

CANADA / JUDGMENT

West Terra v. Myhill

2020 BCSC 1913

COURT

Supreme Court of British Columbia

DECIDED

20 October 2020

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2020 BCSC 1913 West Terra v. Myhill IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: West Terra v. Myhill, 2020 BCSC 1913 Date: 20201020 Docket: S-164839 Registry: Victoria Between: WEST TERRA PROJECTS INC. Plaintiff And: DOROTHY MYHILL Defendant Before: Master Bouck Oral Reasons for Judgment In Chambers Counsel for Plaintiff: L. Karr by teleconference Counsel for Defendant: J. Hall by teleconference Place and Date of Hearing: Victoria, B.C. October 20, 2020. Place and Date of Judgment: Victoria, B.C. October 20, 2020

- [1] THE COURT: I am not persuaded that the plaintiff's action should be dismissed for want of prosecution. There has been delay but I am not satisfied that it has been inordinate. The notice of intention to proceed is not a step in the proceeding when considering the issue of delay. There has been at least a 20-month delay in the prosecution of the claim. There are two excuses given for the delay: one having to do with the health of the plaintiff's principal; and the other, the inattentiveness of counsel. Both are reasonable excuses for the delay.
- [2] In terms of whether there can be a fair trial if the action continues, I am appreciative of the defendant's age, but cannot find on the evidence that she is unable to put forward a defence or, for that matter, prosecute her counterclaim. There is no evidence that the defendant's mental capacity is impaired and no evidence that potential witnesses have been lost or documents destroyed. Those are the types of situations where the court might find that there is an inability to present a defence or conduct a trial that is fair to both parties.
- [3] So that aspect of the application is dismissed.
- [4] With respect to the cancellation of the CPL, I am attracted to Mr. Hall's submission that this is an exceptional remedy and the legislature, in allowing for the remedy, expected parties to 'get on with the litigation.' However, when I consider the decision of Mr. Justice Halfyard in Wiest v. Middlekamp, 2005 BCSC 1626 which is cited in Lawn Genius Manufacturing Canada, 2016 BCSC 1915, I see that the court retains the discretion as to whether or not there should be discharge of the CPL or cancellation of the CPL, even when there has been the delay. This requires the court to consider whether there is serious prejudice, or to put it another way, whether the prejudice to the landowner is not serious.

- [5] If at a later date the defendant finds herself in need of refinancing, or wishing to sell the property, prejudice in having the CPL registered on title may be found. The frustration and anxiety suffered by the defendant is common to many litigants. I see no prejudice to the defendant in her dealings with the land at present. Thus, any prejudice to the defendant is not serious as a matter of law.
- [6] The remedy that I asked counsel to speak to is one that is suggested decision of Roumanis v. Liebenberg 2011 BCSC 278, a decision of Mr. Justice N. Smith. What I intend to direct is that the parties try to come up with a case plan and, if necessary, have the court impose a plan. The object of the exercise is to ensure that this litigation gets back on track. Although I am confident in counsel's representations today, it is ultimately the parties that direct the litigation, so orders need to be in place for that plan to come to fruition.
- [7] The order that I pronounce is as follows:
1. The relief sought in Item 1, under Part 1, is dismissed.
 2. The relief sought under Item 2, under Part 1, is dismissed, with liberty to reapply upon bringing further evidence addressing prejudice to the defendant.
 3. Item 3 would appear to follow the outcome of Item 2.
- [8] THE COURT: Mr. Hall, do you have any submissions on that?
- [9] MR. HALL: I don't at present Your Honour, but let me -- let me flip to it.
- [10] THE COURT: What I do not want to happen is an argument at a later date that the remedy is res judicata. So, Ms. Karr, do you have any submissions while Mr. Hall is looking to it?
- [11] MS. KARR: I am actually also looking to it Your Honour.
- [12] MR. HALL: I can jump in now, Your Honour, and suggest that perhaps that portion of the relief be simply adjourned generally because it is not necessary, given the disposition of paragraph 2, but that result at least, would - would not be foreclosed out if we reapply as you have granted leave, if the circumstances change.
- [13] THE COURT: So, before I hear from you, Ms. Karr, my proposal or suggestion would be that Item 3 is adjourned generally, subject to the defendant bringing further application pursuant to s. 252.
- [14] MS. KARR: Well, I think that is a - sorry, Your Honour. I think that is a reasonable way of handling that.
- [15] THE COURT: All right. Mr. Hall, I added some language, but is that satisfactory to you?
- [16] MR. HALL: Absolutely.

- [17] THE COURT: The next term of the order will be that within 20 days of today's date the parties will exchange case plan proposals and if unable to agree to a consent case plan order, set down a case planning conference at the earliest mutually convenient date. I do not wish to layer on costs to the parties. It is best if the parties can arrive at a consent order with respect to steps to be taken in the proceeding, including securing a trial date. If the parties are unable to reach a consent order, then the court will step in. Any submissions on the language of that term, Mr. Hall?
- [18] MR. HALL: No. I think as you have articulated, Your Honour, it - it - it makes good sense and I think it is understandable to the parties.
- [19] THE COURT: Ms. Karr?
- [20] MS. KARR: I agree.
- [21] THE COURT: Now, submissions on costs, Mr. Hall?
- [22] MR. HALL: Well, I have to acknowledge, Your Honour, that I have not prevailed in substance, although you have granted leave to reapply, but I would suggest that in the circumstances this is one of those situations where it was reasonable of the applicant to make this application because of the delay, and in my respectful submission, costs should be in the cause.
- [23] THE COURT: Ms. Karr?
- [24] MS. KARR: I would - I agree with my friend. I believe costs in the cause would be appropriate under the circumstances.
- [25] THE COURT: Thank you. Costs are in the cause. "Master C.P. Bouck"

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