COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tam v. PD Plumbing & Heating Ltd.,*
2023 BCCA 457

Date: 20231130
Docket: CA47863

Between:

Betty Sui Fan Tam and Alexander Ming Tam

Appellants
(Defendants)

And

PD Plumbing & Heating Ltd. d.b.a. KMPAS Plumbing Ltd.

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated October 7, 2021 (*PD Plumbing & Heating Ltd. v. Tam*, 2021 BCSC 2078, New Westminster Docket S163984).

Oral Reasons for Judgment

Counsel for the Appellants: S. Alimirzaee

No one appearing on behalf of the Respondents

Place and Date of Hearing: Vancouver, British Columbia
November 30, 2023

Place and Date of Judgment: Vancouver, British Columbia
November 30, 2023

Summary:

Appeal from an order dismissing the appellants' application to dismiss an action for want of prosecution. The underlying action concerns alleged non-payment on a home renovation contract performed more than ten years ago. The respondent filed a claim of builders lien and certificate of pending litigation against the appellants' home. The respondent did not appear on the hearing of the appeal.

Held: Appeal allowed and underlying action dismissed. The respondent's delay in prosecuting the action has been inordinate. Having commenced the action, the respondent took no steps in the following 7 years to prosecute the action. When faced with an application to dismiss for want of prosecution, the respondent essentially admitted that it never intended to actually proceed with the litigation.

[1] **SKOLROOD J.A.**: This is an appeal from an order dated October 7, 2021, dismissing the appellants' application to dismiss the within action for want of prosecution.

[2] At the outset, I would note that no one appeared for the respondent on the appeal. Counsel for the respondent withdrew in May of this year and no new counsel was appointed. We are advised by counsel for the appellants that the notice of hearing was served on the address provided in the notice of withdrawal.

Background

[3] In or about 2013, the appellants, Mr. and Mrs. Tam, entered into a contract (the "Contract") with the respondent pursuant to which the respondent agreed to provide plumbing services at the appellants' home, located on Grant Street, in Burnaby, BC (the "Property"). The Contract price, including taxes, was $55,216.00.

[4] At the time the Contract was entered into, the respondent was operating through the company KMPAS Plumbing Ltd. ("KMPAS"), however KMPAS was subsequently dissolved and a new company, PD Plumbing & Heating Ltd. ("PD Plumbing") was incorporated. As I will return to, that change contributed to the dispute that arose between the parties.

[5] In August 2013, the respondent completed the work under the Contract. On August 16, 2013, the City of Burnaby issued an inspection report approving the plumbing work.

[6] After the inspection, the respondent issued an invoice for $55,216, of which the appellants paid $41,220, leaving a balance claimed by the respondent of $13,996. The appellants issued another cheque in the amount of $3,384.40 payable to KMPAS. According to Mr. Dhaliwal, a director of the respondent, the appellants refused to change the name on the cheque to PD Plumbing, hence that amount was never credited against the amount owing under the Contract.

[7] Mr. Dhaliwal also deposed that the appellants calculated the amount owing as $8,906, and that they also calculated a holdback of $5,521.60. Those figures were set out in a document attached to Mr. Dhaliwal's affidavit, apparently prepared by the appellants. Subtracting the holdback amount resulted in an amount shown as "to be paid now" of $3,384.40, which coincides with the amount referred to above.

[8] Neither the holdback amount nor the $3,384.40 was in fact paid by the appellants.

[9] On September 13, 2013, the respondent filed a claim of builders lien against the Property. On September 2, 2014, the respondent filed its notice of civil claim. The respondent also filed a certificate of pending litigation (CPL) against the Property.

[10] The appellants filed a response to civil claim on October 16, 2014, which was amended on January 13, 2015. In the amended response, the appellants claim that the respondent breached the Contract by, amongst other things, failing to complete the work and failing to undertake the work in accordance with industry standards and municipal codes. The appellants claimed various set off amounts to remedy the alleged deficiencies.

[11] Thereafter, no steps were taken in the litigation, apart from the respondent delivering an initial list of documents, until the respondent served a notice of

intention to proceed on April 9, 2021. On June 16, 2021, the appellants filed their notice of application seeking to dismiss the claim for want of prosecution.

[12] The application was supported by affidavits sworn by each of Mr. and Mrs. Tam, which are identical in form. The affidavits simply attest to the basic facts as I have outlined.

[13] I have referred to the affidavit of Mr. Dhaliwal on behalf of the respondent which was sworn and filed in response to the application. In addition to also setting out the basic background facts, Mr. Dhaliwal states the following:

> 22. The plaintiff was still willing to accept that amount [referring to the $8906.00 identified by the Tams as owing] and not pursue the litigation, because the costs of thje litigation would have been much more than the amount, which is in dispute, the only disputed amount was $5090.00.
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> 23. The Plaintiff was aware that it is not worth while fighting for $5090.00 and spent much more on litigation. It is for this reason; the Plaintitff was hoping that the Defendants would pay at least $8906.00 as admitted. But now, the Defendants do not even want to pay that amount (admitted amount).
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> 24. I was aware that this litigation was pending, and no steps has been taken for the past 4 years prior to on set of covid-19. Once this situation improved, I requested my counsel to proceed in this action. Since this action was lying dormant for 3 or 4 years, a notice of intention to proceed was filed on April 6, 2021 and served to the Defendants' counsel's office on April 9, 2021.
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> 27. I was made aware that in order to proceed with this matter, at least I would need 2 days of trial, which would mean that examination of discovery and trial. The litigation costs would have been at least twice than what is claimed. It is for this reason; I ws hoping that this matter should be resolved with minimum costs.

The Chambers Judge's Decision

[14] The judge cited the decision of Justice Grauer, then of the Supreme Court, in *West Harbour Electric Ltd. v. NGC Constructors Ltd.*, 2019 BCSC 452 summarizing the test for an application under Rule 22-7(7) to dismiss a proceeding for want of prosecution:

> [33] Under Rule 22-7(7), the court may order that a proceeding be dismissed if it appears to the court that there is want of prosecution in the proceeding. The core principle on such an application is that "the dismissal of

> an action without permitting it to be heard on its merits is a drastic measure, to be taken only when it is clearly required in the interests of justice": *Gemex Developments Corp v Sekora,* 2011 BCSC 318 at para 16.
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> [34] In essence, the court is to determine whether the delay is so great that justice requires the action to be dismissed. To make this determination, courts are bound to consider certain factors, particularly: (i) the length of delay and whether it was inordinate; (ii) any reasons for the delay; (iii) whether the delay has caused prejudice or made a fair trial impossible; and (iv) whether, on balance, justice requires dismissal of the action: *0690860 Manitoba Ltd v Country West Construction Ltd,* 2009 BCCA 535 at para 27.
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> [35] Although all of these factors must be considered, the central issue is the interests of justice. The core purpose of Rule 22-7 is to put an end to litigation that has not been prosecuted for so long that it creates a substantial risk that a fair trial on the issues will no longer be possible: *Allen v Sir Alfred McAlpine & Sons Ltd*, [1968] 2 QB 229 at 255–259 (CA). As Mr. Justice Melnick comments at para 29 in *Ralph's Auto Supply (BC) Ltd v Ransford*, 2015 BCSC 1428:
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> > The cases in which actions have been dismissed for want of prosecution do not merely involve delay. Rather, they involve delay that affects the possibility of a fair trial in the circumstances of the specific case.

[15] The judge noted (at para. 13) that the respondent had admitted that the delay in prosecuting the claim had been inordinate. In terms of an explanation for the delay, the judge referred to the respondent's position that the cost of the litigation did not make it practical or feasible to take further steps because the amount outstanding would be far less that the cost of the litigation. In response to that position, the appellants argued that the cost of litigation cannot be relied upon to explain delay, citing the decision of Master Elwood, as he then was, in *North Shore Law LLP v. Cassidy*, 2020 BCSC 1658 at paras. 35–37.

[16] The judge distinguished the decision in *North Shore Law*, stating:

> [16] In my view, that is not analogous to the evidence before me. This is not just about the plaintiff's hope that the litigation would resolve. The plaintiff points out that he has evidence that the defendants have admitted that money is owing, but they have refused to pay. There is a dispute about how much money, but at the end of the day, the issue is the cost of pursuing the litigation since the difference between the parties on the amount owing outweighs to a significant degree the cost of litigation. But for the juridical requirement that builders' liens be brought in this Court, it would make no sense to litigate this in Supreme Court. That is not quite the same situation that was before Master Elwood.

> [17] I am not suggesting that the defendants agree with the plaintiff's position. However, the point is that I have evidence in front of me from the plaintiff that there is some acknowledgment by the defendants that money is owing to the plaintiff. I also note that one of the issues the plaintiff raised is that the defendants issued a cheque, but it was issued in the wrong name (the name of the dissolved company), and but for that, the litigation would not have been commenced, or would not need to be ongoing.
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> [18] I note that the response to civil claim specifically acknowledges that the plaintiff asked the name on the cheque to be changed. The defendants assert that they were not given the reason for that request. Thus, there is at least some acknowledgment by the defendants of facts asserted by the plaintiff that relate to the plaintiff's position that the defendants acknowledge money is owing.
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> [19] In my view, those are facts that distinguish this case from the discussion in *North Shore*.

[17] The judge then turned to the third factor: prejudice. She cited this Court's decision in *0690860 Manitoba Ltd. v. Country West Construction Ltd*., 2009 BCCA 535 for the proposition that the question of prejudice must focus on any impact to a defendant's ability to present a defence, as distinct from more general prejudice arising out of the mere fact of being involved in litigation.

[18] The appellants argued before the judge that the fact that a CPL had been registered against their property created a presumption of prejudice, again citing *North Shore Law*.

[19] However, the judge again distinguished *North Shore Law* on the basis that there was evidence of actual prejudice in that case. In contrast, the judge noted that here, there was no evidence from the appellants at all about prejudice.

[20] The judge concluded by saying:

> [30] Turning back to the four factors, I agree that the delay in this case has been inordinate. However, I am not persuaded that on the second ground, it is necessarily true that the reason is inexcusable to the degree that, together with the delay, it raises a presumption of prejudice. As I said, on the facts before me, this is somewhat different than a party simply sitting back and doing nothing. The plaintiff offered evidence and an explanation as to why he has not gone forward. I am not suggesting that clears the hurdle completely, but in my view, it distinguishes the facts from the cases relied upon by the defendants.

> [31] Turning to serious prejudice, I am not satisfied here that the plaintiff loses on this ground. Even if a presumption was raised (as I said, I have not decided that it has been raised), in this particular case, I find the lack of any evidence of prejudice to the defendants to be problematic in terms of the ultimate balancing.
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> [32] This was a straightforward case. There was no indication on the record before me, and certainly no indication from the defendants, that they are going to be prejudiced in their ability to defend the case. The issue seems to come down to certain documents, but there is no suggestion of any other trial unfairness.
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> [33] Those are the reasons why I do not find it appropriate in this case to invoke the draconian remedy of dismissing the action for want of prosecution. I find, in the overall balancing, the interests of justice do not favour that. I therefore dismiss this application.

[21] Despite that conclusion, the judge went on to say:

> [34] However, I do find in the overall circumstances that the defendants should be precluded, if circumstances change, or if nothing changes in a reasonable amount of time, from attempting to bring this forward if the plaintiff does not take steps in the litigation.

[22] I think it obvious that this paragraph contains a typographical error and that the judge intended to say that the defendants (appellants) should not be precluded from bringing their application forward again if the respondent does not take steps in the litigation.

Issues on Appeal

[23] The appellants allege that the judge erred by:

a) Finding the onus for a rebuttable presumption of prejudice in a builders lien case is with the appellants;

b) Failing to consider Rule 1-3 of the *Supreme Court Civil Rules*;

c) Failing to consider the admissions contained in the respondent's affidavit that the costs of litigation are the basis for not taking any steps within the litigation; and

d) Finding admissions were made when there was no evidence to support such a conclusion.

Analysis

[24] It is not necessary to consider each of these alleged errors separately as they are simply different formulations of the appellants' central position that the judge erred in the application of the test for want of prosecution.

[25] This Court has held that a decision about whether to dismiss an action for want of prosecution involves an exercise of discretion on the part of the chambers judge that attracts a high degree of deference. The Court will only interfere with such an exercise of discretion if it finds that the judge acted on incorrect legal principles, made palpable and overriding errors, or made a decision that amounts to an injustice: *Drennan v. Smith*, 2022 BCCA 86 at paras. 23–24; *Northwest Organics, Limited Partnership v. Sam,* 2018 BCCA 70 at para. 31.

[26] Notwithstanding the high degree of deference owed, I am satisfied that the judge erred in a manner that warrants this Court's intervention. I reach this conclusion for the following reasons.

[27] The respondent's delay in prosecuting the action has been inordinate, as the respondent apparently acknowledged below. To my mind, the delay is reflected not simply in the failure to prosecute the action in a timely way, but also in the fact that the respondent did not commence the action to enforce its lien until shortly before the one-year time limit under the *Builders Lien Act* expired. The overall conduct of the litigation displays a lack of commitment to moving it forward in a timely way, which undermines the objective of the *Supreme Court Civil Rules* as reflected in Rule 1-3. I would add that the respondent's attitude towards the litigation is further reflected in its decision not to participate in this appeal.

[28] In my view, the delay is inexcusable. Respectfully, it was an error of principle for the judge to accept the respondent's explanation that the cost of litigation caused it to not proceed. As submitted by the appellants, the respondent's evidence in the

form of Mr. Dhaliwal's affidavit essentially amounts to an admission that the respondent never intended to proceed with the litigation, rather it simply commenced the action to try to leverage a settlement out of the appellants. That type of strategy is not an excuse for unduly dragging out litigation.

[29] In terms of prejudice, the respondent in its factum submits that the only prejudice that can be considered is prejudice to the ability of the defendant to mount a proper defence, of which there is no evidence here.

[30] However, I agree with the appellants that where a party has effectively interfered with another party's use of its property through the prejudgment security mechanisms of a builders lien and a CPL, there is a rebuttable presumption of prejudice, which has not been rebutted here.

[31] Regardless, the final and overriding factor to be considered is the interests of justice. Here those interests weigh heavily in allowing the appeal and dismissing the respondent's claim for want of prosecution. To recap: the Contract was completed in 2013, over 10 years ago. The respondent filed a builders lien and then delayed for almost one year in commencing its action to enforce the lien. Having commenced the action, the respondent took no steps in the following seven years to prosecute the action. When faced with an application to dismiss for want of prosecution, the respondent essentially admitted that it never intended to actually proceed with the litigation. Finally, the respondent has not appeared on the hearing of this appeal.

[32] For all of these reasons, I would allow the appeal, set aside the order below, and order that the respondent's action be dismissed.

[33] I would like to commend counsel for the appellants for her thorough submissions as set out in her factum and for her helpful and succinct oral submissions today.

[34] **SAUNDERS J.A.**: I agree.

[35] **STROMBERG-STEIN J.A.**: I agree.

[36] **SAUNDERS J.A.**: The appeal is allowed, the order appealed is set aside and the action is dismissed.

"The Honourable Justice Skolrood"