

CANADA / JUDGMENT

Peterson Custom Woodwork Ltd. v. Fu

2022 BCSC 1767

COURT

Supreme Court of British Columbia

DECIDED

11 October 2022

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2022 BCSC 1767 Peterson Custom Woodwork Ltd. v. Fu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peterson Custom Woodwork Ltd. v. Fu,

2022 BCSC 1767

Date: 20221011

Docket: S-201196

Registry: Victoria

Between:

Peterson Custom Woodwork Ltd.

Plaintiff

And:

Linnan Fu

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

R. Lo

Counsel for the Defendant:

R. T. Vangenne

Place and Date of Hearing:

Victoria, B.C.

June 16, 2022

Place and Date of Judgment:

Victoria, B.C.

October 11, 2022

- [1] The plaintiff filed a claim of builders lien in the amount of \$30,000 (the "Lien") against lands owned by the defendant, on March 22, 2019. Just under one year later, on March 17, 2020, the plaintiff filed a notice of civil claim commencing the present action, claiming a declaration of entitlement to the Lien as a charge against and in priority to the defendant's interest in the lands, and claiming personal judgment against the defendant in the Lien amount. The plaintiff registered a certificate of pending litigation (the "CPL") against the lands on April 23, 2020.
- [2] The defendant applies to cancel the claim of Lien and the CPL on two grounds. First, the defendant relies on s. 252(1) of the Land Title Act, R.S.B.C. 1996 c. 250 [LTA], which provides that a registered owner may apply for an order that a CPL be cancelled, if no steps have been taken in the proceeding for a year. Second, the defendant says that the Lien became extinguished due to the CPL not having been registered in the Land Title Office within one year of the Lien having been filed, as required by s. 33 of the Builders Lien Act, S.B.C. 1997, c. 45 [BLA].
- [3] The Court's power to dismiss a claim for want of prosecution is discretionary. The factors to be considered include whether the application respondent has provided an acceptable explanation for the delay; whether despite the presumed prejudice, the applicant has suffered or will suffer prejudice; and, whether the claim has at least a reasonable prospect of succeeding: *S.W. v. J.D.M.*, 2005 BCSC 1626.
- [4] The plaintiff's explanation for the delay is not compelling. He says that he left the matter in the hands of his (now former) solicitor, trusted that his solicitor would take the necessary steps to move the matter along, and was shocked and upset when his solicitor advised him, on May 24, 2022, that the defendant was applying to cancel the Lien and the CPL. The plaintiff relies on affidavits from an associate and a legal assistant in his former solicitor's office, but those affidavits only address the unsuccessful attempt to file the CPL in the court registry in March 2020, as described below. There is no evidence from the plaintiff's solicitor explaining the delay after that point in time. While a party should generally not be prejudiced through the conduct of their counsel (*McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297) that principle does not entirely relieve a party of their responsibility to conduct their litigation with some degree of dispatch. Here, it appears the plaintiff obtained no information from his counsel and made no inquiry as to the litigation's status, for

approximately two years.

- [5] Other factors however weigh in favour of the plaintiff on this issue. The plaintiff's case appears reasonably strong. The defendant is said to reside in China and to have no other assets in British Columbia, and there is evidence that the defendant intends or has intended to transfer title to the lands to his daughter, so that depriving the plaintiff of his lien claim could very well leave him with a dry judgment. There is no evidence of actual prejudice to the defendant, beyond the prejudice that is presumed, and in fact the defendant appears to have been able to pay off a mortgage on the lands just prior to filing the present application. There is also, finally, the factor that the interests of justice generally weigh in favour of determining matters on their merits. For all these reasons, this is not a suitable matter for dismissal under s. 252 of the LTA.
- [6] The defendant's alternative argument is that the Lien was extinguished before it was registered against title to the lands in the Land Title Office. Section 33 of the BLA provides,
- 33(1) If a claim of lien has been filed, an action to enforce the claim of lien must be commenced and, unless the claim of lien has been removed or cancelled under section 23 or 24, a certificate of pending litigation in respect of the action must be registered, not later than one year from the date of its filing, in the land title office or gold commissioner's office in which the claim has been filed.
- (5) Unless an action to enforce a claim of lien is commenced and a certificate of pending litigation is registered within the time provided in this section, the lien is extinguished.
- [7] The Lien was registered on title on March 22, 2019. The plaintiff therefore had until March 22, 2020 to commence an action, file a CPL in the court registry, and register the CPL in the Land Title Office. The plaintiff's evidence is that his solicitor was frustrated in attempts to do so by the Court's suspension of regular court operations as of March 19, 2020, as pronounced in a notice to the profession issued by the Chief Justice on March 18. The aforementioned legal assistant in the offices of the plaintiff's solicitor received the draft form of CPL from the associate lawyer who had carriage of the file on March 18, with instructions to file it with the court registry and register it with the Land Title Office. She deposes that she learned that day of the Court's suspension of operations, and was therefore unable to file it. The associate lawyer was away from their office on a planned absence from March 20 to 23, 2020. On his return he heard from a colleague that the Victoria court registry was still accepting filings in person. He attempted to do so, but found that while the courthouse was open, the registry counters were closed, with the blinds drawn, and a staff member he spoke with declined to accept the CPL.
- [8] Under Ministerial Order No. M086 issued by the Minister of Public Safety and Solicitor General on March 26, 2020 pursuant to the Emergency Program Act, R.S.B.C. 1996, c. 111 [M086], all mandatory limitation periods and mandatory time periods with respect to civil and family proceedings were suspended. M086 did not, however, have retroactive effect.

- [9] On April 8, 2020, the Solicitor General issued Ministerial Order No. M098, repealing Order No. M086, and under which effective April 15, 2020, limitation periods and mandatory time periods continued to be suspended, with the exception of those established under the BLA and Division 5 [Builders Liens and Other Charges] of Part 5 [Property] of the Strata Property Act, S.B.C. 1998, c. 43.
- [10] The CPL was ultimately filed with the court registry on April 15, 2020, and was registered on title on April 23, 2020.
- [11] The defendant says that as M086 did not have retroactive effect, the one-year registration requirement under s. 33 was still in effect as of the anniversary date of filing of the Lien, March 22, 2020. The defendant submits that the Lien must therefore be regarded as having extinguished as of that date, as there is no juristic reason for the CPL not having been registered as required. I do accept, however, that in the unprecedented circumstances under which the Court and the legal profession were operating at the beginning of the COVID pandemic, the failure to file and register the CPL by March 22, 2020 was excusable. This is an appropriate case for application of the legal maxim, *lex non cogit ad impossibilia aut inutilia*--the law does not compel doing impossible or useless things.
- [12] Those circumstances do not, however, explain the ultimate delay in filing and registering the CPL. The plaintiff provides no evidence to explain the circumstances under which the CPL was filed on April 15, 2020, nor to account for the further delay until registration of the CPL on April 23.
- [13] The plaintiff submits that the 20-day gap between the declaration of M086 on March 26, 2020, and its expiry upon M098 becoming effective on April 15, 2020, created a 20-day "grace period", extending the plaintiff's filing deadline for a further 20 days from April 15 to May 5, 2020, and that the CPL was duly registered within that time period. In support of this position the plaintiff relies on *Canada Hanjiang Construction Ltd. v. Lee's Noodle House Ltd.*, 2020 BCSC 1598, *aff'd* 2021 BCSC 219 [Canada Hanjiang], in which it was held that M086 had extended the BLA limitation period by 20 days. That case does not assist the plaintiff. In particular, it does not establish that a 20-day grace period runs from the effective date of M098. In *Canada Hanjiang*, the limitation period would have, but for its suspension, ended on May 7, 2020. When M086 came into effect, that limitation period still had another 42 days to run. The combined effect of M086 and M098, the Court held, was to extend the one-year limitation period by the period of a further 20 days. In other words, the effluxion of time during the suspension period did not count against the one-year limitation. Extending that plaintiff's limitation period by 20 days meant that the limitation period would end not 42 days, but 62 days from the date M086 went into effect: May 27, 2020, rather than May 7.
- [14] In contrast, in the present case the limitation period had in fact expired by the time M086 came into effect. While there is some inconsistency based on the record before me of whether the court registry suspended its operations on March 18 or March 19, 2020, it does however appear to have been the case that at the earliest, as of March 18, 2020, filing and

registration of the CPL had become a practical impossibility. As of that date the limitation period still had another four days to run. Under the most generous application of M086 to the plaintiff's circumstances--that is, giving it some limited retroactive effect in order to achieve its purpose--the running of time over the next four days would not count to the plaintiff's prejudice. Once the suspension period ended on April 15, however, the plaintiff would then have had to file and register the CPL within the next four days, i.e. by April 19, 2020.

- [15] The plaintiff did file the CPL with the court registry during that time period, but did not register it against title until April 23, 2020. Therefore, by operation of s. 33(5) of the BLA, the Lien expired before it was registered.
- [16] The application is therefore granted. The Lien and the CPL are cancelled, and the Registrar of Land Titles at the Victoria Land Title Office shall cause the Lien and the CPL to be wholly cancelled as against the lands upon production of a certified copy of this order.
- [17] The defendant is awarded his costs of this application as costs in the cause.

"A. Saunders, J."

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