

CANADA / JUDGMENT

Jawanda v. Sra Estate

2021 BCSC 366

COURT

Supreme Court of British Columbia

DECIDED

4 March 2021

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2021 BCSC 366 Jawanda v. Sra Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jawanda v. Sra Estate,

2021 BCSC 366

Date: 20210304

Docket: S132724

Registry: Victoria

Between:

Mukhtar Singh Jawanda

Plaintiff

And:

Kuldip Singh Sra, Executor of the Estate of Inderjit Kaur Sra

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

S. A. Gray-Schleihauf

Counsel for the Defendant:

A. H. Jordan

Place and Date of Hearing:

Victoria, B.C.

February 26, 2021

Place and Date of Judgment:

Victoria, B.C.

March 4, 2021

- [1] The defendant applies for dismissal of the plaintiff's claim for want of prosecution, under Rule 22-7(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR].
- [2] At the commencement of the hearing of this application I made orders correcting the spelling of the plaintiff's name, and substituting as defendant the executor of the estate of the original defendant, now deceased - her husband, Mr. Kuldip Sra. There should be an order filed reflecting those pronouncements, prior to filing the order embodying the terms I pronounce herein.
- [3] This is a debt action. It was commenced against the deceased, Ms. Sra, by way of a notice of civil claim filed August 2, 2013. The plaintiff alleges that he loaned Ms. Sra \$305,000, by way of two installments paid in April 2007 and June 2008, with interest payable at 3.75% per annum, and that the monies were "for purposes solely in the discretion of the Defendant". He alleges that \$55,000 was repaid by Ms. Sra "on or about the year 2008", and that Ms. Sra made promises "from time to time" to repay the loan, but the balance remains unpaid.
- [4] Ms. Sra did not file a response to civil claim, and there is no evidence that one was ever demanded. Nevertheless, the plaintiff examined her for discovery, in June 2014. Ms. Sra denied having been party to a loan agreement with the plaintiff. The evidence of her denial of course does not go to its truth, but to the fact that it was made, which is relevant to the reasonableness of the steps the plaintiff took thereafter.
- [5] Ms. Sra died on January 5, 2015.
- [6] In or about April 2016, a property in which Ms. Sra's estate held an interest was sold, and by agreement of the parties to this action the estate's share of the proceeds has been held in trust pending the resolution of this claim. That amount is only a fraction of the total indebtedness alleged.
- [7] No steps in the action have been taken since then.
- [8] In a letter to the estate's then counsel Mr. Simpson dated September 25, 2017, the plaintiff's then counsel Mr. McMicken acknowledged having been advised by Mr. Simpson that Mr. Sra was not prepared to settle or compromise.

- [9] In September 2020, counsel for the defendant provided to Mr. McMicken a signed witness statement of Mr. Harvey Simons. The gist of Mr. Simons' statement is that the plaintiff did not make a loan to Ms. Sra, but instead made an investment in a company owned by Mr. Simons; that the investment monies were transferred by the plaintiff to Mr. Sra by way of Ms. Sra's bank account; and that the monies paid to the plaintiff were not repayment of the alleged loan, but were funds transferred to the plaintiff to alleviate financial strain until the investment "came through". This signed statement is not in the form of an affidavit, and so is inadmissible in respect of the truth of its contents, and in any event appears to be largely inadmissible hearsay. However, in the letter by which the statement was transmitted, the defendant's counsel said that Mr. Sra supports Mr. Simons' version of events.
- [10] Mr. Sra's affidavit filed in support of this application makes no reference to any investment involving Mr. Simons or his company; in respect of the alleged loan, he simply denies that Ms. Sra was party to any agreement with the plaintiff. The plaintiff's affidavit filed in opposition to this application also makes no reference to the arrangement described in Mr. Simons' statement. However, the plaintiff says that Mr. Sra was "in the room" when he and Ms. Sra agreed to the loan, and that he "is aware of the terms of that agreement and loan".
- [11] The plaintiff states in his affidavit that he intends to proceed with this claim expeditiously, and has retained his current counsel for that purpose.
- [12] The factors to be considered on an application of this nature are as follows:
- a) the length of the delay and whether it is inordinate;
 - b) the reasons for the delay and whether the delay is excusable in the circumstances;
 - c) whether the delay has caused serious prejudice to the defendant, and if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date after its reactivation by the plaintiff; and
 - d) whether, on balance, justice requires dismissal of the action.

See: *Wiegert v. Rogers*, 2019 BCCA 334 [Wiegert] at para. 31; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 [0690860] at para. 27. The fourth factor was said by Mr. Justice Low, in 0690860 at para. 28, to "encompass the other three and to be the most important and decisive question".

- [13] Delay becomes inordinate when it has been "immoderate, uncontrolled, excessive and out of proportion to the matters in question", as assessed in light of the circumstances of the case: *Wiegert* at para. 32. In respect of this factor, the pertinent circumstances will include matters such as the nature of the litigation, the stage of the litigation at which the delay occurred, and the manner in which the litigation progressed before the period of delay began.

- [14] In the present case, there has been no progress since the action was commenced more than seven years ago, other than the examination for discovery. I find the delay has been inordinate.
- [15] As to the second factor - whether the delay is inexcusable in all the circumstances - the plaintiff points to the defendant's failure to file a response to civil claim, and relies on Mr. Justice Esson's statement in *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 [Tundra Helicopters] at para. 21, that failure to file a defence "amounts to an invitation to delay". I note that in *De Cotiis v. Viam Holdings Ltd*, 2004 BCSC 1301, Madam Justice Ballance held at para. 32 that this statement did not establish a broad principle that a defendant who fails to file a defence acquiesces to a plaintiff's delay and is thereby precluded from pursuing a dismissal for want of prosecution. Rather, she stated that the Court of Appeal in *Tundra Helicopters* found that failure to file a defence may amount to a defendant's acquiescence in delay, and that is a factor to consider in assessing whether the delay is excusable, but is not conclusive against dismissal.
- [16] The plaintiff offers evidence of a host of reasons why he submits the delay ought to be excused: the death of the defendant, and the consequent lack of a legal entity against whom the plaintiff could proceed; the parties undertaking settlement discussions; Mr. Sra having acknowledged the debt; Mr. McMicken's belief that the matter would settle, which in part derived from his understanding of how the matter was regarded within the East Indian community in Victoria; and Mr. McMicken having suffered a medical issue in March 2018, leading to him significantly reducing his practice, on his doctor's advice, until given the "green light" in the spring of 2020.
- [17] I am not persuaded by the evidence of these circumstances. It was open to the plaintiff to take steps to have the executor substituted as defendant for the deceased, and there is no evidence from the plaintiff why he did not do so. The plaintiff says that he made efforts outside of formal steps in the proceedings to try to reach an agreement with Mr. Sra, and that Mr. Sra acknowledged the debt, but the plaintiff provides no particulars as to when Mr. Sra made that acknowledgment, nor as to when he undertook those "efforts" or what they consisted of; and, there is no evidence that would enable me to assess whether taking those efforts instead of litigating was objectively reasonable in the circumstances.
- [18] The plaintiff has known at least since the September 25, 2017 letter that Mr. Sra had no intention of settling the claim. Neither the plaintiff nor Mr. McMicken have said how they planned to deal with the matter upon receiving that advice. Approximately six months after sending that letter Mr. McMicken apparently became unable to deal with the matter for medical reasons. Presumably, he did not let all his files go into abeyance for two years. There is no evidence as to why the plaintiff did not then move to retain counsel who would be able to deal with the matter. It appears that present counsel was only retained after the defendant served notice of the intention to bring an application for dismissal, in the fall of last year.

- [19] These circumstances have not been shown to provide reasonable excuse for the plaintiff's inordinate delay.
- [20] As to the third factor, prejudice, a rebuttable presumption of prejudice arises once a defendant establishes there has been inordinate, inexcusable delay: Wiegert at para. 33. In *Tundra Helicopters*, Esson J.A. explained the nature of the presumption:
- [35] I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in *Sopinka and Lederman "The Law of Evidence in Civil Cases"*, 1974 at p. 378:

The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.

- [36] It is in that sense that the word "presumption" is employed in *Busse v. Robinson Morelli Chertkow*, [(1999), 63 B.C.L.R. (3d) 174 (C.A.)]. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:

... has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?

In considering that question it may be misleading to approach it by asking whether the plaintiff offered evidence on the point. In most cases, it will only be the defendant who is in a position to offer evidence as to the existence of specific prejudice - as two of the defendants attempted to do in this case. The plaintiff often will be able only to point to the overall circumstances, including the absence of any evidence from the defendant of specific prejudice, as establishing on the balance of probabilities that serious prejudice has not been suffered.

- [21] Madam Justice Dickson gave this description of the indicia of prejudice in *Wiegert* at para. 33:

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. ...

- [22] The defendant says in the notice of application that he has suffered prejudice "because the only person whom may answer the allegations is now deceased the Defendant cannot confirm or deny any evidence which may be put forth by the Plaintiff to prove that a verbal contract existed". But it appears from the defendant's evidence that both Mr. Sra and Mr. Simons purport to be able to give evidence as to the nature of the plaintiff's "investment". Neither of them say their memory is impaired, or that documents are missing. Mr. Sra does not deny he was present when the alleged loan agreement was made, as the plaintiff attests

to. I am satisfied there has been no serious prejudice, putting at risk a fair trial, caused by the delay.

[23] With respect to the final factor, I do not find that, on balance, it is in the interests of justice to strike the claim. There is a serious question to be tried, and while there has been a want of prosecution, it has not been demonstrated that the delay has jeopardized a fair trial.

[24] The application is dismissed.

[25] In accordance with the defendant's alternative submissions, and it being in the public interest that matters before this Court proceed with due dispatch, I make the following orders:

- a) The defendant is given leave to file a response to civil claim outside of the time period prescribed by SCCR Rule 3-3(3);
- b) The defendant shall file and serve a response to civil claim within 21 days of the date of this order;
- c) The plaintiff shall take a further step or steps in this proceeding within 30 days of being served with the response to civil claim; and
- d) The parties thereafter shall, unless the court otherwise orders, conduct this action in accordance with the time requirements set out in the SCCR.

[26] The plaintiff will have his costs of this application as costs in the cause, pursuant to SCCR Rule 14-1(12)(b).

"A. Saunders, J."

The Honourable Mr. Justice A. Saunders

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Prepared on 29 October 2026 · Esheria