

CANADA / JUDGMENT

AAA Rebar Only Ltd. v. 1003708 B.C. Ltd.

2022 BCSC 1962

COURT

Supreme Court of British Columbia

DECIDED

9 November 2022

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2022 BCSC 1962 AAA Rebar Only Ltd. v. 1003708 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

AAA Rebar Only Ltd. v. 1003708 B.C. Ltd.,

2022 BCSC 1962

Date: 20221109

Docket: 211253

Registry: Victoria

Between:

AAA Rebar Only Ltd.

Plaintiff

And:

1003708 B.C. Ltd.

Defendant

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Plaintiff:

G. Harney

Counsel for the Defendant:

J. Aiyadurai

Place and Date of Hearing:

Victoria, B.C.

February 8, 2022

April 11, 2022

May 6, 2022

June 16, 2022

Place and Date of Judgment:

Victoria, B.C.

November 9, 2022

Introduction

- [1] The defendant seeks to have the plaintiff's claim dismissed for want of prosecution. In the alternative, it seeks an order striking the plaintiff's notice of civil claim and dismissing its action because of its failure to comply with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].

Background Facts

- [2] The plaintiff is a British Columbia company in the business of supplying and installing reinforced steel, also known as rebar, to residential and commercial construction projects.
- [3] The defendant is a British Columbia company that developed and owns a mixed commercial and residential condominium property in Duncan, British Columbia, known as "Dakova Square".
- [4] In or around July 2014, the parties entered into a contract that required the plaintiff to supply and install rebar for the construction of the Dakova Square project. The defendant says it was a variable price contract, meaning the amount owing to the plaintiff would depend on how much rebar was ultimately required.
- [5] The parties agreed that based on the original building plans for the Dakova Square project and the estimated amount of rebar that would be required to complete the project, the defendant would pay the plaintiff \$435,844 (the "Base Price").
- [6] Revisions to the Dakova Square plans were made reducing the size of the project and the amount of rebar that would be required from the plaintiff. The plaintiff says the Base Price was determined and agreed to only after these revisions to the original building plans for the Dakova Square project had been made. On the other hand, the defendant says the revisions to the original building plans were made after the Base Price had been established. Consequently, with the reduced amount of rebar necessary to complete the project, the Base

Price should have been and was reduced accordingly. Therein lies the seed of the present litigation.

- [7] The defendant paid the plaintiff approximately \$360,000, leaving a balance of around \$76,000 after factoring in the Goods and Services Taxes owing.
- [8] On 4 May 2016, the plaintiff registered a claim of builders lien against the defendant's Dakova Square property.
- [9] On 7 June 2016, the parties reached an agreement that the lien that had been registered against the Dakova Square property would be discharged in return for the defendant posting \$30,000 security. That security has been posted.
- [10] On 3 August 2016, the plaintiff commenced this action. It seeks \$90,000 in damages from the defendant for its alleged breach of contract.
- [11] The present application was served on counsel for the plaintiff in September 2021. It was subsequently set for hearing twice. However, the first date was adjourned because of lack of court time and the second date was adjourned because of plaintiff's counsel's personal circumstances.

The Defendant's Position

- [12] The defendant contends that the plaintiff's unjustified delay in prosecuting its claim has resulted in material prejudice to it and consequently the action ought to be dismissed for want of prosecution. Counsel for the defendant maintained that this was the defendant's principal and strongest argument, and understandably devoted most of his submissions to addressing it.
- [13] As an alternative, secondary argument, the defendant submits that the plaintiff has breached Rule 7-2 by failing or refusing to provide answers to outstanding questions from its examination for discovery, particularly with respect to identifying the Dakova Square project building plans that it used to establish the Base Price. The defendant says this gross failure or refusal on the part of the plaintiff to answer a critical question to this litigation should disqualify it from continuing with its action.

The Plaintiff's Position

- [14] The plaintiff acknowledges that there has been a delay in getting its claim adjudicated. However, it maintains that the delay has not been of such a magnitude that warrants the draconian measure of preventing it from having the claim adjudicated on its merits. Moreover, counsel for the plaintiff submits that the plaintiff wishes to proceed with its claim against the defendant and is prepared to do so. Consequently, the plaintiff maintains that the defendant's application to dismiss the action for want of prosecution is premature and unnecessary.

[15] With respect to the defendant's claim that the plaintiff failed to comply with the Rules by refusing or neglecting to provide responses to the questions posed of it at its examination for discovery, the plaintiff asserts that it has provided all of the information that it has available to it, and can do no more than that.

Dismissal for Want of Prosecution

[16] Rule 22-7(7) provides:

If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

[17] In determining whether a proceeding ought to be dismissed for want of prosecution, the court should consider the following factors:

- a) Has there been an inordinate delay in prosecuting the plaintiff's action?
- b) Is the delay excusable?
- c) Has the delay caused or is it likely to cause the defendant serious prejudice?
- d) Does the balance of justice require that the action be dismissed?

See *Busse v. Chertkow*, 1999 BCCA 313; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535; *Wiegert v. Rogers*, 2019 BCCA 334.

Discussion

Has there been an inordinate delay?

[18] In *Callan v. Cooke*, 2020 BCSC 290, Chief Justice Hinkson described the expression "inordinate delay" as follows:

[74] An inordinate delay is one that is uncontrolled, immoderate or excessive: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9. Silence or absence of encouragement to proceed from a defendant should not weigh in the plaintiffs' favour: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 67 [Ed Bulley].

[75] The delay to be considered is the delay in prosecuting an action from the time that it was commenced: *Ed Bulley* at para. 38.

[19] The fact that this is a builders lien action is also a relevant consideration in determining whether there has been inordinate delay. As Master Keighley observed in *Creative Door Services Ltd. v. 3609987 Canada Inc.*, 2006 BCSC 1676:

[23] It has been held by several authorities that "inordinate delay" may be more readily found in actions brought, as here, pursuant to the Builders Lien Act: *Goritsas* (supra), *M.G. Plumbing & Heating Ltd. v. Rooth's Construction Ltd.*, [2000] B.C.J. 2275, 6 C.L.R. (2d) 101 (S.C. Master) *Wilson v. Hrytsak*, [1997] B.C.J. No. 1115, 34 C.L.R. (2d) 65 (S.C. Master), and my own decision in *Kamal and Brothers Enterprises Inc. v. Mohan*, [2004] B.C.J. No. 2699, 2004

B.C.S.C. 1620, 40 C.L.R. (3d) 121 (S.C. Master). The rationale behind such decisions is, simply, that the plaintiff, in such cases, is given the extraordinary remedy of securing its claim before it is proven. Until the case is resolved, the owner is either restrained from disposing of the property, or is obliged to provide security, at its own expense, to secure removal of the plaintiff's encumbrance. In such cases there is significant reason to expect the plaintiff to proceed expeditiously with its claim. That expectation may be taken into account when considering whether the plaintiff's delay has been inordinate.

- [20] Delay should be examined in a holistic and not a piecemeal fashion: Wiegert at para. 32.
- [21] Moreover, in *Alpine Village Shopping Centre Ltd. v. Princeton Way Pub Ltd.*, 2020 BCSC 1725, Madam Justice Morellato provided further guidance on what constitutes a step in an action in the context of evaluating delay:
- [81] delivery of a Notice of Intention to Proceed, exchanges of correspondence or other communications between counsel, are not considered steps in an action for purposes of assessing delay as they do not move the litigation forward: *Kelly v. Dyno Nobel Canada Inc.*, [sic] [2016 BCSC 1601] at paras. 19-21
- [22] The defendant says the plaintiff has taken no meaningful step towards prosecuting its claim against the defendant since the examination for discovery of the defendant's representative was conducted in October 2017. However, there has been some further activity of a minor nature since then, including the delivery of an amended list of documents in October 2017, the plaintiff filing a notice of intention to proceed on 24 March 2021, and the filing of a consent order on 31 March 2021 transferring the matter from the Duncan court registry to the Victoria court registry. However, in my opinion, none of these actions constitute material steps in the proceedings for the purposes of calculating the length of the delay. There has also been periodic communication between counsel, generally involving the defendant's counsel trying to determine whether and when the plaintiff intends to proceed with its action. Again, based on *Alpine Village Shopping Centre Ltd.*, I do not find that any of this communication between counsel constitutes steps in the proceedings for the purposes of calculating the period of delay.
- [23] The plaintiff's action was started on 3 August 2016. Prior to that date, on 4 May 2016, the plaintiff had encumbered the defendant's Dakova Square property by registering a lien against its title. The plaintiff's action is therefore six years old.
- [24] In my opinion, the plaintiff has taken no active steps in this litigation since the examination for discovery of the defendant's representative was concluded in October 2017. This means the action against the defendant has been dormant for five years.
- [25] In my opinion, there has been an inordinate delay in prosecuting this action. Therefore, it is incumbent upon the plaintiff to provide a satisfactory and convincing excuse for this delay.

Is the delay excusable?

- [26] This is a problematic question for the plaintiff because there is no affidavit from the plaintiff's principal, Mr. Kenneth Emms, or anyone else associated with the plaintiff, that addresses the reason why there has been a six-year delay in prosecuting the plaintiff's claim.
- [27] During submissions, counsel for the plaintiff explained that he had had health issues that caused some of the delay in this case. However, in my view, this does not constitute evidence that can be used to evaluate whether the overall delay in question is excusable. Moreover, counsel for the plaintiff referenced vague difficulties that Mr. Emms has had over the years since the plaintiff filed the builders lien and commenced this action. Again, this is not evidence upon which I can base a finding that the delay in question is excusable.
- [28] By initiating these proceedings, the plaintiff assumed the sole responsibility to ensure it proceeded in a timely fashion; the defendant has no parallel obligation to do so, nor does it need to pursue the plaintiff to ensure it complies with its responsibility.
- [29] I accept the submission of defendant's counsel that there is no satisfactory or convincing explanation for why the plaintiff has not been more diligent in prosecuting this case. In my opinion, there is simply no means to conclude that the inordinate delay in this case is excusable.

Is there serious prejudice?

- [30] In Wiegert, Madam Justice Dickson addressed this branch of the test and explained:
- [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
- [31] In addition to relying on the presumption of prejudice that exists in this case, the defendant also claims it has suffered actual prejudice in that it needed to post \$30,000 as security in order to have the plaintiff's lien removed from the title to the Dakova Square property. This sum has been held in trust by counsel for the defendant since June 2016, meaning the defendant has not had use of any of those funds for over six years.
- [32] In addressing the issue of prejudice, the plaintiff points to the fact that it agreed to have its lien against the Dakova Square property discharged in return for a security deposit of only one-third of the amount of its claim against the defendant. Moreover, the plaintiff argues that there is insufficient evidence before the court to conclude that the defendant has suffered actual harm or prejudice on account of the plaintiff's delay in proceeding with its action.

- [33] I am not persuaded by the plaintiff's argument on this point. In my opinion, the plaintiff has failed to rebut the strong presumption of prejudice that exists in this case, given the extensive passage of time since it was commenced and the fact that it involves a claim of builders lien.
- [34] In addition to the presumed prejudice in this case, I accept that the defendant has suffered actual prejudice in having \$30,000 of its operating capital tied up in this litigation for such an extended period of time. The lien the plaintiff registered against the Dakova Square property was for \$90,000 and the notice of civil claim identifies \$87,467.01 as the value of the work performed that the defendant had not paid. However, at his examination for discovery, Mr. Emms acknowledged that the outstanding amount owing to the plaintiff was only \$76,000, meaning the security the defendant posted was not for one-third of the plaintiff's claim but closer to one-half the claim. I accept that the defendant's inability to access these funds over such a long period of time has had a material impact on its business operations.
- [35] Moreover, I am satisfied that with the passage of time, the memories of those involved in the development and construction of Dakova Square, like Mr. Emms, have naturally faded and most importantly critical evidence is no longer available. The missing evidence that I am referring to is the actual building plans that the plaintiff says it relied on to calculate the Base Price that it now says cannot be locate.

Does the balance of justice require the action to be dismissed?

- [36] This is the final and overarching question. It incorporates the three previous questions and addresses the need to balance the interests of the parties in determining what would be fair and just in the circumstances.
- [37] Counsel for the plaintiff is correct that an order dismissing an action before it has had an opportunity to be decided on its merits is a draconian remedy and should be granted only in the clearest of cases.
- [38] In my opinion, all of the elements of the test applicable to want of prosecution applications militate in favour of dismissing the plaintiff's claim against the defendant. There has been a six-year delay since the plaintiff started its action against the defendant. There have been no material steps taken in the litigation in the past five years. The plaintiff has offered no evidence explaining or justifying the delay. While counsel for the plaintiff has done his best to fashion some sort of response to address the delay, what he has submitted is not convincing. Lastly, given the prejudice that I accept the defendant has suffered on account of the plaintiff's delay in prosecuting its action, I am satisfied that the balance of interest tips convincingly in favour of the defendant.

Decision

- [39] I find there has been an inordinate and inexcusable delay on the part of the plaintiff in prosecuting its claim against the defendant. Moreover, I am satisfied that the delay has caused significant prejudice to the defendant and that overall, the balance of justice calls for the plaintiff's action to be dismissed.
- [40] Consequently, the defendant's application is granted and the plaintiff's action is dismissed for want of prosecution. Furthermore, the funds held in trust by the defendant's counsel as security for the plaintiff's builders lien, plus any accrued interest, are to be paid out forthwith to the defendant.
- [41] In light of my conclusion that the plaintiff's action ought to be dismissed for want of prosecution, there is little need or benefit to me addressing in detail the defendant's alternative position; that is, whether the plaintiff's alleged failure to comply with the Rules warrants an order dismissing the plaintiff's action. Having said this, I will note that I find the manner in which the plaintiff has approached this alternate argument very troubling. Facing the real possibility that its action would be dismissed summarily without assessing its merits, Mr. Emms, acting as the plaintiff's representative, has inexplicably failed to provide an affidavit of his own answering the critical question that remains outstanding from his examination for discovery: what building plans for the Dakova Square project did the plaintiff use and rely upon to calculate the Base Price? Instead, he and the plaintiff have chosen to rely on affidavits sworn by the plaintiff's counsel's legal assistant. The problem is that none of these affidavits provide a satisfactory answer to the question. While I do not find it necessary in the circumstances of this case to decide if this failure to respond to the defendant's request for this critical information constitutes independent grounds to dismiss the plaintiff's action, I will say that I find that the plaintiff's failure constitutes a breach of the Rules, which, were it necessary, would warrant some form of remedy.
- [42] As the defendant is the successful party, it is entitled to its Scale B costs.
- "G.R.J. Gaul, J."

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