

CANADA / JUDGMENT

Milly v. Kapelus

2022 BCSC 1729

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Supreme Court of British Columbia

DECIDED

30 August 2022

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2022 BCSC 1729 Milly v. Kapelus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Milly v. Kapelus,

2022 BCSC 1729

Date: 20220830

Docket: S197296

Registry: Vancouver

Between:

Francois Milly and Prop A Lot Rental & Design Inc.

Plaintiffs

And

Gordon Alexander Kapelus, Jeannine Marie Kapelus

and Janalex Investments Ltd.

Defendants

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

Counsel for the Plaintiffs:

L.J. Mackoff

J.A. Greville

Counsel for the Defendants:

B. Dorst

Place and Dates of Trial:

Vancouver, B.C.

August 29-31 and

September 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 30, 2022

- [1] This is an application by the plaintiffs under R. 22-7 of the Supreme Court Civil Rules [Rules], for an order striking the defendants' pleadings, and for judgment on the plaintiffs' claim, other than the quantification of damages, including aggravated and punitive damages and special costs. The basis for the application is what is said to be the defendants' persistent and repeated obstruction of the court's process, most significantly, by failing to attend when required and to provide oral and documentary discovery, contrary to the Rules and several orders previously made in this matter.
- [2] The defendants oppose the application. They say that whatever failure there has been on the part of the defendants does not justify the draconian relief sought by the plaintiffs. Instead, they urge me to adjourn the hearing of this application (a request I have already refused) or to dismiss the application and either adjourn the trial so that more fulsome discovery can take place for both sides, or to allow it to proceed in the time remaining this week and next, relying if necessary on adverse inferences to remedy any deficiencies in the quality of the discovery that has been provided.
- [3] The defendants have only recently retained their current counsel, who is on a limited retainer to deal with this application in isolation, rather than the merits of the case more broadly. The interests of justice can best be served, he argues, if he can be given time to regularise his retainer and prepare his clients' case for a more balanced trial on the merits.
- [4] The application was heard on the first day of this nine-day trial, with submissions spilling over to the second day, where we are now. The parties previously appeared prior to the commencement of the trial before Justice Matthews on August 12, 2022. At that time, the defendant Mr. Kapelus, a former lawyer, appeared in person on his own behalf and on behalf of the other defendants, who are his wife and a company of which they are the principals. On that occasion, Matthews J. adjourned the application and ordered that it be heard on the first day of the trial. Although the content of her order is disputed, I am satisfied that she made both the trial date and the hearing of the application yesterday

peremptory on the defendants. She also ordered Mr. Kapelus to produce a list of documents by August 15, 2022 and attend for an examination for discovery on August 17, 2022.

- [5] Those orders were made necessary because Mr. Kapelus had failed to produce documents as previously ordered and failed to attend for his examination for discovery on two earlier occasions, June 17, 2022 and July 4, 2022, although the appointments setting those examinations had been duly delivered to his home, which is the defendants' address for delivery. Mr. Kapelus has repeatedly taken the position, now acknowledged by his counsel to have been unfounded, that he was not required to attend for his examination for discovery at those times because he had not been personally served. Indeed, the defendants have repeatedly ignored correspondence and legal notices on the basis that they were left at the door of their home rather than personally served on them, thereby requiring the plaintiffs to procure affidavits of delivery for all communications.
- [6] The parties do agree on the legal test that must be applied on an application of this kind. That is to be found in the decision of the Court of Appeal in *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322. There, Dickson J.A., writing for the Court, after citing *R. 22-7*, stated as follows:
- [103] An order dismissing a claim or striking out a response to civil claim is a draconian remedy, described by this Court as "a blunt tool, to be used sparingly": *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28. Nevertheless, in the most egregious of cases, such an order may be justified. In *Rise & Shine Grocery & Gas Ltd. v. Novak*, 2016 BCCA 483, this Court upheld an order dismissing the plaintiff's claim in a negligence action based on its multiple flagrant and unexcused breaches of the Rules and court orders. In explaining why, Justice Goepel quoted from *Breberin*, in which Justice Willcock, then of the Supreme Court of British Columbia, summarized the principles that apply:
- [35] In *Breberin v. Santos*, 2013 BCSC 560 Willcock J. (as he then was) summarized the jurisprudence dealing with dismissal applications pursuant to Rule 22-7:
- [52] Several principles identified in the jurisprudence describe and limit the appropriate application of Rule 22-7.
- [53] The order sought by the defendants is not readily granted. Dismissal is a "blunt tool, to be used sparingly" in response to procedural delay: *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28 [*House of Sga'nisim*]. The remedy is a "draconian" one, "only to be invoked in the most egregious of cases": *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. It is to be avoided where it is reasonable to do so: *House of Sga'nisim* at para. 30.
- [54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [*Balaj*]; *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521 at para. 15.

- [55] In this context, a "lawful excuse" is "one which, in the discretion of the judge acting judicially, is worthy of acceptance": *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 1252 at para. 24.
- [56] Because an action may be struck when the lack of production has been occasioned by negligence, the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.
- [57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.
- [58] A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action.
- [59] A dismissal order will not usually be granted until the plaintiff has been warned that result will follow upon further delay or obstruction.
- [60] Lesser sanctions ought to be considered where any are available and appropriate.
- [61] A self-represented litigant cannot be held to the same standards as a professional lawyer in terms of compliance with court procedures and rules. That said, a litigant who chooses to represent him- or herself cannot ignore his or her responsibilities with impunity.
- [62] A persistent pattern of delay on the part of the plaintiff, as well as a persistent failure to comply with the Rules of Court and court orders, may result in a dismissal order. Defaults must be seen in context. The plaintiff's conduct of the claim from its inception does have a bearing on the seriousness of the default before the court.
- [63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.
- [64] Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: *Balaj; House of Sga'nisim; Dhillon v. Pannu*, 2008 BCCA 514; *Kemp v. Dickson*, 2006 BCSC 288.
- [104] In *Breberin*, Justice Willcock acknowledged the importance of securing a merits-based determination wherever possible. However, he stated, where a party has frustrated the proper conduct of litigation, at some point a just and efficient outcome on the merits of a claim may be unattainable:
- [65] The desire to address claims on their merits is the preeminent objective of the courts. The Rules are written with a view toward achieving that objective in a just and efficient manner. At some point non-compliance with the Rules frustrates the pursuit of a just outcome. Even in cases where a defendant has admitted liability to a plaintiff, it is just to dismiss the plaintiff's claim if it is not being diligently and fairly pursued. The civil justice system is

founded upon the assumption that parties will respect court orders, will comply with the Rules and will work together to resolve the claim or bring it to trial for resolution. A just and efficient outcome will not be obtained if one party frustrates its operation.

- [105] The ultimate question on a Rule 22-7(5) application is whether the order sought serves the interests of justice. The order granted must be proportionate and the court must consider whether a lesser remedy will cure the default(s) and inspire confidence in future compliance: *House of Sga'nisim* at para. 26; *Schwarzinger v. Bramwell*, 2011 BCSC 304 at paras. 107, 118, 123. In assessing the overall interests of justice, the court must also consider and weigh the relative prejudice caused to the parties if an order dismissing a claim or striking a response to civil claim is granted or denied: *Canreal Management Corporation v. Mercedes-Benz Canada Inc.*, 2010 BCSC 642 at para. 35.
- [106] As to lesser possible remedies, the court has a broad discretion under Rule 22-7(2)(e) to impose orders that further the object of the Rules in response to non-compliant conduct. One such order may be an award of special costs, which are available to censure and deter reprehensible conduct in the course of litigation: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57.
- [7] I will briefly canvass the history of the litigation so that the question before me can be placed in context.
- [8] The plaintiffs commenced this action on June 27, 2019. At the same time, they caused a certificate of pending litigation to be placed on title to a piece of real property owned by the personal defendants.
- [9] As subsequently amended on April 26, 2021, the notice of civil claim alleges that the plaintiff Mr. Milly sold a property at 2305 Cypress Street in Vancouver. The property was subject to a mortgage and two lines of credit, all held by Toronto-Dominion Bank ("TD"). When Mr. Milly sold the property, the TD generated payout statement, due to TD's error, did not include provision for one of the lines of credit and it was never paid from the proceeds of sale. When TD subsequently discovered its error after the transaction closed, it demanded payment from Mr. Milly. Mr. Milly sought advice on the matter from Mr. Kapelus, whom, it appears, he considered as a kind of father figure.
- [10] Mr. Kapelus advised him to refuse the bank's demand and instead place the money in the hands of one of Mr. Kapelus' companies, the defendant Janalex Investments Ltd. ("Janalex"), to insulate it from TD's collection efforts, which is what Mr. Milly did. He transferred approximately \$480,000 into his company, the plaintiff Prop A Lot Rental & Design Inc., which in turn transferred those funds to Janalex, a company controlled by the personal defendants, Mr. and Ms. Kapelus. The plaintiffs allege that Janalex subsequently released the funds, in breach of trust, to the personal defendants, Mr. Kapelus and his wife, who then used them for their own purposes.

- [11] TD obtained a judgment against Mr. Milly and he eventually realised that he had no defence to the claim. He asked for his money back from Janalex but the defendants refused to return it.
- [12] The defendants say, and plead in response to the claim, that the money was given to Janalex in pursuit of an alleged joint venture that involved the purchase of artwork. Mr. Milly acknowledges having given Mr. Kapelus permission to use a small part of the funds to purchase two works of art, but otherwise the plaintiffs deny the defendants' allegation as to the existence of the alleged joint venture. In a subsequently filed affidavit, Mr. Kapelus has deposed that the funds were invested in a loan for a five-year term and were unavailable until it expired. Not only has that five-year period long since expired with no return of the funds, the defendants have produced virtually no documents to substantiate their assertions in that regard, which brings us to the application before the court today.
- [13] The corporate defendant, Janalex, filed a counterclaim on February 6, 2020 alleging breach by the plaintiffs of an alleged agreement as to confidentiality in relation to the alleged joint venture. Unbeknownst to the plaintiffs until the first day of the trial that was supposed to have begun yesterday, because they were never served with it, the defendants filed an amended counterclaim on February 11, 2022 adding the personal defendants as plaintiffs by way of counterclaim and purporting to claim an interest in real property owned by Mr. Milly in Victoria. On the strength of that claim, the defendants caused a certificate of pending litigation to be filed on title to that property later in February 2022.
- [14] When the plaintiffs first commenced the action, they obtained an order without notice from Master Vos to serve the defendants substitutionally by leaving documents at the front door of their home. That step was made necessary because the defendants were evading service by refusing to accept documents at the door. Mr. and Ms. Kapelus filed an appeal from that order but appear not to have proceeded with it.
- [15] The parties were before Justice Giaschi on October 23, 2019. At that time, he ordered Mr. and Ms. Kapelus to prepare and serve a list of documents. He awarded costs of the application to the plaintiffs in the cause.
- [16] On January 16, 2020, the parties were before Justice Groves on a number of matters. First, there was the defendants' applications for summary judgment and to cancel the plaintiffs' certificate of pending litigation. The applications were refused, with costs payable to the plaintiffs in any event of the cause. Ms. Kapelus was given leave to reapply if she was able to show that the funds she used to make a payment to the University of British Columbia had come from a source other than the plaintiffs. She was never able to do so.
- [17] At the same hearing before Groves J., the court also heard the plaintiffs' application for further and better particulars of Mr. Kapelus' pleaded allegation as to the formation of a joint venture agreement between the parties. The plaintiffs also sought production of documents from the defendants' banker, CIBC. Justice Groves ordered the particulars to be provided. He also ordered the corporate bank account of Janalex to be produced by CIBC.

The personal defendants were ordered to produce their home equity line of credit account documents, but to counsel only. Justice Groves adjourned generally the plaintiffs' application for production of the Kapelus' other personal banking records at CIBC. The costs of the application were awarded to the plaintiffs in the cause.

- [18] Over a year later, on March 30, 2021, on further application by the plaintiffs directed at CIBC and the defendants, Justice MacDonald ordered CIBC to produce the personal defendants' personal banking account documents as well.
- [19] Next, Ms. Kapelus applied to stay MacDonald J.'s order. That application was heard by Justice Ross on May 11, 2021. After refusing the defendants' associated recusal application, he refused the application on the merits, referring at para. 18 to a "trail of applications in this case", which in his view made it "evident that the defendants have put up roadblocks wherever possible to try and prevent Mr. Milly from obtaining the evidence he needs in order to prosecute his case ". Accordingly, he awarded the plaintiffs' special costs in any event of the cause. The defendants' attempt to appeal that decision was unsuccessful.
- [20] Ms. Kapelus also renewed her application seeking summary judgment, cancelling the certificate of pending litigation and varying Grove J.'s order of January 16, 2020. On June 23, 2022, Justice Skolrood dismissed the application and awarded the plaintiffs costs in the amount of \$1,000 payable forthwith and in any event of the cause.
- [21] The parties came before Matthews J. on August 12, 2022 just over two weeks before trial. I have already described what I understand to have occurred on that date.
- [22] A significant part of the basis for the plaintiffs' application, as it was argued over the last two days, arises from Mr. Kapelus' responses, or more accurately, his refusal to respond, when, on August 17, 2022 he was examined for discovery as ordered by Matthews J., and the limited nature of the documents that he has produced in response to Matthews J.'s order.
- [23] According to the plaintiffs, that conduct is just the latest chapter in a long history of obstruction that has earned the defendants the rebuke of this court, including special costs and costs payable forthwith and in any event of the cause, only part of which have been paid to date.
- [24] The defendants respond that they have never been given their first chance spoken of in the authorities I have just cited, with the severity of the consequences for non-compliance having been adequately brought home to them.
- [25] The defendants' counsel candidly acknowledges that Mr. Kapelus' refusal to answer the central questions put to him on his examination for discovery was not justifiable. However, he submits that with the benefit of legal advice (advice he has now provided), Mr. Kapelus will be more forthcoming. He also argues that Mr. Kapelus' conduct must be considered in the context of the objections with which he himself was faced when, on November 15, 2019, again acting in person for the defendants, he examined the plaintiffs' representative, Mr. Milly. At that time, it was the plaintiffs' prior counsel (not their counsel today) who raised

objections to several of the questions posed, objections that are said to be similar to those which Mr. Kapelus raised when examined himself. The defendants also point to the latest list of documents produced by the plaintiffs only on the eve of trial.

- [26] Having considered the parties' submissions and the evidence that has been adduced on this application, I am satisfied that this is one of those egregious cases contemplated by the authorities in which the draconian order sought by the plaintiffs ought to be granted.
- [27] In particular, I have not been given a satisfactory explanation for the defendants' repeated efforts to delay and hinder the court's process. What has occurred, on numerous occasions now, is a serious default in their obligations as litigants to the court.
- [28] Contrary to the defendants' submission, this is not the first time that the matter has come before the court with the prospect of having their pleadings struck on the table, because it is not the first hearing of this application. When the matter first came on for hearing before Matthews J. earlier this month, she gave the defendants the opportunity to cure their default in failing to provide adequate discovery by ordering that discovery to occur. What happened was not a genuine effort to provide the discovery the defendants were ordered to provide, but rather further efforts to obstruct the process. That conduct occurred in the face of the knowledge that further delay or obstruction of the process might well lead to the striking of the defendants' pleadings when the application came on again for hearing on the first day of the trial.
- [29] I am not persuaded that Mr. Kapelus' conduct at his examination for discovery can be excused on the basis that he acted no differently than the plaintiffs' former counsel in raising the objections he did at Mr. Milly's examination for discovery. Although I accept that there was some similarity to some of the objections raised (such as a groundless objection to questions about a previously sworn affidavit of the witness), I am satisfied that overall, the objections raised by Mr. Kapelus were comprehensive in shutting down meaningful discovery of any kind. The objections made on behalf of the plaintiffs were also of a different nature and made in a different context (for example, in response to Mr. Kapelus' suggestion that Mr. Milly should have brought documents with him to the examination). In summary, they do not excuse Mr. Kapelus' refusal to do what Matthews J. had ordered him to do.
- [30] I also agree with the plaintiffs that no lesser sanction than the one sought by the plaintiffs today can suffice to remedy the dilatory and obstructive conduct that has occurred. The fact of the matter is that we are now at the commencement of a trial in which one side has not produced the documents essential to an adjudication of the central matter in dispute. That dispute concerns, at its core, two fundamental questions: one, the nature of the arrangement under which the plaintiffs provided the defendant Janalex with the funds in issue; and two, what became of those funds thereafter.

- [31] Both are matters either primarily or exclusively within the knowledge of the defendants, which makes the discovery defaults by the defendants different in nature than any failures of that kind by the plaintiffs. The plaintiffs are still essentially in the dark about the evidentiary basis for the joint venture claim, and more importantly, the ultimate fate of the funds that the plaintiffs entrusted to the defendants, whether for the purpose of hindering the TD claim, as the plaintiffs contend, or in furtherance of the alleged joint venture, as the defendants claim. Either way, the defendants were required to account for the funds they received and they have not done so. Rather, they have responded to the claim with contradictory and nonsensical accounts of what occurred and then refused to substantiate their assertions with the evidence to support them, when called upon to do so. The result of their conduct has, in Justice Willcock's words, frustrated the pursuit of a just outcome in this case.
- [32] It follows that the plaintiffs' application to strike the defendants' pleadings should be allowed and I am so ordering.

"Milman J."

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Prepared on 25 October 2026 · Esheria