ABlawg.ca

October 24, 2010

When is Delay "Undue" under Section 7(2)(d) of the Arbitration Act?

By Jonnette Watson Hamilton

Cases Considered:

Eiffel Developments Ltd. v. Paskuski, 2010 ABQB 619

In June of 2007, Eiffel Developments Ltd. sued Geoffrey and Lisa Paskuski for $46,667, alleging non-payment under a contract for the construction of the Paskuskis' home. Three years later, Eiffel asked Jodi L. Mason, Master in Chambers, to deem service of Eiffel's Statement of Claim on the Paskuskis to be good and sufficient. The Paskuskis made three arguments opposing this simple application: (1) that there was no evidence of service of the Statement of Claim and an absence of service cannot be cured; (2) that even if an absence of service could be cured, there was no evidence to support the relief sought by Eiffel, and (3) that Eiffels' claim should be stayed on the basis of an arbitration clause in the home construction agreement. The Paskuskis lost all three arguments. This comment will focus on the third argument seeking enforcement of an arbitration agreement.

In connection with the first two arguments, the Master held (at para. 13) that the Paskuskis had knowledge of Eiffel's claim against them by June 2, 2008 at the latest. By June 2008, the parties and their lawyers had exchanged e-mails and correspondence relating to the issues in dispute and the Paskuskis' lawyer had requested documents from Eiffel. The Master indicated (at para. 6) that it was significant that the Paskuskis did not file their own affidavit, as would most defendants in these circumstances, swearing that they had not been served. I mention this particular fact because it is also significant to the Paskuskis' loss on the arbitration issue.

Section 21 of the home construction contract provided that "[i]f any dispute arises between the builder and the Purchaser(s) with respect to any matter in relation to this Agreement, the dispute shall be settled through binding arbitration...". As the Master notes (at para. 20), because Eiffels' claim related to the home construction agreement it was within the scope of its arbitration clause and, without more, section 7(1) of the *Arbitration Act*, R.S.A. 2000, c. A-43 would require the court to stay Eiffel's application. Section 7(1) is mandatory, stating:

> 7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court <u>shall</u>, on the motion of another party to the arbitration agreement, stay the proceeding. (emphasis added)

Section 7(2) of the *Arbitration Act* nevertheless sets out five exceptions:

> 7(2) The court may refuse to stay the proceeding in only the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
> (b) the arbitration agreement is invalid;
> (c) the subject matter of the dispute is not capable of being the subject of arbitration under Alberta law;
> (d) the motion to stay the proceeding was brought with undue delay;
> (e) the matter in dispute is a proper one for default or summary judgment.
> (emphasis added)

The Master therefore had discretion to refuse to stay Eiffel's application if the Paskuskis' motion "was brought with undue delay."

The issue of undue delay is fact-specific and context-dependant. In this case, the Master held that the Paskuskis had knowledge of Eiffel's claim against them by June 2, 2008 at the latest. It was September 9, 2010 when they argued that Eiffel's claim should be struck because of the arbitration clause — two years and two months later. The parties cited a number of cases from across Canada where the delay ranged from four to twenty-one months without precluding a stay of a court action in favour of arbitration. In previous cases in Alberta, a delay of only eight months after the filing of a Statement of Claim was enough to preclude a stay (*Millennial Construction Ltd. v. 1021120 Alberta Ltd.,* 2005 ABQB 533 at para. 15), as was a delay of a few months short of two years (*Schmidt v. Alberta New Home Warranty Program*, 2007 ABPC 85 at para. 15, where the number of steps taken in the court action was a contributing factor). However, no matter how many precedents one racks up, the issue is still within the decision-maker's discretion and still dependant on the circumstances of each case.

The Master found the Paskuskis' delay of 26 months to be significant for two reasons. First, "[i]t is inconsistent with the Paskuskis wishing to have the issues with Eiffel determined by arbitration" (at para. 26). Second, she suggested that the Paskuskis lulled Eiffel into thinking it was alright to negotiate informally rather than push the court action or commence an arbitration. The Master noted (at para. 27) that the Paskuskis' lawyer did raise the matter of arbitration in his June 2, 2008 letter to Eiffel's lawyer when he asserted that Eiffel "had no right to litigate." Despite that assertion, the Paskuskis did not take any steps to have the dispute resolved through arbitration. They did not apply to the court to stay Eiffel's action and they did not demand or suggest that an arbitrator be selected or appointed or pursue arbitration in any other way. Instead, they requested documents from Eiffel to verify the costs Eiffel was claiming, pressed for further documents, and advised that their accountant might want even further documents. Thus, the Master found (at para. 30) that the Paskuskis' motion to stay Eiffel's action "was clearly strategic rather than a genuine expression of the Paskuskis' desire to arbitrate their dispute with Eiffel." As a result, the Master found that the Paskuskis' motion to stay was brought with undue delay and she declined to stay Eiffel's action.

In reaching that conclusion, the Master noted (at para. 30) that it "appears that the Paskuskis' aim is to avoid any resolution on the merits." This statement is one of several that hints at the Master's impatience with the Paskuskis' unwillingness to confront the substantive issues. The fact that the male defendant, Geoffrey S. Paskuski, has been a lawyer in Calgary for twenty years is not noted in the judgment but it might have contributed to the general "get on with it" impression that this judgment leaves with a reader.

cc BY NC ND