

CANADA / JUDGMENT

Liu v. Ma

2026 BCSC 390

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Supreme Court of British Columbia

DECIDED

5 January 2026

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2026 BCSC 390 Liu v. Ma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liu v. Ma,

2026 BCSC 390

Date: 20260105

Docket: S090835

Registry: Vancouver

Between:

Zhi Qi Liu

Plaintiff

And

Sharon Ma and Westmar Realty Ltd. doing business as MacDonald Realty Westmar

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. Lo

Counsel for the Defendants:

K. Murray

Place and Date of /Hearing:

Vancouver, B.C.

January 5, 2026

Place and Date of Judgment:

Vancouver, B.C.

January 5, 2026

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered given that some matters were abbreviated in the interests of time. I have made such edits without affecting the substance or final disposition.
- [2] The application before the court today is for the dismissal of this action for want of prosecution.

Background

- [3] By way of background, the plaintiff is currently 69 years old. She is a single mother who immigrated to Canada in 2002. At that time, she was 46 years old. Her English is minimal. She relies heavily on interpretation by others for her general business matters, and she states that, similarly, she is not well versed with technology, relying heavily on her daughter to send and receive emails.
- [4] In 2006, she became aware of property being for sale through a mutual acquaintance of the plaintiffs and the defendant realtor. The property, which was intended to include a to-be-built house, was already subject to a contract of purchase and sale with a third-party buyer (the "CPS"), which the plaintiff was to assume through an assignment agreement. A \$65,000 deposit was paid in respect of the CPS.
- [5] The CPS contained an extension clause whereby, if the vendor was not able to complete, i.e., complete the sale with a fully completed house having been constructed, the CPS would be terminated and the deposit would be returned.
- [6] The plaintiff claims that she became aware that she would be unable to obtain financing and that rather than allowing the plaintiff to get out of the CPS, which she argues could have been done as the vendor was not in a position to complete on the original date given construction was not finished, that she was pressured by the defendant realtor into signing extension agreements. There was either two or three of those.

- [7] Simply, the plaintiff's argument is that had those extensions not been signed, given that the vendor was unable to complete in the first instance, she would have been able to obtain the return of her deposit and walk away from the CPS; however, because of the extension agreements, that did not happen and instead she forfeited her deposits due to what became her inability to complete.
- [8] The cause of action rests largely on what she says the defendants told her, and advice given as her realtors, when the extensions were granted.
- [9] The claim for damages in this action amounts to the \$65,000 that she lost through her forfeited deposit.
- [10] Neither party disputes that after the claim was filed, notably by writ of summons in 2009, the matter was initially moved forward quickly. Specifically, trial dates were set quickly with two notices of trial being filed, the first on September 17, 2009, for a June 2010 trial date, which was then adjourned by consent to February 2012, however, then struck because no trial certificates were filed.
- [11] The second notice of trial was filed in February 2011. After that filing, nothing was done until February of 2022, in other words for some 11 years, other than filing of a notice of change of solicitor by the plaintiff in January 2013 and by the defendant in October 2020. Neither of those actions would constitute a step being taken in the litigation.
- [12] In February 2022, new counsel was retained by the plaintiffs. That counsel contacted the defendant's office and filed a notice of intention to proceed. However, no steps were taken thereafter for the following year. Instead, in February of 2023, a third counsel, the one appearing on today's application, was retained and a new notice of intention to proceed at that time with a subsequent notice to admit being served in October 2024 and thereafter responded to.
- [13] The filing of notices of intention to proceed similarly do not constitute a step being taken, although I am satisfied that a notice to admit did constitute a step.
- [14] Regardless, on this chronology what is clear that there was a period of time of some 11 years, between 2011 and 2022, when no steps were taken and, thereafter, the only step taken was the delivery of a notice to admit after two notices of intention to proceed were filed.

Legal Framework

- [15] The parties both agree that the current authority with respect to applications for dismissal of want of prosecution is the recent *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473, where the court set out a revised test as follows:
- [69] For clarity, I will summarize the revised framework of analysis that, in my view, should govern applications to dismiss actions for want of prosecution in British Columbia. The first two questions are:

- (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
- (2) Is the delay inexcusable?
- [70] These two questions are to be answered in accordance with the law that has developed in British Columbia under the existing test. If both questions are answered in the affirmative, the court should move to the third and final question:
- (3) Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?
- [71] The non-exhaustive list of factors set out at paragraph 45 of *International Capital Corporation* provides a useful starting point for assessing the interests of justice. To that non-exhaustive list, I would add one further factor: the merits of the action. While a judge should not engage in any searching examination of the merits on an application to dismiss for want of prosecution, if the action is bound to fail then the interests of justice favour its dismissal: *Ed Bulley* at para. 62.
- [72] Under this framework of analysis, the prejudice to the defendant's ability to defend the action remains a relevant, and indeed important consideration. However, prejudice to the defendant is not a pre-requisite to an order dismissing a claim for want of prosecution. At the interests of justice stage, the court should look to all relevant circumstances rather than prioritizing the impact of delay on trial fairness.
- [73] By way of concluding comments, I make three further points.
- [74] First, in my view, it is not helpful to characterize the remedy of dismissal for want of prosecution as "Draconian", to the extent this label implies the remedy is excessively harsh or punitive. It must be remembered that a plaintiff faces the risk of dismissal of an action only once they are guilty of inordinate and inexcusable delay. Undue litigation delay undermines public confidence in the justice system, and should not be countenanced. Generally speaking, a plaintiff who has filed a civil claim should be expected to get on with it. If, having regard to the circumstances, it is not in the interests of justice to allow an action characterized by such delay to continue, then the remedy of dismissal is not excessively harsh or punitive. Rather, it is justified.
- [75] Second, the preceding comment, and the revision of the test that I propose, should not be taken to signal an invitation to defendants to bring applications for dismissal for want of prosecution as a matter of routine. A plaintiff's interests in a trial on the merits remains an important consideration. The revised test is simply intended to provide a more nuanced balancing of the competing considerations of the interests of defendants, and the justice system as a whole. An application will succeed only if the court is persuaded that the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits.

- [76] Third, it should not be forgotten that there are avenues available to defendants concerned about the pace of litigation, including setting timelines for pre-trial steps through the terms of a case plan order. Put simply, the plaintiff's delay does not tie the hands of a defendant who is motivated to bring the case to its conclusion. There is, of course, no obligation on the defendant, who has involuntarily been brought into a lawsuit, to take any steps to move the plaintiff's case forward. However, the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action at the interests of justice stage of the analysis.
- [16] The plaintiff emphasizes that if either of the first two questions under the test are in the negative, i.e., there is a finding by the court that the delay is neither inordinate nor excusable, then it is not necessary to go further into the analysis as to whether or not it is in the interests of justice to dismiss the action. The defendants do not dispute that it is only necessary to consider the interests of justice if the court finds that the delay was inordinate, and the court finds that it was inexcusable.

Analysis

Was the Delay Inordinate?

- [17] For the purposes of the analysis today, the plaintiff does not dispute that there was an inordinate delay, that being from 2011 to 2022, with no steps being taken. While the notice to admit constituted a step thereafter, the fact that one step is taken does not effectively re-set an arbitrary clock. The consideration of whether there has been an inordinate delay takes into account the whole of the prosecution of the action. I am satisfied that there was an inordinate delay.

Is the Delay Excusable?

- [18] However, the plaintiff argues that there are reasonable excuses for that delay, those being:
- a) financial;
 - b) the inability to obtain counsel, specifically one that spoke Mandarin; and
 - c) health issues with respect to both the plaintiff and her daughter.
- [19] The plaintiff's evidence is that she has a poor grasp of English and the Canadian legal system, including a mistaken belief that she believed she needed counsel to proceed with her litigation and that, to that end, between 2011 and 2021; she would "visit the Vancouver Law Courts to see if the court file still exists," and received some sort of confirmation that it did. Further, between 2011 and 2021, she attempted to retain Mandarin speaking counsel, identifying five specific counsel in seven different law firms that were contacted as well as noting that there were "many others."

- [20] In respect of these last two explanations, it is notable that the plaintiff does not specify the specific time frame that any of these steps were taken by her, other than the broad "from 2011 to 2021."
- [21] In addition, she has included in her evidence references that she looked after her adult daughter who was frequently hospitalized due to colitis, Graves' disease, and depression, and that she herself also required medical treatment. In support of this latter explanation, she attaches a number of clinical records to her affidavit, what appears to be hundreds of pages of clinical records, although these were not summarized in any way.
- [22] During submissions, I was not initially taken to any particular medical note entries; however, upon a directed inquiry as to what I was to take from the medical evidence I was taken to a 2012 consultation report which confirmed a diagnosis of diabetes. There were also, as counsel and I flipped through the records together, notations of a later radiology report on November 25, 2020, which referenced, again, that diagnosis of diabetes, but as well diagnoses of hypertension, GERD, and hyperthyroidism.
- [23] Through my quick glance through the records during submissions, there were no significant admissions or medical issues of note that would suggest an inability to deal with this litigation, or a disability that would affect the plaintiff's ability to do so.
- [24] While there were various ER attendances, they appeared to be for issues that would often be dealt with at a general family doctor's office, such as ankle pain after being on a treadmill in 2015 and an ear infection in 2017, as well as various reports of chest pain throughout 2017 and 2019 where none of the ER visits appeared to have resulted in any admissions other than a November 2020 incident which resulted in an admission that may have been overnight due to reports of chest pain that had been ongoing for three days.
- [25] In one of the consult reports, there was a reference to her having had a business until the beginning of COVID-19 in which time she sold it, having "given most of her wealth away to charities". I comment on that latter point only because one of the explanations for the delay is lack of financial ability to retain counsel, given that the plaintiff was attempting to find counsel who would take this matter, again a matter that the damages are limited to \$65,000 at most, on a contingency fee basis which were unsuccessful. Although there were tax returns in the materials before the court to show financial restraints, based on the clinical records that appears to be self chosen.
- [26] Having regard to those factors, the plaintiff argues that this provides a reasonable explanation such that the delay is excusable.
- [27] I am not satisfied that they do. They are vague, and while I do agree that they are factors that the court ought to consider, in my view, they are not a complete answer to the inordinate delay, particularly given the 11 years that is completely unexplained by anything more than those vague suggestions that the matter was not being advanced because of these issues.

[28] That being said, these explanations may also be considered in the third part of the analysis, that being the overall interests of justice.

Is it in the overall interests of justice to dismiss the claim?

[29] The factors that go into the overall analysis of interests of justice analysis are repeated at para. 66 of *Giacomini*, and augmented at para. 71, those being:

- a) the prejudice the defendant will suffer defending the case at trial;
- b) the length of the delay;
- c) the stage of the litigation;
- d) the impact of the delay on the defendant's professional, business, or personal interests;
- e) the context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure by the defendant to proceed;
- f) the reasons offered for the delay;
- g) the role of counsel in causing the delay;
- h) the public interest in having cases that are of genuine public importance heard on their merits; and
- i) a consideration of the merits.

[30] As noted, the length of the delay here is in favour of a dismissal, which the plaintiff acknowledges. There is no genuine public importance in respect of this matter. Counsel had no role in causing the delay, although the plaintiff does state that the inability to obtain counsel has. There is similarly no evidence as to the impact on the defendant's professional interest, despite that this is a professional negligence claim. As such, I will not consider those as factors weighing in favour of one party or the other but as being more neutral.

[31] The factors that are relevant to this matter are as follows, and I will address each in turn.

Stage of Litigation

[32] First, the stage of litigation. The plaintiff argues that this is in favour of the plaintiff and that the matter is virtually ready for trial, given that two notices of trial were filed. I agree that the fact that this is not a matter where a claim was filed and nothing done to advance it at all, but rather that the matter was brought to a state that it is likely close to being tried. In this respect, the defendant does take an issue with whether or not discoveries have been completed; nonetheless, some discoveries have been conducted.

Delay in the face of pressure to proceed

- [33] The second factor that is relevant to this application, is whether there was a delay in the face of pressure by the defendant to proceed.
- [34] The plaintiff acknowledges that there is no obligation on the defendant to push the matter forward. However, it is the case that the defendant did not do anything, despite this inordinate delay, to bring this matter to a conclusion. It is not disputed that after the 2022 or 2023 involvement of counsel, the defendants made it clear that they would be proceeding with this application, although it appears that the parties are in relative agreement that there was some time given for the parties to discuss matters before proceeding specifically with the application.
- [35] In my view, given that there is no obligation on the defendants to push the matter forward themselves, the fact that there was no pressure by the defendants to proceed in the face of there being no action taken whatsoever is a relatively neutral factor.

Reasons for the delay

- [36] The reasons for the delay are, as noted previously, the financial health and representation constraints that the plaintiff was experiencing.
- [37] The plaintiff argues that these factors weigh heavily in her favour, arguing that this is not a case where there was a deliberate delay, just a belief that she could sit back and do nothing.
- [38] At para. 81 of *Giacomini*, the court noted that the excuse "must be considered within the specific circumstances of the action."
- [39] This is an action where an allegation was being made as to the professional credibility, for lack of a better word, of the defendant. It is the type of action that has serious professional connotations and, as such, is generally one that ought to be proceeded with some dispatch.

Prejudice to the Defendant in proceeding

- [40] The plaintiff relies heavily on the fact that there is no specific evidence from the defendants as to a prejudice being caused by the delay. Notwithstanding the Court of Appeal's comments in *Giacomini* that prejudice should not be given undue weight, the plaintiff notes that prejudice does, however, remain a factor. I agree. It is a factor; however, it is no longer determinative.
- [41] The plaintiff also relied on *McLelland v. McLelland*, 2025 BCCA 401 at para. 47 where the court commented on the lack of direct evidence as to hardship despite the lower court's finding of such hardship. That was found to be an appealable error.

- [42] The plaintiff argued that the same can be said regarding prejudice, i.e., that there must be direct evidence of prejudice. There is no such evidence here. The defendant acknowledges as much; however, the defendant argues that prejudice can be presumed.
- [43] In this respect, the court stated as follows in *Trak Energy Corporation v. Happy Valley Resort Ltd.*, 2015 BCSC 1928:
- [50] The specific nature of this presumption was discussed in *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145, 98 B.C.L.R. (3d) 238, as follows:
- [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.

- [51] Madam Justice Fisher in *Pardy v. Levant*, 2015 BCSC 130, states at para. 13:

It has long been recognized that memories fade with the passage of time, and witnesses may disappear. Prejudice may be presumed from this, but without evidence of specific prejudice, such a presumption may be insufficient to support a finding of prejudice serious enough to warrant dismissal. Specific prejudice may be apparent in cases where disputed facts must be determined from oral testimony of witnesses: See *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 at para. 12; *Ed Bulley* at paras. 51, 55, 57.

- [52] Certainly the memories of witnesses will have been compromised by the passage of time. There is confirmation that at least one prospective witness, Mr. Barone, is now deceased but there is no evidence before me that he would have been a witness for either party or that he may have been an important witness.

- [44] Further, in *Wiegert v. Rogers*, 2019 BCCA 334, the court noted as follows:

- [33] Once a defendant establishes that delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Busse v. Chertkow*, 1999 BCCA 313 at para.18. 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. As to the final consideration -- whether, on balance, justice requires dismissal of the action -- again, the determination is highly fact-dependent. Relevant matters could include the length of and reasons for the delay, the stage of the litigation, the context in which the delay occurred and the role of counsel in causing the delay (although negligence on the part of a plaintiff's lawyer may not always amount to an excuse): *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45; 0690860 at para. 29.

[45] Nothing in *Giacomini* has altered the presumption of prejudice.

[46] In this case, the fairness of any trial on the merits will depend upon the memories of witnesses as to discussions that will have, by the time of any trial, taken place some 20 years prior. This is a factor that does weigh in favour of the defendants in the case before the court today, notwithstanding that there is no direct evidence as to specific prejudice. However, it is not on its own determinative.

Merits

[47] Finally, as to the merits, the plaintiff argues that there is a triable issue based on the claim as framed.

[48] This case is essentially a "she said/she said" case. The defendant disputes that she made any misrepresentations or that she pressured the plaintiff into signing any of the extension agreements or failed to adequately provide advice as to the impact of them.

[49] Absent a determination of credibility, on an application such as this, the merits can only be considered at a high level. Here, they are, a neutral factor in that I cannot find that either party has a stronger case than the other.

[50] When considering the merits, however, I would add that the object of the Rules, including, proportionality is also to be considered:

Rule 1-3 -- Object of Rules

Object

(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

- (b) the importance of the issues in dispute, and
- (c) the complexity of the proceeding.

[51] This is a claim for the return of a \$65,000 deposit that is now some 19 years old and, as noted, will be well over 20 years old by the time of a trial, based on allegations of misrepresentation and professional negligence on the part of a realtor.

[52] Proportionality weighs heavily against the plaintiff in this case.

[53] At para. 67 of *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2025 BCSC 222, the court noted that "timely and affordable justice is in the public interest."

[54] In *Forgotten Treasures*, the court found that the balance tipped in favour against a dismissal after what was considered by the court to be a five-year delay, after discounting two years for issues arising from counsel inaction, given the importance of the plaintiff's interests being determined after a full trial on the merits.

[55] The court there also considered the defendant's own inaction in the face of the delay, something that, as I have referenced, is also a factor here. However, the delay here not only is extremely inordinate, with it being some 11 years with no steps being taken whatsoever and, as I have said, explanations for that being relatively vague. While each of those explanations provide some weight to the lack of action on the part of the plaintiff, they do not provide an adequate explanation for an 11-year period of inaction, particularly when, as noted, the claim involves a professional reputation of a defendant, a professional, and a claim that is for \$65,000.

[56] Neither party said what the length of trial was. I understand that it was initially set for three days and then four days, but between two counsel, the fees for counsel for a four-day trial largely will likely surpass the amount of the claim itself.

[57] I conclude that it is not in the interests of justice that this action continue given the risk that there can no longer be a fair trial on the merits, with any of the discussions on which the claim is based having occurred, by the time of any trial, some 20 years prior.

[58] While there is a documentary component of this case, the nub of it will come down to what was said when the documents were signed, those being the representations, or not said, in terms of the lack of adequate advice being given. And while that is not on its own determinative as an element of prejudice, it does go to the overall considerations of the nature of the claim, the merits of the claim, the length of the delay itself, and the explanations given as referenced.

[59] The application is granted as sought at para. 1.

[SUBMISSIONS RE COSTS]

[60] THE COURT: Costs of this application shall be at scale B to the defendants.

"Associate Judge Robertson"

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