ONTARIO ADMIRALTY DISTRICT

1962
Dec. 13

BETWEEN:

CANADIAN BRINE LIMITED .....PLAINTIFF;

AND

NATIONAL SAND & MATERIAL COMPANY LIMITED ..... } DEFENDANT.

Shipping—Practice—Rule 158, General Rules and Orders of the Exchequer Court in Admiralty—Discontinuance of action—Defendant's costs under Rule 158—Application to fix time and place of trial dismissed.

Held: That under Rule 158 of the *Rules of the Exchequer Court in Admiralty* the plaintiff may discontinue its action at any time and pursuant to such rule at the option of the defendant there may be a judgment entered for the defendant's costs of the action on its filing of a notice to enter the same.

2. That an application by defendant to have a time and place fixed for trial will be dismissed when the plaintiff has filed a notice of discontinuance even though such notice was served later than the defendant's motion to have the time and place of trial fixed.

APPLICATION for an order fixing time and place of trial.

The application was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

A. J. Stone for plaintiff.

F. O. Gerity, Q.C. for defendant.

WELLS, D.J.A. now (December 13, 1962) delivered the following judgment:

This is an application pursuant, I presume, to Rule 119 for an order fixing the time and place of trial. On the same day that this notice of motion was served, but as I understand from counsel for the defendant, later in the day, a notice of discontinuance was served by the plaintiff. This notice is filed pursuant to Rule 158 which provides as follows:

> The plaintiff may, at any time, discontinue his action by filing a notice to that effect, and the defendant shall thereupon be entitled to have judgment entered for his costs of action on filing a notice to enter the same. The discontinuance of an action by the plaintiff shall not prejudice any action consolidated therewith or any counter-claim previously set up by the defendant. Forms of notice of discontinuance and of notice to enter judgment for costs will be found in the Appendix hereto, Nos. 48 and 49.

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Mr. Gerity appearing for the defendant, objects to this discontinuance and claims that the Court should nevertheless grant an order setting a time and place for trial which he has asked for. The basis on which this objection is made is that to permit the plaintiff to discontinue this action is an abuse of the process of the Court. To understand what he means by this it is necessary to briefly review the history of this action as disclosed by the defendant's material.

The action was apparently commenced by the issue of a writ on December 20, 1961 last. The action was originally against the present defendant and two other defendants who are out of the jurisdiction, namely The Wilson Transit and Hanna Coal and Ore Corporation. Leave had originally been granted by the Surrogate Judge to serve them and on May 2, 1962 both these foreign defendants moved before the Surrogate Judge to set aside the service made on them out of the jurisdiction. The Surrogate Judge set the services aside. The plaintiff then appealed to a Judge of the Exchequer Court of Canada and the matter was heard by Thurlow J. who handed down reasons for judgment on October 31 last dismissing the appeal. In the meantime pleadings were delivered between the plaintiff and the present defendant and examinations for discovery were held in June of this year. The action was apparently set down for trial prior to the delivery of Thurlow J.'s judgment and the present notice of motion was served on November 7 last. On the same day the notice of discontinuance was filed.

The argument of defence counsel as I understand it, is that the plaintiff by its action of discontinuing the action seeks to evade the adverse decision in respect of the other defendants resulting from the judgment of Thurlow J., that the defendant is entitled to have the action proceed on the day set for trial despite the serving of the notice of discontinuance and that it has acquired new rights during the course of the proceedings. What these rights are is not made clear. The defendant also alleges that in permitting a discontinuance there has been a delay in proceeding with the action, it being nearly four years since the happening of the events in question and that the Court should pay no attention to the notice on the basis that there is an inherent jurisdiction in the Court to deal with proceedings which are obviously vexatious or an abuse of its process.

I must confess that I am unable to appreciate the validity of this argument. It is quite true that a lapse of time may be embarrassing to the litigant but what is allowed in that direction is surely contained in the various statutes of limitation of actions as they now exist and it is not an abuse of the process of the Court to bring an action within the time allowed by those statutes. The defendant attempts to rely on Rule 107 of the Exchequer Court Rules where there is a discretion in the Judge to give or withhold leave to discontinue and reference is made to Rule 215 of the *General Rules in Admiralty* which states:

> In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

It is to be observed, however, that Rule 215 applies only to those cases not provided for by the *General Rules and Orders in Admiralty* and with respect, it would appear to me that the matter of discontinuance is provided for by the provisions of Rule 158 which I have already quoted. In support of this view I am referred to the decision of Martin L.J.A. in *Wrangell v. The Steel Scientist*[1]. At p. 137, dealing with the point which is essentially involved here, Martin L.J.A. said this:

> In the Quebec District of this court, in *Morton Down & Co. v. The Lake Simcoe* (1905) 9 Ex. C.R. 361, my esteemed brother Routhier, made an order for security after the defendant had, as here, taken several steps in the action, but gave no reasons for so doing, which is unfortunate because the argument of both counsel proceeded upon the erroneous assumption that Rule 228 governed the matter, thus:—
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> "In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."
>
> But this rule is excluded by its own terms from any application to this case because it can only be invoked in "cases not provided for by these Rules," and the "case" is, in fact, entirely provided for by said rule 134 above recited.

I can only echo the words of Martin L.J.A. by saying that in my opinion, the matter is entirely provided for by the provisions of Rule 158 which provides for the discontinuance at any time.

The application to set a time and day for trial will accordingly be dismissed. Pursuant to Rule 158 at the option of the defendant there may be a judgment entered

[1] [1924] Ex. C.R. 136

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for the defendant's costs of the action in its filing of a notice to enter the same. Under all the circumstances I think the defendant should also have its costs of this application which I fix at the sum of $50 and they should be added to what other costs he claims in respect of the application generally.

The application will therefore be dismissed with costs to the defendant as fixed.

Judgment accordingly.