

CANADA / JUDGMENT

Casa Milanello Developments Ltd. v. D'Angelo

2018 BCSC 2210

COURT

Supreme Court of British Columbia

DECIDED

12 December 2018

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2018 BCSC 2210 Casa Milanello Developments Ltd. v. D'Angelo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Casa Milanello Developments Ltd. v. D'Angelo,

2018 BCSC 2210

Date: 20181212

Docket: S074946

Registry: Vancouver

Between:

Casa Milanello Developments Ltd.

Plaintiff

And

Franco D'Angelo

Defendant

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.G. Sandilands

Counsel for the Defendant:

J.C. McKechnie

Place and Date of Hearing:

Vancouver, B.C.

November 29, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2018

Introduction

- [1] The defendant, Franco D'Angelo ("D'Angelo"), has brought an application that the proceeding against the defendant be dismissed for want of prosecution pursuant to Rule 22-7(7) of the Supreme Court Civil Rules. The plaintiff replied that there has not been inordinate delay, that any delay has been excusable, and that the defendant has not been prejudiced.

Background facts

- [2] The plaintiff commenced this action against D'Angelo and other defendants on July 20, 2007. The statement of claim filed on September 18, 2007 alleged, first, that D'Angelo had made negligent misrepresentations about property located at 33816 South Fraser Way, Abbotsford, British Columbia (the "property"), which misrepresentations were relied upon by the plaintiff in the purchase of the property and, second, that D'Angelo was negligent in failing to obtain certain disclosures about the property related to environmental concerns, by which negligence the plaintiff suffered loss and damage.
- [3] The background to the claim is that the defendant first became interested in purchasing the property in 2002. In about 2003, the defendant's real estate agent, Patricia Brown, gave D'Angelo copies of earlier engineering reports from 1993-1999 regarding possible contamination of the property. The 1999 report stated that "minor groundwater contamination still exists on the site". The defendant did not consider these reports to be significant and made several unsuccessful offers to purchase the property.
- [4] In September 2005, D'Angelo met with Gino Varnier ("Varnier") and Ezio Bortolussi ("Bortolussi") concerning purchase of the property. The three agreed to enter into a joint venture agreement to purchase and develop the property. As stated by Varnier, D'Angelo was to be a partner in the venture. D'Angelo was to enter into a purchase and sale agreement while a corporation was formed. D'Angelo "or a nominee" was named as the purchaser in a purchase and sale agreement for the property dated September 27, 2005. The closing date for the purchase was extended to December 29, 2005. In the meantime, the plaintiff company was incorporated on December 7, 2005 with D'Angelo, Varnier, and Bortolussi as

directors. The plaintiff company completed the sale as D'Angelo's nominee on the original agreement for purchase and sale.

- [5] Varnier stated that D'Angelo had told him that the property was "clean" and had never advised that there were engineering reports. This alleged representation was made orally. Varnier stated that he became aware of contamination on the property "some weeks after the purchase closed" when he was advised by officials in the building department with the City of Abbotsford.
- [6] The plaintiff made unsuccessful offers to purchase adjacent properties in February 2006. None of the offers contained conditions or warranties related to contamination.
- [7] The plaintiff remained the registered owner of the property until February 2018 when it was sold. By September 2017, the plaintiff had settled claims against other original defendants including the original vendor, previous owners of the property and the real estate agents.
- [8] Statements of defence had been filed on behalf of all defendants by September 24, 2008, D'Angelo having filed on January 24, 2008. Discoveries were conducted: Vanier on November 30, 2010; D'Angelo on June 21, 2012; and Bortolussi on July 4, 2012.
- [9] The first trial date was set on March 17, 2011 for a 10-day trial to be held starting September 10, 2012. This trial was adjourned by order of July 20, 2012 "on application of the parties". A second trial set for September 15, 2014 for 20 days was found to be "ready to proceed" at a trial management conference on May 29, 2014. At a second trial management conference of August 25, 2014, the defendant D'Angelo, acting in person, sought an adjournment of trial because the plaintiff had failed to produce documents. The trial management judge required the defendant to apply in chambers for the adjournment. D'Angelo's notice of application complained that the statement of claim alleged that the plaintiff had taken an "assignment" of the agreement of purchase and sale, but no such document had been produced; that the conveyancing solicitor's file had not been produced; that there were still outstanding requests from the discovery of Bortolussi; and that there had been late delivery of the plaintiff's expert remediation report such that D'Angelo could not obtain a reply report in time for trial. The adjournment was granted on September 5, 2014.
- [10] D'Angelo brought an application for summary trial on July 27, 2015, which application was dismissed because it was not suitable for summary disposition given credibility issues. The defendant was awarded costs in any event of the cause payable at the conclusion of the proceedings. It is noted that Madam Justice Fisher stated at para. 12 of her oral reasons for judgment that "this is an awfully old case and I can see that it would be good to find a resolution to it" and then referred to "how old" the case was at para. 14.
- [11] The plaintiff filed a notice of trial on October 30, 2014 for a 20-day trial to start on March 14, 2016. This trial was adjourned generally at a trial management conference on February 24, 2016 because of the failure of plaintiff's counsel to get a risk assessment report and other materials to the defendants in a timely way, notwithstanding their request for disclosure.

The court expressed the need to expedite the process of going to trial by directing the parties to attend another trial management conference and ordered a new trial date to be "peremptory on the defendants".

- [12] The plaintiff has done nothing since February 24, 2016 to obtain a new trial date.
- [13] The plaintiff settled this action as against all of the defendants except D'Angelo in September 2017. A term of the settlement was that the plaintiff obtain a certificate of compliance by January 31, 2018 to demonstrate that remediation had been completed, in which event the settlement amount would be paid in full. This was accomplished. Details of the remediation, including what occurred, when, and costs, have not been disclosed. No documents have been produced to date by the plaintiffs to establish an amount claimed for damages as against D'Angelo. Indeed, when asked for an amount during this application, the plaintiff could provide neither an amount or give any indication of what documents would be provided to establish a damage amount.
- [14] On January 12, 2018, the plaintiff obtained an order to amend the statement of claim to delete the other defendants from the action. The allegations against D'Angelo remained the same as when first alleged in 2007. The plaintiff has not amended the pleadings to conform to Vanier's affidavit evidence that clarified that the plaintiff had never been assigned the agreement for purchase and sale. Also, Vanier's statement that D'Angelo told him that the property was "clean" is not alleged.
- [15] This application to dismiss for want of prosecution was initially brought on March 13, 2018 for hearing on April 11, 2018. It was adjourned to June 5, 2018, then adjourned to September 14, 2018, and then adjourned to today's hearing date.

Analysis

- [16] Rule 22-7(7) provides for dismissal of a proceeding for want of prosecution. It is a draconian measure to be used only when required in the interests of justice (*Gemex Developments Corp.v. Sekora*, 2011 BCSC 318 at para.16).
- [17] The pre-emptive objective of a trial is to address claims on their merits. If this objective is frustrated such that a just outcome is unlikely, then a claim might be dismissed.
- [18] The criteria to be applied on this application is: first, whether there was inordinate delay; second, whether the delay is excusable in the circumstances; third, whether the delay has caused serious prejudice to the defendant; and fourth, whether, on balance, justice requires dismissal of the action (*Ed Bulley Ventures Ltd. v. Pantry Hospitality Corp.*, 2014 BCCA 52 at para.24). The delay to be considered is the overall delay since commencement of the action (*Ed Bulley Ventures Ltd.* at para. 38). Once an inordinate and inexcusable delay is established, a rebuttable factual presumption of prejudice arises (*Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at paras. 35-36; *Ed Bulley Ventures Ltd.* at para.51). If a fair trial can still be had in the face of delay and prejudice, then the interests of justice may

require that the litigation proceed. In this latter regard, the court may consider the merits of the case and whether there is a reasonable prospect of success (Ed Bulley Ventures Ltd. at para.62).

- [19] This case has been outstanding for over 11 years, with the facts giving rise to this case occurring 13 years ago. The allegation against D'Angelo arises from an alleged oral representation that occurred in the course of dealings between three men as they decided whether to purchase the property. Throughout this time, the plaintiff has failed to amend the pleadings against D'Angelo to conform to the plaintiff's evidence as apparent from affidavit and discovery evidence. In argument before this Court, the plaintiff alleged breach of fiduciary duty as against D'Angelo, a cause of action never pleaded. There have been two adjournments of trial due to the plaintiff's failure to produce documents in a timely manner. After the last adjournment, the plaintiff has failed to set a new trial date for almost three years. The plaintiff has been judicially warned twice about the need to expedite proceedings, in the summary trial decision on July 27, 2015 and at the trial management conference of February 24, 2016. Once the claims were settled as against the other defendants over a year ago, the plaintiff has done nothing to pursue its claim against D'Angelo: particularly, it has not produced any documentation to support the claim for damages as against D'Angelo. The plaintiff indicated that a trial against D'Angelo would now take about four days. Such a trial date is readily obtained: yet, the plaintiff has done nothing to pursue a date, even in the face of this application. In candid comment before this Court, plaintiff's counsel indicated that the matter now is one of costs, with the plaintiff not wanting to have to reimburse the defendant for costs throughout.
- [20] The delay here has been lengthy and exceeds a tolerable limit, especially given the twice urging by this Court to expedite proceedings. In these circumstances, this Court has no difficulty in concluding that there has been inordinate delay.
- [21] The plaintiff offered as an excuse for the delay that it was required to remediate the contamination at the property before it could assess damages. The plaintiff argued that, in law, it was unable to do so until legislation was changed in 2012. The specifics of the legislation were not presented. However, there was no reason given as to why the remediation itself was not undertaken in a timely manner. The plaintiff suggested that remediation occurred in 2017: but, the defendant said that no evidence has ever been provided as to whether remediation was ever undertaken. As it pertains to this defendant, liability is not a complex case.
- [22] The second excuse was that it is "difficult to obtain trial dates for long trials in less than two years". There is no evidence that the plaintiff tried to obtain trial dates after February 2016. Further, the trial against this defendant requires only four days and can be readily obtained.

- [23] The third excuse is that all adjournments were the result of applications by the defendants. As already described, the adjournments were granted because the plaintiff had failed to produce documents in time. The fault for two of the three adjournments lies at the feet of the plaintiff.
- [24] The inordinate delay is inexcusable.
- [25] In the circumstance where delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises. Here, it is not contested that the primary evidence against the defendant will be viva voce through recollected memory of conversations that occurred 13 years ago. There is no supporting documentary evidence. From discovery of Bortolussi in 2012, it is apparent that he has no recollection of events. Varnier's evidence from affidavit material suggests that he has no recollection of when the alleged misrepresentation that the property was "clean" was made and also recollects that he understood from the statement that the defendant had enquired and the property was suitable for building a multi-unit residential development. There is no specific recollection that he understood D'Angelo to say that the property was free of contamination and there is no evidence that the property was not suitable for building a multi-unit residential development. Other affidavit evidence of Varnier confirms that his memory of events is not consistent internally or externally. This only serves to heighten concerns about the unreliability of the memory of witnesses 13 years after the conversation is alleged to have occurred. It is apparent here that the chance of finding out what really happened has been substantially reduced with the significant passage of time.
- [26] There exists a substantial risk that a fair trial on the issues is no longer possible. The evidence here will be viva voce from memory of an event 13 years ago that was not documented. One of the three persons present already has no memory of events. Credibility is in issue as determined in 2015 by the s. 9-7 summary trial judge. There have been long periods of inactivity on the part of the plaintiff. This cannot be remedied by giving the plaintiff another opportunity to remedy its default. The plaintiff has shown no inclination to proceed expeditiously either by producing documents to support the damages claim or by setting a date for trial.

Conclusion

- [27] The application to dismiss this action for want of prosecution against the defendant, D'Angelo, is granted. The defendant is granted costs on Scale B.

"Dillon J."

The Honourable Madam Justice Dillon

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