

CANADA / JUDGMENT

Swanson v. Hill

2014 BCSC 2001

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2001 Swanson v. Hill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Swanson v. Hill,

2014 BCSC 2001

Date: 20141027

Docket: M045359

Registry: Vancouver

Between:

Roselynn Amy Swanson on her own behalf and on behalf of all persons entitled to benefit from the Estate of Alice Mary Kidd, Deceased

Plaintiffs

And:

Jason Hill and Murray James Christman

Defendants

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment

Counsel for Plaintiffs:

S.G. Cordell

Counsel for Defendant Christman:

L.J. Mackoff

Place and Date of Hearing:

Vancouver, B.C.

September 24, 2014

Place and Date of Judgment:

Vancouver, B.C.

October 27, 2014

Introduction

- [1] These reasons deal with an application to have this action dismissed for want of prosecution pursuant to Rule 22-7(7) of the Supreme Court Civil Rules. The defendant Christman seeks dismissal of the claim for pecuniary damages brought on behalf of the plaintiff Ms. Swanson, deceased; and claims on behalf of persons who would be entitled to take under the Family Compensation Act, R.S.B.C. 1996 c. 126 (the "Act"). The argument of the defendant Christman is that it has been ten years since this action was commenced and there remains a lack of disclosure regarding the identities of the persons for whom relief is sought under the Act. As well, there have been incomplete efforts to gather income loss information related to Ms. Swanson. The defendant submits that there has been an inexcusable and inordinate delay which has caused serious prejudice and in the circumstances justifies the dismissal of the claims.
- [2] In response, it is conceded on behalf of the plaintiff that an inordinate delay has occurred; however, it is submitted that the delay is excusable. In this case the plaintiff, Ms. Swanson, died in 2008 which has caused some difficulties in the proceeding; however, the primary argument advanced is that the solicitors prosecuting the claim are at fault for the delay. It is argued that the failings of these solicitors should not be placed at the feet of their client.
- [3] It is agreed by the opposing parties that the application narrows to this last point; whether the actions or lack of action by the plaintiff's solicitors in the circumstances amounts to a delay which is excusable.
- [4] In the event the defendant's application is denied, then the executor of Ms. Swanson's estate, Mr. Van Weenen (her husband) seeks under Rule 6-2(7)(b) to be substituted as a plaintiff in this action with the attendant amendment to the style of cause. The defence consents to the order should the application come forward.

Applicability of Rule 6-2(5)

- [5] At the start of the hearing, counsel for the plaintiff raised a technical objection to the application. It was submitted that the application had been brought under the wrong rule. Instead of Rule 22-7(7), it was argued that the applicant was required to have proceeded first under Rule 6-2(5). The latter rule reads as follows:

Prosecution of proceeding if plaintiff or petitioner dies

If a plaintiff or petitioner has died and the proceeding may be continued, a defendant or respondent may apply to the court for an order that the person entitled to proceed do proceed within the time that the court orders and that, in default, the proceeding be dismissed for want of prosecution.

- [6] The plaintiff argues that the defendant cannot seek a dismissal for want of prosecution presently because the defendant has not obtained that right under Rule 6-2(5). The plaintiff states that the failure of the defendant to make an application under Rule 6-2(5) precludes the defendant from now asking this Court for a dismissal for want of prosecution under Rule 22-7(7). The defendant disagrees and submits that the rule is not stated to be mandatory as the words "may apply" are used. Counsel for both parties advise they have been unable to locate any authorities discussing the interpretation or application of this rule. There appears to be little to no discussion of similar rules in the English cases or in other Canadian jurisdictions. In some jurisdictions a proceeding cannot continue upon the death of a party without leave of the court. That has not been the case in this province.
- [7] It appears the rule in this Province is a means for a defendant or respondent to prompt action where, for example, a proper representative has not come forward or is unknowledgeable as to the requirement to advance the case. In such a situation, an application to ensure fairness in the process is required. If the person entitled to proceed following the hearing does not do so in accordance with the court's order it is then that the proceedings can then be dismissed. I do not read the rule as an option on the part of the party seeking dismissal to either go by Rule 6-2(5) or Rule 22-7(7) in this type of situation.
- [8] In the instant case, while Ms. Swanson has died, it is clear that the plaintiff's solicitors believed that they were properly retained to advance the case and were being instructed by the right person. They also held themselves out in this way. The delays in this action were not the result of an appropriate representative for Ms. Swanson needing to be ascertained or a representative lacking in knowledge as to how to advance the case. The lack of the substitution of Mr. Van Weenen as representative for the plaintiff was a technical deficiency. This should have been addressed promptly by plaintiff's counsel, but was not. Notice to plaintiff's counsel of the dismissal application was provided close to six months in advance of the hearing. In the circumstances, denying the defendant an opportunity to apply under Rule 22-7(7), on the technical basis raised, would be inappropriate. I note that the inaction of plaintiff's counsel is available on a mitigating factor in a dismissal application under Rule 22-7.

Background

- [9] The action arises from a motor vehicle accident that occurred on December 27, 2002 in Golden, BC. The circumstances of the accident are that the plaintiff, Ms. Swanson, her mother Alice Mary Kidd, and Ms. Swanson's granddaughter were passengers in a car driven by the plaintiff's father. A car travelling in the opposite direction crossed the center line and collided with the car in which the plaintiff was a passenger. Alice Mary Kidd was killed in the crash. The plaintiff was injured. Liability has been admitted by the defendant Christman.
- [10] The plaintiff's case was originally handled by counsel in Alberta, but the file was transferred to the firm of Vertlieb Dosanj in Vancouver. A writ and statement of claim were filed in December 2004. Various lawyers in the firm have represented the plaintiff's claims since the action was commenced and, except for the present application, have remained on the record.
- [11] Independent counsel for the plaintiff in this application is Mr. Cordell.
- [12] The case, it appears, progressed in the usual way. Pleadings were closed in November 2005. Medical information and wage loss documents were sent to ICBC.
- [13] In 2006, clinical records from 15 doctors, clinics, or hospitals treating the plaintiff, documents related to her wage loss, and documents related to claims under the Act were listed and produced. An examination for discovery of Ms. Swanson was carried out and, at the request of the defendant, independent medical examinations were scheduled for 2007.
- [14] In 2007, a trial was scheduled for June 2008, independent medical examinations were conducted, and answers to outstanding requests were given. The defendant sought production of the RCMP records regarding the accident, and brought third party proceedings against Parks Canada. The pleadings in respect to the third party proceedings were not closed until December 2007.
- [15] In 2008 due to illness of the plaintiff's counsel an adjournment of the trial was sought and agreed to. The third party proceedings were dismissed by consent, in April 2008. A notice of mediation was delivered in June 2008 by the defendant's counsel and mediation was scheduled for November of that year. Unfortunately, Ms. Swanson died on July 21, 2008. As a result, the only aspect of her personal claim that remained was her loss of income.
- [16] It is from Ms. Swanson's death that progress in the litigation lost momentum relative to interactions between the plaintiff and the defendant.

Discussion

- [17] The order sought by the defendant is draconian and is not lightly granted. In *PMC Builders & Developers Ltd. v. Country West Construction*, 2009 BCCA 535, Mr. Justice Low, writing for the court, stated that there were four questions that required consideration in an application to dismiss for want of prosecution (at para. 27):

- (1) the length of the delay and whether it was inordinate;
 - (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
 - (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
 - (4) whether, on balance, justice requires dismissal of the action.
- [18] He commented that the fourth question encompassed the other three and was the most important and decisive question.
- [19] Mr. Justice Romilly in *Louie v. John Doe*, 2008 BCSC 651, observed that the test is cumulative, and that an applicant must be successful in achieving an affirmative answer for all of the questions in order to obtain a dismissal of the action. He also observed that a rebuttable factual presumption in support of prejudice arises where an affirmative answer is established for the first two questions.
- [20] In this case the plaintiff has conceded that the delay has been inordinate. However, the remaining questions are in dispute. Opposing counsel advise that the application turns on the answer to whether the inordinate delay is excusable.
- [21] It has been recognized that an inordinate delay may be found to be excusable where counsel, as distinct from their client, has been largely responsible for the delay; see for example *Louie* at para. 40. The applicant submits that this is not the case in the instant. While acknowledging that plaintiff's counsel has played a role in the delay, it is submitted that the client bears the dominant responsibility for the inordinate delay.
- [22] Independent plaintiff's counsel on the other hand argues that the record clearly shows that the inordinate delay was the responsibility of the plaintiff's counsel retained to prosecute the claim.
- [23] For the following reasons, I conclude that the inordinate delay was due to plaintiff's counsel and that this failing should not be held as a detriment to the plaintiff. Further, the prejudice to the defendant and a review of the overall circumstances do not justify a dismissal of the action. In this regard, I note that by 2008 a trial date had been fixed, a notice of trial issued, and a notice to mediate was issued and scheduled by counsel for the defendant.
- [24] As already noted, this action unfolded as would normally be expected. The unfortunate event was Ms. Swanson's death. Her husband, Mr. Van Weenen, was executor of her estate. He identified himself as such to plaintiff's counsel and confirmed his appointment by providing a copy of the Will by November 2008. The materials indicate that in 2009, 2010 and

2011 plaintiff's counsel were contacted repeatedly by Mr. Van Weenen, the plaintiff's daughter Ms. Harrison, and previous Alberta counsel, Mr. Brackett, with respect to the action. Mr. Van Weenen and Ms. Harrison were advised that steps were being taken to gather information and retain an economist. One communication from a member of the firm to the client indicates that Ms. Swanson's claims were being dealt with on a priority basis, which was not the case.

- [25] In January 2011 and early 2012, documents and information were sought by plaintiff's counsel from Mr. Van Weenen or Ms. Harrison, which were promptly provided. Mr. Van Weenen and the plaintiff's family were never advised matters were not proceeding or that there was any risk of an application for dismissal for want of prosecution. In early 2012, defendant's counsel indicated to plaintiff's counsel that such an application might be brought. In May 2013, the defendant sought hearing dates for, and served application seeking dismissal for want of prosecution returnable in October 2013. Mr. Van Weenan and the plaintiff's family were not told of these developments by their counsel until October 2013. The materials indicate that the assigned lawyer in the firm had the misguided belief that settlement would occur. An offer to settle was made on July 30, 2013. It appears the offer was not received by the defendant's counsel. The offer was re-sent in September 2013, at which point defendant's counsel indicated there would be no response and that the application to dismiss would proceed. On October 15, 2013 a notice of intention to proceed was filed by plaintiff's counsel. On October 30, 2013 independent counsel was retained to deal with the dismissal application. Several months were required by independent counsel to review the matter.
- [26] I note in the communications from Mr. Van Weenen with counsel in 2009 that he was "upset" with not being informed as to the status of the case and it not advancing; his concerns were noted by counsel. There is no conduct on his part that reflects intent to gain a tactical advantage by delay or a lack of reasonable action.
- [27] Mr. Vertlieb deposed candidly that based upon his review of the entire file, which he details in his affidavit, "the delay in prosecuting this action rests with Plaintiff's counsel. Despite numerous inquiries from Mr. Van Weenen, from former counsel, and from Ms. Harrison, Plaintiff's counsel failed to take steps to move the action forward, although our firm was indicating to Mr. Van Weenen and Ms. Harrison that we were doing so. In hindsight, it appears this arose from the number of associates involved, and inattention."
- [28] I agree with the above statement.
- [29] Further, in terms of prejudice regarding the claim under the Act, in my view, there is financial information regarding Mrs. Kidd and Ms. Swanson regarding their circumstances. Also, there is one surviving dependant adult child who was cared for by Mrs. Kidd and after her death by Ms. Swanson. That adult child now resides with his brother, Shane Kidd, who can provide evidence in respect to the financial support provided for his brother and the medical requirements. It is noted that the burden is upon the plaintiff and it appears that the

prejudice in the delay here may be realistically more against the plaintiff's case. I am advised that the particulars of the family compensation claim had not been demanded or sought by defendant's counsel prior to Ms. Swanson's death.

Conclusion

- [30] On the basis of the foregoing, the application is denied.
- [31] The parties are directed to schedule and attend a case planning conference to confirm a schedule for the production of outstanding information requirements and raise any other issues required to finalize matters for trial. A trial date should also be set.
- [32] The plaintiff's application for an order to substitute Ms. Swanson as the plaintiff in this action with Mr. Van Weenan, in his capacity as Executor of the Estate of Roselynn Amy Swanson, sought is granted.

"The Honourable Mr. Justice Masuhara"

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