

In the Court of Appeal of Alberta

Citation: Sunder Building Supplies Ltd v 7th Avenue Sky Property Inc, 2026 ABCA 210

Date: 20260624

Docket: 2401-0313AC

Registry: Calgary

Between:

Sunder Building Supplies Ltd.

Appellant

- and -

7th Avenue Sky Property Inc.

Respondent

The Court:

**The Honourable Justice Kevin Feehan
The Honourable Justice Bernette Ho
The Honourable Justice Joshua B. Hawkes**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice S.G. Parker
Dated the 18th day of October, 2024
Filed on the 26th day of November, 2024
(Docket: 1701 14681)

Memorandum of Judgment

The Court:

[1] The appellant appeals a chambers judge's order pronounced in October 2024 dismissing the appellant's action for long delay under rule 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010.

Background

[2] The appellant filed a statement of claim in October 2017 seeking relief under what is now the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4. The appellant then filed an application to have its lien declared valid and obtain judgment. Questioning of the appellant's deponent on the affidavit filed in support of that application occurred in September 2019. The application was adjourned *sine die* to allow the respondent time to file a response affidavit and be questioned, if the appellant wished.

[3] In an email sent on September 23, 2019, counsel for the respondent stated "[w]ith regard to the affidavit, the affiant is returning from Toronto today and will swear the affidavit as soon as he returns. I will send you a sworn copy of the affidavit once we receive it".

[4] There was a further adjournment and counsel thereafter exchanged correspondence sporadically. The appellant sent letters asking for the affidavit to be filed within a week or two, failing which steps would be taken to have its application for judgment heard. The respondent replied the deadlines were too brief and proposed other matters such as settlement discussions.

[5] Eventually, in April 2022 the appellant sent a letter attaching a draft litigation plan and stating that if a response was not received by May 6, 2022, the appellant would bring an application to set a litigation plan. This did not occur.

[6] On June 30, 2022, the respondent sent a letter acknowledging a phone conversation between counsel that took place on May 20, 2022, and reiterating its position that the appellant at most might be entitled to \$23,873.97, rather than the higher amount sought. No response was received.

[7] On September 7, 2022, the respondent sent a follow up to its proposal of June 30, 2022. Again, no response was received.

[8] On March 21, 2023, the appellant brought its application for judgment. In response, the respondent filed a cross-application to have the action dismissed for long delay. The applications

judge allowed the cross-application and dismissed the appellant's action. The chambers judge arrived at the same conclusion.

[9] The appellant now appeals to this Court submitting in its factum that the chambers judge erred by:

- (a) failing to find that a significant advance had occurred, having regard to the correspondence between the parties relating to the respondent's stated intention to file an affidavit in response to the appellant's application;
- (b) failing to find that the respondent had participated in the action because it asked the appellant to adjourn its application for judgment *sine die* to allow the respondent to file an affidavit, which engaged the exception in rule 4.33(2)(b); and
- (c) failing to find that the parties had agreed to a suspension period.

[10] For the reasons that follow, the appeal is dismissed.

Standard of Review

[11] Questions of law are reviewed on the standard of correctness. Questions of fact and questions of mixed fact and law are reviewed on the standard of palpable and overriding error, unless there is an extricable question of law: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8–10, 36–37; see also *Flock v Flock Estate*, 2017 ABCA 67 at para 13. An error is palpable if it is obvious, and it is overriding if it goes to the core of the outcome of the case: *Benhaim v St-Germain*, 2016 SCC 48 at paras 37–40.

Analysis

[12] On the appellant's first ground of appeal, rule 4.33 provides that if three or more years have passed without a significant advance in an action, the court must dismiss the action unless a specified exception applies. The assessment as to whether a significant advance has occurred is functional and contextual: *Patil v Cenovus Energy Inc*, 2020 ABCA 385 at para 7. Defendants must not obstruct, stall or delay an action, and the rule was not designed to encourage an ambush by one side if the parties had agreed to take a particular step: *Patil* at para 7; citing *Turek v Oliver*, 2014 ABCA 327 at para 6.

[13] The appellant submits that he was relying on a representation from counsel for the respondent, and it was reasonable for him to do so in the circumstances. The appellant submits it was incumbent on counsel for the respondent to inform him that the respondent no longer intended to file the affidavit if that was the case, when he continued to inquire about it. We appreciate the appellant's position. In our view, it would have been preferable for counsel for the respondent to clarify his client's intentions regarding the affidavit out of professional courtesy. However, the

chambers judge's findings regarding whether there was a significant advance is entitled to deference on appeal: *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 11.

[14] The chambers judge carefully considered the correspondence relied on by the appellant, concluded that the matter proceeded in fits and starts, and the parties were often speaking at cross-purposes. The chambers judge found the respondent did not obstruct or delay the action. The chambers judge found the September 23, 2019 email was an undertaking to file the affidavit, but it later became clear the affidavit would not be filed any time soon, and it was incumbent on the appellant to take steps to enforce that undertaking or otherwise advance the action within the three-year period.

[15] The chambers judge did not accept that the appellant was entitled to rely on the September 23, 2019 email as a reason to stop taking positive steps to advance the action for over three years. Rather, the chambers judge found that both parties had effectively dropped the matter well before the three year period expired. Even if equitable principles applied to rule 4.33 as submitted by the appellant, it has not established any basis that would justify a finding that the three-year period was suspended based on the correspondence. We are not satisfied the chambers judge committed a reviewable error in concluding that three or more years had passed without a significant advance in the action.

[16] On the appellant's second ground of appeal, subrule 4.33(2)(b) provides an exception to the three-year rule if the defendant has participated in an application or proceeding since the delay, such that it warrants the action continuing. A chambers judge's conclusion regarding whether a defendant has participated in an action since the delay in a manner that warrants the action continuing is largely a discretionary decision that is subject to deference on appeal: *CWC Well Services Corp v Option Industries Inc*, 2019 ABCA 331 at para 11. Again, while it would have been preferable for counsel for the respondent to be more forthcoming regarding its intention regarding the filing of an affidavit, we are not persuaded the appellant has demonstrated the chambers judge erred in his exercise of discretion.

[17] Finally, turning to the appellant's third ground of appeal, subrule 4.33(5) provides that parties may "agree in writing to a suspension period" that will be excluded from the three-year period. In this case, there is nothing in the record to indicate that such an agreement was reached and the appellant has failed to identify a reviewable error on this point.

Conclusion

[18] The appeal is dismissed. Costs of the appeal are awarded to the respondent pursuant to Column 3 of Schedule C of the *Alberta Rules of Court*.

Appeal heard on March 13, 2026

Memorandum filed at Calgary, Alberta
this 24th day of June, 2026

Authorized to sign for. Feehan J.A.

Ho J.A.

Hawkes J.A.

Appearances:

C.O. Llewellyn
for the Appellant

C. Petrucci
T. Ke
for the Respondent