Court of Queen's Bench of Alberta

Citation: Downs (Next friend of) v. Calgary Board of Education, 2006 ABQB 161

Date: 20060227
Docket: 0401 06884
Registry: Calgary

Between:

Nolan Downs, a Minor, by his next friends, Susan Downs and Rod Downs

Plaintiffs

- and -

Calgary Board of Education, Tim Steffler, Guardian Ad Litem, John Doe I and Jane Doe I

Defendants

- and -

Tim Steffler, by His Guardian Ad Litem, Lisa Steffler and Robert Steffler

Third Party

Corrected judgment: A corrigendum was issued on March 3, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Madam Justice C.A. Kent

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[1] The Defendant, Calgary Board of Education (CBE) applied before Master Laycock on October 7, 2005, for Leave to file a Third Party Notice against Tim Steffler, Guardian Ad Litem. Notice of that motion was served upon Lisa Steffler, Tim Steffler's mother. The Notice of

Motion provided that an application would be made before the Master for an Order allowing the CBE to add Tim Steffler "Guardian Ad Litem, as a Third Party to the within action." No personal service was made upon Robert Steffler, Tim Steffler's father, or on Tim Steffler himself. The Affidavit of Service provided that personal service was effected on Lisa and Robert Steffler by delivering and leaving the documents in care of Lisa Steffler.

[2] At the hearing of the application the Master was advised that service was in order, the application was made and the Order granted. Nobody appeared on behalf of the Stefflers. The Stefflers now appeal that Order on the basis that there was not proper service. The CBE responds on the basis that even if there was not technical compliance with the Rules with respect to service, since Tim Steffler is an infant the intent of the Rules is that a parent or guardian should be served with notice. That occurred in this case. In any event on the question of whether the Order should have been granted, this Court hears an appeal from the Master on a *de novo* basis so that the entire application can be argued at this level. Clearly the Stefflers have representation at this time.

[3] The Stefflers say that the Third Party Notice should be struck, this matter should be sent back to Masters Chambers on a new application to apply for leave to file and serve a Third Party Notice and all of the issues including any prejudice to the Stefflers can be argued afresh.

[4] In argument before me, in answer to questions by me about why this matter cannot simply be heard entirely by me on a *de novo* basis, counsel for the Stefflers indicated that he had not filed material with respect to the potential prejudice because in his view the only issue before me was whether or not I should strike out the Third Party Notice and send it back for an entire re-hearing. He argued that sending it back the Master was appropriate, allowing the parties the chance to be heard in an efficient and cost-effective manner and that any appeal would then be to this Court again in a cost-effective way. Hearing the matter afresh here would mean that any appeal would go to the Court of Appeal.

[5] In my view service was defective since Rule 18 requires service on the infant and on the infant's parents. That said, to some extent, it was a technical defect in the sense that Lisa Steffler did receive notice that the application was being made. I also agree, however, that while Ms. Steffler would have no misunderstanding that Tim Steffler was being added as a Third Party to this action, it would not be as clear to her that she and her husband were being named Guardians Ad Litem since they were not specifically named in the Notice of Motion.

[6] The matter of service was clearly in question. It seems to me that the Stefflers had two options. One was to apply before the Master on the basis that the Order was made ex-parte and by Rule 387(3), the Order could be set aside and the matter heard anew. The other option was to appeal the Master's Order on the basis that leave should not have been granted because of the service defect. That second option was chosen. It seems to me that now that the matter is before a judge, the matter can be heard *de novo* with the applicant providing whatever evidence of prejudice is available to him. Indeed during argument, counsel for the CBE did not make any objection to that sort of evidence being filed. In my view the greater prejudice would be the delay

involved in having this matter sent back to Masters Chambers to be heard anew with the potential for an appeal first to this Court and further to the Court of Appeal.

[7] In the result the application whether to strike the Third Party Notice will be heard by a judge of this Court. The issue before the judge will be whether or not leave should be granted to file a Third Party Notice should be given in this case. As indicated above the Stefflers may file additional Affidavit material in relation to their application.

Heard on the 23rd day of February, 2006.
Dated at the City of Calgary, Alberta this 27th day of February, 2006.

C.A. Kent
J.C.Q.B.A.

Appearances:

Tyler J. Bond
for the Plaintiffs

Chad R. Johnson
for the Defendant

Abraham A. Fares
for the Third Party

Corrigendum of the Memorandum of Decision
of
The Honourable Madam Justice C.A. Kent

Paragraph [2] - fifth line down should read:

The CBE responds on the basis that even if there was not technical compliance with the Rules with respect to service, since Tim Steffler **is** an infant the intent of the Rules....