

CANADA / JUDGMENT

Taylor v. Johnson Estate

2023 BCSC 1103

COURT

Supreme Court of British Columbia

DECIDED

27 June 2023

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

2023 BCSC 1103 Taylor v. Johnson Estate

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Johnson Estate,

2023 BCSC 1103

Date: 20230627

Docket: S173730

Registry: Vancouver

Between:

Alan Eric Taylor

Plaintiff

And

Kim Martin Johnson, the administrator with will of estate of Raymond John Johnson, Elizabeth Taylor-Menzie, also known as Carol Elizabeth Hendriks, Patricia Anne Taylor, Jaclyn Magdalena Taylor, Kristi Marie Taylor, Michael Allan Fedell, Jamie-Anne Fedell, Stephanie Louise Hendriks, Troy Marcel Hendriks, Catharina Wilhelmina Hendriks, Bonita Johanna Hendriks and St. Mary's Hospitals

Defendants

Before: Master Robertson

Reasons for Judgment

Counsel for the plaintiff:

J. Sandhu

Counsel for the defendant, Kim Martin ("Rhys") Johnson, in his capacity as executor of the estate of Raymond John Johnson

J. Ginther

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

April 27, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 27, 2023

Table of Contents

Background.. 3

Litigation Chronology. 4

Legal Framework.. 6

Argument. 8

Has There Been an Inordinate Delay?. 8

Is the Delay Inexcusable?. 10

Prejudice of the Parties. 13

Overall Interests of Justice. 14

Conclusion and Orders. 15

[1] This is an application brought in an estate litigation matter involving, among other things, a dispute as to the validity of a will made in 2003, to dismiss the plaintiff's action for want of prosecution and, if granted, ancillary relief to provide for the discharge of a certificate of pending litigation ("CPL") and notice to dispute to pursuant to R. 25-10.

[2] For the reasons that follow, I am dismissing the application.

Background

- [3] This action was commenced by the plaintiff, the son of Francis Louise Tayelor ("Ms. Tayelor"), who died on December 29, 2015, leaving a will dated January 8, 2003 (the "2003 Will") which appointed the plaintiff as executor.
- [4] On the same day that the 2003 Will was executed, Ms. Tayelor entered into a cohabitation agreement (the "Cohabitation Agreement") with the defendant, Raymond John Johnson ("Mr. Johnson"), who she had met in June 2000. Mr. Johnson has now passed away, with his estate (the "Johnson Estate") being a party to these proceedings.
- [5] The Cohabitation Agreement, in general, provides that each party would retain sole ownership of the real and personal property brought into the relationship, as well as any after acquired property save and except that jointly owned, and that the Cohabitation Agreement forms a marriage contract and continues to be binding upon each of them should they marry with each renouncing any right or interest they may have to participate in the estate of the other, unless a specific bequest is made in their wills.
- [6] The plaintiff claims that after the Cohabitation Agreement was signed, Ms. Tayelor gave him a copy of it for safekeeping, writing on the sealed envelope "Eric - please put in a safe place. In case there is a dispute about A4-1865 W. 10. I do not know Ray's sons well or anything else. Copy of agreement between Ray Johnson and Frances Tayelor. NOT TO BE OPENED UNLESS NEEDED".
- [7] At the time of the 2003 Will and the Cohabitation Agreement, Ms. Tayelor was the owner of a strata property in Vancouver, as well as another property in Sechelt. Mr. Johnson owned an apartment in Vancouver. Ms. Tayelor subsequently sold her two properties, and purchased a new home in Surrey ("the "Surrey Property").
- [8] Shortly after its purchase, Ms. Tayelor and Mr. Johnson moved into the Surrey Property together. However, title to the Surrey Property was put into Ms. Tayelor's sole name. The plaintiff alleges that Mr. Johnson put no funds into the acquisition of the Surrey Property.
- [9] On or around March 9, 2009, Ms. Tayelor suffered a stroke and was hospitalized. She was subsequently moved to a care home where she lived until her death in December 2015. On February 16, 2011, Ms. Tayelor and Mr. Johnson were married in a civil ceremony performed at the care home.
- [10] Thus, among other things, at issue in these proceedings is whether the marriage revoked the 2003 Will pursuant to ss. 14(1)(a) and 15 of the Wills Act, R.S.B.C. 1996, c. 489, in effect at the time, such that the estate is to be administered as an intestate estate under the Wills Estate and Succession Act, S.B.C. 2009, c. 13 and, regardless of the validity of the 2003 Will, whether or not the Johnson Estate has any claims to the assets given the terms of the Cohabitation Agreement.

Litigation Chronology

- [11] In December 2016, Mr. Johnson filed and delivered to the plaintiff and his sister, a notice of proposed application for administration without will in respect of Ms. Tayelor's estate. The plaintiff then filed a separate application for probate of the 2003 Will. The plaintiff alleges that before the expiry of the notice period, Mr. Johnson submitted his application for administration for entry, but because of the conflict with the plaintiff's probate application, it was rejected.
- [12] On April 24, 2017, the plaintiff filed these proceedings claiming the 2003 Will and the Cohabitation Agreement to be valid, a CPL against the Surrey Property, probate of the 2003 Will or alternatively administration of Ms. Tayelor's estate, and an accounting of funds alleged to have been taken from Ms. Tayelor's estate by Mr. Johnson under a power of attorney he held.
- [13] On May 23, 2017, Mr. Johnson filed a response and counterclaim. In the counterclaim, Mr. Johnson claims, among other things, that if the 2003 Will is found to be valid, which is disputed, then it has failed to provide proper provision for him, and a declaration that some \$300,000 that was gifted to the plaintiff by Ms. Tayelor, or property purchased with it, is an estate asset.
- [14] On November 2, 2019, Mr. Johnson passed away.
- [15] On July 28, 2021, the plaintiff filed a notice of intention to act in person, followed by a notice of change of solicitor on January 25, 2022.
- [16] On February 2, 2022, a notice of intention to proceed was delivered by the plaintiff's new counsel.
- [17] By letter dated February 8, 2022, the plaintiff requested copies of the documents disclosed on Mr. Johnson's list of documents.
- [18] On March 22, 2022, the Johnson Estate submitted a desk order, without notice, substituting the Johnson Estate as a defendant in place of Mr. Johnson. The order was pronounced March 29, 2022, but given that it was obtained without notice, the plaintiff was not aware that an order had been made amending his notice of civil claim.
- [19] By letter of June 29, 2022 counsel for the plaintiff sent a detailed letter identifying, from his perspective, the main issues for resolution in the various actions, and proposed that:
- the most efficient way to approach this complex estate dispute is to first determine the size and content of Frances Tayelor's estate. Specifically, it would be in the parties' best interests to get a determination from the court on whether the Cohabitation Agreement is valid.
- If you agree, I propose an application in October of November 2022 in which the parties seek the court's determination as to the validity of the Cohabitation Agreement.

- [20] Instead of responding to that letter, the Johnson Estate brought the subject application, which was filed August 29, 2022 and unilaterally returnable September 26, 2022. When it came on for hearing on that day an order was made adjourning it to be set for the next mutually convenient day for a full day hearing, leading to this hearing date.
- [21] Notwithstanding the order to amend being pronounced in March, 2022, the amended notice of civil claim was not filed until November 28, 2022.
- [22] No examinations for discovery have been conducted, nor sought.

Legal Framework

- [23] The application is brought under R. 22-7(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provides that If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.
- [24] The parties do not disagree as to the criteria to apply for such an order, as set in *Irving v. Irving*, 1982 CanLII 475 (B.C.C.A.) and confirmed in *Ed Bulley Ventures Ltd. v. Pantry Hospitality Corp.*, 2014 BCCA 52 at para. 24:
- a) the length of the delay and whether it was inordinate;
 - b) any reasons for the delay either offered in evidence or inferring 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;
 - c) 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
 - d) whether, on balance, justice requires dismissal of the action.
- [25] This test has been confirmed more recently in *Wiegert v. Rogers*, 2019 BCCA 334, at para. 30 ("Wiegert").
- [26] Underlying any application for a dismissal for want of prosecution is the principle that litigation ought to be prosecuted with diligence and expedition, a principle that is now expressed in R. 1-3 by which it is confirmed that the purpose of the rules is to secure the just, speed and inexpressive determination of every proceeding on its merits: *Mydonick v. ICBC*, 2017 BCSC 1897, at para. 31 ("Mydonick").
- [27] The Johnson Estate argues that the delay here is from April 27, 2017, when the notice of civil claim was filed, to August 29, 2022 when this application was filed, or five years and four months. The parties each rely on a different set of authorities in which the court has applied

the above criteria with different results. There are decisions where a delay of over five years has been found to be an inordinate delay. There are cases where it has not. In this respect, a court's determination of an application to dismiss for want of prosecution is, ultimately, factually dependent.

- [28] In considering that, certain cases are generally expected to be prosecuted in a more expeditious manner than others, including those where a CPL has been filed: *Sharma v. Parmar*, 2022 BCSC 1442 at para. 20., citing *North Shore Law LLP v. Cassidy*, 2020 BCSC 1658, at para. 34 and *Trak Energy Corporation v. Happy Valley Resort Ltd.* 2015 BCSC 1928, at para. 38.
- [29] Ultimately, as noted in *Singh v. Media Waves Communications Inc.*, 2022 BCSC 1611 at para. 40, despite that the decision to dismiss for want of prosecution is a discretionary one, an order should "not be made lightly", but rather should be made "sparingly" and "with great caution". It is often described as being a draconian remedy to be exercised only "if the court is satisfied that the default was intentional or of such a degree that there is a substantial risk that a fair trial on the merits of the issues will not be possible".

Argument

- [30] The three factors for consideration which were emphasized by the parties as being the most relevant in this matter are:
- a) whether there has been an inordinate delay in the plaintiff's prosecution of this matter, which requires the analysis of what the plaintiff's last step in the litigation has been;
 - b) whether there is an excuse for any delay, if there was an inordinate delay; and
 - c) the prejudice caused by Mr. Johnson's passing, and loss of that evidence.
- [31] I will consider each of these factors.

Has There Been an Inordinate Delay?

- [32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Wiegert*, at para. 32.
- [33] The defendant argues that since commencing these proceedings on April 24, 2017, the plaintiff has not taken any formal step to prosecute the proceedings.
- [34] Counsel for the Johnson Estate seeks to have the court make an inference that the delay by the plaintiff was tactical in that the plaintiff was waiting for Mr. Johnson to pass away so that his evidence would be lost. And, as a result of that tactical approach, any delay at all is inexcusable on its face.
- [35] In *Wiegert* the trial judge noted that, in considering whether a delay is inordinate, the court ought to be particularly concerned with ones that are tactical (at para. 22).

- [36] In support of his argument that this was a tactical delay, the Johnson Estate state points to the fact that no lists of documents were delivered by the plaintiff, although Mr. Johnson did deliver a list of documents himself, nor were discoveries sought. Rather that the plaintiff sat back and, in essence, waited for that evidence to potentially be compromised, including through the passing of Mr. Johnson.
- [37] The Johnson Estate pointed to one specific matter in issue, that being the status of the plaintiff, namely whether or not he is in fact a child of Ms. Tayelor. The Johnson Estate submits that the plaintiff has not provided documents to show he is the natural born son, or that he was adopted. In his response to notice of civil claim, the Johnston Estate has pled that both the plaintiff and his sister, are "said to be" adopted, but that there is no knowledge of that. Despite that being included in the response, the Johnson Estate notes that no documents to prove status have been listed.
- [38] However, it was not clear to me why a delay would benefit the plaintiff as to this particular evidence. The person with the best knowledge as to that would have been Ms. Tayelor, not Mr. Johnson.
- [39] Further, as to the general argument of a delay being tactical, there is no evidence to support an inference that the failure to take steps until Mr. Johnson's death was a tactical one.
- [40] In addition, the length of the delay is only relevant to the extent it was caused by the plaintiff's delay and not other events: 0803589 B.C. Ltd. (formerly Ralph's Auto Supply (B.C.) Ltd.) v. Ken Ransford Holding Ltd., 2015 BCSC 1428, at para. 26. The plaintiff points to the COVID pandemic as being a cause or other event that partially caused delay.
- [41] I accept that there is a general recognition that COVID affected the ability to prosecute claims, as is illustrated by the legislative decision to suspend limitation by ministerial order on March 26, 2020, until March 25, 2021. Thus, in considering the length of the delay for the purpose of this application, I agree that that a one-year period should not be included in the calculation of the length of delay.
- [42] As to the plaintiff's last step in this proceeding, counsel's correspondence after the filing and delivery of the notice of change of solicitor in February 2022 is of note. I agreed with the argument of the plaintiff that, based upon that correspondence, it was clear by that time that the plaintiff was proceeding, in that he immediately requested documents from Mr. Johnson's list of documents and, by June 2022, proposed a full day application to determine what it suggested would be a threshold issue, namely the validity of the Cohabitation Agreement as that determination would guide the parties as to the practicality of litigating the validity of the 2003 Will. However, I am satisfied that this correspondence was not a step, as "exchanges of correspondence and various communications between counsel" are generally not considered to be a step in litigation. Rather, a step is a formal one, that being one that is either required or permitted by the Rules to move the action forward to trial: Canadian National Railway Company v. Chiu, 2014 BCSC 75, at para. 7.

[43] I am satisfied that the delay, which I calculate to be four years and four months (April 27, 2017 to August 29, 2022, less one year), was inordinate.

Is the Delay Inexcusable?

[44] A delay will be inexcusable where the plaintiff intentionally failed to take steps to advance its claim when there was no legitimate reason preventing them from doing so: Wiegert at para. 34. A bald assertion as to a reason for the delay will not be sufficient to meet this test: Sharma, at para 28, citing Momi v. Wawanesa Mutual Insurance Company, 2016 BCSC 2025, at para. 58.

[45] The plaintiff's explanations for the delay are that, in addition to the confusion and interruption of matters due to the COVID pandemic, his prosecution of the matter was impacted by the death of Mr. Johnson, and issues with his counsel moving firms, the failure of the firm to properly re-assign it, and in seeking new counsel.

[46] The plaintiff initially retained counsel for these estate matters in January 2016. The action was commenced, and pleadings were closed, as noted, by late May 2017. Before matters progressed further, with the plaintiff relying upon his counsel, Mr. Johnson passed away November 2, 2019, less than 18 after the pleadings closed. The plaintiff was unsure of what impact Mr. Johnson's passing had on the action and deposes that he believed that a representative of the Johnson Estate would need to take steps to replace Mr. Johnson as a party in this action, and was waiting for that to happen.

[47] However, before that could be done, the COVID pandemic began. The plaintiff deposes that he understood that all legal matters were affected, so was not alarmed by the delay which, although not stated this way, I take it to mean that he heard nothing from his firm for over a year. After things settled, in July 2021 he reached out to the firm that was representing him to determine the status, at which time he was advised that the counsel he had retained had left the firm. He was redirected to another counsel, who appeared to have no knowledge of the file, or that he had apparently been assigned conduct of it.

[48] Given these issues, the plaintiff decided to end his retainer with that firm on July 26, 2021. Up to that point, he deposes, he understood that Mr. Stewart was managing the file and making progress in that respect.

[49] On July 28, 2021 he filed his notice of intention to act in person, and began to look for new representation. The first lawyer that he consulted was not able to help him, and he was referred out to another lawyer, who he then retained.

- [50] On January 25, 2022, a change of solicitor was filed. While acknowledging that this did not necessarily constitute a step in the litigation, the plaintiff relies on Sharma for the proposition that a change in counsel may provide some explanation for the delay in that it "evidences some indication of the plaintiff's intention to proceed" with the claim which, in this case, was done prior to any indication from the defendants that they were concerned about the pace of litigation.
- [51] After being retained the plaintiff's new counsel reached out to the plaintiff's former counsel, both the firm and the counsel himself, to obtain information for the transition of the file but received no response as of February 2022. As such, he proceeded to deliver a letter to the Johnson Estate on February 2, 2022 with a notice of intention to proceed. The cover letter asked for confirmation as to whether or not the Johnson Estate had retained counsel. Counsel for the Johnson Estate replied directly to confirm his retainer. By letter dated February 8, 2022, the plaintiff requested copies of the documents disclosed on Mr. Johnson's list of documents. Thereafter, the June 29, 2022 letter setting out a proposal for the future handling and resolution of these issues was sent.
- [52] The plaintiff also notes that the defendants did not take any steps or raise a concern regarding this matter's prosecution, notwithstanding that they have filed their own counterclaim. The plaintiff cites *Singh v. Media Waves Communications Inc.*, 2022 BCSC 1611, at para. 49, where the court noted that, notwithstanding that a defendant has no obligation to move an action forward, that had the defendants warned the plaintiffs that a failure to complete certain steps within a set timeframe would lead to such an application, the inaction of counsel would likely have come to the plaintiff's attention.
- [53] The plaintiff argues that the same can be said here, in that he would have likely learned that his file was not being handled by anyone at his prior firm, or more likely, the firm would have properly re-assigned it to counsel so that it was being handled, had any correspondence been sent to that firm by the defendants.
- [54] I do not find Singh to be persuasive in these circumstances, given that Mr. Johnson's death meant that procedural steps needed to be taken before his estate could proceed with a defence in his place. It is not an answer to one's own delay to argue that the defendants could have taken steps which would brought your delay to light. Although, it is notable that a step that may have done that was done in secrecy, that being the without notice order to allow them to amend the notice of civil claim and substitute the Johnson Estate as defendant.
- [55] Nonetheless, in the circumstances of this case, I am satisfied that the explanation from the plaintiff is a reasonable one with the delay being due to relevant and explainable causes.

- [56] While there was an initial inaction of a 18-month period prior to Mr. Johnson's death, that delay, on its own, was not inordinate. Within months of the COVID anniversary, steps were quickly taken to remove inattentive counsel and move this matter forward. Nonetheless, delay ought to be analysed in a holistic rather than piece meal fashion: *Sun Wave Forest products Ltd. v. Xu*, 2018 BCCA 63, at para. 25.
- [57] In considering the time elapsed from April 2017 to August 2022, the plaintiff's explanation and evidence in support is not merely a bald assertion, but one that I cannot find to be inexcusable.

Prejudice of the Parties

- [58] The Johnson Estate argues that the passing of Mr. Johnson in November 2019 prejudices them, and that prejudice arises from the failure to prosecute this action in a timely way.
- [59] Mr. Johnson passed away some 18.5 months after the notice of civil claim was filed.
- [60] While there is some possibility that the trial of this action could have been held before November 2019, that timing is not obvious on its face. While discoveries could have also been conducted, I cannot find that any prejudice arising from Mr. Johnson's death is a prejudice that arises from the delay in prosecution of this action.
- [61] In addition, the Johnson Estate argues that, among other things, there are no longer any witnesses available to testify as to the validity of the marriage and capacity of Ms. Tayelor at the time of the ceremony. The pastor who performed the ceremony has apparently left British Columbia and the Johnson Estate says, they do not know where he is, although it is not clear what efforts have been made to find him.
- [62] In *Gamex Developments Corp. v. Sekora*, 2011 BCSC 318, at para 26, the court noted that the prejudice must be such that the defendant's ability to have a fair trial is imperilled. That it is merely leading to difficulty will not be sufficient, *Ralph's* at para. 28. As such, having to, for example, retain a skip tracer to locate a witness is not prejudice.
- [63] In addition, the role of the defendant in contributing to the delay has been held to be relevant: *Gamex* at paras. 27-29. I take that as meaning that the role of the defendant as to any prejudice they claim to suffer is also relevant.
- [64] Given that the issues as to the validity of the marriage, and therefore the validity of the 2003 Will, is an issue that will need to be resolved in the probate actions, including those commenced by Mr. Johnson, I would expect that the Johnson Estate would be taking appropriate steps to preserve the evidence, including locating all relevant witnesses, regardless of a delay in these proceedings. If they were not doing so, they bear some responsibility for that.

[65] In these circumstances, I am not satisfied that the Johnson Estate has established that their ability to defend this action has been prejudiced by the plaintiff's delay in prosecuting this matter.

Overall Interests of Justice

[66] In determining if justice requires dismissal of an action, the court is to consider all of the factors and balance the interest of justice in deciding if the action ought to be dismissed: Sharma, at para. 17.

[67] One of the compelling factors in this matter is that, even if this claim were dismissed, the issues in this action will still need to be resolved for the purpose of the counterclaim, as well as the probate actions, namely the validity of the 2003 Will in order to prove the Will in solemn form and, in order to determine what is and is not an estate asset, the validity of the Cohabitation Agreement. Dismissing this action has no practical effect in resolving the litigation between these parties.

[68] Having regard to the overall interests of justice, notwithstanding my finding that the delay was inordinate, it is my view that it is not in the overall interests of justice to dismiss the action.

Conclusion and Orders

[69] For these reasons, I dismiss the application in its entirety.

[70] With respect to the relief sought to have the CPL released from title, notwithstanding that my decision above renders that relief moot, I note that the court of appeal has indicated that this court has no jurisdiction to make such an order: Sun Wave Forest Products Ltd., at para. 34.

[71] The parties did not have an opportunity to argue costs.

[72] Given the various actions involving the parties, in which the issues that arise are the same, with the contentious threshold issues as to the validity of both the 2003 Will and Cohabitation Agreement which may render certain aspects of the claim moot, it seems appropriate that costs be in the cause. However, if the parties disagree with that disposition they have leave to make written submissions on costs, with the plaintiff to render its submissions by July 14, 2023, and the defendants their response submissions by July 31, 2023. Both submissions should be limited to four pages. Otherwise, the order may be entered as "costs in the cause".

"Master Robertson"

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/23/11/2023BCSC1103.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/taylor-v-johnson-estate-2023>

Prepared on 29 October 2026 · Esheria