
CANADA / JUDGMENT

Wright v. Yen

2013 BCSC 753

COURT

Supreme Court of British Columbia

DECIDED

1 May 2013

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2013 BCSC 753 Wright v. Yen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright v. Yen,

2013 BCSC 753

Date: 20130501

Docket: S055916

Registry: Vancouver

Between:

Kevin Wright and Maureen Wright

Plaintiffs

And

Peter Yen and Colette Yen and

Pebbles Realty Property Management Ltd.

and Pebbles Realty Ltd. and Brian Christoff

Defendants

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiffs:

Mark H. Sobolewski

Counsel for the Defendants Peter Yen and Colette Yen:

Albert K. MacKinnon

Counsel for Pebbles Realty Property Management Ltd., Pebbles Realty Ltd. and Brian Christoff:

Christopher Schuld

Place and Date of Hearing:

Vancouver, B.C.

April 16, 2013

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2013

INTRODUCTION

- [1] This is an application by the defendants for dismissal of the plaintiffs' action for want of prosecution pursuant to Rule 22-7(2), (5) and (7) of the Rules of Court and special costs pursuant to Rule 9-6(9).
- [2] The plaintiffs' action involves a dispute about an infestation of rats in a house they rented from Mr. and Mrs. Yen. The corporate defendants were the property managers and Mr. Christoff was the rental agent. The house is located on the Sunshine Coast. It was in or about March 2003 that the plaintiffs responded to an advertisement about the house and inspected the property in person. During this inspection the plaintiffs claim that the corporate defendants and Mr. Christoff represented there was no history of rodents in the house.
- [3] The plaintiffs moved into the house in May 2003. In or about November 2003, the plaintiffs claim they discovered the house and an outbuilding were infested with rats. In December 2003, when the house was inspected by a pest control service, the plaintiffs maintain they learned that it had been infested with rats in the past and, further, that the defendants were aware of the problem. The plaintiffs moved out of the house while the rats were exterminated.
- [4] In early 2004, there was a proceeding before the Residential Tenancy Board concerning damages claimed by the plaintiffs. The arbitrator awarded them \$1,063.20 for loss of quiet enjoyment and loss of use.

SUMMARY OF THE LITIGATION

- [5] The plaintiffs commenced an action for damages against the defendants by petition on April 20, 2004. They were self-represented at the time. In June 2005, the plaintiffs delivered documents to the corporate defendants and Mr. Christoff; however, no further steps were

taken in the litigation. At some point the defendants advised the plaintiffs that their action should not have been commenced as a petition. It was not until November 2005 that the plaintiffs discontinued the petition proceedings and commenced this action by filing a writ of summons on November 4, 2005. Their claim was for damages due to the defendants' negligence, misrepresentation and deceit.

- [6] The writ expired on November 4, 2006, prior to serving the defendants. The plaintiffs obtained a renewal of the writ on May 7, 2007 and shortly thereafter served the defendants with the writ and statement of claim. The defendants filed appearances on May 7, 2007 and statements of defence on May 25, 2007, denying all of the factual claims made by the plaintiffs.
- [7] In June 2007, the plaintiffs' statement of claim was struck; however, the plaintiffs were given until July 5, 2007 to file an amended statement of claim. The plaintiffs complied with this order and the defendants filed amended statements of defence in response on July 13, 2007.
- [8] The plaintiffs delivered a demand for production of documents to Mr. and Mrs. Yen in July 2008 and Mr. and Mrs. Yen delivered their list of documents in response on July 15, 2008.
- [9] No further steps were taken in the litigation until May 31, 2010 when the plaintiffs filed a notice of intention to proceed and a notice of appointment of solicitor. At this time, Shona Moore, Q.C. became counsel of record but it was the plaintiffs' intention to retain their current legal counsel once he was called to the bar. This occurred on August 19, 2010.
- [10] In response to the notice of intention to proceed, the defendants joined in an application to dismiss the claim for want of prosecution. The motion was filed in August 2010 and was heard on September 29, 2010. After reviewing the history of the litigation and the relevant legal principles, Loo J. dismissed the defendants' application because the delay was not inordinate (22 ½ months); there were reasons for the delay (the plaintiffs were self-represented); and the defendants suffered no prejudice beyond that which can be presumed due to the delay. In regard to the character of the case as involving recollections of oral representations seven years earlier, Loo J. says at para. 31 of the judgment:

I can infer that memories will fade over the years, but I cannot find that any presumed prejudice will create a substantial risk that a fair trial is not possible. Having considered all of the circumstances of this case, on the fourth question, I cannot find that on balance justice requires that this action be dismissed.

- [11] Subsequent to the dismissal of the defendants' application, the plaintiffs took no steps in furtherance of the litigation until February 2, 2011. On this date the plaintiffs issued an appointment to examine Mr. Yen for discovery on March 8, 2011. On the same date the plaintiffs issued an appointment to discover Mr. Christoff on March 8, 2011. The examination of Mr. Christoff was adjourned to April 8, 2011. On March 24, 2011, the plaintiffs served an amended list of documents on the defendants. The defendants also sought to examine the plaintiffs for discovery in the spring of 2011.

- [12] On April 19, 2011, the corporate defendants and Mr. Christoff forwarded a demand for particulars to the plaintiffs. The particulars sought related to the damages and losses suffered and any documentation in support of damages; the conduct alleged to be deceitful and an abuse of power; and the amount of special and aggravated damages as well as the basis for this claim.
- [13] On May 30, 2011, the plaintiffs sent an email to the defendants' counsel that contained a settlement offer. It is unclear whether either of the defendants' counsel received this email; however, neither counsel for the corporate defendants and Mr. Christoff nor the Yens' counsel responded to this offer of settlement.
- [14] The examinations for discovery set down for the spring of 2011 did not take place. In the fall of 2011, the parties adjourned their respective discoveries to December 2011. On December 14, 2011, the plaintiffs served the defendants with a notice to produce documents in their possession during the examination for discovery. While the examination for discovery of Mr. Yen occurred on December 21, 2011, Mr. Christoff's examination was postponed due to an injury. Both he and Mr. Wright were scheduled to be examined on January 26, 2012. On that day the plaintiffs produced an amended list of documents.
- [15] The examinations of Mr. Christoff and Mr. Wright were not held until February 1 and 2, 2012, respectively. Transcripts were delivered to all parties by February 8, 2012. Counsel for the corporate defendants wrote to the plaintiffs' counsel requesting documents be produced in accordance with the examination for discovery of Mr. Wright. Similarly, counsel for the plaintiffs made requests of counsel for Mr. Christoff and Mr. Yen to produce outstanding documents demanded during their respective examinations for discovery. Neither the plaintiffs' counsel nor the defendants' counsel responded to these requests. Mr. MacKinnon, on behalf of the Yens, took the position that the document requests were improper and refused to produce them. It is unclear whether this was in writing but the discovery transcript indicates that he was opposed to producing some of the requested documents. The plaintiffs did not seek an order compelling production of these documents. In addition, the plaintiffs never responded to the defendants' demand for particulars.
- [16] After a flurry of correspondence concerning the particulars demanded by the defendants and demands for the production of documents (primarily from the defendants), no further steps were taken in the litigation. The only correspondence sent to the defendants by the plaintiffs since March 21, 2012, apart from follow up letters regarding the particulars and documents requested during discoveries, was a change of address for service. However, on January 25, 2013, the plaintiffs emailed another offer to settle to counsel for the defendants and, in the alternative, solicited dates for trial. Mr. MacKinnon did not receive this email because it was sent to the wrong email address. The defendants did not respond to this email and counsel for the plaintiffs did not follow up the email with further inquiries or take any steps to set down the matter for trial.

- [17] Mr. Yen filed an affidavit in this application dated March 22, 2013. He maintains the delay in this litigation has caused him and his wife concern and financial uncertainty. Neither the corporate defendants nor Mr. Christoff filed affidavits alleging any prejudice suffered as a result of the delay.
- [18] Mr. Wright filed an affidavit in this proceeding dated April 8, 2013. He deposes that it was not until May 14, 2012 that he received the defendants' demand for particulars from his legal counsel. Since that time Mr. Wright deposes that he has been working on obtaining the details and explanations for each of the 1670 items claimed as lost or damaged due to the rat infestation. Mr. Wright says he has not yet completed the process of gathering evidence to satisfy the demand for particulars but is nearing completion.
- [19] Mr. Wright also deposes that in July 2012, his legal counsel became ill and had to reduce his work hours for the following months. In January 2013, Mr. Wright instructed his legal counsel to solicit trial dates from the defendants and set the matter down for trial if a settlement offer was not accepted.

ARGUMENT

- [20] The defendants argue that there has been inordinate delay in this case; that there is no credible explanation for the delay; and that the delay has caused serious prejudice. Because this is a claim that depends upon the parties' recollection of oral conversations that occurred ten years ago, serious prejudice must be presumed. Further, the defendants maintain these three factors combine to require, in the interests of justice, that the action be dismissed. In support of their argument the defendants rely upon *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 and *Irving v. Irving* (1982), 38 B.C.L.R. 318 (C.A.).
- [21] The defendants also argue that prejudice must be presumed once it is concluded that the delay is inordinate and inexcusable: *March v. Tam*, 2002 BCSC 1125; *Nice v. Nice*, 2006 BCSC 1162; and *Hamouth v. Canjex Publishing Inc. et al*, 2007 BCSC 417. Further, the defendants maintain that while the delay after the action is commenced measures whether it is inordinate, the combined delay before and after the action is commenced determines whether the delay is excusable: *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2000 BCSC 1414 [*Tundra Helicopters S.C.*].
- [22] The plaintiffs argue the delay in this action is not inordinate or inexcusable. The delay prior to obtaining legal counsel is excusable because the plaintiffs were not familiar with the legal system: *Bay v. Family Insurance Corporation*, 2008 BCSC 1164. Further, the plaintiffs say the defendants contributed to the delay by postponing examinations for discovery and by failing to respond to requests for documents arising out of the discoveries and to suggested trial dates.
- [23] The plaintiffs also argue they have established on the balance of probabilities that the defendants have not suffered serious prejudice as a result of the delay such that it would be in the interests of justice to dismiss the action: *Taylor Ventures Ltd. v. Sterling*, 2008 BCSC

736. The fact there is no evidence of actual prejudice shows that no serious prejudice has been suffered by the defendants: *Tundra Helicopters (S.C.)*; and *Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd.*, 2012 BCCA 251. The plaintiffs say this is not a case of tactical delay or delay that threatens the wellbeing of the defendants. It is a Draconian remedy that should not be issued lightly: *Toor v. Aetna Life Insurance*, 2011 BCSC 691; and *Rangi v. Lloyd's Underwriters*, 2011 BCSC 1150. The plaintiffs say they will suffer greater prejudice if the action is dismissed: *Takenaka v. Stanley*, 2000 BCSC 242.

DECISION

[24] In *Irving*, and more recently in *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2002 BCCA 145, the Court of Appeal described the test for dismissal for want of prosecution as having three distinct parts:

1. Has there been inordinate delay?
2. Was the inordinate delay inexcusable?
3. Has the delay caused, or is it likely to cause, serious prejudice to the applicant?

[25] If these tests are met, the court must go on to consider whether or not the balance of justice demands that the action should be dismissed. This has been described as an overarching factor: *Cal Coast Spas Inc. v. Coast Spas Inc.*, 2008 BCSC 846 at para. 54.

[26] Inordinate delay means a lengthy delay that exceeds the normal timeframe for litigation of a similar type or nature; however, it is the particular context of the litigation in question that is the focus of the inquiry. A relatively short delay in some cases may be inordinate while a very lengthy delay in other cases may not be regarded as undue. (See the authorities cited in *Cal Coast Spas Inc.* at paras. 55-57.)

[27] Delay is calculated from the commencement of the action rather than the date when the cause of action arose. However, any delay prior to the commencement of the action may have a bearing on whether the delay is excusable and whether the defendants have suffered serious prejudice: per Macaulay J. in *Tundra Helicopters (S.C.)* at para. 16.

[28] In the defendants' first application for dismissal for want of prosecution, Loo J. concluded that as of September 29, 2010 there had been a delay of 22.5 months since the commencement of the litigation. She concluded this delay was not inordinate. Since that date there has been a further delay of just slightly less than two years and six months. The total delay is thus four years and five months. I find this is an inordinate delay. The plaintiffs' action is not a complicated one. This delay is far beyond the time it would normally take to prosecute a simple misrepresentation claim to its conclusion.

[29] Was the delay inexcusable? In my view, the delay in the commencement of the action and the delay up until the plaintiffs retained legal counsel is excusable. The plaintiffs were self-represented and lacked expertise in the law and civil procedure. They incorrectly chose to

file a petition to commence their action causing a delay of a year before the action was properly commenced by writ and statement of claim. Additional delay was caused by the plaintiffs' failure to properly draft their statement of claim thereby causing it to be struck. Their amended statement of claim was not filed until July 2007.

- [30] The plaintiffs also offer explanations for the delay since the ruling of Justice Loo on September 29, 2010. The plaintiffs maintain they took steps to set down examinations for discovery for the defendants; however, discoveries had to be adjourned for various reasons and were not completed until late 2011 and early 2012. Subsequently, the plaintiffs made attempts to obtain information and documents demanded of the defendants during their discoveries. However, the defendants failed to respond to their demands. The corporate defendants and Mr. Christoff also sought detailed particulars of their damage claim that has taken over a year to complete. More generally, counsel for the plaintiffs was ill in the latter part of 2012 and could not devote as much time to this action as was warranted in the circumstances.
- [31] I must conclude that there are some credible explanations for at least part of the delay since September 2010. The defendants were responsible for some of the discovery adjournments and they did not respond to the plaintiffs' demand that they produce documents and information requested during their discoveries. The failure to respond in a timely manner to these demands, even if disputed, obviously caused some delay in moving forward in the litigation. At some point the plaintiffs should have taken steps to obtain an order for production in light of the defendants' failure to respond to their demand. Thus the entire delay is not excusable.
- [32] I am also satisfied that the illness of counsel, as a sole practitioner, partly explains the lack of any positive steps toward concluding the litigation in the latter part of 2012. However, I am unable to accept as credible the plaintiffs' explanation for their delay in responding to the defendants' demand for particulars. The demand was made in April 2011 and to date the plaintiffs have failed to complete and serve a response on the defendants. This is a delay of two years. There is no explanation for why the plaintiffs say they first received notice of this demand in the spring of 2012 or why it would take so many months to formulate a response.
- [33] In my view, large tracts of time remain unexplained by the plaintiffs. I must presume there is no valid explanation in these circumstances and conclude the delay is inexcusable.
- [34] Turning to the third prong of the test, the authorities are clear that once the delay is found to be inordinate and inexcusable, the onus shifts to the plaintiffs to establish that the defendants have not suffered serious prejudice: The defendants have not alleged actual prejudice apart from Mr. Yen's vague statement that the litigation is causing him and his wife concern and financial uncertainty. I find this statement insufficient to establish actual prejudice. The defendants' claim of prejudice essentially stems from the nature of the action brought by the plaintiffs. In particular, that the case for the plaintiffs will turn on the parties' recollection of conversations and events that occurred over ten years ago. In these

circumstances the defendants argue there is presumed prejudice.

[35] The defendants rely on the following comments by Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 at 255-60, which were adopted by our Court of Appeal in *Irving*:

And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. But there may come a time when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

[...]

It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

[36] On the other hand, the plaintiffs rely on the following passage from the reasons of the Court of Appeal in *Tundra Helicopters* at para. 37:

... The question remains whether, on a balance of probabilities, absence of prejudice has been established. In considering that, it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. It is no light matter to dismiss an action for want of prosecution. As Diplock L.J. said in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, *supra*, at p. 259:

The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

- [37] In light of the passage of time in this case, both before and after the action was commenced, it is appropriate to presume the prejudice that normally flows from the fading of witnesses' memories. However, without any evidence of actual prejudice it is difficult to conclude that the defendants have suffered serious prejudice of the nature warranting dismissal of the action for want of prosecution.
- [38] Turning to the last part of the test, is it in the interests of justice to dismiss the action? While this action has been outstanding for over four years, I am unable to conclude that justice demands that it be dismissed for want of prosecution. First, I am not satisfied that the defendants have suffered serious prejudice due to the delay. Second, and importantly, although it has taken over two years to complete the examinations for discovery, these are now completed and the plaintiffs are ready to set the matter for trial. There are outstanding document requests and demands for particulars. However, these should not preclude the fixing of trial dates. When so much has been accomplished, it is inappropriate to dismiss the action because it took an inordinate amount of time to do so. Finally, while the plaintiffs were implicitly given an opportunity to proceed diligently with their action based on the decision of Justice Loo in September 2010, there was no indication in her judgment that the plaintiffs were warned about any lack of due diligence regarding the prosecution of the action. Her only finding was that the delay was not inordinate at that point in time.
- [39] Consequently, I am prepared to give the plaintiffs a final opportunity to pursue their claim with due diligence. To accomplish this objective, I make the following orders:
1. The plaintiffs shall set this action down for trial within 14 days of the date of this judgment. If the defendants are unable to agree to dates within this time period, the plaintiffs shall determine the dates unilaterally and the defendants may apply to adjourn if necessary. Subject to the court schedule, the trial shall commence no later than December 31, 2013.
 2. The plaintiffs shall respond to the corporate defendants' and Mr. Christoff's demand for particulars within 21 days of the date of this judgment. A failure to do so will result in the dismissal of the plaintiffs' action without the need for any further application by the defendants.
 3. The plaintiffs shall respond to the corporate defendants' and Mr. Christoff's demand for documents and other information arising out of Mr. Wright's discovery within 14 days of the date of this judgment.
 4. The defendants shall respond to the plaintiffs' demand for documents and other information arising out of the discovery of Mr. Yen and Mr. Christoff within 14 days of the date of this judgment.
- [40] The defendants have asked to be permitted to make submissions as to the costs of this application. I find that costs should be addressed by the trial judge in light of the divided success of the parties. The parties are at liberty to seek the costs of this application at the conclusion of the trial.

"Bruce J."

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Prepared on 29 October 2026 · Esheria