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CANADA / JUDGMENT

## Fahey v. Fahey

2021 BCSC 1388

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1388 Fahey v. Fahey

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fahey v. Fahey,

2021 BCSC 1388

Date: 20210715

Docket: S206633

Registry: New Westminster

Between:

Dermot Fahey

Plaintiff

And

Matthew Dermot Fahey

Defendant

Before: The Honourable Madam Justice Blake

Reasons for Judgment

Counsel for the Plaintiff:

No one appearing

Counsel for the Defendant:

I. Giroday

Counsel for Gerald Joseph Fahey:

J. Zaitsoff

Place and Date of Hearing:

New Westminster, B.C.

June 14, 2021

Place and Date of Judgment:

New Westminster, B.C.

**July 15, 2021**

[1] This matter came before me in Chambers. The applicant, Matthew Dermot Fahey brought an application seeking an order that a proceeding brought by his late father Dermot Fahey (the "Deceased") be dismissed for want of prosecution and for costs payable from the Deceased's estate. His brother, Gerald Fahey (Gerry) seeks standing to respond to Matthew's application (as he is not a named party in Action No. S-206633), opposes the relief sought by the applicant, and seeks his costs of responding to the application from Matthew.

## **Background**

[2] The background to this application is complicated. The Deceased was married to Jane Fahey (Jane), with whom he had three surviving sons: Matthew, Gerry, and their brother David Fahey. I will refer to the Fahey family by their first names for clarity, and intend no disrespect to any of them by doing so. Jane appointed her son Gerry as her attorney by way of enduring power of attorney dated April 5, 2012. Jane was the sole registered owner of a property located at 4641 256 Street, Aldergrove, B.C. (the "Property") from 2005 until July 15, 2016, at which time Gerry (in his capacity as attorney for Jane) transferred title to the Property to Jane and Matthew as joint tenants. The Property is a farm property.

[3] On or about the same day, Matthew acknowledged and agreed by way of a Trust Deed that he was the Trustee of the Trust (the "Trust"), that he held his interest in the Property in trust for Jane, that he had no beneficial interest in the Property, and that upon her death Matthew as Trustee was to give the beneficial ownership in the Property in equal shares to Jane's three surviving children: Matthew, Gerry and David. Gerald says that the transfer of the Property to the Trust was done for estate planning purposes.

[4] Both Matthew and Gerry practise as lawyers in Vancouver.

[5] Jane's last will was dated January 12, 1978, and in her Will she directed that the residue of her estate to be divided in equal shares among her surviving children. The distribution scheme of the Trust is consistent with the distribution scheme set out in Jane's Will. Jane passed away on December 18, 2017.

- [6] In the spring of 2018 Dermot discovered that title to the Property was held jointly in the names of Jane and Matthew. He wrote an email to Matthew and Gerry on August 7, 2018 in which he stated "In June of 2018 on inspection of property tax notice I discovered the property is registered in name of Matthew Fahey and Mum. I do not know how or why this happened. I want my property back and registered in my name. I want this done now not later".

### **New Westminster Action No. S-206633**

- [7] The Deceased filed the within proceeding (New Westminster Action No. S206633) on September 26, 2018, seeking, inter alia, a declaration that the beneficial interest in the Property is held in trust for his benefit by Matthew. Of note, in Action No. S-206633 Dermot named Matthew in his personal capacity (not as Trustee), and he did not name Gerry (who in his capacity as attorney for Jane had transferred legal title to the Property). Matthew filed his response to civil claim in Action No. S-206633 on December 20, 2018.
- [8] Gerry takes the position that on or about December 15, 2018, Dermot executed two documents:
- a) a one page handwritten document in which Dermot purported to transfer all of his legal and beneficial interest in the Property to Gerry (the "Alleged Transfer"); and
  - b) a one page handwritten will in which Dermot left his entire estate to Gerry (expressly including his legal and beneficial interest in the Property) (the "Alleged Will").
- [9] Dermot died approximately four months after Action No. S-206633 was filed, on January 22, 2019.
- [10] In July 2019 Matthew was asked if he would consent to Gerry being the litigation representative of the plaintiff, and through counsel responded on July 9, 2019 as follows:

My client [Matthew] does not consent to Gerry Fahey being the plaintiff's litigation representative. In the action, the plaintiff is attacking Gerry Fahey's conduct and actions as his mother's attorney. Gerry Fahey should be a defendant in the action in his capacity as his mother's attorney, and personally as a beneficiary of the trust his mother set up (through Gerry as her attorney).

Dermot Fahey died six months ago. It is not acceptable to my client to continue to have this action sit in abeyance with the ownership of the Langley property unresolved. I am instructed to set down a case planning conference as soon as possible.

- [11] The parties to Action No. S-206633 attended at a case planning conference on August 28, 2019. At that conference Matthew was represented by his current lawyer (Mr. Giroday) the Deceased was still represented by the lawyer he had retained before his death to bring the Action, and Gerry as the proposed litigation representative was represented by his current lawyer (Mr. Zaitsoff). At that case conference, Matthew identified as item 1 on his case plan proposal:

The plaintiff died on January 23, 2019. Order that the person entitled to proceed with this action do proceed and that, in default, the proceeding be dismissed for want of prosecution.

He proposed this occur immediately. In response, the Deceased's prior lawyer filed a case plan proposal, and indicated that as Matthew did not consent to the appointment of Gerry as litigation representative for Dermot, the application materials should be filed by September 6, 2019, with the hearing to be set by agreement. The second case plan proposal was filed by Gerry, as "proposed litigation representative" for the plaintiff, and also agreed the application materials for the litigation representative appointment should be filed by September 6, 2019.

- [12] Gerry's application to be appointed litigation representative pursuant to Rule 20-6(3) of the Supreme Court Civil Rules, BC Reg. 168/2009 and s. 150 of the Wills, Estates and Succession Act, SBC 2009, c. 13 was heard by Master Keighley on September 19, 2019, and oral reasons were issued on the same day. Gerry argued that as the Alleged Will names him as executor, and sole beneficiary, his interests were aligned with those of Dermot and his Estate. Master Keighley disagreed and noted as follows:
- [15] He says at all times he, Gerry, has supported the deceased's position in this proceeding and that there was no conflict of interest or adverse interest as between him and the estate of the deceased. I do not agree, and I had indicated during the course of counsel's submissions that there were some concerns I had that Gerry may be in a position of conflict. It seems to me firstly that Gerry has a personal interest in the outcome of this litigation. If the estate is successful, the result would be a determination that both the trust agreement and the transfer from Jane to herself and Gerry [Matthew] were invalid. In the event that the will naming Gerry a beneficiary is found to be a valid one, then Gerry will inherit the property entirely. It seems to me that Gerry's interest in a successful outcome in the litigation might conflict with his obligations as a litigation guardian with respect to compromise or settlement of the estate litigation.
- [16] Perhaps more importantly, it seems to me that Gerry's interest as a representative of the estate in having the trust agreement and transfer set aside conflicts with the fiduciary duty he owed to Jane under the terms of the power of attorney from her. Gerry will in any event become a witness in this litigation if it proceeds with respect to issues surrounding the execution of the trust agreement and the transfer to Jane and Gerry [Matthew] as joint tenants. There is also another conflict in that if the estate succeeds in this litigation, there is the possibility that a wills variation claim might be brought by one or more of the sons. With respect to the transfer from the deceased of the deceased's alleged beneficial interest in the

property, there is the potential that Gerry might be alleged to have exerted undue influence or placed the deceased in a position where duress may be an issue.

- [13] In all of the circumstances Master Keighley dismissed Gerry's application to be named as litigation representative and concluded that it was appropriate for a third party to be appointed to act as litigation representative representing the interests of the estate in the litigation. Gerry did not appeal Master Keighley's decision, and to date no third party has been appointed as litigation representative for the Deceased or his estate in Action No. S-206633.
- [14] On November 26, 2019, plaintiff's counsel in Action No. S-206633 filed a notice of withdrawal of Lawyer, which provided a last known address of the plaintiff at the Property. This was the last step taken in this Action until this application for dismissal for want of prosecution.
- [15] Rather, two additional proceedings have been filed by Gerry after Dermot's death which are relevant to this application.

### **Vancouver Action No. S-1912607**

- [16] On November 6, 2019, Gerry (in his personal capacity) filed a notice of civil claim naming Matthew (again in his personal capacity) as the defendant (Vancouver Action No. S-1912607) seeking, inter alia, an order and declaration that Matthew holds the Property in trust for the plaintiff absolutely and in the alternative, a determination of the plaintiff's interest in the Property. This Action is based upon the Alleged Transfer of the Property by Dermot to Gerry. Matthew filed his response to civil claim to Action No. S-1912607 on December 4, 2019, in which he plead in Part 3 of his Legal Basis:
1. The plaintiff's claim that he is the full beneficial owner of the Property is premised and contingent upon Dermot Fahey being the beneficial owner of the Property at the time he purportedly transferred the Property to the plaintiff on December 15, 2018.
  2. The issue of whether Dermot Fahey was the beneficial owner on December 15, 2018 of the Property is the subject matter of the New Westminster action. Until that action is determined, the plaintiff's action is premature, rests upon a contingent determination that may not occur, may not be necessary and should not be adjudicated by the Court at this time.
  3. The plaintiff herein is attempting to do indirectly in this action, what this court ordered that he could not do on behalf of Dermot Fahey's estate in the New Westminster action - bring a claim that seeks a determination of Dermot Fahey's alleged ownership interest in the Property. That is a personal claim properly brought by Dermot Fahey and to be continued by his estate, in the said New Westminster action.

4. The legal basis for why Dermot Fahey was not the beneficial owner of the Property as at December 15, 2019 is set out in the defendant's Response to Civil Claim in the New Westminster action.
5. The plaintiff has failed to bring this action against all necessary defendants, which would include the estate of Jane Fahey (personal representative thereof), and the beneficiaries of the July 15, 2016 Trust.
6. None of the requisite elements for an unjust enrichment claim exists on the facts nor the law.

[Emphasis added.]

[17] Action No. S-1912607 is set for trial for five days commencing May 30, 2022.

### **Vancouver Petition No. S-1912608**

- [18] On November 19, 2019, Gerry also filed a petition in Vancouver No. S-1912608 seeking an order that the Alleged Will was the last will and testament of the Deceased, so that he may then obtain a grant of probate of that Will. This petition was also served on the Public Guardian and Trustee of British Columbia ("PGT"), as Matthew and Gerry's brother David suffers from schizophrenia and has periods of instability when he is non-compliant with medication. Matthew filed a response to this petition on June 19, 2020 opposing the relief sought in the petition (noting the Alleged Will sought to be admitted to probate was not the complete document), and specifically taking the position Gerry "cannot act as the legal representative of the Deceased's estate in respect of the Deceased's purported interest in the Property". Neither David nor the PGT has filed a response to this petition. There was no evidence before me as to what stage this proceeding is at.
- [19] Finally, in response to this application, Gerry has provided evidence that he and Matthew have been in without prejudice settlement discussions to resolve all matters between them (presumably all three proceedings) since October 2020.

### **Analysis**

- [20] Matthew admits that this is an unusual case. His argument is that it is not that there has been inordinate delay in prosecuting the action per se but rather that there is no living plaintiff to prosecute Action No. S-206633, and there has not been one for almost three years. As there has been ample time to have a third party litigation representative appointed, and as Gerry chose to neither appeal Master Keighley's Order nor bring an application for a third party litigation representative to be appointed but rather to proceed by commencing Action No. S-1912607, Matthew says Gerry has chosen his course of proceeding and "is stuck with it" and in all of the circumstances it is appropriate to order that Action No. S-206633 be dismissed for want of prosecution.

- [21] Matthew also argues that Gerry has no standing to oppose this application, as he is not the litigation representative for the plaintiff. In response, Gerry argues that he will be affected should Action No. S-206633 be dismissed for want of prosecution in two ways:
- a) any proceeding which seeks to determine the Deceased's interest in the Property will directly affect Gerry (as the potential ultimate recipient of that interest by way of either the Alleged Transfer or the Alleged Will); and
  - b) Matthew's Response to Action No. S-1912607 takes the position that his claim is premature in that Action and is contingent upon the result in Action No. S-206633.
- [22] In all of the circumstances I find that Gerry does properly have standing to appear and oppose this application (and I note participated fully at the case planning conference and the application to be appointed as litigation representative).
- [23] Gerry also argues that he has not been properly served with this application, as Dermott has died, and so no one has legal authority to be served with an application for dismissal for want of prosecution. His position is that until or unless someone is appointed as a litigation representative, it is not possible to serve them with an application for dismissal for want of prosecution. Given his decision not to appeal Master Keighley's decision, nor to proceed to have a third party litigation representative appointed, this argument is problematic. Effectively, he takes the position that as it is impossible for anyone to move that Action forward at this time, it is also impossible for anyone to be properly served with an application for dismissal for want of prosecution. On this point Matthew says that Gerry has failed to have an appropriate litigation representative appointed for the plaintiff, and in failing to do so, cannot take procedural advantage of now arguing there is no one to properly serve with this application. I agree, and find that those interested in the outcome of this application have been properly served.
- [24] Gerry takes the position that the applicant should properly have proceeded pursuant to Rule 6-2(5) which provides as follows:

### **Prosecution of proceeding if plaintiff or petitioner dies**

- (5) If a plaintiff or petitioner has died and the proceeding may be continued, a defendant or respondent may apply to the court for an order that the person entitled to proceed do proceed within the time that the court order and that, in default, the proceeding be dismissed for want of prosecution.
- [25] Gerry says that Matthew had to bring an application under Rule 6-2(5), and serve the plaintiff with that application, and as he brought this application under Rule 22-7(7) this application should be dismissed. He relies upon the decision of *Swanson v. Hill*, 2014 BCSC 2001 [Swanson]. Matthew argues the Swanson decision should be distinguished on the basis that in those circumstances there was an appropriate representative to be appointed for the estate, whereas here there is none apparent at this time. I note that in that case a similar

technical objection was made arising out of the inadvertent lack of appointment of a representative for the plaintiff, which Judge Masuhara determined was a technical deficiency, and he determined that to deny the defendant an opportunity to apply under Rule 22-2(7) on that technical basis "would be inappropriate". Matthew argues that Rule 6-2(5) is permissive and discretionary, that he made reasonable efforts to prompt Gerry to proceed with Action No. S-206633 (at the case planning conference in August 2018) and Gerry failed to take the appropriate steps to have an appropriate third party litigation representative appointed. As a result of Gerry's failure, Matthew says he did not need to proceed pursuant to Rule 6-2(5) but had the discretion to choose how to proceed, and chose to proceed pursuant to Rule 22-7(7) which provides:

### **Rule 22-7(7) Dismissal for want of prosecution**

- (7) 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.

Matthew also cites Rule 20-6, which governs appointment of litigation representatives for a deceased's estate. I agree with Matthew's position that to deny him the opportunity to now apply under Rule 22-7(7) on the technical basis he should first have applied under Rule 6-2(5) would be inappropriate and not proportionate.

[26] The fundamental issue before me is whether the applicant has met the test to dismiss the within action for want of prosecution. The framework for determining whether to grant such a draconian order was set out by our Court of Appeal in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 as follows:

27. These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal for want of prosecution is bound to consider the following:
- (1) the length of the delay and whether it was inordinate;
  - (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
  - (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
  - (4) whether, on balance, justice requires dismissal of the action.

[28] I consider the fourth question to encompass the other three and to be the most important and decisive question.

- [29] I would not attempt to state what reasons for the delay might serve as an excuse for the plaintiff. In some cases, for example, negligence of the plaintiff's lawyer might amount to an excuse, in others it might not. Whether the reason for the delay amounts to an excuse will depend on the circumstances of the particular case.
- [27] The above test is cumulative, and an applicant must obtain an affirmative answer for each of the four questions to obtain a dismissal of the action. If the first two answers are affirmative, a rebuttable factual presumption in support of prejudice arises. (See Swanson, above, at para. 19).
- [28] In *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2002 BCCA 145 the Court of Appeal acknowledged that "it is no light matter to dismiss an action for want of prosecution" (para. 37). They stressed that it is a draconian order not to be lightly made, and not to be exercised without giving the plaintiff an opportunity to remedy his default.
- [29] The circumstances of this situation are unique. As Matthew correctly acknowledged, the issue is not the length of the delay since the claim was filed in 2018, but rather there is no plaintiff to prosecute the Action, there has been no plaintiff since January 2019, and after Master Keighley's decision was issued in 2019, Gerry chose to pursue a new and different action relating to the Property rather than either appealing Master Keighley's decision or seeking to have a third party litigation representative appointed. There appears to be no plan to have a third party litigation representative appointed in Action No. S-206633, which effectively leaves that Action being held in abeyance. Matthew identifies the potential prejudice to him arising from the delay in his Affidavit sworn April 15, 2021 as follows:
12. I am obligated to fulfil the terms of the Trust Deed of July 15, 2016. I cannot do so while beneficial ownership of the Property is disputed. I believe that Gerald Fahey uses the Property, but does not live on it. Vacancy taxes, a lack of funds to pay property taxes and an inability to fulfil the terms of the Trust Deed are all concerns to me.
- [30] In response, Gerry takes the following position in his response to the application:
19. f) On November 6, 2019, Gerry commenced an action to enforce his beneficial interest in the Property. His action raises many of the same issues as this proceeding. The trial in the new action is set for May, 2022;
- g) Matthew's position in the new action is that the new action is premature, and is contingent on the result of this proceeding;
- h) If these issues can be determined in the new action (which Gerry says is the case), then this proceeding may be moot. However, in light of Matthew's position that the new proceeding is contingent upon this proceeding, it would be prejudicial to Gerry (and to the plaintiff's estate) to dismiss this proceeding at this time; and
- i) David's capacity issues and the inability to locate him further complicate matters. His interests must be considered in the various proceedings by an appropriate representative.

- [31] Gerry argues that his decision to await the outcome of Action No. S-1912608 justifies any delay that has occurred. Further, he stresses that the parties have been engaged in good faith attempts to negotiate a settlement which justifies the delay further. He says there are good reasons why this proceeding has not moved forward at this time, that the delay was not inexcusable and there is no evidence of actual prejudice to Matthew arising out of the delay. The source of the fundamental disagreement between Matthew and Gerry appears to arise out of a disagreement as to which action will be determinative: Matthew says Action No. S-206633 must be heard and determined first and the new action is premature and contingent on the result in Action No. S-206633, and Gerry says that all of the issues can be determined in Action No. S-1912608 and if they are, then Action No. S-206633 may be moot. However, in light of Matthew's position on the new proceeding, Gerry says "it would be prejudicial to Gerry (and to the plaintiff's estate) to dismiss this Action No. S-206633 at this time".
- [32] Gerry makes an alternative argument that makes clear his concern about the potential impact of dismissing Action No. S-206633 at this time. He says that if Action No. S-206688 is dismissed for want of prosecution, then "it should be without prejudice to Gerry's right to raise any argument or bring any claim in his action which could have been made in this proceeding [being Action No. S-206688]". In response to this alternative argument Mr. Giroday argued that Gerry was effectively seeking an advance order from the court as to the appropriate proceeding for Gerry to bring, which he says is wholly inappropriate. I agree with Mr. Giroday that Gerry must make a determination of the appropriate proceeding and claims he wishes to pursue, with all of the attendant consequences of that strategic decision.
- [33] While there clearly has been delay in pursuing Action No. S-206633, it appears the delay has been caused by the unexpected death of the plaintiff and the consequences arising as a result of that death, and the delay is not inexcusable as at this time. Further, given the response to civil claim filed by Matthew in Action No. S-1912607 in which he argued that the issues in Action No. S-206633 must be resolved before Action No. S-1912607 the potential prejudice to Matthew arising out of the delay does not cause him serious prejudice, nor does it create a substantial risk to Matthew that a fair trial is not possible. While there are procedural methods available to move Action No. S-206633 forward, they have not occurred after the decision of Master Keighley was rendered. Given the unusual nature of this matter, I find there has not been inordinate delay, and the delay is excusable in the circumstances, at this time. I also note that any potential prejudice is more likely to be experienced by the Deceased's Estate, not by Matthew. In any event I find that justice does not, on balance, require dismissal of Action No. S-206633 at this time.

- [34] During the application Mr. Giroday noted his position that both actions are defective, and lack the appropriate parties being properly named. While I am troubled that no attempts have been made to have a third party litigation representative appointed in this Action to date, and the comments by Mr. Giroday that in his submission both actions are defective, I conclude it is inappropriate to strike Action No. S-206633 for want of prosecution at this time, and I dismiss Matthew's application.
- [35] However, an appropriate third party litigation representative for the Deceased in Action No. S-206633 should be appointed, to allow that proceeding to proceed effectively. If that does not occur in a timely manner, Matthew should not be left in the untenable position of being unable to obtain a final resolution of that action indefinitely.

## Conclusion

- [36] On the basis of the foregoing, the application is dismissed, and I order that an appropriate third party litigation representative should be appointed for the Deceased in Action No. S-2006633 within three months of the date of these Reasons for Judgment, failing which Matthew is at liberty to bring another application for dismissal for want of prosecution of that action arising out of non-compliance with this order.
- [37] The costs of both parties to this application shall be payable from the Estate of Dermot Fahey.

"Blake, J."

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