

CANADA / JUDGMENT

Mufford v. Lilley

2020 BCSC 1159

COURT

Supreme Court of British Columbia

DECIDED

7 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1159 Mufford v. Lilley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mufford v. Lilley,

2020 BCSC 1159

Date: 20200807

Docket: S16652

Registry: Quesnel

Between:

Leslie Diane Mufford

Plaintiff

And

Lorne Louis Lilley and Lorne Louis Lilley c/o E & L Bulldog Construction and

E & L Bulldog Construction

Defendants

- and -

Docket: S16235

Registry: Quesnel

Between:

Lorne Louis Lilley doing business as E & L Bulldog Construction

Plaintiff

And

Leslie Diane Mufford and

The Mutual Fire Insurance Company of British Columbia

Defendants

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

K. Thomson

Counsel for the Defendants:

M. Danielson

Place and Date of Trial/Hearing:

Prince George, B.C.

July 20, 2020

Place and Date of Judgment:

Quesnel, B.C.

August 7, 2020

Introduction

- [1] In their application filed November 1, 2019 the defendants seen an order, pursuant to R. 22-7 of the Supreme Court Civil Rules, striking the plaintiff's Notice of Civil Claim filed October 16, 2015.
- [2] The basis of the defendants' application is an alleged failure on the part of the plaintiff to produce an amended list of documents, despite repeated demands made in 2017 and 2019, and the plaintiff's failure to comply with an order, made by Master Vos on September 16, 2019, to produce the amended list of documents within 14 days.

Background

The Underlying Claim

- [3] The plaintiff Leslie Mufford is the owner of a home in Quesnel, British Columbia.

- [4] In March 2015, Ms. Mufford entered into a contract with the defendant Lorne Lilley, doing business as E & L Bulldog Construction, to complete and insurance rebuild of her Quesnel home and garage after they were destroyed by fire in December 2014.
- [5] During reconstruction of the home and garage a dispute arose between the parties regarding payment of "extras" and the construction contract was terminated and the reconstruction work started by the defendants left incomplete. Ms. Mufford then proceeded to have the work completed by a different contractor, with the total rebuild costs being significantly higher than expected.

Defendants' Demands for an Amended List of Documents:

- [6] Ms. Mufford produced her second list of documents on December 15, 2015. She has not produced an updated list of documents since that date.
- [7] In December 2016, the defendants requested that Ms. Mufford provide an updated list of documents. The next year, after the defendant Mr. Lilley was examined for discovery in March 2017, the defendants made further requests for an updated list, including unlisted documents which were put to documents that were put to Mr. Lilley during his March 2017 discovery.
- [8] May 10, 2017 Ms. Mufford's counsel Mr. Thomson responded, advising that his assistant was reviewing his client's document file and a new list of documents would be produced "shortly".
- [9] When an amended list of documents was not produced the defendants made a further written demand for an amended list on September 18, 2017.
- [10] On February 16, 2018, Mr. Thomson wrote to counsel for the defendants and advised, inter alia, that he had received a quotation to complete the reconstruction of Ms. Mufford's home for \$218,000 and would be providing an amended list of documents "shortly".
- [11] The defendants made further written demands for an amended list on May 7, June 3, June 7, and July 3 of 2019.
- [12] On July 18, 2019, the defendants filed an application seeking an order that Ms. Mufford provide an amended list of documents and an affidavit of verifying such amended list. This application was returnable in August 2019 but was adjourned, at the request of counsel for Ms. Mufford, to September 16, 2019.
- [13] Despite the request for an adjournment, Ms. Mufford did not file a response to the defendants' application for production of documents and did not appear at the hearing on September 16, 2019. By order dated September 18, 2019, Master Vos ordered that Ms. Mufford prepare and serve and Amended List of Documents within 14 days.

First Application to Strike

- [14] On October 1, 2019, the defendants' counsel wrote to counsel for Ms. Mufford advising that if the Amended List of Documents was not produced by October 7, 2019, they would apply to strike Ms. Mufford's claim.
- [15] The defendants filed the present application on strike Ms. Mufford's claim and dismiss the proceeding on November 1, 2019 and the application was originally set to be heard before Madam Justice Fitzpatrick in Prince George on December 2, 2019. At the hearing on December 2nd, Mr. Norman appeared as agent for counsel of record for the defendants, as did Mr. Thomson, counsel for Ms. Mufford. Ms. Mufford had not at this time filed a response to the defendants' strike out application.
- [16] A transcript of the hearing shows that Mr. Thomson advised Fitzpatrick J. that the application to strike was served by email and that he had not agreed to accept service in that manner. He advised Fitzpatrick J. that he became aware of the defendants' application to strike by "happenstance" when reviewing emails the week before.
- [17] Fitzpatrick J. adjourned the defendants' application on the basis that service was not properly made on Ms. Mufford. Later that day, at the request of Mr. Norman, the matter was recalled. Mr. Norman advised the Court that he had communicated with the defendants' counsel of record and had confirmed that Mr. Thomson had filed a notice of change of address in September 2018, which in fact showed his mailing address and email address as the address for service on Ms. Mufford.
- [18] Mr. Thomson was not present for the subsequent appearance before Fitzpatrick J. Despite her concerns that Mr. Thomson may have misrepresented service requirements to the Court, because he was not present, Fitzpatrick J. maintained her earlier ruling adjourning Mr. Lilley's strike-out application to a later date.
- [19] The defendants' strike-out application was then re-set for March and then adjourned as the Court was not hearing non-urgent applications at that time as a result of the COVID-19 crisis. The application was again re-set to July 6, 2020, but was again adjourned to July 20, 2020 at the request of Mr. Thomson, on the basis that he needed more time to prepare a response because he had recently been ill and was working on other matters.

Rule 22-7 - Effect of Non-compliance

- [20] Rules 22-7(2) and (5) provides this Court with discretion to set aside or dismiss a proceeding where a plaintiff refuses to, under sub-rule (2), comply with the Supreme Court Civil Rules, or under sub-rule (5), refuses, without lawful excuse, to comply with their discovery obligations under the Rules.

- [21] Rule 22-7(2) is a broad remedy which is typically only applied to dismiss a proceeding after the non-compliant party is given a second chance at compliance and some reasonable explanation for their non-compliance must be provided: *Schwarzinger v. Bramwell*, 2011 BCSC 304 at paras. 109, 113 and 135 [Schwarzinger].
- [22] Rule 22-7(5) is concerned with the non-compliance with the rules in the context of the discovery process. A party applying under this rule must only show that the non-complying party has acted without lawful excuse: *Stovicek Estate v. Napier International Technologies Inc.*, 1996 CarswellBC 1529 (S.C. [In Chambers]).
- [23] Rule 22-7(6) provides this Court with the discretion to dismiss a proceeding if a person, without lawful excuse, refuses or neglects to comply with a direction of the Court.
- [24] In *Breberin v. Santos*, 2013 BCSC 560, Mr. Justice Wilcock, as he then was, outlined several principles identified in the jurisprudence describing and limiting the application of R. 22-7. Relevant portions of Wilcock J.'s reasons are as follows:
- [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.

- [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.
- [25] Where there is an order to amend a list of documents the seriousness of a party's non-compliance with such an order ranges from intention and complete disregard of the order to inadvertent but inadequate performance and different consequences may apply: *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164, at para. 36.

Issues

- [26] There is no question that Ms. Mufford failed to comply with the R. 7-1(12) by failing to provide an amended list of documents or advising why an amended list was not being prepared after the required demand was made on several occasions in 2017 and 2019.
- [27] In addition, there is no question that Ms. Mufford failed to comply with the order of Master Vos pronounced on September 16, 2019 to prepare and serve and amended list of documents within 14 days.
- [28] The issue to be decided is whether Ms. Mufford has shown that she has a lawful excuse for not complying with the discovery requirements of R. 7-1(12) and the order of Master Vos.
- [29] As well, consideration must be given to the question of whether, under the principle of proportionality, it is appropriate to dismiss Ms. Mufford's proceeding: *Schwarzinger*, at paras. 118-121.

The Position of the Parties

- [30] The defendants contends that Ms. Mufford's action should be dismissed for the following reasons:
- a) She is represented by counsel and has been throughout this action;
 - b) She has failed to produce an amended list of documents, despite numerous demands, dating back almost three years;
 - c) She has failed to comply with the order of Master Vos flagrantly and without explanation; and
 - d) She was warned, by letter dated October 1, 2019, that the defendants would seek an order dismissing her claim if an amended list of documents was not produced.

- [31] The defendants also submit that the extent of non-disclosure has been significant. They say that a number of documents put to Mr. Lilley during his examination for discovery in 2015 have not been listed by. In addition, they say that Ms. Mufford has not listed any communication with contractors hired to complete the replacement of her home or garage or any invoices relevant to the cost of doing so.
- [32] The defendants submit that Ms. Mufford's failure to disclose documents has resulted in prejudicial delay including loss of the February 2020 trial dates.
- [33] Finally, the defendants submit that in response to this application, Ms. Mufford has not provided any evidence setting out what efforts she will make in order to be brought back into compliance with her discovery obligations.
- [34] Ms. Mufford says that no steps were taken by any party to proceed with the action between January 8, 2018 and July 11, 2019. As a result, she contends that since the defendants did not file a Notice of Intention to Proceed pursuant to R. 22-4 that they are not entitled to bring this application.
- [35] At the hearing of this application Mr. Thomson submitted that it is in the interests of justice that Ms. Mufford's claim proceed. He says that his client is a pro-bono client, on a fixed income and her claim is in respect of increased construction costs of approximately \$120,000 more than the contract price agreed to with the defendants.
- [36] Mr. Thomson submitted that there was no deliberate effort not to produce an amended list of documents. No evidence explaining why the amended list of documents was not produced has been provided by Ms. Mufford.
- [37] Mr. Thomson submitted that the failure to produce an amended list of documents after issuance of the September 2019 order of Master Vos results from improper service of the order by email. Mr. Thomson said that he did not regularly review emails and therefore did not become aware of the impending application on September 16th or that the September 18th order had been granted until just before the hearing of the defendants' application to strike Ms. Mufford's claim on December 2, 2019. He says that he still does not have a copy of the order of Master Vos.

Analysis and Reasons

- [38] For the reasons set out below I find that Ms. Mufford has not demonstrated a lawful excuse for failing to comply with the discovery requirements of R. 7-1(12) and the order of Master Vos.
- [39] Throughout this proceeding Ms. Mufford has been represented by counsel - Mr. Thomson. The evidence before me establishes that Mr. Thomson was aware of the defendants repeated demands for production of an amended list of documents, made in 2017 and 2019.

- [40] Mr. Thomson promised to provide an amended list of documents in 2017 and 2018 "shortly" but failed to do so. No explanation has been provided for this failure.
- [41] With respect to Mr. Thomson's submissions that he never received a copy of the defendants' application materials prior to the hearing the application for an amended list of documents on September 16, 2019 and did not receive a copy of the order of Master Vos dated September 18, 2019 because these materials were delivered to his email address, and he never agreed to accept service by email, I simply do not believe Mr. Thomson.
- [42] Mr. Thomson agreed to accept service by email when he filed and served a Notice of Address for Service on September 4, 2018, which included his email address.
- [43] Further, the evidence establishes that Mr. Thomson was aware of the impending application for production of an amended list of documents well in advance of the hearing. After receiving correspondence from counsel for the defendants on September 6, 2019, asking when they would receive Mr. Thomson's reply materials, he stated in an email to counsel for the defendants dated September 9, 2019 "[u]nfortunately your application was lost in a stack of materials that I had to deal with on my return. I will review your application materials and try to file a response in the next day."
- [44] It was Mr. Thomson who requested that the application be rescheduled to September 16, 2019. He simply did not appear.
- [45] With respect to Mr. Thomson's submission that he was not aware of the defendants' intention to bring an application to strike Ms. Mufford's claim if an amended list was not produced I do not believe him. Mr. Thomson had been warned that the defendants would so apply in October 2019.
- [46] In addition, I am satisfied that the defendants' strike-out application materials were appropriately served by email. Clearly Mr. Thomson was aware of the application as he appeared on December 2, 2019 to seek an adjournment. Mr. Thomson's submission to Fitzpatrick J. on that day, that he had not agreed to accept service of materials from the defendants by email, was not true.
- [47] In conclusion, Ms. Mufford has not provided any evidence or submission explaining her failure to produce an amended list of documents, despite repeated demands, prior to the September 2019 order of Master Vos. In addition she has not provided any evidence or submission explaining why she did not do so after she became aware of Master Vos' order that she produce an amended list, which I find must have been, at the latest, shortly before to December 2, 2019.
- [48] In total, Ms. Mufford's delay in producing an amended list of documents is approximately three and one-half years, for which no lawful excuse has been provided.
- [49] With respect to Ms. Mufford's contention that the application of R. 22-4 prevents the defendants from bringing this application, I do not accept this argument.

- [50] Rule 22-4 provides that a party must not proceed with any steps in a litigation if no steps have been taken for one year before serving and filing a notice of intention to proceed and the required 28 days notice period has elapsed.
- [51] Ms. Mufford contends that the last "step" taken in this proceeding was the filing of an application by the defendants on January 8, 2018, to have this action heard with the parallel action commenced by the defendants, as plaintiffs (Action No. QL S12635) and the next "step" was filing of a Notice of Trial by the defendants in this action on July 11, 2019.
- [52] I note that the alleged failure to comply with R. 22-4 was not raised as a defence to the defendants' September 16, 2019 application for production of an amended list of documents and was not raised when Mr. Thomson appeared before Fitzpatrick J. on December 2, 2019 to seek an adjournment of the defendants' application to dismiss Ms. Mufford's claim. Ms. Mufford raises this highly technical argument now - in response to the defendants' application to dismiss her claim.
- [53] I have reviewed the court file in this matter. Between January 8, 2018 and July 11, 2019 the following steps were taken:
- a) On March 26, 2018, Mr. Thomson, in response to the defendants' application to have the two parallel actions heard together, wrote to counsel for the defendants consenting to have this action heard at the same time as the parallel action commenced by the defendants;
 - b) In April and May of 2018, the defendants provided a consent order to Ms. Mufford for the actions to be heard together and the order was eventually signed and entered on January 17, 2019; and
 - c) On September 4, 2018, Mr. Thomson counsel filed and served a Notice of Address.
- [54] In my view, the steps in March, April and May 2018 leading to the entry of a Consent Order that both actions be heard together, likely constitute a step in the proceeding.
- [55] IAt a minimum the filing and service of a Notice of Address by Ms. Mufford constitutes a step, expressly permitted or required by R. 4-1(3), and therefore constitutes a step under R. 22-4(4). According, the filing of a Notice of Intention to Proceed was not required.
- [56] Given that dismissal of Ms. Mufford's proceeding is a draconian remedy. I now turn to the question of proportionality.
- [57] I conclude that Ms. Mufford's failure to produce an amended list of documents constitutes intentional, flagrant disregard for the Rules of Court and the order of Master Vos and is deserving of sanction.
- [58] I accept the defendants' submissions that significant disclosure has been outstanding for over three years. Ms. Mufford has not provided any satisfactory evidence that the requested documents do not exist - which if provided might have somewhat justified her failure to comply with the Rules and Master Vos' order.

- [59] As a result of this on-going failure the defendant has already lost the February 2020 trial date.
- [60] This is not a situation where Ms. Mufford did not have advance warning that if she failed to comply with the order of Master Vos that the defendants would be applying to dismiss her claim. In this respect she had a second chance to comply and has failed to do so.
- [61] As pointed out by counsel for the defendants, Ms. Mufford has not provided any evidence with respect to how she intends to get back into compliance by preparing and serving an amended list of documents. Accordingly, I am unable to conclude that a lesser penalty, which could for example include an order for special costs against Ms. Mufford, would remedy the situation.
- [62] As a result, I find that it is just in all of the circumstances to dismiss this proceeding.

"Mayer J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/11/2020BCSC1159.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mufford-v-lilley-2020>

Prepared on 24 October 2026 · Esheria