IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Almas Bros. Contracting Ltd. v. Tomax Enterprises Ltd.,* 2023 BCSC 68

Date: 20230116
Docket: S216493
Registry: New Westminster

Between:

Almas Bros. Contracting Ltd.

Plaintiff

And

Tomax Enterprises Ltd. and Tomax Builders Ltd.

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:	K. Tiwana
Counsel for the Defendants:	D. Lehrer
Place and Date of Hearing:	New Westminster, B.C. January 5, 2023
Place and Date of Judgment:	New Westminster, B.C. January 16, 2023

I. Introduction

[1] The defendants apply to have this action dismissed for want of prosecution.

II. Background

[2] This is a builders lien proceeding. The plaintiff performed work on a Maple Ridge property owned by Tomax Enterprises Ltd., pursuant to a contract with the other defendant, Tomax Builders Ltd. The structures being built were two warehouses.

[3] The plaintiff supplied labour for formwork and framing work.

[4] In May 2018 a dispute arose between the parties over payment. At that point, the plaintiff had finished its work on the first warehouse and had completed 75 percent of its work on the second warehouse. The dispute resulted in the plaintiff leaving the project.

[5] The essence of the dispute centres on the plaintiff's contention that monies owed to it were overdue and the defendants' position that no amounts were then owing. The defendants also allege that the plaintiff demanded, without any contractual basis, that the remaining portion of the contract price be deposited in a solicitor's trust account.

[6] There appears to be no dispute by the defendants that the plaintiff was owed further monies for its contract work, but the defendants say the plaintiff abandoned the project without cause to do so and they claim a set-off for costs incurred in retaining a replacement contractor to complete the work and for the repair of defects and deficiencies in the plaintiff's work.

III. Litigation Chronology

[7] On July 12, 2018, the plaintiff registered a claim of builders lien ("CBL") against the subject lands, claiming it was owed the sum of $46,998 as of June 21, 2018.

[8] On June 28, 2019, the plaintiff commenced this action by filing a notice of civil claim, alleging it was owed $46,998 pursuant to the construction contract between the parties.

[9] On July 2, 2019, the plaintiff registered a certificate of pending litigation ("CPL") against the subject lands.

[10] On August 7, 2019, the defendants filed a response to civil claim, alleging among other things that the plaintiff had abandoned the project and repudiated the contract.

[11] The plaintiff and defendants, through counsel, exchanged lists of documents in September and October 2019, respectively. In that same time frame, counsel corresponded with one another about dates for examinations for discovery.

[12] There was further correspondence between counsel in September 2020 about discovery and trial dates, but there was no litigation activity from that date until the filing of the current application.

[13] The defendants filed the original version of this application on July 27, 2022, and served it the following day. I use the term "original version" because, as counsel explained, due to an error of some sort, that version of the application was struck. The problem was addressed by refiling the application. Nothing turns on this as both counsel agree the defendants' application to dismiss the action for want of prosecution was originally filed on July 27, 2022.

[14] The plaintiff filed a notice of intention to proceed on August 8, 2022.

[15] In or around October 2022, the lands were sold. On November 10, 2022 the parties entered into a consent order that provided for the cancellation of the CBL and CPL upon the payment into court of the sum of $46,998. That sum was in fact paid into court and the sale then completed.

IV. Positions of the Parties

A. Defendants

[16] The defendants note the four factors to take into account in considering an application to dismiss for want of prosecution: whether the delay is inordinate; whether it is inexcusable; whether there has been prejudice; and whether the interests of justice favour the dismissal. The defendants note the parties agree on the general test for dismissal.

[17] The defendants submit the delay is inordinate. Overall, the delay is four years from the time of the subject events, and it has been three years since the commencement of the action and two years since the last step in the action.

[18] The defendants also submit that builders lien claims carry with them an enhanced obligation to proceed expeditiously because lien actions grant to plaintiffs the extraordinary remedy of obtaining security prior to establishing their substantive legal entitlement to that remedy.

[19] The defendants maintain the delay is inexcusable, noting that the plaintiff's explanation for the delay – that their company ceased operations in 2019 and were looking for a way to fund the litigation – was a situation that pre-dated the action.

[20] As for prejudice, the defendants say that when delay is inordinate and inexcusable, prejudice is presumed. In any event, there is actual prejudice here insofar as the defendants have had their lands, and now money, tied up for four years.

[21] Finally, as for the balance of justice the defendants submit that all of the factors in the case call for a dismissal of the action for want of prosecution.

[22] The defendants submit, as an alternative remedy, that the Court should dismiss the builders lien portion of the claim and order the repayment to them of the monies paid into court.

B. Plaintiff

[23] The plaintiff notes that the merits of the claim are relevant to the "interests of justice" factor. Here, it is undisputed that two invoices have not been paid. The dismissal of this action would mean the dismissal of a meritorious claim.

[24] The plaintiff, while agreeing on the general test for dismissal of an action for want of prosecution, submits that some of the cases cited by the defendants are of doubtful validity or have been overtaken by more recent authorities.

[25] The plaintiff submits that the delay has not been inordinate, citing several comparative cases where dismissal was not ordered. They note that financial issues were the reason for the delay in this case and so the delay has been explained and is not "inexcusable". They also note that some of the period of delay fell within the extreme times of the pandemic.

[26] The plaintiff cited case authorities which suggest lien claims do not have any enhanced status on applications such as this and that the filing of a lien does not create prejudice in and of itself.

[27] Finally, the plaintiff submits that in considering the interests of justice, the Court should also take into account the fact that the plaintiff's work added value to the asset owned by the second defendant, work for which it has not been paid, and the lands were recently sold for sums which, based on the listing price of $5,950,000, were likely in the range of $5 million or more. The defendants benefitted from the plaintiff's work, yet the plaintiff has not been properly paid.

V. Discussion

A. Legal Principles

[28] The law relating to applications for dismissal based on want of prosecution has been discussed many times in many cases. The most recent appellate summary of the law is set out in *Wiegert v. Rogers*, 2019 BCCA 334:

> [31] On an application to dismiss for want of prosecution, it must be shown that there has been inordinate delay, that the inordinate delay is inexcusable,

> and that the delay has caused, or is likely to cause, serious prejudice to the defendant. In addition, the final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at paras. 27–28.
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> [32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Azeri* at para. 8; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 17. As Justice Saunders explained in *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25, the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion, and the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38; *0690860* at para. 29.
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> [33] Once a defendant establishes that delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Busse v. Chertkow*, 1999 BCCA 313 at para. 18. The concern is with the prejudice that a defendant will suffer in mounting and presenting a defence if the matter goes to trial: *0690860* at para. 27. Relevant matters could include failing memories, unavailable witnesses and the loss or destruction of physical evidence. As to the final consideration — whether, on balance, justice requires dismissal of the action — again, the determination is highly fact-dependent. Relevant matters could include the length of and reasons for the delay, the stage of the litigation, the context in which the delay occurred and the role of counsel in causing the delay (although negligence on the part of a plaintiff's lawyer may not always amount to an excuse): *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45; *0690860* at para. 29.

[29] While the dismissal of an action for want of prosecution involves the exercise of discretion, the authorities emphasize caution in exercising it. In *Singh v. Media Waves Communications Inc.*, 2022 BCSC 1611, the Court said:

> [40] Whether to dismiss an action for want of prosecution is a discretionary decision. It has been described as an order that should "not be made lightly", one that should be "made sparingly" and "one to be approached with great caution". It has variously been described as "draconian" and "an extreme and drastic measure". The discretion should only be exercised if the court is satisfied that the default was intentional or of such a degree that there is a substantial risk that a fair trial on the merits of the issues will not be possible.

[30] Of note, the Court of Appeal has recently signalled a concern about delays in the prosecution of civil claims: *Drennan v. Smith*, 2022 BCCA 86, at paras. 59–63.

In response to a submission that dismissing an action after a delay of five years would be "extraordinary", the Court said (at para. 61), "[i]f that is an accurate depiction of civil litigation practice in British Columbia, it may be time to revisit the legal test for dismissal" and invite the sort of response applied in the criminal law field as a result of *R. v. Jordan*, 2016 SCC 27.

B. Analysis

[31] I will deal with each of the factors under the subheadings that follow.

Whether Delay is Inordinate

[32] To the date of the defendants' application, the litigation has been outstanding for three years and one month. To that point, there had been no steps taken in the action for one year and 10 months (late September 2020 to late July 2022).

[33] The defendants submit that the larger time frame ought to be taken into account, taking the time back to the filing date of the CBL (making the delay four years, not three years, approximately), but I note that in *Wiegert*, excerpted above, the Court of Appeal said "the date of commencement of the action is typically identified as the point from which delay is measured" (at para. 32). I accept, however, that it is proper to consider the history of the matter as a whole when considering the exercise of discretion.

[34] At a little over three years, this matter appears to be at the lower end of the scale in terms of dismissal applications generally. The defendants say, however, that builders lien cases are different because they involve the extraordinary remedy of obtaining security prior to proof of the claim. Accordingly, there is an enhanced duty on builders lien plaintiffs to prosecute their claims with despatch: *Wilson v. Hrytsak*, 34 C.L.R. (2d) 65, 1997 CanLII 3396 (B.C.S.C.) at paras. 6, 12; and *Kamal & Bros. Enterprises Inc. v. Mohan*, 2004 BCSC 1620 at paras. 32-33 [*Kamal Bros.*].

[35] I accept that general proposition. As noted in the above extract from *Wiegert*, inordinate delay is a relative concept and "some cases … call for more expeditious prosecution than others" (at para. 32). That principle applies, for example, where a

plaintiff's allegations go to a defendant's character and credit: *Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.*, 2015 BCSC 915 at para. 42.

[36] While the fact that builders lien actions involve an extraordinary prejudgment remedy for plaintiffs is one reason those cases "call for more expeditious prosecution" than other cases, I also note that the statute itself provides measures for the prompt commencement of actions. Specifically, s. 33 of the *Builders Lien Act*, S.B.C. 1997, c. 45, requires that actions to enforce builders liens be commenced within one year, and it also provides a mechanism for defendants and other lien claimants to require that actions to enforce liens be commenced within 21 days after service of a notice. These provisions suggest the Legislature intended that these actions be pursued expeditiously.

[37] Taking all of these matters into consideration, I conclude the delay here is "immoderate, uncontrolled, excessive and out of proportion to the matters in question" (*Wiegert* at para. 32), and is therefore inordinate.

Whether Delay is Inexcusable

[38] The plaintiff's representative, Kyle Almas, attributes the delay in this case to financial difficulties the company encountered in May 2019. He deposes that these financial difficulties were due to the increased competitiveness of bids, resulting in no contracts for the plaintiff, and because of the one defendant's breach of contract. The company ceased operations as a result. Mr. Almas said that he and his brother ultimately decided to use their personal funds to carry on with the litigation.

[39] In submissions, plaintiff's counsel also noted that part of the delay period fell within the acute phase of the pandemic, but I note there is nothing in the evidence that indicates this contributed to the delay in any way.

[40] The defendants submit that the excuse of financial difficulty is no excuse at all, given that those difficulties were present at the very outset of the lawsuit.

[41] I agree that there is no valid excuse for the delay. While financial difficulties or hardship may be a basis for finding a valid excuse in some cases, the delay here was due to the delay by the plaintiff's principals in their decision to fund the litigation personally. That decision is one that should have been made at the outset of the litigation or a reasonable time after that.

Whether Serious Prejudice Has Been Caused, or is Likely

[42] Once a defendant establishes that delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Wiegert*, at para. 33.

[43] Relying on *Wilson*, the defendants submit that they have also suffered prejudice as a result of the CBL and CPL registered against their property. In *Wilson*, this was found to be "serious prejudice to the defendant's economic interests caused by the continued cloud upon her title" (at para. 20). However, subsequent authorities have concluded otherwise.

[44] In *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535, a builders lien case, the Court said:

> [50] The prejudice we are concerned with under Allen and Irving is impairment of the ability to defend the action, not the interest expense for a bond and possible business inconvenience caused by the filing of a lien. Those are matters that can be addressed in costs and perhaps in a claim for damages by way of counterclaim if the lien is not proven. Therefore, in my opinion, the chambers judge erred to the extent that she based the finding of prejudice on the business consequences to Country West of the lien having been filed by the appellant and security for it having to be provided by Country West. There is no evidence that those consequences interfered with the ability of Country West to defend the claim at trial.

[45] Similarly, in *Wiegert*, excerpted earlier, the Court said the prejudice to be considered is "the prejudice that a defendant will suffer in mounting and presenting a defence if the matter goes to trial" (at para. 33).

[46] From these authorities, I conclude that the registration of a CBL or CPL against the subject lands is not to be regarded when considering the prejudice associated with a delayed prosecution of an action.

[47] This conclusion also casts doubt on the defendants' alternative position that if the Court does not dismiss the action outright, it ought to dismiss the builders lien aspect of the claim. This submission was based on the result in *Wilson*, where such an order was made (at para. 21), and on *Kamal Bros.*, where there is a reference to such an order having been made earlier in the proceedings (at para. 10). The reasoning for the earlier order in *Kamal Bros*. is unknown as the actual ruling is not available. However, it is available in *Wilson*, where it is apparent that the basis for the order is the now-debunked notion that the filing of a builders lien creates prejudice that is properly considered on an application for dismissal of an action for want of prosecution. I would add that Rule 22-7(7) of the *Supreme Court Civil Rules* empowers the court to dismiss a proceeding and says nothing of dismissing *part* of a proceeding.

[48] For all of those reasons, I conclude that the defendants' alternative relief sought – that the Court should dismiss just the builders lien aspect of the action – is not relief that is available on an application to dismiss a proceeding for want of prosecution.

[49] Leaving aside any prejudice associated with the builders lien, which I have found to be irrelevant here, the prejudice in question is at large, meaning the general prejudice associated with faded memories and matters of that sort. The defendants allege no specific prejudice to their ability to defend the action. The plaintiff has not rebutted the presumption of prejudice.

[50] As was the case in *Callan v. Cooke*, 2020 BCSC 290 at para. 109, I am prepared to presume that the delay in the prosecution of the plaintiff's claim may cause the defendants some challenges in defending the claims, but I am unable to accord this factor much weight.

[51] In *Drennan*, the Court of Appeal said:

> [59] It is the law of this province that dismissal for want of prosecution based on delay requires a finding that the delay has caused, or is likely to cause, serious prejudice to the defendant.

[52] While I accept there is some presumed prejudice to the defendants in this case due to the passage of time, I am not satisfied that it rises to the level of serious prejudice.

The Interests of Justice

[53] In the event I am wrong in my conclusion concerning "serious prejudice", I will proceed to consider the interests of justice.

[54] As noted in *Wiegert* at para. 31, the "final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action". In considering this question, the court may consider the merits of the proceeding: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 62.

[55] Here, there appears to be no dispute that the plaintiff provided services to the defendants and that, but for the defences pleaded, the plaintiff is owed money for that work. In this respect at least, the plaintiff's claim has merit.

[56] The plaintiff made much of the fact that the warehouses that it helped build were recently sold for what is likely a large amount of money, but obviously there were materials and effort of all sorts that went into the building of the warehouses, not just formwork and framing. It is perhaps enough to note that the plaintiff's efforts added value to the asset of the landowner defendant.

[57] Leaving aside the defendants' claim of set-off for deficiencies, about which nothing was said on this application, it appears the case will turn on the fairly discrete question of whether payment was due, the related question of repudiation versus breach of contract and, if applicable, the set-off claims for the cost of hiring another contractor and rectifying the deficiencies. I expect these are matters that will turn more on documents than on the ability of witnesses to recall. The interests of justice favour the disposition of this matter through trial.

VI. Conclusion

[58] Having considered all the necessary factors, I conclude that the interests of justice weigh against the dismissal of this action for want of prosecution and instead the plaintiff should be allowed to proceed as expeditiously as possible to trial.

[59] The defendants' application is dismissed with costs.

"Blok J."