

CANADA / JUDGMENT

North Shore Law LLP v. Cassidy

2020 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

5 November 2020

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2020 BCSC 1658 North Shore Law LLP v. Cassidy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

North Shore Law LLP v. Cassidy,

2020 BCSC 1658

Date: 20201105

Docket: S161571

Registry: Vancouver

Between:

North Shore Law LLP

Plaintiff

And

Sean Bryan Cassidy and

Jennifer Ann Catherine Miles

Defendants

Before: Master Elwood

Reasons for Judgment

Counsel for Plaintiff:

J. Bryant

Counsel for Defendant Jennifer Anne Catherine Miles:

S. Payne

Place and Date of Hearing:

Vancouver, B.C.

August 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2020

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I. INTRODUCTION

- [1] The defendant Jennifer Ann Catherine Miles applies for an order dismissing the action against her for want of prosecution and an order cancelling or temporality removing a certificate of pending litigation.
- [2] The action arises out of a claim by North Shore Law to collect on outstanding legal fees on account with the defendant Sean Bryan Cassidy. Mr. Cassidy and Ms. Miles were spouses. They entered into a separation agreement pursuant to which Mr. Cassidy transferred his interest in the family home to Ms. Miles. North Shore Law alleges Ms. Miles holds Mr. Cassidy's interest in the home in trust for the law firm.
- [3] North Shore Law commenced this action and filed a certificate of pending litigation against title to the home in February 2016. Since then, it has not taken any steps in the action beyond asking Ms. Miles to produce a list of documents.
- [4] For the reasons which follow, I have concluded the action should be dismissed for want of prosecution.

II. BACKGROUND

- [5] Ms. Miles and Mr. Cassidy lived together in a marriage-like relationship for approximately 17 years. They separated in February 2015.
- [6] Ms. Miles and Mr. Cassidy purchased a home in November 2010. The purchase price was approximately \$373,000. Ms. Miles provided the down payment of approximately \$93,000. The couple funded the balance of the purchase price with a loan from a credit union, secured by a mortgage against the property.
- [7] They purchased the home from Ms. Miles' grandmother. Ms. Miles deposes that the purchase price was \$90,000 below market value. She says this discount was a gift to her from her grandmother.
- [8] During the relationship, Mr. Cassidy was involved in a family law case with a former spouse. North Shore Law represented Mr. Cassidy in those proceedings. The case went to trial. Ms. Miles was a witness at the trial.
- [9] At the conclusion of the family law case, Mr. Cassidy was indebted to North Shore law for unpaid legal fees in excess of \$70,000. The fees remained unpaid and accumulated interest.
- [10] In June 2014, North Shore Law and Mr. Cassidy agreed on an amount to be repaid and a payment schedule. North Shore Law prepared a certificate of fees in the total amount of \$85,576.64. Mr. Cassidy made payments on the debt to North Shore Law.
- [11] Mr. Cassidy did not sign the certificate of fees until February 2, 2015. North Shore Law filed the certificate of fees with the court registry on June 16, 2015.
- [12] North Shore Law alleges an agreement with Mr. Cassidy that the law firm would wait to register the certificate of fees against title to the family home of Mr. Cassidy and Ms. Miles so as to allow the couple to refinance their mortgage. Ms. Miles denies knowledge of this agreement.
- [13] Ms. Miles and Mr. Cassidy entered into a separation agreement dated July 18, 2015. Amongst other matters, the separation agreement provided that Mr. Cassidy would transfer his interest in the family home to Ms. Miles, and Ms. Miles would assume responsibility for all of the expenses related to the home, including the mortgage.
- [14] On August 13, 2015, Mr. Cassidy transferred his interest in the family home to Ms. Miles. On August 14, 2015, the credit union cancelled the existing mortgage on the property. The balance outstanding on the mortgage was approximately \$262,000.
- [15] At or about the time it cancelled the existing mortgage, the credit union advanced a new loan to Ms. Miles in the amount of \$712,500, secured by a new mortgage against the home.
- [16] In this action, North Shore Law alleges that Mr. Cassidy breached a contract with the law firm by transferring the home to Ms. Miles, and that Ms. Miles knowingly assisted the breach of contract by registering the home in her name. In the alternative, North Shore Law alleges that the transfer of the home from joint tenancy to sole ownership of Ms. Miles was a

fraudulent conveyance and a fraudulent preference within the meaning of the Fraudulent Conveyance Act and the Fraudulent Preference Act. North Shore Law claims that Ms. Miles holds Mr. Cassidy's interest in the home in trust for the law firm.

- [17] North Shore Law filed the notice of civil claim and the CPL against title to the home on February 17, 2016. Ms. Miles filed a response to the notice of civil claim on March 24, 2016. There have been no examinations for discovery in the action. There is no trial date.

III. ANALYSIS

- [18] The court's authority to dismiss an action for want of prosecution is found in Rule 22-7(7) of the Supreme Court Civil Rules, B.C. Reg 168/2009.
- [19] On an application to dismiss for want of prosecution, the applicant must show that: (a) there has been inordinate delay; (b) the inordinate delay is inexcusable; and (c) the delay has caused, or is likely to cause, serious prejudice to the defendant. The final and decisive question, which encompasses the other three, is whether, on balance, justice requires a dismissal of the action: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 31; *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at paras. 27-28.
- [20] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Wiegert* at para. 32; *Azeri* at para. 8; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 17. The concept is relative; some cases call for more expeditious prosecution than others: *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25. The date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion; the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38; *0690860* at para. 29.
- [21] Once a defendant demonstrates that the delay is inordinate and inexcusable, prejudice is presumed and the onus shifts to the plaintiff to rebut the presumption of prejudice: *Wiegert* at para. 33; *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. Relevant matters include failing memories, unavailable witnesses and the loss or destruction of physical evidence: *Wiegert* at para. 33; *0690860* at para. 27.
- [22] The overarching consideration is whether justice requires dismissal of the action. This analysis is also highly fact-dependent. Relevant matters include the length of and reasons for the delay, the stage of the litigation, the context in which the delay occurred and any role of counsel in causing the delay: *Wiegert* at para. 33; *0690860* at para. 29.

A. Is the Delay Inordinate?

- [23] There has been very little activity in this case since North Shore Law commenced the action on February 17, 2016.
- [24] In April 2016, North Shore Law delivered a list of documents to Ms. Miles and asked at least twice that she provide a list and produce her documents, including a complete copy of the separation agreement and mortgage statements.
- [25] In May 2016, Ms. Miles provided North Shore Law with a copy of the separation agreement and mortgage statements for the period January 1, 2014, to May 9, 2016, but she did not deliver a list of documents.
- [26] In November 2016, North Shore Law communicated with a lawyer representing Ms. Miles about the list of documents. The law firm followed up with the lawyer again in March and April 2017.
- [27] In August 2017, Ms. Miles' lawyer asked North Shore Law to remove the CPL on title, arguing that Mr. Cassidy had no equity in the former family home. After a brief exchange of e-mails, counsel appear to have agreed to disagree on the merits of the claim and ended their discussions.
- [28] A further brief correspondence between North Shore Law and a second lawyer representing Ms. Miles occurred in June 2018.
- [29] There is no evidence North Shore Law did anything further until it was served in July 2020 with the notice of application for an order dismissing the action for want of prosecution. At that time, North Shore Law delivered an appointment to examine Ms. Miles for discovery.
- [30] In the context of Rule 22-7, a "step" means a formal step required or permitted by the Rules, not an exchange of correspondence: *Khan v. Johal et al.*, 2006 BCSC 1547, at para. 12-13; *Scurfield v. Air Canada*, 2017 BCSC 1437, at para. 18(31). Accordingly, the delay in this case should be assessed from the date North Shore Law filed the notice of civil claim.
- [31] North Shore Law argues that the delay of some four and a half years is not inordinate, because the next step in the proceeding was for Ms. Miles to deliver a list of documents, which she failed to do.
- [32] I do not agree. This was the law firm's action to prosecute. Ms. Miles produced the specific documents the law firm requested. If it was necessary to obtain further documents from Ms. Miles in order to proceed, then the law firm had remedies under the Rules. Instead, it simply waited and only took the logical next step of taking out an appointment to examine Ms. Miles for discovery after she brought the application to have the application dismissed for want of prosecution.

- [33] This delay was inordinate in the context of a relatively straightforward claim. There is no good reason why North Shore Law could not have proceeded with its action years ago. It had a copy of the separation agreement. It knew Ms. Miles' position that Ms. Cassidy had no interest in the former family home.
- [34] The delay was also inordinate having regard to the CPL filed against title to Ms. Miles' home. A CPL is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the dispute can be resolved: *Berthin v. Berthin*, 2018 BCCA 57, at para. 32. A CPL carries with it an obligation on the party asserting the interest in land to move with reasonable dispatch to obtain a determination of the validity of the claim.

B. Is the Delay Excusable?

- [35] The only explanation offered by North Shore Law for its delay is that it was trying not to be litigious. North Shore Law says it invited counsel for Ms. Miles to discuss the matter with a view to settlement, twice, and never wanted to prevent Ms. Miles from refinancing her home. The delay, North Shore Law argues, was due to Ms. Miles' refusal to deal with the claim.
- [36] Again, I do not agree. While one can appreciate the law firm's preference to resolve matters through negotiation rather than litigation, its hope that Ms. Miles would simply agree to pay some or all of Mr. Cassidy's debt was, in my view, unfounded in the circumstances. Ms. Miles denied any knowledge or involvement in Mr. Cassidy's agreement with the law firm. She took the position that any interest Mr. Cassidy might have claimed under the Family Law Act was offset by her excluded property and debts she paid on his behalf. Her position was clearly communicated through her lawyer by August 2017 at the latest.
- [37] Given Ms. Miles' position the claim was without merit, North Shore Law's delay in moving the case forward in hopes of a favourable settlement was inexcusable in my view.

C. Has the Delay Caused, or Is It Likely to Cause, Serious Prejudice to the Defendant?

- [38] I find that the inordinate and unexcused delay by North Shore Law has caused Ms. Miles both presumed and actual prejudice the law firm has not rebutted.
- [39] Prejudice to Ms. Miles from the CPL is presumed: *Khan*, at para. 18. There is also evidence of actual prejudice. Ms. Miles is a single mother with four children, ages 12 to 20 years, living at home. The family home is relatively old and in generally poor condition. Over the past four years, Ms. Miles has made repairs to the plumbing and the furnace, and replaced the roof. Additional repairs are needed, she says, to the deck, windows and exterior of the home. Ms. Miles deposes that, due to the CPL, she has been unable to obtain a home equity line of credit to help finance needed repairs.
- [40] Ms. Miles would also like to use the equity in her home to assist her eldest son financially with the cost of training to become a pilot.

- [41] Ms. Miles further deposes that she would like to sell the home and move to a smaller house that requires fewer repairs and less maintenance. She has identified a number of homes within her budget in a neighbourhood she likes.
- [42] It is unlikely Ms. Miles could afford all of the expenses she would like to finance with the equity in her home. Ms. Miles took on significant debt at the time she assumed title to the home. There appears to be little equity remaining at the current assessed value.
- [43] Nonetheless, as a direct result of the CPL, Ms. Miles has been unable to deal freely with the property, as would otherwise be her right as the sole title holder. She deposes that, despite her current high level of debt, she was approved by the lender for additional credit of \$100,000. She may have also been able to refinance on better terms without the CPL on title. She may have also been able to port the existing mortgage to a new property.
- [44] North Shore Law has not rebutted this prejudice. The law firm's offer to lift the CPL temporarily to allow Ms. Miles to refinance the mortgage is insufficient to remedy the prejudice caused by its delay. The law firm's offers to lift the CPL have always been conditional on Ms. Miles' addressing the law firm's claim, which she maintains is without merit.
- [45] Ms. Miles has also been prejudiced by the delay in her ability to defend a case that would largely be based on her oral testimony, possibly in conflict with the testimony of Mr. Cassidy. Prejudice is presumed from the passage of time and the normal loss of a person's ability to recall events clearly or challenge the testimony of another witness: Buuse, at para. 27; Lost Lake Properties Ltd. v. Nanaimo, 2016 BCCA 487, at para. 20.
- [46] In a more general sense, Ms. Miles has been prejudiced by the cloud of serious allegations by North Shore Law that she participated in a fraudulent conveyance or fraudulent preference.

D. The Interests of Justice

- [47] In my view, the balance of justice requires that the action against Ms. Miles be dismissed.
- [48] Ms. Miles was never a client of North Shore Law. She did not receive any services from the law firm. She did not incur any debt to the law firm. She was not party to a contract with the law firm.
- [49] North Shore Law's objective in naming Ms. Cassidy as a defendant was to secure Mr. Cassidy's outstanding legal fees. Ms. Miles never agreed to provide that security. North Shore Law's security rests on unproven allegations Ms. Miles has consistently denied. North Shore Law did not pursue those allegations in any meaningful way, seemingly content to maintain its security against her property indefinitely for a debt she did not incur.

[50] Dismissal for want of prosecution is a dramatic remedy. But this case is one of those cases that requires a dismissal in the interests of justice. Ms. Miles is entitled to get on with her life and to put her relationship with Mr. Cassidy behind her. North Shore Law still has a claim against Mr. Cassidy. The just consequence of its lengthy unexplained delay in prosecuting the claim against Ms. Miles is that it lose the security against Ms. Miles' home.

IV. CONCLUSION

[51] The action against Ms. Miles is dismissed with costs. The CPL is accordingly cancelled.

"Master Elwood"

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