

CANADA / JUDGMENT

Lu v. Chiang

2024 BCSC 893

COURT

Supreme Court of British Columbia

DECIDED

1 May 2024

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2024 BCSC 893 Lu v. Chiang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lu v. Chiang, 2024 BCSC 893 Date: 20240501 Docket: M-1910258 Registry: Vancouver Between: Yiming Lu Plaintiff And William Chiang Defendant - and - Docket: M-1910259 Registry: Vancouver Between: Qianrui Fang Plaintiff And William Chiang Defendant Before: Associate Judge Robertson Oral Reasons for Judgment In Chambers Counsel for the Plaintiffs in both actions: L.A. Lukacs, appearing as agent for C.J. Chak Counsel for the Defendant in both actions: C.L. Arrieta Place and Date of Trial/Hearing: Vancouver, B.C. May 1, 2024 Place and Date of Judgment: Vancouver, B.C. May 1, 2024

- [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. I have made such edits, without affecting the substance or final disposition.
- [2] The application before the court today is for a dismissal for want of prosecution in two actions arising from one motor vehicle accident, one being brought by the driver, and the other a passenger in one of the vehicles.
- [3] The motor vehicle accident occurred on October 19, 2017. The plaintiff filed a notice of civil claim on October 9, 2019. The response was filed November 17, 2020 admitting liability. This document was served by the defendant on November 19, 2021.
- [4] Other than the closing of the pleadings, and the defendant providing their list of documents thereafter, no disclosure has been provided by the plaintiff.
- [5] In particular, there has been a series of correspondence being sent by defendant's counsel to the plaintiffs, asking for, among other things, a list of documents, authorizations in Halliday format which were provided for signature, and requests for dates for examination for discovery.
- [6] The plaintiffs' counsel is here taking no position, given that they have been unable to reach their client to obtain instructions.

- [7] There is no dispute as to the applicable legal principles, with the leading authority being *Irving v. Irving* (1982), 38 B.C.L.R. 318 (CA) ("*Irving*"), where a three-part test was set out at para. 8, that being:
- a) whether there has been an inordinate delay;
 - b) whether the delay is inexcusable; and
 - c) whether the delay has caused prejudice.
- [8] More recently, the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 ("*Giacomini*") at paras. 68 to 70, reframed the third part of the test as to prejudice as being a consideration broader than simply whether there is prejudice, but rather whether it is in the overall interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay, under which prejudice is a consideration.
- [9] In considering that reformulation, the court in *Domirti v. Crescenzo*, 2024 BCSC 422 at para. 31 stated: The nuance added by the Court in *Giacomini* is that when considering whether it is in the interests of justice for the action to be dismissed for want of prosecution or continue, it is not determinative if there is prejudice to the defendant. Instead, a court must look more holistically at whether it is in the interests of justice to permit the action to proceed or be dismissed.
- [10] In this case, I am satisfied that there has been an inordinate delay. As a result of that finding, the onus shifts on the plaintiff to establish that there is an excuse. There is no material before the court to establish or to raise any excuse whatsoever, other than that of the counsel to indicate that they have been unable to locate their client.
- [11] The plaintiff must take some ownership of the action, even if originally represented by counsel. It is incumbent upon litigants to remain in contact with their counsel and ensure that their interests are being protected, and that there is an ability at all times to be reached if issues arise in respect of the litigation. It is, in my view, not an excuse, and to be clear counsel is not suggesting that it is, that counsel is unable to reach his client. Put another way, a client cannot use as an excuse that he may not be aware of actions being taken in the proceedings when they ignore them or make themselves unreachable. I accept that the delay is, in all respects, inexcusable.
- [12] Turning then to the third factor, whether or not it is in the overall interests of justice to dismiss, I inquired of counsel specifically whether or not this was a matter that was more appropriate to do the staged approach, perhaps in the form of a guillotine order, whereby an order ought to be made to compel compliance with the Rules of Court, failing which the claim would then be dismissed. Here, no procedural orders have been sought to compel compliance with the Rules of Court or, for that matter, for a case planning conference.

- [13] While it is an extreme measure to strike a claim and one that is not to be lightly ordered by the court, as noted in *Giacomini*, undue litigation delay undermines public confidence in the justice system and should not be countenanced (at para. 74).
- [14] The court in *Giacomini*, referring to various cases including the *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 and *Irving*, among others, noted that all the circumstances must be considered when balancing the interests of justice, including length and reasons for the delay and context in which they occurred, whether an action has no reasonable prospect of success, and the degree of prejudice.
- [15] The circumstances of this application are largely neutral.
- [16] In particular, there is no specific prejudice being raised, other than the usual prejudice as a result of the delay. Liability has been admitted such that issues with respect to witnesses' memories are not as much of an issue. To the extent there is an issue as to the medical status and condition of the plaintiff throughout this period of time, that can largely be obtained through documents once they are obtained, including clinical records. There is no particular impact on the defendant's business interests, given the nature of this claim.
- [17] Instead, the defendant largely relies on two factors:
- a) the stage of the litigation; and that
 - b) this being a standard motor vehicle accident claim which is not one of public interest or in which there is genuine public importance in having it heard on the merits, given that it is only personal to the plaintiff and the damages he is alleged to suffer.
- [18] I agree that these two circumstances fall in favour of the defendant, with the determinative one being the stage of litigation or, more accurately, the level to which the plaintiff has pursued, or more accurately failed to pursue, litigation.
- [19] Other than filing a notice of civil claim, the plaintiff has done very little to pursue this action, and nothing to ensure that it may proceed to trial in a timely manner whatsoever. The fact that the plaintiff has essentially put themselves in a position that they may personally have no notice of this, because they are not keeping in touch with their own counsel who is charged with advancing their interests, is perhaps the most telling factor that they have no interest in proceeding with this litigation. Matters in which the litigants themselves do nothing to pursue, particularly in circumstances where they have not carried out the obligations upon them under the Rules of Court and pursued the matter in a timely way, should be brought to a conclusion.
- [20] In all of the circumstances, including consideration of the efficient use, and overuse, of judicial resources, it is in the interests of justice that the claim be dismissed.
- [21] Therefore, I make the order as sought and the actions are each dismissed. Paragraph 1 of each of the notice of applications is granted as sought. "Associate Judge Robertson"

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