

CANADA / JUDGMENT

Promore Developments v. Fogg N' Suds Realty

2005 BCSC 1050

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1050 Promore Developments v. Fogg N'Suds Realty

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Promore Developments v. Fogg N' Suds Realty,

2005 BCSC 1050

Date: 20050712

Docket: 00/4500

Registry: Victoria

Between:

Promore Developments (Nanaimo) Ltd.

Plaintiff

And:

Fogg N' Suds Realty Inc.

Darell Myers,

Michael Reid and Judith Reid

Defendants

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Waldie

Counsel for the Defendant:

D.D. Nugent

Date and Place of Hearing:

20050707

Victoria, B.C.

[1] The plaintiff appeals the decision of a Master on March 9, 2005, dismissing its claim against the defendants Reid for want of prosecution. As the decision of the Master resulted in a final order, the appeal proceeded before me as a re-hearing based on the material that was before the Master. See *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.).

[2] It is settled law in British Columbia that in order for an action to be dismissed for want of prosecution the following criteria must be met:

- (1) There has been inordinate delay;
- (2) The inordinate delay is inexcusable;
- (3) The delay has caused, or is likely to cause, serious prejudice to the applicant.

If this test is met, the court must go on to consider whether or not justice demands that the action should be dismissed. See *Irving v. Irving et al* (1982), 38 B.C.L.R. 318 (C.A.).

[3] It is apparent from the reasons of the Master that he applied the law set out in *Irving* to the circumstances before him. He concluded that the delay caused or was likely to cause serious prejudice. With respect, I am unable to reach the same conclusion. Therefore, the appeal must be allowed and the application to dismiss for want of prosecution denied. My reasons follow.

[4] The claim is for damages arising out of the alleged breach of a lease between the plaintiff, as landlord, and the defendant, Fogg N' Suds Realty Inc., as tenant, of commercial premises. The lease term was for ten years, calculated from August 1, 1997 to July 31, 2007. The defendants Reid guaranteed the obligations of the tenant for the first five years of the lease, that is, only until July 31, 2002. Thereafter, the remaining defendant, Meyers, guaranteed the lease. The crystallization of any claim for damages against the Reids as at July 31, 2002 is an important factor in considering the delay described below and whether it was inexcusable.

[5] Although the Reids originally owned Fogg N' Suds, they sold their interest to Meyers in 1999. By December 1999, the lease fell into arrears.

- [6] A receiver caused the action to be commenced on behalf of the plaintiff in October 2000 against all defendants. The statement of claim limited the claim against the Reids to \$230,771.80, this amount being the rent owing for the period December 1999 to July 2002 less the rent received from a new tenant who took possession in May 2000. By late 2000, the new tenant had defaulted and ceased operations. The plaintiff was unable to secure another paying tenant and eventually sold the property in September 2004.
- [7] The Reids filed a statement of defence in December 2000 in which they raised a number of general defences and one specific defence. They denied the validity of the lease and the validity of the guarantee, denied that the plaintiff had suffered any loss and asserted that the plaintiff had failed to take reasonable steps to mitigate. The specific defence raised was an allegation that the plaintiff "materially misrepresented the calculation of "Additional Rent" in the Lease as compared to the "Additional Rent" terms set forth in the Offer to Lease executed by the Plaintiff on or about July 8, 1996".
- [8] After the statement of defence was filed, nothing of substance transpired in the litigation until September 2004, a period of about three years and nine months. During this time, there was no demand for documents and no attempt to conduct discoveries or even to set the matter down for trial. Simply put, the plaintiff took no steps to move the litigation along in the interim. Nor did the plaintiff seek to secure any agreement from the Reids to await the results of its attempts to mitigate before proceeding further.
- [9] Since September 2004, the plaintiff has endeavoured to continue with the litigation. The receiver retained present counsel to take over the action on behalf of the plaintiff. Counsel filed and delivered to all defendants a Notice of Intention to Proceed along with Notice of Change of Solicitor, but was met with the Reids' successful application to have the claim against them dismissed for want of prosecution.
- [10] The focus before the Master and me was properly on the period from December 2000 to September 2004. While I recognize that the limitation period for the claim against the Reids has still not expired, a factor that may suggest the delay is not inordinate or inexcusable, that is not a complete answer to the question on the facts of this case. In *Rhyolite Resource Inc. v. CanQuest Resource Corp.*, [1999] B.C.J. No. 114 (C.A.), Hall J.A. agreed with statements made by the chambers judge to the effect that the interests of justice require that actions be brought to trial with reasonable diligence and that the longer the delay, particularly where there are disputed issues of fact, the less likely a fair trial. He made it clear, at paras. 9 and 10, that the non-expiry of a limitation period can be a factor but will not necessarily be a complete answer. In his decision, he emphasized the importance of considering the particular facts.

- [11] The only reason offered for the delay in the present case by the Receiver was that he was attempting to re-let the premises. He deposed to signing a sub-lease with a new tenant effective May 1, 2000 for the balance of the term of the original lease but at a lesser rent. By late 2000, the sub-tenant had defaulted and ceased operation. Thereafter, as I have already set out, the Receiver was unable to locate a paying tenant.
- [12] The Receiver offers no direct explanation for not proceeding with the action against the Reids although the obvious inference is that he decided to wait until the plaintiff's claims against all defendants could be quantified exactly. In particular, the Receiver does not explain why the plaintiff did not proceed against the Reids once the damage claim against them was fully crystallized by the end of July 2002, although he deposes that the plaintiff is now prepared to proceed diligently. Considering the relatively simple nature of the claim against the Reids which could have been disposed of reasonably expeditiously, the delay until September 2004 is, in my view, both inordinate and inexcusable.
- [13] In spite of those findings, I am not persuaded, on the whole of the evidence, that the Reids have been seriously prejudiced or are likely to be if the action is permitted to proceed. In this regard, I have considered the nature of the claim and defence as well as the evidence of the Reids respecting prejudice. I accept that the passage of time impacts the ability to remember events, including any oral negotiations that may have preceded the signing of the lease. I take into account, however, that the Reids, as business people, knew of their potential liability under the guarantees throughout and knew of the specific claims against them no later than October 2000. Their allegations of actual prejudice must be considered against that backdrop.
- [14] Essentially, both Mr. and Mrs. Reid swore identical affidavits on the question of prejudice. Each deposed that their recollections of events "is not as clear as it once was" and that they no longer have "any accurate accounting records and/or information regarding the matters at issue" including their dealings with the plaintiff and with Fogg N' Suds. They also have had no contact with the co-defendant Meyers since early 1999.
- [15] The Master correctly observed that any alleged prejudice associated with not knowing the whereabouts of Meyers should be discounted. That issue was not pressed before me and it is unnecessary for me to deal with it in detail. I do not infer any prejudice attributable to the lack of contact with Meyers.
- [16] As the Master also correctly observed, it is difficult to know exactly what the Reids meant when they deposed that their records are no longer available. There is no evidence, for example, about how accounting records would assist with refreshing memory respecting pre-contractual representations. There is also no evidence as to when the Reids gave up possession of the records or the circumstances in which they did. It may be that they did so as early as 1999 when they turned the business over to Meyers. If that is the case, any prejudice would not be related to the plaintiff's delay. I offer these examples only to demonstrate the inadequacy of the evidence as a basis for establishing actual prejudice.

- [17] At best, any inference of actual prejudice arising on such evidence is very weak. I am not persuaded that the loss of accounting records is a significant prejudicial factor here. In *Tundra Helicopters et al v. Allison Gas Turbine et al*, 2002 BCCA 145, Esson J.A. warned against reliance on weak evidence to support assertions of actual prejudice.
- [18] Esson J.A. also pointed out that it is an error to dispose of the issue of prejudice by asking whether the plaintiff rebutted the presumption of prejudice once inordinate and inexcusable delay is established. The real question is whether, on a balance of probabilities, absence of prejudice has been established on the whole of the evidence.
- [19] I am unable to discern any prejudice here apart from that which one expects as an incident of contested litigation. This includes the fading of memory and the potential loss of relevant documents. Those factors are often present even well before an action is commenced and militate against dismissing an action for want of prosecution before the expiry of the applicable limitation period (*Tundra* at para. 37).
- [20] For these reasons, the appeal must succeed. The defendants' application for a stay of proceedings is accordingly dismissed.

"M.D. Macaulay, J."

The Honourable Mr. Justice M.D. Macaulay

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