

CANADA / JUDGMENT

Miller v. Thompson Rivers University

2018 BCSC 1548

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1548 Miller v. Thompson Rivers University

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Thompson Rivers University,

2018 BCSC 1548

Date: 20180809

Docket: S44021

Registry: Kamloops

Between:

Adrian Stephen Miller

Plaintiff

And:

Thompson Rivers University, Roger H. Barnsley,

Michael Gorman, Ulrich Scheck, Katherine (Kate) Sutherland,

Jenna Woodrow, Catherine Ortner, and Nancy Twynam

Defendants

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

The Plaintiff, appearing in person (by videoconference):

Adrian Stephen Miller

Counsel for the Defendants:

J.M. Hogg, Q.C.

Place and Date of Hearing:

Kamloops, B.C.

August 8, 2018

Place and Date of Judgment:

Kamloops, B.C.

August 9, 2018

- [1] THE COURT: In this action, filed in March 2010, the plaintiff, Mr. Miller, claims damages against the defendants for breach of contract and negligence. The events giving rise to the claims took place beginning in 2007 through to 2009, when Mr. Miller was either registered as a student or attended classes at Thompson Rivers University, which I will refer to as "TRU."
- [2] The defendants now apply for an order that the action be dismissed as against them for want of prosecution, pursuant to Rule 22-7(7).
- [3] Mr. Miller opposes the application, which he says must be dismissed.
- [4] Despite the terms of an order pronounced on July 25, 2018 by Mr. Justice Harvey, whereby "By not later than August 1, 2018 by 4:00 p.m., the Plaintiff is to provide all response materials, filed or unfiled, in the hands of counsel for the Defendants, John M. Hogg, Q.C.," Mr. Miller has not served or filed any sworn evidence (that is, sworn by him) in response to the application. Indeed, in response to my inquiries at the hearing, Mr. Miller confirmed that he has not sworn any affidavit in response. He says that he delivered an application response and other material to Mr. Hogg by email on August 1, 2018. However, Mr. Hogg was not able to locate any application response in the attachments, and, so far as I have been able to determine, none has been filed with the court. In those circumstances, during the hearing, I had Mr. Miller read most of his application response into the record when he was making his submissions.
- [5] Mr. Miller argues that, on the facts, there has not been inordinate delay, and he says that at least some of the delay prior to 2013 should be considered to be the fault of the defendants. For example, he argues, relying on an affidavit sworn in support of an application by the defendants in March 2011 to adjourn the original trial date, that the defendants' position is that there is no time of the year when a trial would be convenient given the university calendar, implying that this has caused difficulty in moving the case forward. Mr. Miller argues, citing cases such as *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 and *Louie v. Webber*, 2013 BCSC 1763 (among others), that dismissing an action for want of

prosecution is a draconian remedy, and the court should exercise caution and restraint when it considers the application.

- [6] Mr. Miller says further that most of the affidavit evidence filed by the individual defendants concerning prejudice is irrelevant, at least in part because (as a result of Mr. Justice Joyce's Reasons published November 25, 2013, which I refer to below) Mr. Miller's claims have been significantly narrowed, and, Mr. Miller asserts, because much of the relevant evidence on the merits will be documentary evidence, meaning that an individual's memory of events will be less important. Therefore, not much weight should be given to the defendants' concerns about the frailties of memory.
- [7] At the hearing, Mr. Miller also advanced an argument based on the premise that no relevant limitation period has expired with respect to his claims in contract and negligence, and he submitted that, if the application were granted, he would simply be able to file a new action, which would be a waste of time and resources. This argument was not one advanced in his application response, although there is support for it in cases such as PMC, one of the cases that I refer to below. However, I note that a cause of action for breach of contract, for example, is complete when the contract is breached. At that point, the limitation period begins to run.
- [8] For the reasons that follow, I am granting the defendants' application and dismissing the action.
- [9] I will first set out a chronology, and I note in this respect that Mr. Justice Joyce's Reasons, which are indexed at 2013 BCSC 2138, also sets out a brief chronology at paras. 3 to 11.
- [10] On March 10, 2010, the writ and statement and claim were filed by Mr. Miller. The statement of claim is about 200 paragraphs long.
- [11] On March 26, 2010, the statement of defence was filed.
- [12] On November 19, 2010, under cover of a letter, Mr. Miller purported to deliver a list of documents "in accordance with the Supreme Court Rules." The form of the list of documents, in fact, did not comply with the Rules.
- [13] On January 31, 2011, Mr. Miller filed a list of documents with the court. Lists of documents are not required to be filed: see generally Rule 7-1. At least some of the documents listed on this new list appeared to be listed on what was delivered by Mr. Miller on November 19, 2010. Mr. Miller gave the address for inspection of the documents as the Registry at the Kamloops Courthouse, which was not proper.
- [14] On March 22, 2011, there was a case planning conference before Mr. Justice Burnyeat. Among other things, Mr. Justice Burnyeat ordered Mr. Miller to file a notice of civil claim under the current Rules by April 21, 2011. The defendants then had until May 6, 2011 to file a response to civil claim. Mr. Justice Burnyeat also made orders concerning oral examinations for discovery and discovery of documents.

- [15] On March 31, 2011, an order was made by Madam Justice Hyslop. Among other things, she ordered that the trial, which was then set for September 13, 2011, be adjourned and was not to be reset until after dates for examinations for discovery had been set and the new pleadings as ordered by Mr. Justice Burnyeat had been filed. The new trial date was to be set by the case planning judge. Lump-sum costs were awarded to the defendants.
- [16] April 21, 2011 was the due date for the filing of the notice of civil claim by Mr. Miller in accordance with the deadline set by Mr. Justice Burnyeat. That date came and went, and no notice of civil claim was filed.
- [17] On June 8, 2011, orders were made by Mr. Justice Rogers on application by the defendants. Among other things, Mr. Justice Rogers set a new deadline for Mr. Miller to file his notice of civil claim (that deadline was June 30, 2011), and a new deadline of July 21, 2011 for the defendants to file the response to civil claim. An order was also made that examinations for discovery were to be scheduled on weekdays during normal business hours. This particular order was made in response to Mr. Miller's attempts to schedule discoveries on weekends.
- [18] On June 30, 2011, Mr. Miller filed a notice of civil claim. However, in addition to the original defendants named in the writ and statement of claim, he named 12 new individuals as defendants and added allegations in the notice of civil claim in respect of them. He did not have leave of the court to add these parties as defendants, and leave was required. No application has ever been made to have those persons added as defendants. The notice of civil claim did not contain an address for delivery, contrary to what the Rules require.
- [19] On July 21, 2011, the defendants filed a response to civil claim.
- [20] On August 2, 2011, the defendants served Mr. Miller with a demand for particulars.
- [21] On September 21, 2011, a number of applications came on for hearing before Mr. Justice Joyce. Among other things, he ordered that the 12 new defendants that Mr. Miller had named in the notice of civil claim be struck and the style of cause be amended accordingly. This was without prejudice to Mr. Miller's ability to make a proper application to have those parties added as defendants. Mr. Justice Joyce also made a number of other orders. By this time, Mr. Justice Joyce had been assigned as the case management judge.
- [22] On January 17, 2011, after the deadline for delivery had passed, Mr. Miller delivered "the first half of the particulars requested." The document attached is titled "Particulars Part 1," and is 22 mostly single-spaced pages.
- [23] On April 4, 2013, the defendants filed a notice of application to strike Mr. Miller's pleadings.

- [24] On July 2, 2013, the defendants' application came on for hearing before Mr. Justice Joyce and, as I mentioned, on November 25, 2013, Mr. Justice Joyce delivered Reasons for Judgment. I am going to read a few paragraphs from Mr. Justice Joyce's Reasons for Judgment because, among other things, they provide what, in my view, is a very apt description of the nature of the pleadings filed by Mr. Miller and also the nature of the claims that Mr. Miller is currently pursuing.
- [25] I am going to start with para. 15 of Mr. Justice Joyce's Reasons:
- [15] The first 20 paragraphs of Part 1 of the notice of civil claim, in which the plaintiff is required to set out his statement of facts, contain descriptions of the defendants. Paragraphs 10 through 20 describe defendants who were struck from the action by the order of September 21, 2011 and should be struck. Likewise, paragraphs 9 through 19 of Part 2 of the notice of civil claim, which claim relief against those defendants who have been removed from the action, should also be struck.
- [26] So, as I read that paragraph of Mr. Justice Joyce's Reasons for Judgment, he has made an order striking those paragraphs from the notice of civil claim, essentially on the basis that they refer to people that are no longer parties to the litigation.
- [27] I am going over next to para. 19 of Mr. Justice Joyce's Reasons:
- [19] The defendants submit, and I agree, that paragraphs 21 to 31 of the notice of civil claim do not set out, by themselves, a factual basis that would give rise to a cause of action. Paragraphs 24 to 28 hint at a contract or contracts between the plaintiff and the defendants or some of them, and breaches of the contract. However, those statements fail to set out facts that, if proven, would establish the contract or contracts or the breach or breaches of such contracts. The paragraphs are bald conclusory statements without any factual foundation.
- [20] There is nothing else in the body of Part 2 of the notice of civil claim that sets out any factual basis for relief under any of the other heads of relief set out in Part 2 of the document.
- [21] It is my view, however, that the notice of civil claim should not be viewed alone but should be considered together with the Particulars delivered by the plaintiff.
- [22] The Particulars are contained in a 22-page, single-spaced document, which begins with the following general statements of the plaintiff's complaint about the defendants and the alleged effect of their actions on him:

This is a complaint about harassment, discrimination and retaliation perpetrated by senior employees of Thompson Rivers University, whose patently false and perverted belief that they are above the law are matched only by their ridiculous belief that discriminating against a disabled, financially indigent person will go unchallenged, unchecked, and unpunished. The individuals, whose actions are complained of herein, destroyed a promising career, future successes and a previously ebullient life. Over the course of numerous years, repulsive harassment and

discrimination intertwined with vicious retaliation has led the plaintiff to clinical depression. Innumerable ethics, laws and precepts were shattered along the way. . . .

. . .

Plaintiff had an agreement with the defendants. Defendant breached their duties by illegally interfering with Plaintiffs financial aid, and telling outright fabrications to BC Student Aid and the National Student Loan Service. As a proximate result of Defendants breach of contract, Plaintiff has lost the usage of student loans, enjoyment of money owed to him, investment opportunities, all to his damage in an amount to be established by trial.

. . .

[23] What follows these general statements are descriptions, under separate headings, of various events concerning the plaintiff's attendance at TRU and his dealings with its instructors and administrators, as well as his dealings with the provincial and federal student loan authorities. . . .

[24] When I review the whole of the notice of civil claim and the Particulars, it appears to me that the real underpinning for Mr. Miller's action seems to be an allegation that:

- He and the defendants were parties to a contract with regard to the delivery of educational services;
- The contract had a term, implied or express, that he would be afforded reasonable accommodation on account of his medical difficulties or learning disability, that were known to the defendants;
- The contract also had a term that the defendants would provide correct information to the student loan authorities;
- The defendants breached that contract by not providing reasonable accommodation and by not providing correct information to the student loan authorities concerning his attendance and enrolment;
- As a result of the breaches he was prevented from completing his courses, thereby causing him to waste money on tuition and fees, and become indebted to the student loan authorities, for which he seeks damages;
- Alternatively, the defendants owed him a common law duty of care to provide reasonable accommodation and to provide correct information to the student loan authorities and that they breached that duty of care; and
- The defendants acted wilfully and maliciously in their conduct towards and concerning him.

. . .

- [27] In my view, the real question is whether the pleadings allege facts, which for the purpose of this application are to be taken as true, that could give rise to a claim in contract or in negligence or whether his claim is bound to fail.
- [28] In response to the plaintiff's claims, the defendants refer to s. 69 of the University Act . . .
- [29] However, it appears to me that those statutory protections would not shield the defendants from liability if the plaintiff can prove, as he alleges, that the defendants acted with malice. Whether they did nor not is not something to be assessed on this application.
- [30] I have come to the conclusion that, with considerable effort, one can extract, as I attempted to do during the hearing of this application, sufficient allegations of fact from the notice of civil claim and Particulars that could found a cause of action in contract or negligence. . . .
- . . .
- [32] While I have not dismissed the plaintiff's claim, it does not conform to the requirements of Rule 3-1 in several respects. It does not set out a concise statement of material facts. It is long and at times, rambling. It contains evidence and argument. It does not set out a concise statement of the legal basis for his claim and it contains reference to statutes and torts that, in my view, are completely unsupported by any alleged facts.
- [33] I might have ordered the plaintiff to file an amended notice of civil claim that complies with the Rules and that properly sets out the foundation for the claim that, with considerable difficulty I have determined and he has agreed, he intends to have tried. However, in the end, I have decided that to do so would simply result in further unnecessary delay and costs to all parties. It makes more sense, in my view, to have the matter proceed limited to claims in contract and negligence, which, I am unable to conclude, are claims that are bound to fail even if the plaintiff proves all of the allegations of fact set out in the pleadings he has filed.
- [34] In order to assist the defendants in responding to the claim and to ensure that the trial proceeds as efficiently as possible, the portions of the plaintiff's claim alleging violations of human rights legislation and the Charter will be struck. . . .
- [28] Mr. Justice Joyce goes on to identify specific paragraphs in the notice of civil claim and also the particulars that are to be struck out.
- [29] After Mr. Justice Joyce's Reasons were published on November 25, 2013, and apart from an email exchange in the fall of 2017 between defence counsel and Mr. Miller about current contact information for Mr. Miller as Mr. Miller had not provided an address for service in accordance with the Rules, nothing substantive was done in this action until the defendants' notice of application was filed (along with supporting affidavits) on June 18, 2018. The application was set for hearing on July 9, 2018, but was adjourned to July 25, 2018.
- [30] On July 23, 2018, the plaintiff filed a notice of intention to proceed and delivered or filed a number of other documents. Apart from the notice of intention to proceed, at least some of the other documents make little sense. For example, a notice requiring trial by jury gives the

trial date as January 1, 2019, New Year's Day. In any event, in accordance with Madam Justice Hyslop's order, no trial can be set until examinations for discovery were scheduled, which they had not been. Mr. Miller's appointment for an examination for discovery at a place "to be determined" did not comply with the Rules and was a nullity. The "Demand" in Form 122, demanding that the defendants "amend the response to civil claim" reflects a fundamental misunderstanding of the purpose of Rule 24-1(10). In fact, a response to civil claim had been filed in July 2011.

- [31] I conclude that, apart from the notice of intention to proceed and the notice of address for service (which gave an address for Mr. Miller in Victoria, contrary to what the Rules require, although it also provided an email address for service), Mr. Miller's purpose in filing or delivering these documents was to create the appearance of activity in this action. However, the activity - such as it was - only came in response to the defendants' application to have the action dismissed.
- [32] Since the order pronounced by Madam Justice Hyslop, this action has never been set for trial. There have been no oral examinations for discovery.
- [33] The defendants say that in order for this case to proceed, there are many steps that would be required including: amendments to the pleadings; further discovery and inspection of documents; and oral examinations for discovery, including of the seven individual defendants named. For most of those defendants, their last interaction with Mr. Miller was prior to March 2010. The defendants say that each of them has and will continue to suffer actual prejudice as a result of Mr. Miller's delay in prosecuting his claim. The individual defendants have filed affidavits in that respect, and I am just going to note, but not read at this point, the following paragraphs, first of all, from the affidavit of Jenna Woodrow, paragraphs 2 and then 5 through 8, and then the affidavit of Michael Gorman, paragraphs 4 through 6. We will take those paragraphs as read and, in my view, those are illustrative of the type of prejudice suffered by the individual defendants.
- [34] A number of the individual defendants have limited or no clear memory of their involvement with Mr. Miller. While imperfect memory is a feature of virtually all litigation, the longer the delay, the more risk there is to a witness's ability to reliably recall events. The defendants say that, as a result of the delay, their ability to properly and effectively defend themselves against Mr. Miller's claims has been significantly diminished and prejudiced.
- [35] There are four criteria to be considered when a party seeks to have an action dismissed for want of prosecution:
- (1) the length of the delay and whether it was inordinate;
 - (2) any reasons for the delay either offered in evidence or inferring 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.

See *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52, at para. 24, citing *PMC Builders & Developers Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535, (sub nom. 0690860 *Manitoba Ltd. v. Country West Construction Ltd.*), at para. 27. These same criteria are set out in *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251 (one of the cases cited by Mr. Miller), at para. 6 (again citing PMC).

[36] Mr. Justice Low in PMC, at para. 28, considered that the fourth question encompassed the other three and that it was the most important and decisive question. The demonstration of inordinate delay, inexcusable delay and serious prejudice does not lead necessarily to dismissal. All of the circumstances must be considered. See PMC, at para. 25.

[37] If allegations go to a defendant's character, as they do here, then there is an onus on the plaintiff to proceed expeditiously and diligently. Inordinate delay will be inexcusable unless a credible excuse for the delay is given. Once inexcusable delay is established, a presumption of prejudice arises. The burden then shifts to the plaintiff who must show on a balance of probabilities that the defendant has not suffered prejudice or that it would be unjust to terminate the action. See *Extra Gift Exchange Inc. v. Accurate Effective Bailiffs Ltd.*, 2015 BCSC 915, at paras. 42 and 45 (citing *Busse v. Robinson Morelli Chertkow* 1999 BCCA 313 and *Tundra Helicopters*). The prejudice relates to the ability to have a fair trial.

[38] What matters is a plaintiff's delay in prosecuting the action once it has been commenced. Delay in an action should not be considered piecemeal. The proper approach is to consider it holistically; that is, whether the overall delay in prosecuting an action is inordinate. See *Ed Bulley*, at para. 38.

[39] In my opinion, the length of the delay, whether counted from the time the action was filed in March 2010, or from the last meaningful step taken by Mr. Miller, that is, responding to the application to strike in July 2013, in the context of a claim that arose out of events occurring between 2007 and 2009, is inordinate. This is not a case (unlike *Hanna's Construction v. Blue River*, 2006 BCCA 142, which was cited by Mr. Miller) where any meaningful delay can be attributed to the defendants. Indeed, the plaintiff missed the first deadline set by the order of Mr. Justice Burnyeat, which required him to provide a notice of civil claim in accordance with the current Rules by April 21, 2011. A further court application was required to compel him to do what he had been ordered to do. Then, the notice of notice of civil claim that Mr. Miller filed failed in a fundamental way to comply with the Rules relating to the addition of parties, among other things, requiring another court application.

- [40] Mr. Miller has offered no reasons for the delay. If he intended to do so, he was obliged to comply with Mr. Justice Harvey's order and provide sworn affidavit evidence setting out his reasons. He did not. In my view, and having due regard for the fact that Mr. Miller is a self-represented litigant, this is a continuation of the pattern that Mr. Miller has displayed since 2010 of failing to comply with the Rules and court orders except where it was convenient for him to do so, and then seeking accommodation or forgiveness for the failure. The Rules exist in part to ensure and facilitate the "just, speedy and inexpensive determination of every proceeding on its merits." A failure to comply with the Rules has the opposite result, as this action illustrates.
- [41] I do not agree with Mr. Miller that, given Mr. Justice Joyce's description of what remains of his claim (as described in Mr. Justice Joyce's Reasons, at para. 24), his pleadings no longer advance allegations going to the defendants' character and therefore his delay is excusable. I note, among other things, that he continues to assert that the defendants have acted wilfully and maliciously in their conduct towards him and he continues to seek punitive damages against them.
- [42] In my opinion, there is no reasonable excuse for the delay.
- [43] I turn, then, to the final two criteria.
- [44] I find that, on the evidence, the delay has caused serious prejudice to the defendants in defending the claims made against them. Given the nature of the allegations made by Mr. Miller (some of which involve only brief interactions with an individual defendant years ago), Mr. Miller's delay in prosecuting his claims creates a substantial risk that a fair trial is not possible. More than eight years after the action was commenced, pretrial steps such as discovery of documents have yet to be completed. Oral examinations for discovery, which could have recorded the defendants' evidence at a time much closer to the events in issue, have yet to be held at all. On that point, I note this case is distinguishable on the facts from *Kossert v. Busswood*, 2018 BCSC 425, which was cited by Mr. Miller. The chances of the court's being able to find out what really happened are progressively reduced as time goes on, and this case illustrates that difficulty.
- [45] Until Mr. Miller's pleadings were regularized in some appropriate way (which did not happen until Mr. Justice Joyce released his Reasons on the application to strike), there was little point in attempting to conduct oral examinations for discovery, since the pleadings are the foundation for discovery. Mr. Miller, as the author, must take responsibility for the state of his pleadings.
- [46] I agree with Mr. Hogg that there is much work to be done before this action could be set for trial, in accordance with the order of Madam Justice Hyslop.
- [47] I turn, then, to the final criterion, whether, on balance, justice requires dismissal of the action.

- [48] I acknowledge that dismissal has been described as a draconian remedy. However, defendants are just as entitled to timely justice as plaintiffs. The facts of this case are quite different from *Louie v. Webber* (cited by Mr. Miller in submissions), which was a motor vehicle accident claim where liability had been admitted and the defendant did not dispute that the plaintiff was entitled to compensation. On those facts, Mr. Justice Rogers concluded that the interests of justice required that the action be allowed to proceed, although, even there, with conditions.
- [49] In my opinion, given the history of this litigation, justice requires dismissal at this time for want of prosecution, and I so order.
- [50] In summary, the defendants' application is granted, and the action is dismissed with costs to the defendants. That is, one set of costs.
- [51] I am dispensing with the need for Mr. Miller's approval of the form of order resulting from this judgment. However, I am directing that, when Mr. Hogg submits the draft to the Registry for entry, he also send Mr. Miller a copy of the draft order and, further, that the draft order be forwarded to me for signature.
- [52] I am also directing that a formal order from the Reasons for Judgment of Mr. Justice Joyce pronounced November 25, 2013, be prepared and submitted to the court for entry.
- [53] That concludes my judgment, and we are adjourned.

"ADAIR J."

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