CANADA / JUDGMENT

Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.

2015 BCSC 915

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Supreme Court of British Columbia

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2015 BCSC 915 Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.,

2015 BCSC 915

Date: 20150601

Docket: S050408

Registry: Vancouver

Between:

Extra Gift Exchange Inc., Leon Lam

and Richmond Liquidation Sales

Plaintiffs/Respondents

And

Accurate Effective Bailiffs Ltd. a.k.a. Accurate Bailiffs &

Collection Agency Ltd. a.k.a. Effective Bailiff services Ltd.

a.k.a. Accurate Effective Bailiff Services Ltd., AA Property

Management Ltd. and Aaron Hung Kit Leung

Defendants/Applicants

And

The Owners, Strata Plan 3259, AA Property Management Ltd.

Third Parties

Before: The Honourable Madam Justice Harris

Reasons for Judgment

The Plaintiffs, Extra Gift Exchange Inc., Leo Lam and Richmond Liquidation Sales:

On their own behalf

Counsel for the Defendant, Accurate Effective Bailiffs Ltd.:

W. L. Roberts

Counsel for the Defendant, AA Property Management Ltd. and Aaron Hung Kit Leung and Third Party, The Owners Strata Plan LMS 3259:

H. Parsons

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 24 and November 27, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 1, 2015

Introduction

[1] The applicants AA Property Management Ltd. ("AA Property"), Aaron Hung Kit Leung ("Leung") and the Owners, Strata Plan LMS 3259 ("Strata Corporation") (collectively the "defendants"), bring an application that the plaintiffs' action against them be dismissed for want of prosecution. The defendants make their application pursuant to Rule 22-7(7) and the inherent jurisdiction of the court.

[2] In the alternative, the defendants seek an order for security for costs pursuant to the Business Corporations Act, S.B.C. 202, c. 57 and the inherent jurisdiction of the court.

[3] The defendant, Accurate Effective Bailiffs Ltd. ("Accurate Bailiffs"), supports the defendants' application to dismiss.

[4] The respondents, Extra Gift Exchange Inc., Leon Lam and Richmond Liquidation Sales (collectively known as the "plaintiffs"), oppose the defendants' application.

Background

[5] There is a long history to this litigation, which began as a result of an acrimonious dispute that began in 2001 between the owners of commercial strata units in a commercial development called the Pacific Plaza Mall.

[6] At all material times, Mr. Lam and Sze Hang Holding (the "plaintiffs") owned two strata lots in the Pacific Plaza. Mr. Lam had a 1% ownership interest in strata units. Extra Gift Exchange was the tenant of these units. Mr. Lam is the principal of Extra Gift Exchange, which carries on business as Richmond Liquidation Sales.

[7] The Court of Appeal has described the litigation between Mr. Lam, Sze Hang Holding, Extra Gift Exchange, and the Strata Corporation, in The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc., 2012 BCCA 196 and in Extra Gift Exchange Inc. v. Strata Plan LMS3259, 2014 BCCA 228.

[8] I will not repeat the background, except to the extent that it bears directly on the application before me. In that regard, I note that Mr. Lam and Sze Hang Holding Inc. have commenced various proceedings in this Court against the Strata Corporation, AA Property, Mr. Leung, and others. Some of the actions have concluded, while others have not yet concluded.

[9] The Strata Corporation commenced an action against Mr. Lam and Sze Hang Holding in 2004 (the "Fines Action"). The Strata Corporation claimed that Mr. Lam and Sze Hang Holding breached certain bylaws and failed to pay fines levied against them. Mr. Lam and Sze Hang Holding filed a statement of defence which alleged, among other things, that the Strata Corporation did not have the authority to enact and enforce the bylaws. This action effectively continued an earlier proceeding brought in the Provincial Court.

[10] Some of the fines levied against Mr. Lam and Sze Hang Holding relate to items which were stored in front of their strata units, commencing in approximately September of 2003. The Strata Corporation was of the view that the items were junk which detracted from the appearance of the mall, were intended to embarrass the Strata Corporation, and contravened the bylaws. Mr. Lam and Sze Hang Holding contend that the items were merchandise for their business and that they were entitled to store the items on the limited common property in front of their units.

[11] The Strata Corporation and AA Property, the property management company for Pacific Plaza, demanded that the items be removed. There were a number of warnings issued to Mr. Lam and Sze Hang Holding to remove the items or they would be removed and placed in storage. Ultimately, in approximately January and February of 2004, the items were removed by Accurate Bailiffs and placed in storage. The objects remained in storage for more than 6 years, despite requests that Mr. Lam retrieve them.

[12] In arranging for the removal and storage of the property, AA Property, and Accurate Bailiffs were ostensibly acting under instructions from the Strata Corporation.

[13] In January of 2005, the plaintiffs brought the within action against Accurate Bailiffs. Accurate Bailiffs issued a Third Party Notice naming the Strata Corporation and AA Property (the "Bailiff Action").

[14] The plaintiffs claimed that, among other things, the defendants distrained the plaintiffs' property negligently, wrongfully and in abuse of its authority. The plaintiffs claimed damages for financial loss, compensation for mental anguish, aggravated, special and punitive damages.

[15] A trial of the action was scheduled for July 23, 2007 to July 27, 2007, but did not proceed. In September of 2007, the plaintiffs added AA Property and Mr. Leung as defendants.

[16] The items which were removed and stored by Accurate Bailiffs were appraised in January of 2008 by Timeline Asset Services Ltd. to have a gross market value of $1,650. Mr. Lam deposed that the items were worth $20,000.

[17] In January of 2009, Mr. Leung was examined for discovery by Mr. Lam in this action.

[18] In April of 2009, Madam Justice Prowse struck the pleadings filed by Sze Hang Holding and Mr. Lam in the Fines Action and judgment was granted for the Strata Corporation. This judgment was appealed to the Court of Appeal.

[19] In February of 2010, the defendants in the Bailiff Action brought a Rule 18A application to dismiss the plaintiffs' claim (now Rule 9-7 of the Supreme Court Civil Rules), which was heard by Mr. Justice Masuhara. He did not dismiss the action. However, he ordered the items in storage be returned to Mr. Lam.

[20] The items were returned in March of 2010. Approximately $17,000 in storage fees had been incurred, which were charged to Sze Hang Holding and Mr. Lam.

[21] In May of 2012, the Court of Appeal overturned, in part, the decision of Madam Justice Prowse in the Fines Action. The Court of Appeal allowed certain of the claims of Sze Hang Holding and Mr. Lam to proceed.

[22] For a three year period, no steps were taken in the Bailiff Action. However, on December 23, 2013, the plaintiffs filed a Notice of Intention to Act in Person in place of Richard Hamilton, and a Notice of Intention to Proceed.

Position of the Parties

Position of the Applicants/Defendants

[23] The defendants submit that the plaintiffs' delay in proceeding with the Bailiff Action has been inordinate and inexcusable, and has resulted in serious prejudice to them. The defendants assert that the plaintiffs failed to take a step in the proceedings for nearly four years and that they are attempting to use the Fines Action to obtain judicial findings that would assist them in the Bailiff Action.

[24] The defendants note that the allegations made in this action go to Mr. Leung's character and credit and that, as such, the plaintiffs were required to proceed with expedition and diligence in pursuing their claim.

[25] The defendants also note that the onus falls on the plaintiffs to establish, on the balance of probabilities, that there has not been prejudice as a result of their inordinate and inexcusable delay.

[26] The defendants submit that it is in the interests of justice that the plaintiffs' claim be dismissed for want of prosecution as the action was launched almost ten years ago; serious accusations were made against them; the claim has only a tenuous foundation; and a fair trial in these circumstances is nearly impossible due to the natural degradation of witness memories.

[27] The defendants contend that the plaintiffs are seeking to revive the Bailiff Action as a tactical measure, as they are making essentially the same claims in the Fines Action.

[28] In the alternative, the defendants submit that there should be security for costs against both the corporate and individual plaintiffs. The defendants candidly acknowledge that Madam Justice Prowse, on January 11, 2008, dismissed the application of AA Property and Mr. Leung for security for costs in her decision, Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd., 2008 BCSC 440, but submit that the circumstances have changed since that time - the items have now been returned to Mr. Lam, the remaining damages have little more than nuisance value to the respondents, and the respondents are using the action to cause the defendants expense and wasted effort.

[29] In support of the application for security for costs, the defendants assert that Mr. Lam has a history of non-payment of cost awards. Specifically, in action L023449, he was ordered to pay assessed costs of $36,615 but has failed to pay this amount since they were assessed in 2004.

[30] The defendants filed their amended notice of application to dismiss the plaintiffs' action for want of prosecution on July 15, 2014.

Position of Respondents/Plaintiffs

[31] The plaintiffs deny there has been any inordinate or inexcusable delay. They submit, amongst other submissions, that the defendants' application has to be considered in the context of previous decisions of this Court and, in particular, the interconnection between the Fines Action and the Bailiff Action.

[32] In essence, it is the position of the plaintiffs that they acted on the belief that the Fines Action and the Bailiff Action would be heard together, as Madam Justice Prowse had ordered on October 11, 2007. It was not until the decision of Madam Justice Fenlon, as the case management judge, and, subsequently, confirmed by myself, as the trial judge in the Fines Action, that it was clear to the plaintiffs that the Fines Action would not be heard with the Bailiff Action.

[33] With respect to the 2007 Order, the plaintiffs note that, although they were preparing for trial, the trial could not proceed as a result of the February 26, 2009 Order of Madam Justice Prowse staying this action as well as a number of other actions involving Mr. Lam and Sze Hang Holding, pending the appointment of a case management judge.

[34] Further, the plaintiffs note that after Madam Justice Prowse was named the case management judge, she struck the defence and counterclaim of Mr. Lam and Sze Hang Holding in the Fines Action on April 7, 2009. The plaintiffs submit that by doing so, she effectively "handcuffed" the Bailiff Action. Her decision in the Fines Action meant there was no case left to proceed with: by granting judgment for the Strata Corporation in the Fines Action there was no longer a basis for the plaintiffs to challenge the validity of the actions of AA Property and Accurate Bailiff in the Bailiff Action.

[35] The plaintiffs further submit that when the Court of Appeal, in May of 2012, overturned the decision of Madam Justice Prowse, this not only meant the Fines Action could be continued, it also effectively meant that the Bailiff Action could be continued.

[36] The plaintiffs contend that their belief in the interconnection between the Fines Action and Bailiff Action was reinforced by the decision of Mr. Justice Masuhara on February 17, 2010. While the appeal from the decision of Madam Justice Prowse was pending, the defendants brought a Rule 18A application to dismiss the Bailiff Action, which was heard by Mr. Justice Masuhara.

[37] Mr. Justice Masuhara dismissed the defendants' application on the basis that it was not appropriate for summary trial. The plaintiffs suggest that Mr. Justice Masuhara accepted that the Fines Action and the Bailiffs action were related, such that if the decision of Madam Justice Prowse were upheld on appeal, there would no longer be a reason to proceed with the trial of the Bailiff action.

[38] With respect to the application for security for costs, the plaintiffs observe that the defendants' previous application for security for costs was dismissed by Madam Justice Prowse in 2008 and submit there are no changed circumstances or other special circumstances which would warrant a different decision.

Issues

[39] The following issues arise in this case:

1. Has there been inordinate, inexcusable delay on the part of the plaintiffs which has caused or is likely to cause serious prejudice to the defendants? Does the balance of justice require an order dismissing the plaintiffs' claim?
2. Is this a proper case for the exercise of the court's discretion to order security for costs against the corporate and/or individual plaintiffs in this case? Have the circumstances changed since the January 11, 2008 decision of Madam Justice Prowse in Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd., 2008 BCSC 440.

Legal Framework

Dismissal for Want of Prosecution

[40] In Gemex Developments Corp v. Sekora, 2011 BCSC 318, Madam Justice Smith set out the principles governing the exercise of the court's discretion to dismiss proceedings for want of prosecution. She observed, at para. 16, that the "overriding principle 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."

[41] She noted that there are four questions to be addressed in an application to dismiss for want of prosecution:

1. Has there been inordinate delay on the part of the plaintiff in pursuing its claim?
2. Has the delay been inexcusable?
3. Has the delay caused serious prejudice, or is it likely to cause serious prejudice to the defendants?
4. Does the balance of justice require an order dismissing the plaintiff's claim?

[42] Where the allegations go a defendant's character and credit, there is a particular onus on the plaintiff to proceed with appropriate expedition and diligence, Vic Van Isle Construction Ltd. v. Lomenda, [1999] B.C.J. No. 3032 (S.C.).

[43] In describing what will constitute inordinate delay, Madam Justice Smith, in Gemex, referred to Osolin v. Aquila Holdings Ltd., [1982] B.C.J. No. 1225 (S.C.), in which Justice Tyrwhitt-Drake held that inordinate delay means more than simple delay: "an inordinate delay must be one which strikes at the root of justice and makes a fair trial a virtual impossibility".

[44] In assessing whether or not the delay is excusable, one must look at the reasons for it in all of the circumstances. Until a credible excuse is made by the plaintiffs, the natural inference to be drawn from an ordinate delay is that the delay is inexcusable, Irving v. Irving, (1982), 38 B.C.L.R. 318 (C.A.).

[45] Once an inexcusable delay has been established, a presumption of prejudice arises. The burden shifts to the claimant who must then show on a balance of probabilities that the respondent has not suffered prejudice or that it would be unjust to terminate the action, Busse v. Robinson Morelli Chertkow (1999), 63 B.C.L.R. (3d) 174 (C.A.), Tundra Helicopters et al. v. Allison Gas Turbine et al., 2002 BCCA 145.

[46] A defendant must establish that it is likely to be seriously prejudiced; Fraser Cedar Products Ltd. v. Oceanic Underwriters Ltd., [1997] B.C.J. No. 837. The prejudice must be such that the defendant's ability to have a fair trial is imperilled, Gemex.

[47] None of the above noted factors are to be considered in isolation and, in the end, the overriding consideration is whether on balance justice demands that the action be dismissed, Irving.

Security for Costs

[48] The purpose of an order for security for costs is to protect a litigant from the possibility that it will be unable to recover costs from its opponents if the litigant is ultimately successful in the litigation.

[49] The principles governing applications for security for costs were outlined by Madam Justice Prowse in response to the defendants' previous application in Extra Gift Exchange Inc., at paras. 11 to 22. Her review of the law may be summarized as follows:

1. The authority to order security for costs against a corporate defendant is derived from the Business Corporations Act. The authority to order security for costs against an individual plaintiff is derived from the court's inherent jurisdiction, Tordoff v. Canada Life Assurance Co. (1985), 64 B.C.L.R. 46 (S.C.) and Fraser v. Houston (1997), 36 B.C.L.R. (3d) 118 (S.C.) against an individual plaintiff.

2. The test to be met is higher against an individual than a corporate plaintiff. In the case of an individual, there must be special or egregious circumstances, Bronson v. Hewitt, 2007 BCSC 1751 at para. 47, Dong v. Au, 2007 BCCA 37.

3. To guide the exercise of the court's discretion in determining whether an order for security for costs, the court should consider all relevant circumstances; the possibility that a plaintiff company will be deterred is not, without more, sufficient reason not to order security; the court must balance the injustice arising from the use of security to stifle a legitimate claim with the use of impecuniosity as a means of putting unfair pressure on a defendant; the court can order any amount of security up to the full amount of the claim, but it should not be nominal; before a court determines that a valid claim would be stifled it must be satisfied that in the circumstances it is probable that the claim would be stifled; and the lateness of the application is a circumstance which can properly be taken into account, Kropp v. Swanset Bay Gold Course Ltd. (1997), 29 B.C.L.R. (3d) 252 (C.A.).

4. A plaintiff may avoid an order for security for costs by showing it has sufficient exigible assets, Kropp. Even where the plaintiff does not have exigible assets, it may still decline to order security for costs if it would visit undue hardship on the plaintiff in having the opportunity to have its case heard, Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress (1999), 36 C.P.C. (4th) 266.

Analysis

Dismissal for Want of Prosecution

[50] In considering the questions to be addressed on an application for want of prosecution, I must first consider whether there has been inordinate delay. I note there is a heightened obligation on the plaintiffs where there are allegations going to a defendant's character. In that regard, the plaintiffs have made serious allegations of impropriety against Mr. Leung, as well as the corporate defendants.

[51] As noted above, the defendants say that there has been inordinate delay as the plaintiffs did not take a step in the proceedings for over almost four years and the events giving rise to the action occurred over ten years ago. If those facts were considered in isolation, I would be inclined to accept that the delay was inordinate and inexcusable. However, I must consider all of the circumstances related to the delay. In this case, I have considered the following:

1. In the application for security for costs in the Bailiff Action, which the defendants brought against the plaintiffs in 2007, Madam Justice Prowse commented in her reasons that the plaintiffs were moving the action forward, from which I infer that, at that time, the plaintiffs were not dilatory in pursuing the claim. She stated at para. 27 of Extra Gift Exchange:

A review of the proceedings in this action discloses that, to date, it has been the Plaintiffs rather than the Defendants that have taken the necessary steps to move this action along. The Plaintiffs have endeavoured to set down examinations for discoveries, exchange documents, and set a trial date.

2. A trial of the Bailiff Action was originally scheduled for July 23, 2007 to July 27, 2007. It did not proceed at that time and was rescheduled for February 25, 2009 for ten days. It was to be heard together with another action, as noted by Madam Justice Prowse in Extra Gift Exchange, at para. 1. Although it is not clear from the reasons whether that "other action" was the Fines Action, she had made an order in October 2007 that these actions were to be heard together.

3. Prior to Madam Justice Prowse issuing a stay of proceedings in respect of actions in which the plaintiffs were involved on February 26, 2009, the plaintiffs had been preparing for trial. In January of 2009, Mr. Leung was examined for discovery by Mr. Lam in the Bailiff Action.

4. Madam Justice Prowse's subsequent decision to strike the pleadings which had been filed by Sze Hang Holding and Mr. Lam in the Fines Action did not directly affect the status of the Bailiff Action. However, I accept that the plaintiffs believed that they could not realistically proceed to challenge the lawfulness of the actions of the defendants in the Bailiff Action when the court in the Fines Action had given judgment for the Strata Corporation in respect of the fines which had been imposed by them for, amongst other things, the storage of items in front of the strata units owned by Sze Hang Holding and Mr. Lam.

5. When the defendants brought a summary trial application in the Bailiff Action in February of 2010, the plaintiffs made this argument to the court. Among other arguments made, Mr. Hamilton, on behalf of the plaintiffs, submitted that the matter was not appropriate for a summary trial, given the complexity of the case and its interconnection with the Fines Action. Indeed, he asserted that the Fines Action and Bailiff Action were so interconnected that there would be no reason to proceed with the Bailiff Action if they were unsuccessful in the appeal of the Fines Action. There is some indication from the transcript of the proceeding that this argument was considered favourably by the court.

According to the transcript of that proceeding, Mr. Justice Masuhara stated:

And Mr. Hamilton laid out a fairly persuasive argument, saying, well, at least, you ought to wait - or I ought to wait pending what happens with that [the appeal of the decision of Madame Justice Prowse]. And I don't hear you saying, look, this is from a never never plan. I take it from what Mr. Hamilton says that there is a fair degree of desire to get this thing on quickly and that counsel on the other actions are going to be moving fairly hard to keep this thing on track .

this might become a moot type of action. And that's the way I see - that's the way I took the information anyways

I think more than just the bylaws itself, I think that there's enough that I've heard in terms of submissions that tell me it's not just the bylaws. There's other actions here which I have been persuaded are sufficient that I ought to exercise some caution on an 18A. 18As certainly don't bar the court from moving right to a final conclusion. But from what I've heard there's a question of the several aspects regarding the lawfulness of the action taken that is a key piece of the pleading of the plaintiff in this case. There's a question as to whether the bylaws were void ab initio, whether the strata was properly constituted, whether the actions of the council were proper or whether there were unduly or unfairly prejudicial, et cetera that all leads me to the point to which Mr. Hamilton has agreed that he's got instructions to consent to, and that is that Mr. Lam will have a period to make timely .retrieval of the items - in a way that doesn't disturb the interests of the parties with respect to the integrity of the items and the security of the items.

[Emphasis added]

6. The subsequent consent order of Mr. Justice Masuhara, dated February 17, 2010, was restricted to the conditions for the return of the items which had been in storage. It did not deal with his decision in respect of the defendants' summary trial application. However,

from the learned judge's comments, I infer that the outstanding appeal of Madam Justice Prowse's decision in the Fines Action and the lawfulness of the Strata Corporation bylaws were factors which weighed in his decision not to allow the defendants' summary trial application.

7. After the decision of the Court of Appeal was issued on May 4, 2012, the plaintiffs sought to have the Fines Action heard together with the Bailiff Action.

[52] In light of the history of the proceedings, I find that there was some basis for the plaintiffs' belief that the Bailiff Action would not proceed pending the appeal of the Fines Action. In that regard, I note that after the summary trial application was dismissed, the defendants did not set the matter down for trial. There is no evidence, the defendants communicated with the plaintiffs regarding trial dates or regarding the suggestion that there would be no reason to proceed with the Bailiff Action if the plaintiffs were unsuccessful in the appeal of the Fines Action. The correspondence in evidence from the defendants following the summary trial application deals only with the delivery of the goods to Mr. Lam.

[53] While I accept that the onus of prosecuting the Bailiff Action was ultimately on the plaintiffs, in the above circumstances, I accept that they had reason to believe that the Bailiff Action would not proceed, if at all, until after the Court of Appeal issued its decision in May of 2012.

[54] Although the plaintiffs did not proceed with the Bailiff Action immediately after the Court of Appeal's decision, I do not find their delay after the 2012 Court of Appeal decision to be inordinate, given that in 2013 Mr. Lam filed a notice of intention to act in person and a notice to proceed and also sought to have the Bailiff Action heard together with the Fines Action.

[55] That said, I must also consider whether there has been serious prejudice or there is likely to be serious prejudice caused to the defendants in the Bailiff Action, as a result of the delay. The applicants submit that there is potential prejudice to Mr. Leung's reputation given the serious allegations made against him. They also submit that the degradation in witness memory would make a fair trial nearly impossible. They suggest that Mr. Lam was using the Bailiff Action to increase the pressure on the Strata Corporation.

[56] With regard to the allegations against Mr. Leung, I accept that certain of the pleadings make allegations which reflect on his character. This is a factor which weighs in favour of the defendants' position on the application.

[57] With respect to the degradation of witness memory, I am not satisfied that the trial would be impossible even at this late date. I note that the events giving rise to the seizure of the items from the plaintiffs were recently canvassed in the trial of the Fines Action. Mr. Leung gave evidence in those proceeding, as did Mr. Lam.

[58] I am also not satisfied that the applicants have established, on the evidence, that Mr. Lam is using the action for an improper purpose. While Mr. Lam has initiated a number of actions related to the Pacific Plaza, that is not by itself evidence that he is using this action to pressure the Strata Corporation - who I note was brought into this action as a third party by the defendants. In that regard, the Court of Appeal recently declined to find that Mr. Lam was a vexatious litigant in Extra Gift Exchange Inc. at para. 44.

[59] Further, I note that the defendants have not brought an application to dismiss the plaintiffs' action on the basis that it is an abuse of process. While there is some duplication between the Bailiff Action and the Fines Action, the Bailiff Action makes claims and involves parties that are not part of the Fines Action.

[60] Having regard to all of the circumstances, I am not persuaded that it is in the interests of justice that the plaintiffs' action be dismissed for want of prosecution. As stated in Gemex, the dismissal of an action for want of prosecution is a drastic measure which is only to be taken when it is clearly required in the interests of justice.

Security for Costs

[61] The defendants seek, in the alternative, an order for security for costs. They submit that circumstances have changed since the 2008 decision of Madam Justice Prowse, in which she dismissed a similar application.

[62] In my view, the circumstances have changed since the 2008 decision. It has been seven years since the decision of Madam Justice Prowse, without any significant progress having been made in this action. Although I have found that it is not in the interest of justice to dismiss the plaintiffs' claim for want of prosecution, the defendants should not have to bear the prospect of being unable to recover their costs if they are ultimately successful in the litigation.

[63] In that regard, the defendants have provided evidence that Mr. Lam has not paid costs assessed against him in other proceedings in this court. Specifically, costs were assessed against him in the amount of $36,615 in Supreme Court Action No. L023449. This amount remains unpaid and the Strata Corporation is seeking judgment against Mr. Lam in the amount of $51,186.

[64] With respect to both Sze Hang Holding and Mr. Lam, I note Madam Justice Fenlon referred to their having not paid a previous order for special costs. In The Owners Strata Plan LMS 3259 v. Sze Hang Holding Inc. and Leon Lam, (4 September 2013), Vancouver L050030 (B.C.S.C.), Madam Justice Fenlon commented at para. 76:

Given the history of these proceedings, I conclude that it would be an abuse of process to permit the defendants to use the court process to pursue their claims when they are in breach of an outstanding order to pay special costs to the plaintiff. In expressing that view, I am simply stating my agreement with the original and extant order of Madame Justice Sinclair Prowse made in March of 2007.

[65] I also note that Mr. Lam has not claimed financial hardship, although he is currently representing himself. In any event, I do not find that his financial situation is due to the acts which are complained of in this action.

[66] Further, given that the defendants were ostensibly acting with the authority of the Strata Corporation in seizing and storing the items in front of the plaintiffs' strata units, this is not a case where it could be said that there is no merit to the defence to the plaintiffs' claim.

[67] Accordingly, I have concluded that an order for security for costs is justified. In my view, Mr. Lam's failure to pay the previous costs assessed against him by this court constitutes "special and egregious circumstances" which justify an order that he, as well as the corporate defendants, be responsible for providing security for costs.

[68] While the defendants seek security in the amount of $50,000, that amount appears to me to be excessive. In that regard, the applicants have not provided a draft bill of costs or affidavit evidence to support the amount of security claimed. The plaintiffs say the trial will take one or two days, although that time estimate has not been confirmed.

[69] I set the security for costs at $8,000, which is to be paid into the Registry by the plaintiffs within 30 days of this order. The plaintiffs' action is stayed until such security has been deposited with the Registrar and proof of deposit has been provided to the solicitors for the defendants. If the plaintiffs fail to pay into the Registry security in accordance with this order, the defendants are at liberty to apply to dismiss the action. The defendants are also at liberty to apply for an order that the plaintiffs post further and better security, on terms to be determined.

[70] If and when the plaintiffs have provided security for costs as provided herein, there should be no further delay in proceeding with this action. The plaintiffs are not entitled to await the outcome of the Fines Action. I direct the plaintiffs to contact Trial Scheduling within five days of their satisfying the terms of the security, for the purpose of obtaining a trial date - unless the plaintiffs discontinue the action before that time.

[71] The trial should be scheduled at the earliest available date convenient to counsel for the defendants.

Conclusion

[72] In summary, I have concluded as follows:

1. The defendants' application to dismiss the plaintiffs' action for want of prosecution is dismissed;
2. The defendants' application for security for costs is granted in the amount of $8,000. The plaintiffs' action, Vancouver Registry No. S050408, against the defendants is stayed until the security for costs is paid into the Registry, with the defendants being at liberty to apply to dismiss the action if the security for costs is not paid within 30 days of the date of this order.

[73] Costs will be in the cause.

"Madam Justice Harris"

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