duty imposed on the Court by subsection 15(1) "to ensure that any person giving evidence before it may be heard in the official language of his choice" and highlighted this duty again at para 27:

> [27] The OLA requires more of the Courts than mere permission to appear in either official language. The OLA imposes positive duties on Courts to encourage and facilitate access to its services in either official language.

[12] As noted above, to remedy the Court's error, Justice Trudel granted the Plaintiff three weeks to serve and file his motion records in the official language of his choice in reply to the Defendant's motion to dismiss his actions, with the next step being the reconsideration by this Court of the Defendant's motion.

II. The Defendant's (Moving Party's) Submissions

[13] The Defendant's January 2016 submissions include a chronology of the proceedings noting: the Plaintiff's first action was filed in May, 2012 and the other two shortly afterward; by Order dated June 28, 2013, the action became a specially managed proceeding; a Case Management Judge was appointed and the Plaintiff was required to submit a proposed timetable by August 30, 2013; and, the Case Management Judge issued several orders and directions over the next two and a half years in an effort to, among other things, advance the proceedings.

[14] The Defendant submits that the test established in *Bell v Bell Estate* (2000), 96 ACWS (3d) 590 at para 29, 187 FTR 64 (TD) [*Bell*] to determine whether an action should be dismissed for delay focuses on whether there has been inordinate delay, whether the delay is inexcusable and whether the defendant is likely to be seriously prejudiced by the delay. The Defendant further submits that where a status review has occurred, the usual test is stricter and requires consideration of a party's compliance with any steps ordered by the Court in the course of the status review *(Bell* at paras 31-35).

[15] The Defendant's June 2017 submissions maintain that the test to grant the motion for dismissal due to inordinate delay has been met.

[16] The Defendant argues that the Court of Appeal addressed the official languages issues arising from the Plaintiff's inability to respond to the Defendant's Motion to dismiss. The remedy has been provided: the Plaintiff has now had the opportunity to respond in his language of choice. The Defendant submits that this remedy does not assist the Plaintiff in justifying the delays which occurred prior to the motion to dismiss.

[17] The Defendant submits that, among other missed deadlines, the Plaintiff has not explained how the obstacles or restrictions he alleges regarding his access to documents prevented him from filing a requisition for a pre-trial conference or a pre-trial memorandum. The Defendant argues that given that the Plaintiff made several handwritten submissions in the past, he could have done so again to meet the preemptory deadlines.

[18] The Defendant reiterates that the usual test applied to determine a motion to dismiss does not govern cases where a status review has occurred, as in this case (*Bell* at paras 31-35). The Defendant adds that prejudice, or lack of prejudice, is not a consideration.

[19] The Defendant also submits that the Plaintiff has not provided a sufficient plan to move his actions forward; he has not proposed any timetable, rather he calls on the Court to do so.

III. The Plaintiff's (Respondent to the Motion) Submissions

[20] In accordance with the Court of Appeal's decision, the Plaintiff filed submissions on June 15, 2017.

[21] The Plaintiff acknowledges that he failed to comply with several Orders of the Case Management Judge and with the required procedure related to his three claims. The Plaintiff submits that his conduct and the resulting delay are not unreasonable due to the obstacles he faced. He describes these obstacles as including: the lack of legal representation and advice at various and important points in time, including when he was required to meet certain deadlines; the lack of access to a computer; the failure of the staff at the Kent Institution to deliver documents to him; the lack of documents necessary for preparation for discoveries and participation in settlement discussions; and, as a result of his transfer to Ontario, the lack of assistance to communicate in English.

[22] The Plaintiff explains that on receipt of the Defendant's Motion to strike his claims, he wrote to the Court in French on February 6, 2016 advising that he could not proceed in English. He noted that, although he had previously communicated in English, this was due to the assistance provided by other inmates while he was at the Kent Institution.

[23] The Plaintiff acknowledges that he has the duty to prosecute his claims, but suggests that the Defendant has induced the delay to some extent by failing to facilitate his access to certain records and documents and by requiring him to use the English language in his proceedings.

[24] The Plaintiff submits that, applying the *Bell* test, the Court should find that he has provided a reason for his delay and that the Defendant has not established that it will suffer any prejudice if the claims proceed.

[25] The Plaintiff notes that the physical and documentary evidence relevant to the Plaintiff's claims should not have deteriorated given that the Defendant has a duty to safeguard the personal effects of the Plaintiff, which are at issue in the claims.

[26] The Plaintiff also submits that he will now have consistent legal representation and, going forward, the Court could ensure that the claims proceed by establishing reasonable time frames for the next steps and providing directions.

IV. The Motion is Dismissed

[27] As the Court noted in *Bell*:

> [29] In considering a motion for dismissal for delay, generally the following test must be applied: whether there has been inordinate delay, whether the delay was inexcusable and whether the defendant is likely to be seriously prejudiced by the delay. However, in my view, the same test should not be applied to proceedings which have survived status review.

[28] The Court went on to explain at para 33:

> [33] If in response to status review a party states unequivocally that a specific step will be taken within a certain time and the Court subsequently orders that the proposed step be taken, that party should comply, except for circumstances beyond the control of counsel or the party. Otherwise, the Court's ability to supervise and manage the proceeding will be altogether thwarted.

[29] In the present case, there was a status review in 2013, following which a Case Management Judge was appointed. Despite the issuance of Directions and timelines for the next steps, the Plaintiff generally did not comply. However, the status review occurred relatively early on in the chronology of the proceedings. The circumstances differ from those in *Bell*. In my view, the usual test, which considers whether there has been inordinate delay, whether that delay is excusable, and whether the defendant is likely to be prejudiced, is more appropriate.

[30] There is no dispute that the delay has been inordinate. The Court is left to consider whether the delay is inexcusable and whether there has been prejudice. The Defendant's submission that prejudice is not a relevant factor is based on its view that the usual test should not apply, and the Defendant did not address this issue.

[31] If the Plaintiff's right to participate in his official language of choice was not at play, I would agree that the Defendant's motion could be granted. The Plaintiff has not pursued his actions with any diligence, he has not complied with established time limits, even where these have been extended, and it appears that he has not cooperated with scheduled examinations for discovery, even in circumstances where it appears that there were no language barriers. However, the Plaintiff's language rights are at issue.

[32] I have considered the submissions of the Defendant that the reconsideration of the motions has provided the remedy to address any contraventions of Mr. Ewonde's rights to participate in his proceedings in English or French. I do not agree that the issues highlighted by

the Court of Appeal have been remedied or can be isolated to focus only on the opportunity to respond to the Defendant's Motions to dismiss.

As Justice Trudel highlighted, the Court has a positive duty to encourage and facilitate access to its services in either official language. This duty calls on the Court to give practical effect to the right to pursue litigation in either one of Canada's two official languages. In the present case, that would not be accomplished by simply concluding that the Plaintiff has now had an opportunity to respond to the current motions in his language of choice. While I agree that the Plaintiff's explanation for his many delays and non-compliance with Directions, timelines and other procedural requirements cannot all be attributed to his language abilities or his choice to use English or French, I cannot determine whether and to what extent some of the steps and timelines imposed leading up to the Motion to dismiss were affected by the Plaintiff's language abilities. Nor can I speculate with respect to any additional prejudice the Defendant may suffer. However, the passage of time generally poses challenges for both the Plaintiff in the proof of the claims and the Defendant in its defence.

[33] The Plaintiff's submits that some of the past delays and non-compliance were due to the need to rely on other inmates to assist him to understand and to respond in English. It is not possible to conclude whether the significant delays were caused by language barriers or otherwise. To ensure that the Plaintiff's language rights are fully protected and respected, the Defendant's Motions to dismiss the action cannot be granted.

[34] I agree with the Defendant that the Plaintiff's proposal for the prosecution of his claims is vague and relies on the Court's further case management. The Plaintiff is responsible for the prosecution of his claims. However, the Case Management Judge will be in the best position to establish appropriate timelines for the next steps.

[35] The Plaintiff's claims may proceed, as Case Managed Proceedings, with a timetable to be established by the Case Management Judge to ensure no further delays.

ORDER

THIS COURT ORDERS that:

1. The Defendant's Motions are dismissed.

2. T-1015-12, T-1016-12 and T-1017-12 shall continue as Specially Managed Proceedings.

3. A Case Management Judge will be appointed and timelines for the next steps in these proceedings will be established.

4. There is no Order for Costs.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1015-12
STYLE OF CAUSE:	SERGE EWONDE v HER MAJESTY THE QUEEN, IN RIGHT OF CANADA AND, MICHEL THERIAULT, CSC EMPLOYEE
AND DOCKET:	T-1016-12
STYLE OF CAUSE:	SERGE EWONDE v HER MAJESTY THE QUEEN, IN RIGHT OF CANADA AND, MARC BOURQUE, CSC EMPLOYEE
AND DOCKET:	T-1017-12
STYLE OF CAUSE:	SERGE EWONDE v HER MAJESTY THE QUEEN, IN RIGHT OF CANADA AND, SHERYL BREMNER, CSC EMPLOYEE

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	KANE J.
DATED:	DECEMBER 8, 2017