IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Etcheverry v. Bhatti,*
2024 BCSC 1222

Date: 20240425
Docket: S194059
Registry: Victoria

Between:

Gerald Michael Etcheverry

Plaintiff

And:

Michael Singh Bhatti

Defendant

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Application for Dismissal for Want of Prosecution)

(In Chambers)

Counsel for the Plaintiff:	N. Nefstead (as agent for D. J. Mildenberger)
Counsel for the Defendant:	J. A. Burgess
Place and Date of Trial/Hearing:	Victoria, B.C. April 25, 2024
Place and Date of Judgment:	Victoria, B.C. April 25, 2024

[1] **THE COURT:** These are oral reasons made in chambers. As a result, I reserve the right, if a transcript is ordered, to edit that transcript for errors, omissions, clarity, repetition and to add references to case law or enactments. The result will not change, nor will the basis for it.

[2] This is an application by the defendant in a builders lien action for dismissal for want of prosecution. Approximately $24,000 was deposited with the court as a means of discharging the builders lien that was filed in this action. The underlying allegations are that the defendant owes that amount of money to the plaintiff for work done on the defendant's property. I have been informed that the basic issues are what hourly rate was agreed to orally, $30 or $40, and the total number of hours spent working.

[3] The notice of civil claim was filed on September 17, 2019. A response to civil claim was filed October 16, 2019. Other than an application brought by the defendant in May of 2021 to discharge the lien in return for the posting of security, no action was taken until the service of this application, filed March 27, 2024. A notice of intention to proceed was served on the defendant on April 11, 2023, but nothing was done in the following year.

[4] The test for a want-of-prosecution application was set out recently by the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*] at paras. 69 -70. There are three questions:

a) Has the defendant established that the plaintiff’s delay in prosecuting the action is inordinate?

b) Is the delay inexcusable?

c) If the answer to both the first two questions is “yes”, is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[5] The first two questions are related in that it must be the unexcused delay that is inordinate.

Excusability of the Delay

[6] To be sure, there is an excuse for some delay during the first year of the COVID pandemic. That probably applies to almost all civil litigation in this province. But other than that, I am not persuaded that there is an excuse for the delay.

[7] The excuse put forward by the plaintiff in his application response was that on August 18, 2021, he was involved in a motor vehicle collision in which another party was seriously injured. He was given a *Charter* warning by the police and retained criminal defence counsel. The plaintiff was charged in relation to that incident on August 23, 2022, and the matter was resolved with a *Motor Vehicle Act* charge and staying the criminal charge on January 24, 2023.

[8] While I have no doubt that this was distracting for the plaintiff and was of great concern to him, he does not indicate that it was a reason that he did not want to proceed or, more importantly, was unable to proceed with the civil action. He deposes that he was advised by Mr. Mildenberger, his civil lawyer, and believed it to be true, that Mr. Mildenberger assumed that the plaintiff would not be available to deal with the civil matter and took no steps to advance the civil matter. In my view, this is not a sufficient excuse for a delay of two and a half years.

[9] It was incumbent on Mr. Etcheverry, as plaintiff, especially in a builders lien matter, especially in a matter that was very straightforward for a relatively small amount of money, and especially in light of the fact that the money was in court and therefore, not available to the defendant, to communicate with his civil lawyer to say that he continued to be interested in pursuing this if he heard nothing for that length of time. He indicates no basis on which he could not have done that. Therefore, I am not persuaded that this means that that period of time of delay was excused.

[10] The total delay was from October 2019 to March 2024. That is almost four and a half years. Of that, one year is excused by the Covid pandemic, which leaves three and a half years of unexcused delay.

Delay was Inordinate

[11] I, therefore, conclude that the unexcused delay, which really stretches from the filing of the pleading itself right up until the receipt of this application, with the exception of the year between March 2020 and March 2021, during which there really was nothing done by the plaintiff, was inordinate.

Interests of Justice Test

[12] I am then taken to the question of whether in light of that inordinate delay, it is in the interests of justice for the action to proceed. In *Giacomini*, at para. 71, the Court of Appeal refers to a non-exhaustive list of factors set out in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 [*International Capital*] at para. 45:

> a) The prejudice the defendant will suffer in mounting its case if the matter goes to trial attributable to the inexcusable delay.
>
> b) The length of the inexcusable delay.
>
> c) The stage of the litigation.
>
> d) The [non-litigation] impacts of the inexcusable delay on the defendant.
>
> e) The context in which the delay occurred.
>
> f) The reasons offered for the delay.
>
> g) The role of counsel in causing the delay.
>
> h) The public interest.

[13] I will go through those factors, which, in my view, overall support the conclusion that it is in the interests of justice for this action to be dismissed.

Prejudice of the Defendant in Mounting its Case

[14] On the first factor, “prejudice” refers to litigation prejudice in a sense of the inability to fairly address the claim at trial as a consequence of the unexcused delay.

[15] Here, my main concern is that this was an oral contract. The factual question of how much was promised as an hourly rate will turn on the memories of the relevant parties. It is inevitably prejudicial to have such a lengthy delay where the fundamental issue is an oral contract.

[16] I also note that at one point, the defendant referred to a number of witnesses by first name who he said he was going to call to prove his claim. Counsel on this application, who was agent for the counsel in the action, was unable to say whether these witnesses would in fact be called. This is fair enough in light of his role. But if they are, their memories are likely to be quite distorted by the passage of time.

[17] It could be argued that this is primarily a problem for the plaintiff. But, in my experience, it is also possible that a person, who is trying to remember something from a very long period of time, will remember it perhaps sincerely in a way that is of benefit to the party calling them. I do not think it is fair to the defendant to be on the hook based on memories of witnesses from many years later about the amount of construction work done when a much earlier trial could have been obtained if the inordinate delay had not occurred.

Length of Unexcused Delay

[18] The next factor is the length of the inexcusable delay. Taking into account the COVID year, the inexcusable delay is about three and a half years. That may not be the longest delay in a want-of-prosecution application ever, but it is a factor that weights in favour of dismissal.

[19] In explaining this factor in *International Capital*, the Saskatchewan Court of Appeal noted, “An unjustifiable delay of a few months is something quite different than an unjustifiable delay of many years.” This is obviously not in the few-months category.

Stage of the Litigation

[20] In *International Capital*, it is said, “In general terms, a court should be less inclined to strike an action which is well advanced than one which is in its early stages.” A case that has not advanced beyond the pleadings stage “might be easier to strike.” In this case, that factor weighs in favour of a dismissal being in the interests of justice.

Impact of Inexcusable Delay on the Defendant

[21] This factor -- and this has been specifically asserted by the Court of Appeal in *Giacomini* -- means that we have to consider more than just *litigation* prejudice in the sense of the inability for witnesses to remember for the availability of documents. Impact on the defendant includes questions of reputation and livelihood.

[22] Specifically in the context of builders liens, I think this category includes the impact of the unavailability of funds and property as a result of the special protections for plaintiffs created by the *Builders Lien Act*.

[23] In this case, the property of the defendant was tied up by the original lien which required an application to dislodge. And then subsequently, the security paid in has not been available to the defendant. The defendant has provided some evidence of a need for it. Without my thinking it is necessary to weigh this in detail, I think it weighs as a factor in favour of dismissal.

Context of Delay

[24] One additional factor that the Saskatchewan Court of Appeal refers to is the context in which the delay occurred. This is where consideration can take place about what *defendants* could have done recognizing they do not have a positive obligation to move litigation forward. Nonetheless, a court entertaining an application to strike for want of prosecution should note whether the inexcusable delay took place in the face of pressure from the defendant to move the file ahead.

[25] I do not see pressure from the defendant to move the file ahead here. And so, this factor weighs against dismissal for want of prosecution.

Reasons Offered for Delay

[26] The reasons offered for the delay are considerations at the “interests of justice” stage, even if those reasons do not amount to an “excuse”. I weigh to some extent the fact that the plaintiff faced criminal charges for a period of time under this factor, but I do not weigh it *strongly*. He could have -- and there was no real reason for him not to pursue the civil action to the extent he considered that to be of value to him. If he did not consider it to be a priority, then that should not be something that the defendant has to live with in the form of having over $24,000 unavailable.

Role of Counsel

[27] In *International Capital*, the following is said:

> Depending on the circumstances, there might well be a measure of unfairness in visiting the consequences of a lawyer’s lack of diligence on his or her client. However, this consideration should not be overstated or given undue weight.

[28] In some contexts, it may be appropriate not to dismiss if inexcusable delay was caused by counsel, particularly if new counsel are available and particularly if the plaintiff had nothing to do with the problem.

[29] In this case, while I see there is some reference to counsel, it is not clear to me exactly who bears the responsibility between counsel and the plaintiff in terms of the delay here. Generally speaking, if this factor is going to be relied on, it is important to have evidence from counsel and that is not available here. So, I am not prepared to weigh this factor as militating against dismissal.

Public Interest

[30] A final factor, the Saskatchewan Court of Appeal refers to is the public interest, so if there is an action that is of importance to a broader public interest then that may weigh against dismissal. That factor is not present here.

Interests of the Plaintiff in a Trial On the Merits

[31] In *Giacomini*, the Court of Appeal, after endorsing the *International Capital* list of factors, also refers to the general point that the interests of the plaintiff in having determination on the merits is, of course, something that needs to be considered in every case. *Giacomini* also states that it is a *revision* of the test, which I think can properly be interpreted as saying that dismissal is more available in a want-of-prosecution application than was the case before the decision.

[32] As the Court of Appeal stated at paras. 74 and 75 of *Giacomini*:

> First, in my view, it is not helpful to characterize the remedy of dismissal for want of prosecution as "Draconian", to the extent this label implies the remedy is excessively harsh or punitive. It must be remembered that a plaintiff faces the risk of dismissal of an action only once they are guilty of inordinate and inexcusable delay. Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.
>
> Second, the preceding comment, and the revision of the test that I propose, should not be taken to signal an invitation to defendants to bring applications for dismissal for want of prosecution as a matter of routine. A plaintiff's interests in a trial on the merits remains an important consideration. The revised test is simply intended to provide a more nuanced balancing of the competing considerations of the interests of defendants, and the justice system as a whole. An application will succeed only if the court is persuaded that the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits.

[33] I do not think this is a matter of routine. This is a very substantial inexcusable delay on a very straightforward case. So I take the caution, and I give weight to the fundamental importance of a plaintiff's interests in a trial on the merits. But that factor cannot always govern, or there would not be any successful want-of-prosecution applications. I do not think in this case that interest outweighs the interests of the defendant in not being prejudiced and otherwise burdened by inordinate delay.

Defendant's Own Actions

[34] Finally it is important to consider the avenues available to defendants concerned about the delay of litigation. That was referred to in the very able submissions on behalf of the plaintiff today and is also one of the factors the Saskatchewan Court of Appeal refers to under "context". I agree that in this case, the defendant could have taken some steps.

[35] Of the steps that I think perhaps the defendant could be criticized for not doing would be an early list of some documents. I think that that is a fair criticism.

[36] Nonetheless, notwithstanding that fair criticism, I consider that it is overall in the interests of justice for this very straightforward matter that has been in the courts for so long and for which there has been substantial cost to the defendant, it is in the interests of justice for it to be dismissed and for the money deposited with the registrar to be returned along with interest accrued thereon.

Costs

[37] The defendant asked for special costs. I do not see a basis for that. I do not see reprehensible behaviour of the type that -- litigation behaviour of the type that would be a basis for special costs. So I award costs at Scale B.

"J. G. Morley, J."
The Honourable Justice Morley