
CANADA / JUDGMENT

Kossert v. Busswood

2018 BCSC 425

COURT

Supreme Court of British Columbia

DECIDED

19 March 2018

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2018 BCSC 425 Kossert v. Busswood

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kossert v. Busswood,

2018 BCSC 425

Date: 20180319

Docket: S167235

Registry: New Westminster

Between:

James Kossert

Plaintiff

And

John Busswood

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

Elizabeth L. Clarke

Counsel for the Defendant:

John D. Shields

Place and Date of Hearing:

Vancouver, B.C.

February 23, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2018

Introduction

[1] In this application, the defendant seeks to strike the plaintiff's claim for want of prosecution, and for contempt, alleging that the plaintiff failed to comply with a consent order of Master Keighley dated May 31, 2016 and filed July 29, 2016 (the "Keighley Order") and to fulfill his obligations at examination for discovery.

Background Facts

[2] In the originating action, the plaintiff seeks to recover loans he claims to have made to the defendant between June 2010 and September 2012 in the amount of \$74,500. In addition, the plaintiff claims that the defendant breached an agreement under which the defendant agreed to pay for products that were supplied by the plaintiff in the amount of \$81,200.

Issues

[3] The issues are:

- a. Should the proceeding be dismissed for contempt, including the failure to comply with the Keighley Order?
- b. Should the proceeding be dismissed for want of prosecution pursuant to Rule 22-7 of the Supreme Court Civil Rules [Rules]? and
- c. Costs.

Failure to comply with the Keighley Order

Legal Principles

[4] The defendant seeks an order that the plaintiff is in contempt of the Keighley Order and in violation of Rule 22-7(5) of the Rules, which supports that the plaintiff's claim should be dismissed.

[5] Rule 22-7(5) reads:

Consequences of certain non-compliance

- (5) Without limiting any other power of the court under these Supreme Court Civil Rules, if a person, contrary to these Supreme Court Civil Rules and without lawful excuse,
- (a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for his or her examination for discovery,
 - (b) refuses to be sworn or to answer any question put to him or her,
 - (c) refuses or neglects to produce or permit to be inspected any document or other property,
 - (d) refuses or neglects to answer interrogatories or to make discovery of documents, or
 - (e) refuses or neglects to attend for or submit to a medical examination,

then

- (f) if the person is the plaintiff or petitioner, a present officer of a corporate plaintiff or petitioner or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding, and
- (g) if the person is a defendant, respondent or third party, a present officer of a corporate defendant, respondent or third party or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no response to civil claim or response to petition had been filed.

[6] Rule 22-8(4) reads:

Certain acts as contempt

- (4) A person who is guilty of an act or omission described in Rule 12-5 (25) or 22-7 (5), in addition to being subject to any consequences prescribed by those rules, is guilty of contempt of court and subject to the court's power to punish contempt of court.

[7] In *Larkin v. Glase*, 2009 BCCA 321 at para. 7, the Court of Appeal stated that:

[7] A court order must be obeyed until and unless it is reversed. Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard. Madam Justice McLachlin, as she then was, stated in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

Mr. Glase must understand that if he can select what laws to obey, others may do so as well, to society's and his personal detriment.

[8] An order striking a claim has been said to be a "draconian" remedy. Ultimately, this is a discretionary decision, for which there are several factors to consider in the context of each case. In *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 at para. 22 [Crowley], the Court of Appeal stated:

[22] The appellant notes that striking pleadings is a draconian remedy (*Microsoft v. Eurocopter S.A.*, 2003 BCCA 229, 180 B.C.A.C. 316 at para. 4). The chambers judge was well aware of that. The appellant states that generally a party is given a "second chance". The chambers judge was well aware of that as well. Counsel for the Director directed the judge's attention to the factors that must be considered on an application to strike pleadings. These factors were recapitulated by Master Bouck in *British Columbia (Director of Civil Forfeiture) v. Zacchiana*, 2011 BCSC 989 at para. 54, referring to passages in *Schwarzinger v. Bramwell*, 2011 BCSC 304:

- The Court must start from the proposition that the relief will be granted "only in extreme cases": para. 109;
- Parties are entitled to a "second chance" before the relief is granted: para. 112;
- There must be some element of proportionality between the impugned conduct and the remedy. That is, "the punishment must fit the crime": para. 118;
- The court must consider whether there is a "lesser remedy" that would "cure the default and inspire confidence that the Court's orders will be respected in the future": para. 123; and
- The Court must take into account any explanation offered by the offending party for non-compliance with the court order: para. 135.

Discussion

[9] The Keighley Order was by consent and required that:

1. the plaintiff list and provide copies of
 - a. his tax returns from 2009 to date; and
 - b. corporate tax returns and financial statements for Kossert Enterprises Inc. from 2009 to date.

2. the plaintiff, within one month, list and provide copies of
 - a. accounting records for the plaintiff and his joint account with his wife from 2009 to date; and
 - b. all emails and text traffic with the defendant.
3. the plaintiff, within one month, swear and deliver an affidavit verifying his list of documents; and
4. the plaintiff attend at the offices of defence counsel, on a date to be chosen by defence counsel, at his sole expense, to be examined further on examination for discovery.

[10] The record before me supports that the plaintiff failed to comply with the Keighley Order in the following ways:

- Not listing and providing copies of accounting records, bank account records, and all emails and text traffic within a month;
- Not providing an affidavit verifying his list of documents within a month; and
- Not attending examination for discovery on July 5, 2016, as requested by defence counsel.

[11] With respect to providing an affidavit verifying his list of documents, the plaintiff has only attempted to comply with this requirement since the filing of this application. Neither the plaintiff nor his counsel have provided a reasonable explanation for this non-compliance. With respect to the failure to attend the examination for discovery on July 5, 2016, the plaintiff submits that his counsel was unavailable and in chambers that day, and that he himself was on a holiday with his family. I note that the defendant's request for the examination was only a week in advance.

[12] The defendant also submits that the plaintiff was unprepared for the initial examination for discovery that occurred on April 11, 2016, contrary to his obligations: see e.g. *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816 at para. 80. The transcript of the examination supports that the plaintiff did not make reasonable efforts in the circumstances, as he admitted to not bringing potentially relevant documents. His preparation did not appear to be diligent.

[13] The plaintiff submits that the claim for dismissal for contempt should be dismissed, as he is currently not refusing to comply with the Keighley Order, and has now substantially complied with it. Furthermore, the plaintiff submits that he is prepared to attend a second examination for discovery on reasonable notice and subject to the availability of his counsel.

[14] Although the plaintiff's failures to comply with the Keighley Order and his failure to diligently prepare for the examination for discovery are no doubt serious infractions, the circumstances falls short of being of an "extreme case" that justifies the striking of his claim. Taking into account the factors discussed in *Crowley*, this relief would not be proportionate to the impugned conduct. The affidavit evidence supports that much of the plaintiff's failures regarding document disclosure are attributable to lack of diligence by his counsel. This is not the counsel that appeared on this application who was retained on a limited basis

for purposes of speaking to this application. For example, the plaintiff deposes that he provided further documents to his counsel, after the Keighley Order, in early August 2016, in the fall of 2016, and between January and May 2017; however, no reasonable explanation is given by counsel why these documents were not promptly listed.

- [15] Furthermore, the plaintiff's failure to attend the July 5, 2016 examination for discovery is partially attributable to his counsel's schedule; this was communicated to the defendant in advance on June 30, 2016. Lastly, since the filing of this application, the plaintiff has taken steps to comply with the terms of the Keighley Order by providing on three occasions an affidavit verifying his list of documents. The defendant claims that the form of the plaintiff's affidavits verifying the list of documents is deficient but that again does not rest on the shoulders of the plaintiff but his counsel. Moreover, the plaintiff has taken steps to push this litigation forward by setting down a trial date in January 2019. As a result, I find that the plaintiff is entitled to a second chance, and the claim will not be struck for contempt.
- [16] That being said, this should be taken as a serious warning to the plaintiff to comply with court orders and adequately prepare for future examinations for discovery. No case law has been submitted regarding third chances. Orders regarding a further affidavit and examination for discovery are provided at the conclusion of these reasons.

Dismissal for Want of Prosecution

Legal Principles

- [17] A dismissal for want of prosecution is provided at 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.
- [18] The proper approach for determining whether an action should be dismissed for want of prosecution was laid out by the Court of Appeal in 0690860 Manitoba Ltd. v. Country West Construction Ltd., 2009 BCCA 535 at paras. 27-28 [0690860 Manitoba], recently referenced in Sun Wave Forest Products Ltd. v. Xu, 2018 BCCA 63 [Sun Wave]. In 0690860 Manitoba, the Court of Appeal noted:
- [27] [A] chambers judge charged with the hearing of an application for dismissal of an action 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.
- [19] In *Sun Wave*, a claim alleging fraud and defalcation, the court noted at para. 26 the concern when defendants face claims for fraud and the care spoken of in actions pleading fraud. There are no such issues in this case.
- [20] In *Busse v. Chertkow*, 1999 BCCA 313, a claim for misrepresentation, breach of trust and breach of fiduciary duty, the Court of Appeal at para. 18 adopted the principle that, "once a defendant has established the delay complained of has been inordinate and is inexcusable a rebuttable presumption of prejudice arises."
- [21] In *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 [*Tundra Helicopters*], the Court of Appeal stated:
- [37] In this case, much of the evidence which tends to prove absence of prejudice was put in the record by those defendants who sought to establish that the case against them is a weak one. It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. It is no light matter to dismiss an action for want of prosecution. As Diplock L.J. said in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [[1968] 2 Q.B. 229 (C.A.)], at p. 259:

The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

In this case the plaintiffs should have been given an opportunity to remedy their default. Had that been done, the case by now could have been tried or, more likely, resolved by settlement. In all the circumstances, there was virtually no risk, much less a substantial one, that a fair trial of the issues would not have been possible.

- [22] 0690860 Manitoba also reaffirmed Tundra Helicopters on the issue of the presumption of prejudice:
- [44] In Tundra Helicopters, Esson J.A. determined the proper approach to the questions of presumption of prejudice and onus of proof:
- [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*, supra. 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.

- [45] In the ensuing paragraph, Esson J. A. said this:
- [37] It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear ...
- [23] In *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2011 BCSC 1856 [Murrin Construction], the chambers judge dismissed a defendant's application for dismissal due to want of prosecution. The delay in that case was two and-a-half years. The chambers judge considered this to be an inordinate delay, and as no reasons were given by the plaintiff for the delay, the judge ruled that it was inexcusable and, thus, presumed prejudice against the defendant. The chambers judge went on to find that, although there was presumed prejudice, the defendant did not provide any evidence of specific prejudice, and as the defendant had also delayed with regard to a counterclaim, the application for want of

prosecution should be dismissed. The defendant appealed.

- [24] The Court of Appeal, in *Murrin Construction (C.A.)*, indexed at 2012 BCCA 251, affirmed the legal principles relating to applications for dismissal for want of prosecution canvassed above and dismissed the appeal. In so doing, Mr. Justice K. Smith, writing for the majority of the Court, held that the chambers judge had not erred in taking into consideration the actions of the defendant on the counterclaim as part of the relevant considerations when balancing the interests of justice in the final step of the test (at para. 9). K. Smith J.A. also found that the delay was not intentional or "contumelious" and, as the defendant did not show any specific or serious prejudice, it was unlikely that the delay would lead to any trial unfairness (at para. 14). The Court again referred to the *Tundra Helicopters* case and the quote from Lord Justice Diplock, that dismissal for want of prosecution is a "draconian" measure which should not be used lightly, and not until the plaintiff has been given an opportunity to remedy the matter (at para. 13).

Discussion

- [25] Turning to the case at bar, the defendant asserts there were two periods of delay: the first being from the time the last loan was made in September 2012 to the commencement of the proceeding, and the second being from the date the action was commenced to date.
- a. Has there been inordinate delay?
- [26] The question is whether the overall delay has been inordinate.
- [27] The last loan was alleged to have been made in September 2012. The evidence of the plaintiff is that the loans were to be paid on demand. The plaintiff, in his response to particulars, sets out that demands for repayment were made in 2013 and early 2014. By November 2014, the plaintiff had retained counsel, and a further demand was made by plaintiff's counsel to the defendant, seeking repayment of the loans in early December 2014.
- [28] The action was started on December 29, 2014. This timeline does not support any inordinate delay during this first time period.
- [29] The second allegation of delay is from the commencement of the action to date.
- [30] The timeline supports the following key steps taken in the action:
- a. April 15, 2015 - an amended notice of civil claim raising the issue of the claim for unpaid products was filed; no response to the amended notice of civil claim has been filed to date.
- b. May 5, 2015 - a demand for particulars by the defendant.
- c. May 12, 2015 - a reply to the demand for particulars by the plaintiff.
- d. December 17, 2015 - a list of documents of the plaintiff delivered; a demand made for the defendant's list of documents; and a request made for discoveries to be scheduled.

- e. April 10, 2016 - an Amended List of Documents of the plaintiff delivered (plaintiff's first amended list).
 - f. April 11, 2016 - examinations for discovery of the plaintiff and defendant.
 - g. April 27, 2016 - a Further Amended List of Documents of the plaintiff delivered (plaintiff's second amended list).
 - h. April 27, 2016 - an application by the defendant for production of documents, an affidavit verifying the list of documents, and a further examination for discovery of the plaintiff.
 - i. May 30, 2016 - the First Amended List of Documents of the defendant delivered.
 - j. May 31, 2016 - the Keighley Order by consent.
 - k. June 29, 2016 - counsel for the defendant set down continuation of the discovery of the plaintiff for July 5, 2016.
 - l. June 30, 2016 - another Amended List of Documents of the plaintiff delivered (plaintiff's third amended list), along with an objection to the July 5, 2016 discovery date.
 - m. August 2016 to June 2017 - plaintiff searching for further documents.
 - n. July 19, 2017 - a Fourth Amended List of Documents of the plaintiff delivered (plaintiff's fourth amended list), along with a notice to proceed.
 - o. July 25, 2017 - a notice of application of the defendant seeking to strike the claim and for special costs.
 - p. July 31, 2017 - the first affidavit of the plaintiff verifying the Fourth Amended List of Documents of the plaintiff delivered to the defendant on August 2, 2017.
 - q. September 1, 2017 - the second affidavit of the plaintiff verifying the Fourth Amended List of Documents of the plaintiff.
 - r. September 5, 2017 - the third affidavit of the plaintiff verifying the Fourth Amended List of Documents of the plaintiff.
 - s. January 16, 2018 - a notice of trial filed by the plaintiff setting the trial of this action for January 21, 2019, for five days.
- [31] The only inordinate delay that arises out of the above chronology is the delay from August 2016 to August 2017 for the plaintiff to collect further documents, and the delay, previously dealt with, in swearing an affidavit verifying the list of documents as required by the Keighley Order.
- b. Is there a credible excuse offered for the inordinate delay?

- [32] The excuse provided for the delay in producing further documents was that the plaintiff was searching for the further documents. The plaintiff deposes that he provided further documents to his counsel after the Keighley Order in early August 2016, in the fall of 2016, and between January and May 2017, but no further explanation is given.
- [33] I am not convinced that a credible excuse has been provided by the plaintiff for his lack of diligence in the production of relevant documents.
- c. Has the inordinate delay caused prejudice?
- [34] Although there has been an inordinate delay by the plaintiff, I am satisfied, on the balance of probabilities, that the defendant has not suffered serious prejudice. The plaintiff points to the circumstances of this case, submitting that the bulk of evidence relating to the claim for debt are documents in writing, and the claim is not wholly reliant on memory.
- [35] The defendant submits that he has suffered serious prejudice, as the delay has caused these proceedings to be expensive. I note, however, that the court has previously held that "[w]ith regard to the issue of serious prejudice, the Court is concerned with the 'impairment of the ability to defend the action', not the expense incurred by proceeding with the action, which may be dealt with in costs": *Canadian National Railway Company v. Chiu*, 2014 BCSC 75 at para. 20, citing 0690860 *Manitoba* at para. 50.
- [36] In light of the overall circumstance of this case, the delay, and the evidence put forward by the defendant do not establish, on balance, serious prejudice. This case involves straightforward issues of unpaid loans and unpaid amounts for provided product. The evidence of the parties has been canvassed at examinations for discovery. The onus remains on the plaintiff to prove damages. As a result, I am not convinced that any serious prejudice has been suffered or that the delay has created a substantial risk that a fair trial is not possible.
- d. Does justice require the dismissal of the action?
- [37] The last step in the analysis is whether, on balance, justice requires dismissal of the action. The delay and failures in this case are, for the most part, attributed to counsel for the plaintiff. I do not see that there were any tactical steps taken by the plaintiff in this matter. He is the one who is alleged to have provided loans to help the defendant who was "struggling financially", and the defendant is alleged to have not paid for product that the plaintiff paid for. The defendant's position on the unpaid product is not known since no response to the amended notice of civil claim has been filed.
- [38] Based on the allegations in the pleadings, there exists some merit in the action, which can be a factor in determining whether a case should be dismissed: see *Murrin Construction (C.A.)*, at para. 15. The documents produced support that some funds were drawn, by cheque or wire, from the account of the plaintiff and paid to the defendant. The issue arising from the pleadings is whether these were loans or payments made by the plaintiff to the defendant and his wife to keep him working for the plaintiff. I should also note that the

documents and discovery transcript also support that money was sent to the defendant from the account of a corporation, which is connected to the plaintiff but not listed as a party to this action. This may lessen overall the merit of the claim, but it does not diminish it entirely.

[39] I adopt the wording in *Tundra Helicopters* at para. 37, that "[i]n all the circumstances, there was virtually no risk, much less than a substantial one, that a fair trial of the issues would not have been possible."

Conclusion

[40] I, therefore, find, on balance, that the interests of justice do not demand the dismissal of this action for want of prosecution.

[41] The plaintiff should treat this as a significant warning sign that further delay on his part will not be favourably looked upon.

[42] It is my view that the defendant should have his costs, in any event of the cause payable forthwith, for having to bring the application since a party should not need to serve applications to have an opposing party comply with court orders and push litigation forward. I am not convinced that the conduct of the plaintiff is so reprehensible that an award of special costs is warranted.

[43] To address the inadequacy of the affidavits verifying the list of documents, the plaintiff shall provide a further affidavit that specifically:

- a. verifies that, to the best of his knowledge, information and belief, full disclosure has been made of all relevant documents that are or have been in his possession or control;
- b. provides particulars regarding the extent of the search for relevant documents made to date; and
- c. provides such further information as will enable the plaintiff and this Court to decide whether all appropriate steps have been taken to locate such documents.

See *Privest Properties Ltd. v. Foundation Company of Canada Ltd.* (1991), 64 B.C.L.R. (2d) 41 (S.C.) at paras. 43-46.

[44] The plaintiff shall attend an examination for discovery at his own expense, at a time and place at the discretion of the defence, and in accordance with reasonable notice and the schedule of plaintiff's counsel.

Summary of the Orders

[45] A summary of the orders granted is as follows:

1. The application to strike the plaintiff's claim is dismissed.
2. The plaintiff will provide a further affidavit verifying his list of documents that:

- a. verifies that, to the best of his knowledge, information and belief, full disclosure has been made of all relevant documents that are or have been in his possession or control;
 - b. provides particulars regarding the extent of the search for relevant documents made to date; and
 - c. provides such further information as will enable the plaintiff and this Court to decide whether all appropriate steps have been taken to locate such documents.
3. The plaintiff shall attend an examination for discovery at his own expense, at a time and place at the discretion of the defence, and in accordance with reasonable notice and the schedule of the plaintiff's counsel.
 4. The defendant should have his costs, in any event of the cause payable forthwith, for this application.

"The Honourable Madam Justice Fort"

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