Citation: Nguyen v Winnipeg (City of), 2022 MBCA 33
Date: 20220420
Docket: AI22-30-09737

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

KIM NGUYEN	)	
	)	
(Plaintiff) Respondent	)	***J. W. Feldschmid***
	)	*for the Applicant*
- and -	)	
	)	***W. M. Onchulenko*** *and*
ST. JAMES-ASSINIBOIA SCHOOL DIVISION NO. 2	)	***L. O. Valgardson***
	)	*for the Respondent*
	)	
(Defendant)	)	*Chambers motion heard:*
	)	***March 17, 2022***
- and -	)	
	)	*Decision pronounced:*
THE CITY OF WINNIPEG	)	***April 20, 2022***
	)	
(Defendant) Applicant	)	

STEEL JA

[1] The defendant, the City of Winnipeg (the City), moves for an order allowing it to appeal as of right or, alternatively, for leave to appeal to this Court from a judgment in the Court of Queen's Bench dismissing the City's motion for summary judgment. In dismissing the motion, the motion judge made a finding that the plaintiff provided the City with substantial notice of her claim in accordance with *The City of Winnipeg Charter*, SM 2002, c 39 (*The City Charter*) or, alternatively, that she had a reasonable excuse for not doing so and the City has not suffered any prejudice. It is only that finding that the City wishes to appeal.

[2] Is that judgment an interlocutory order which requires leave to appeal or was it a final order, allowing an appeal as of right? The question of whether an order is final or interlocutory is one that has vexed courts for years (see *Waldman v Thomson Reuters Canada Limited*, 2015 ONCA 53 at para 8). The issue has been known to drive judges to despair (see John Sopinka, Mark A Gelowitz & W David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018) at section 1.17). Unfortunately, as with many issues in jurisprudence, the answer is not black or white, but muddy grey.

FACTS

[3] The underlying action arises out of a trip and fall incident where the plaintiff fell while going down a staircase in the St. James-Assiniboia Library. The plaintiff claims that the incident was due to the negligence of the City as occupier of the premises. The City argued that the plaintiff's claim is statutorily barred and brought a motion for summary judgment dismissing the claim based on sections 491 and 492(2) of *The City Charter*.

[4] Those sections require notice within seven days of the happening of the incident unless there is a reasonable excuse for the delay and the action is commenced within three months of the incident. Those sections are set out as follows:

> **Limitation on actions respecting public facilities**
> **491** No action against the city for loss or damage arising from failure to maintain or keep in repair a public facility may be commenced unless
>
> (a) within seven days after the happening of the alleged event giving rise to the loss or damage, the claimant has

served a notice of the claim or action on the city clerk; and

(b) the action is commenced within two years after the day the notice is served on the city clerk.

Requirement of notice
492(2) Subject to subsection (1), failure to serve the notice required under clause 490(1)(a) or (2)(a) or 491(a) bars an action unless

(a) the court in which the action is brought considers that there is a reasonable excuse for the failure and that the city has not been prejudiced by the failure; and

(b) the action is commenced within three months after the happening of the event giving rise to the loss or damage.

[5] The incident occurred on July 10, 2017. The plaintiff provided formal notice to the City clerk on June 5, 2018, and an action was filed against the City on June 28, 2019.

THE MOTION JUDGE

[6] The motion judge held that he could decide some of the issues in the action on a summary judgment motion and that would be a proportionate, more expeditious and less expensive means to achieve a just result, as opposed to going to trial on all of the specific issues raised on summary judgment. In accordance with a more proportionate method of adjudication, he applied the new summary judgment process where a motion judge is now required to determine whether there is a genuine issue requiring a trial rather than merely the existence of a genuine issue for trial (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91).

[7] Thus, he held that the claim by the City that the plaintiff's action is statute-barred can, and should, be dealt with on a summary judgment motion. Based on the evidence filed and the submissions of counsel, he found that the City had enough information to investigate the claim and had substantial notice of what occurred. Alternatively, he held that the plaintiff's lack of strict compliance with section 491 of *The City Charter* was due to a reasonable excuse and the City had not been prejudiced.

[8] The City seeks to appeal the judgment, arguing that the motion judge erred in his determination of the City's limitation defence and that his finding in that regard was a final order. The City maintains that, if it cannot appeal that finding now, it will be barred from raising the defence at the actual trial, since judgment has been entered on that issue. The plaintiff agrees that the City cannot reargue the limitation defence at the trial, but maintains that it is an interlocutory order and, given the facts of this case, leave to appeal should not be granted.

ANALYSIS—FINAL OR INTERLOCUTORY?

[9] *The Court of Appeal Act*, CCSM c C240 (the *Act*) was recently amended in January 2022 to require leave for almost all interlocutory appeals (see *The Court Practice and Administration Act (Various Acts Amended*), SM 2021, c 40, section 3). Section 25.2 of the *Act* now states:

> **Leave required for interlocutory appeals**
> **25.2(1)** Subject to subsection (2), an appeal must not be made to the court with respect to an interlocutory order of a judge of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.

> **Exceptions**
> **25.2(2)** Leave to appeal an interlocutory order is not required
>
> (a) in a proceeding involving the liberty of a person or the custody of a minor;
>
> (b) if the order grants or declines to grant a stay or an interlocutory injunction; or
>
> (c) in other cases specified in the rules.

[10] The issue therefore arises as to whether the portion of the judgment dismissing the limitation defence is a final or interlocutory order. If it is an interlocutory order, should this Court nevertheless grant leave for it to be appealed?

[11] The judgment reads:

> . . .
>
> 1. THIS COURT ORDERS AND ADJUDGES THAT the [City's] motion for summary judgment is hereby dismissed in its entirety.
>
> 2. THIS COURT FURTHER ORDERS AND ADJUDGES THAT the Plaintiff provided the [City] with substantial notice of the claim and that any lack of strict compliance with section 491 of [*The City Charter*] was due to a reasonable excuse that did not prejudice the [City].
>
> . . .

[12] The City argues that the judgment in question does more than simply dismiss its motion for summary judgment. It makes a finding that substantive notice was given in compliance with section 491 of *The City Charter*, thereby

making a determination at para 2 with respect to a substantive right that could be determinative of the action.

[13] The plaintiff argues that, unlike the wording of a similar rule in Ontario, which indicates that an appeal of a final order lies to the Court of Appeal (see the *Courts of Justice Act*, RSO 1990, c C43 at section 6(1)(b)), the word "final" is not in the Manitoba rule. Therefore, in Manitoba, every order without exception that arises from a notice of motion is an interlocutory order that requires leave to appeal. The motion judge's determination that the limitation defence was not available to the City does not finally dispose of the negligence action. It is submitted that, since the merits of the case remain to be determined, the order is interlocutory.

[14] I disagree with the plaintiff. The rule requiring leave does refer to interlocutory orders. However, in order to determine whether it is an interlocutory order, I must interpret the word "interlocutory" within the context of the rule and the facts of the case. The absence of the word "final" is not determinative.

[15] In *Paulpillai Estate v Yusuf*, 2020 ONCA 655, Jamal JA reviewed the main principles to be considered when assessing whether an order is interlocutory (at para 16):

> . . .
>
> 1. An appeal lies from the court's order, not from the reasons given for making the order [citations omitted].
>
> 2. An interlocutory order "does not determine the real matter in dispute between the parties — the very subject matter of the litigation — or any substantive right(.) Even though the

> order determines the question raised by the motion, it is interlocutory if these substantive matters remain undecided" [citations omitted].
>
> 3. In determining whether an order is final or interlocutory, "one must examine the terms of the order, the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order" [citation omitted].
>
> 4. The question of access to appellate review "must be decided on the basis of the legal nature of the order and not on a case by case basis depending on the application of the order to the facts of a particular case" [citations omitted]. In other words, the characterization of the order depends upon its legal nature, not its practical effect [citations omitted].

[16] See also *Johnson v Ontario*, 2021 ONCA 650, where the Court held (at para 26):

> . . . In the overall context, [the applicant] lost substantive rights of significant importance when his motion for an extension of time within which to opt out of the class action was denied. In my view, it is reasonable to treat the order under appeal as a final order for the purposes of determining appeal rights.

[17] The facts of this case closely resemble the case of *Stoiantsis v Spirou*, 2008 ONCA 553. That case was a medical malpractice action where the plaintiffs were seeking damages from the defendants as a result of the treatment to one of the plaintiffs. The parties agreed to a trial of the threshold issue of whether one of the defendant doctors had advised the plaintiff to take a particular drug. The issue was decided in favour of the plaintiffs. The defendants appealed to the Court of Appeal. The plaintiffs moved to quash the appeal on the ground that the order appealed from was interlocutory, so that the appeal lay to the Divisional Court. The Ontario Court of Appeal

allowed the appeal to proceed, finding that, even where an order does not finally dispose of the rights of the parties to the litigation, it will be final for the purposes of appeal if it disposes of an issue raised by way of defence and thereby deprives the defendant of a substantive right which could be determinative of the entire action.

[18] Even more on point is the case of *Ball v Donais*, 1993 CarswellOnt 23 (CA). In *Ball*, the defendant moved for a determination before trial of the application of a limitation period provision. The motion court judge decided the question against the defendant, as is the case in this situation. The Ontario Court of Appeal held that the motion court judge's order was final since the effect of the order was to preclude the defendant's entitlement to raise the plaintiff's failure to sue within the limitation period prescribed by the *Highway Traffic Act*, RSO 1980, c 198 (since repealed), at the trial of the action. While that order did not finally dispose of the rights of the parties to the litigation, it did, subject to appeal, finally dispose of the issue raised by that defence, and thereby deprived the defendant of a substantive right which could be determinative of the entire action.

[19] That reasoning in *Ball* is indistinguishable from the present case. If the City has no right to appeal, the judgment disposed of an issue raised by the City that deprived them of a substantive right that could have been determinative of the entire action and would have precluded a trial. The injustice of holding otherwise is apparent if one looks at the reasons of the motion judge with respect to section 492(2) of *The City Charter*. The motion judge held, alternatively, that the plaintiff had a reasonable excuse pursuant to that section. Yet, the section requires that, not only should the plaintiff have a reasonable excuse, but also the action must be commenced within three

months of the occurrence of the incident. Both parties have agreed that the motion judge erred, in that the action was not commenced within three months of the occurrence of the incident.

[20] Obviously, if a motion for summary judgment is granted, that would bring the action to a close and would be a final order. With respect to the dismissal of such motions, decisions of this Court that were decided prior to section 25.2 of the *Act* coming into force indicate that this Court would hear appeals of a dismissal of a summary judgment motion (see *Swan River (Rural Municipality) v Ellingson*, 2005 MBCA 118; *Finucane v 3777121 Manitoba Ltd*, 2013 MBCA 101; and *Eastman Bio-Fuels Ltd et al v Small*, 2016 MBCA 112). These cases could be taken to suggest that the dismissal of a summary judgment motion is not an interlocutory decision. However, I do not take these cases to be precedential for the issue at hand. These cases were decided before the introduction of section 25.2, therefore, it was not necessary in the above cases to enter into an analysis of whether the orders were final or interlocutory.

[21] In other provinces with similar provisions to our new section 25.2, the courts have concluded that the dismissal of a summary judgment motion is generally an interlocutory decision (and that the granting of a summary judgment motion is a final decision). See *Atlantic Blue Cross Care v LeBlanc*, 2012 NBCA 55 at paras 5-6; *Raymond v Brauer*, 2015 NSCA 37 at paras 17-21; and *Skunk v Ketash*, 2016 ONCA 841 at paras 29-34, 58.

[22] However, the situation is different if the judge has singled out an issue for resolution on a motion for summary judgment, particularly when it is dispositive of the entire action, and that is reflected in the content of the

formal order. That situation may occur more frequently now, given the new summary judgment rules. The content of the formal order in the court below is a factor in determining whether an order is final or interlocutory. So, in the case of *Ashak v Ontario (Family Responsibility Office)*, 2013 ONCA 375, where the defendant's motion for summary judgment was dismissed, the Court examined the wording of the formal order, which simply stated that the motion was dismissed since the motion judge was satisfied that the plaintiff had established a prima facie duty of care in relation to her negligence claim. The order determined only that a genuine issue requiring a trial existed and it was held to be interlocutory.

[23] The judgment in this case can be distinguished since it went further. It not only dismissed the motion for summary judgment. The issue of the limitation defence is singled out for resolution and that is reflected in the content of the judgment at para 2, which determines a substantive right of the City and which could have been dispositive of the entire action.

[24] Thus, I find that the judgment finding that the plaintiff provided substantial notice to the City and, therefore, complied with section 491 of *The City Charter*, is a final order and may be appealed as of right.

[25] Given my decision that this was a final order and may be appealed as of right, it is unnecessary for me to decide whether I would have granted leave.

[26] The City will have costs of its motion.

Steel JA