

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Weiser v. Marsh*,
2025 BCSC 459

Date: 20250314
Docket: S60236
Registry: Kamloops

Between:

Nickolaus Harold Macdonald Weiser

Plaintiff

And

**Lawrence Courtenay Allan Marsh, Leslee Fern Marsh
and Integrita Consulting & Developments Inc.**

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Plaintiff:

K.D. Priddle

Counsel for Defendants:

R.L. Garner

Place and Date of Hearing:

Kamloops, B.C.
November 8, 2024

Place and Date of Judgment:

Kamloops, B.C.
March 14, 2025

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Introduction

[1] On January 5, 2021, the plaintiff, Nick Weiser, filed the notice of civil claim in this matter. The defendants, Lawrence Marsh, Leslee Marsh and Integrita Consulting & Developments Inc. (“Integrita”), apply to have the action dismissed for want of prosecution. Mr. Weiser applies for orders intended to enable him to proceed with the action, including a declaration that the notice of civil claim discloses triable issues, and orders for examinations for discovery and trial dates to be set, and the assignment of a case management judge. The two applications were heard together.

[2] Mr. Weiser was a lawyer who practiced law in Kamloops for approximately 30 years. Mr. Weiser and the Marshes were friends and had business dealings over a number of years in the past. Mr. Weiser has acted as the Marshes’ lawyer. The Marshes own shares in Integrita. In his notice of civil claim, Mr. Weiser pleads that the parties treated each other as equal partners during their relationship, and that the Marshes’ ownership of the shares in Integrita and other named companies is subject to a constructive trust in his favour. He seeks the transfer of half the shares in Integrita and the other companies. For their part, in their response to civil claim, the defendants deny that they were equal partners with Mr. Weiser. They further deny the existence of a constructive trust in favour of Mr. Weiser. The defendants have also filed a counterclaim seeking payment from Mr. Weiser on a number of promissory notes. In his response to counterclaim, Mr. Weiser admits the existence

of the promissory notes, but says that payment for the notes was not to be demanded by the defendants pursuant to a forbearance agreement.

[3] The defendants' application was initially filed November 8, 2022. It was set for hearing in December 2022, but was adjourned due to the assigned presider recusing themselves on the basis of a conflict. It was subsequently rescheduled for hearing, but that presider also recused themselves on the basis of a conflict. As submitted by counsel for the defendants, by this point the defendants felt they had spent enough money attempting to have the action dismissed, and they took no further steps, including declining to schedule examinations for discovery or trial dates. On February 1, 2024, Mr. Weiser filed his application to proceed, and the parties agreed to have the two applications heard together.

Chronology

[4] On January 5, 2021, Mr. Weiser filed the notice of civil claim in this action.

[5] On February 3, 2021, the defendants filed a response to civil claim.

[6] On February 8, 2021, counsel for the defendants sent an email to then counsel for the plaintiff requesting the plaintiff's list of documents.

[7] On February 16, 2021 and March 12, 2021, counsel for the defendants' lawyer sent two more emails to counsel for the plaintiff requesting the plaintiff's list of documents.

[8] On April 20, 2021, the defendants filed a counterclaim in this action. The counterclaim is for payment by the plaintiff of amounts owing pursuant to seven promissory notes. These amounts remain unpaid.

[9] On April 20, 2021, counsel for the defendants wrote another letter to counsel for the plaintiff requesting the plaintiff's list of documents.

[10] This action was started in Williams Lake. The parties live in Kamloops. On April 23, 2021, the defendants filed an application to transfer this proceeding from

the Williams Lake Supreme Court Registry to the Kamloops Supreme Court Registry.

[11] Mr. Weiser did not file an application response to the transfer application.

[12] On April 28, 2021, counsel for the defendants sent an email to counsel for the plaintiff asking why he had failed to provide a list of documents.

[13] On May 4, 2021, Mr. Weiser filed a response to counterclaim denying the claims set out in the defendants' counterclaim.

[14] The application to transfer this matter from the Williams Lake Supreme Court Registry to the Kamloops Supreme Court Registry was heard on May 10, 2021. No one appeared on behalf of Mr. Weiser at the application, though he had been properly served with the notice of application. Madam Justice Gropper granted the order and costs. Mr. Weiser has not paid those costs.

[15] On May 28, 2021, the defendants filed an application to dismiss the plaintiff's claim for failing to follow the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], or in the alternative, requiring him to provide the defendants with a list of documents (the "First Application to Dismiss").

[16] Mr. Weiser did not file an application response to the First Application to Dismiss.

[17] On June 24, 2021, Mr. Weiser provided the defendants with a list of documents. The First Application to Dismiss the action was heard on June 28, 2021. No one appeared on behalf of Mr. Weiser at the application, though he was properly served. Master Keim was advised by counsel for the defendants that Mr. Weiser had provided a list of documents, but the defendants were seeking their costs. Master Keim granted an order for costs of the application fixed at \$750.00, payable forthwith.

[18] On July 7, 2021, the defendants received a cheque for \$750.00 from counsel for the plaintiff in payment of the costs ordered by Master Keim.

[19] On July 16, 2021, the defendants filed a notice of trial scheduling the trial of this action for five days commencing July 11, 2022.

[20] On March 28, 2022, counsel for the defendants received an email from the plaintiff's then counsel advising that he was no longer acting for Mr. Weiser.

[21] On June 21, 2022, Supreme Court Scheduling advised the office of counsel for the defendants that the trial was struck from the trial list as the plaintiff failed to schedule a trial management conference ("TMC").

[22] On June 29, 2022, the office of counsel for the defendants conducted a search through Court Services Online. The results of that search did not show that any documents had been filed to remove the plaintiff's counsel or appoint a new lawyer.

[23] On July 8, 2022, the defendants filed an application to dismiss Mr. Weiser's claim for want of prosecution (the "Second Application to Dismiss"). The application was heard on August 22, 2022 by Master Krentz.

[24] According to the clerk's notes, Master Krentz made the following orders:

1. The application that the Plaintiff's claim be dismissed for want of prosecution, that application is dismissed.
2. The Plaintiff will update his list of documents by September 30, 2022.
3. If the Plaintiff wishes to conduct an examination for discovery of any of the defendants, that that examination for discovery shall be scheduled no later than December 31, 2022.
4. If there are any further documents that the Plaintiff seeks from any of the defendants that that application should be filed and served no later than September 30, 2022.
5. That a new trial date be fixed, also the fixing of the new trial date shall be no later than September 30, 2022. The trial dates have to be fixed by that date.
6. The costs of this application are awarded to the defendants in any event of the cause.

[25] On August 23, 2022, counsel for the defendants sent Mr. Weiser a letter enclosing a draft of the order made by Master Krentz. Mr. Weiser has not returned the draft order for signature.

[26] On November 8, 2022, the defendants filed their present application to dismiss for want of prosecution (the “Third Application to Dismiss”).

[27] On December 7, 2022, Mr. Weiser’s previous counsel filed a notice of intention to withdraw as his counsel. On December 8, 2022, Mr. Weiser’s current counsel filed a notice of appointment.

[28] On December 8, 2022, Mr. Weiser filed his response to the Third Application to Dismiss.

[29] On January 25, 2023, Mr. Weiser provided his updated list of documents.

[30] On January 26, 2023, Mr. Weiser’s current counsel canvassed setting examinations for discovery and trial dates with counsel for the defendants. On January 27, 2023, counsel for the defendants declined to do so.

[31] On February 1, 2024, Mr. Weiser filed his present application.

[32] On October 30, 2024, the defendants filed their response to Mr. Weiser’s application.

Analysis

Should the notice of civil claim be dismissed for want of prosecution?

[33] The current test for dismissal of civil action for want of prosecution was established by the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. Under *Giacomini*, the first two factors remain as they were set out in the previous case law.

[34] First, has there been inordinate delay? As stated at para. 38, an inordinate delay is one that is “uncontrolled, immoderate, excessive and out of proportion to the

matters in question”. The assessment of whether delay is inordinate requires a consideration of the circumstances of the case. Fraud is given as an example of the sort of case in which the court may be less forgiving of litigation delay. Delay is measured from the date the action was commenced.

[35] Second, is the delay inexcusable? As set out at para. 40, the reason for the delay must be assessed in the circumstances of the case. “As a rule, unless a credible excuse is offered, the natural inference is that inordinate delay is inexcusable”. The court should consider if the delay was intentional and tactical, or the result of “dilatatoriness, negligence, impecuniosity, illness or some other relevant cause”. A party who intentionally delays an action assumes the risk of its dismissal.

[36] In *Giacomini*, the Court revised the third branch of the analysis. Under *Giacomini*, if the first two questions are answered in the affirmative, the court must consider if it is in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay. At paras. 66 and 71, the Court endorsed the non-exhaustive set of factors identified in *International Capital Corporation v. Robinson Twigg & Ketilson*, 2019 SKCA 48 at para 45. Those factors are:

- a) The prejudice the defendant will suffer defending the case at trial;
- b) The length of the delay;
- c) The stage of the litigation;
- d) The impact of the delay on the defendant’s professional, business, or personal interests;
- e) The context in which the delay occurred, in particular whether the plaintiff delayed in the face of pressure from the defendant to proceed;
- f) The reasons offered for the delay;
- g) The role of counsel in causing the delay; and

- h) The public interest in having cases that are of genuine public importance heard on their merits.

[37] To this non-exhaustive list the Court in *Giacomini* added at para. 71 one further factor: the merits of the action. A judge should not engage in a searching examination of the merits, but if the action is bound to fail the interests of justice favour its dismissal.

[38] As explained at para. 72, prejudice to the defendant's ability to defend the action remains a relevant and important consideration. But prejudice to a defendant's ability to defend the action is no longer a pre-requisite for dismissal. The court must look to all relevant circumstances.

[39] At para. 68, the Court summed up the changes to the pre-existing test for dismissal as follows:

The approach would change the existing test in two respects: (1) serious prejudice to the defendant arising from delay is not a discrete element of the test, but rather a factor to consider at the interests of justice stage of the analysis, and (2) the impact of the delay on trial fairness is not, invariably, the overriding factor in considering whether it is in the interests of justice to permit a claim to continue.

Is the delay inordinate?

[40] This action was commenced on January 5, 2021. This application was heard on November 8, 2024, almost four years later. In that time, Mr. Weiser has done very little to move this case forward. On June 24, 2021, Mr. Weiser provided a list of documents, but only after repeated requests from the defendants and the defendants filing the First Application to Dismiss for failing to comply with the *Rules*, or in the alternative to produce a list of documents.

[41] It was the defendants who filed a notice of trial on July 16, 2021, scheduling this action for a five-day trial commencing July 11, 2022. That trial was struck from the trial list on June 21, 2022 due to Mr. Weiser's failure to schedule a TMC.

[42] On July 8, 2022, the defendants filed the Second Application to Dismiss the action for want of prosecution. The application was heard by Master Krentz on August 22, 2022. Counsel for the defendants sent a draft order to Mr. Weiser, but he failed to return it. According to the clerk's notes, Master Krentz ordered Mr. Weiser to provide an updated list of documents by September 30, 2022. Mr. Weiser did not provide an updated list of documents by that date. On September 30, 2022, he sent counsel for the defendants an email in which he stated that counsel would receive "amended disclosure". Mr. Weiser did not provide the list of documents he was ordered to provide until after he retained his current counsel, on January 25, 2023. Mr. Weiser was also ordered by Master Krentz to set a new trial date by no later than September 30, 2022, but he did not do so.

[43] Mr. Weiser has done nothing else to push his action forward.

[44] Prior to commencing this action, Mr. Weiser sent a letter to the Marshes, dated April 24, 2020. In it he asked the Marshes to transfer the shares, allegedly held in trust by them for the Weiser family, transferred to him. He referred to an opportunity for a potential profit of \$1,833,750.00 for the Weiser family. He wrote that "if this opportunity is fraudulently taken away from the Weiser family, there will be an action against you seeking damages in that amount." He continued, "The risk of you two losing all your assets, including your house, in a law suit for damages based on fraud can all be avoided, (and wouldn't it be easy and less costly) to simply transfer the USD shares to me..."

[45] In *Giacomini*, at para. 38, the Court stated that "a court may be less forgiving in assessing litigation delay where the allegations impact the defendant's personal reputation, such as where fraud is alleged". The notice of civil claim in this case does not plead fraud, but Mr. Weiser's April 24, 2020 letter to the Marshes clearly did allege fraud. In it, he threatened to ruin them if they did not comply with his demands. I agree with the defendants' submission that the letter colours Mr. Weiser's subsequent actions in filing the notice of civil claim and then effectively taking no action to pursue it.

[46] I find that the delay in this action, considered holistically, is inordinate.

Is the delay inexcusable?

[47] In his 1st affidavit, made December 9, 2022, but not filed until January 29, 2024, Mr. Weiser provides his only evidence with respect to the delay in this case. It was filed in response to the defendants' Third Application to Dismiss, filed November 8, 2022. In his affidavit, Mr. Weiser said that following the August 22, 2022 hearing, he had to deal with "urgent, involved and pressing matters regarding Law Society complaints made against me by the Defendants". He says that "regrettably, I failed to meet the timeline for steps to be taken in the within matter as the Law Society process and maintaining my regular practice took up more time than I anticipated." He explains that he could not perform the litigation work himself and retained his current counsel on December 8, 2022. He says that he provided his new counsel with the complete file material that day and instructed her to prepare a list of documents, schedule examinations for discovery and schedule a trial date.

[48] Mr. Weiser's evidence about his delay in pursuing this action demands some consideration of the Law Society proceedings he refers to as his explanation for the delay.

[49] On September 20 and 21, 2022, Mr. Weiser had a hearing before the Law Society arising out of a citation against him for various allegations of professional misconduct. As set out in the hearing panel's decision, issued December 7, 2022, Mr. Weiser applied to introduce new oral evidence at the outset of the hearing, contrary to the hearing panel's established timelines for doing so. The hearing panel dismissed that application, which led to Mr. Weiser applying to adjourn the hearing. That application too was dismissed. In its December 7, 2022 decision, the hearing panel held that Mr. Weiser had committed professional misconduct. On April 26, 2023, a hearing panel conducted a hearing with respect to penalty. In its July 25, 2023 decision, the panel suspended Mr. Weiser for three months.

[50] The aforementioned Law Society disciplinary proceedings had nothing to do with any complaints made by the defendants. The next Law Society disciplinary

proceeding did arise, in part, out of complaints made by the defendants. The hearing into that matter was held on October 24 and 25, 2022, and the hearing panel issued its decision on March 10, 2023. As set out in that decision, it was alleged that Mr. Weiser had borrowed money from Integrita contrary to the Code of Professional Conduct, and had purported to commit Mr. Marsh to be the personal guarantor of a loan renewal, without his knowledge or consent. The hearing panel found that Mr. Weiser had engaged in professional misconduct.

[51] During this disciplinary hearing, Mr. Weiser sought to introduce documents without prior notice and to testify, without having complied with the Law Society Rules required to do so. The Law Society did not permit him to do either. Mr. Weiser also failed to file written submissions as directed by the hearing panel.

[52] To complete this disciplinary proceeding, a hearing on disciplinary action was held on November 20, 2023. Mr. Weiser did not appear. The hearing panel suspended Mr. Weiser for eight months.

[53] To return to Mr. Weiser's affidavit, he said that following the hearing before Master Krentz on August 22, 2022, he had to deal with urgent, involved and pressing matters regarding Law Society complaints made by the defendants. It is true that Mr. Weiser had Law Society hearings on September 20 and 21 and October 24 and 25, 2022. Only the second hearing involved complaints made by the defendants. So far as the decisions of the Law Society show, it does not appear that Mr. Weiser had done much work in preparation for either of those hearings. His involvement in those proceedings does not excuse his failure to comply with the orders made by Master Krentz, nor his failure generally to pursue this action.

[54] Mr. Weiser has had further Law Society proceedings instituted against him, not involving the defendants. Those proceedings culminated in a hearing panel decision issued March 25, 2024, in which Mr. Weiser was found to be ungovernable. Although Mr. Weiser was no longer a member of the Law Society by this point, the hearing panel found it necessary to disbar him.

[55] I find that Mr. Weiser has failed to provide a reasonable excuse for his delay in pursuing this action.

Is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[56] I will consider the factors set out in *International Capital Corporation*, as amplified in *Giacomini*, in assessing whether it is in the interests of justice for this action to proceed despite the existence of inordinate and inexcusable delay.

[57] While not determinative, prejudice to the defendants is an important factor in considering the interests of justice. In her 3rd affidavit, made October 29, 2024, Ms. Marsh discussed the effect of this litigation on her. She says that she has found it extremely stressful and her thoughts are almost completely consumed by it. She says that she and her husband have spent thousands of dollars on legal fees to defend this case. She has experienced some significant health problems since the litigation started; she does not know if they are related, but she feels that the stress of this litigation has played a role.

[58] In his 1st affidavit, made October 29, 2024, Mr. Marsh describes being required to respond to Mr. Weiser's action as stressful and financially burdensome. Mr. Marsh is 71 years of age and retired. He has found that this case has prevented him from enjoying this time of his life in the way he had hoped. Like Ms. Marsh, he has experienced some health issues in the last couple of years, and while he does not know, feels that the stress has been hard on his physical and mental health.

[59] From the Marshes' evidence, it is clear that having this case outstanding against them for nearly four years, with no signs of Mr. Weiser taking active steps to pursue it, has had a negative effect on them, as it would anyone. I do not know Ms. Marsh's age, but Mr. Marsh is 71. The notice of civil claim alleges an oral trust, which will require the testimony of all the parties. The continuing effluxion of time can only make it harder for them to defend themselves. I find that the defendants have been prejudiced in their ability to defend themselves by the delay in this case, and that they have also been personally harmed by the delay.

[60] The delay in this case, from the action being instituted to this application being heard, was nearly four years. The litigation is at its earliest stages: lists of documents have been exchanged, but nothing else has been done.

[61] Mr. Weiser has done essentially nothing to pursue his action despite the defendants taking persistent and active steps to require him to do so. The defendants promptly filed their response to civil claim. Their counsel requested Mr. Weiser's list of documents four or five times and was forced to file an application before Mr. Weiser finally provided his list.

[62] Mr. Weiser has failed to respond to steps taken by the defendants in this action, thereby driving up their costs. The defendants filed an application to move this file from Williams Lake, where it was filed, to Kamloops, where all the parties live. Mr. Weiser failed to respond to that application and, on May 10, 2021, Madam Justice Gropper granted the application, with costs. Mr. Weiser has not paid those costs. Similarly, Mr. Weiser did not respond to the defendants' First Application to Dismiss, or in the alternative, to provide his list of documents. He did, as previously mentioned, provide his list of documents in response. The hearing proceeded on June 28, 2021, at which time Master Keim made an order for costs in the amount of \$750.00. Mr. Weiser has paid those costs.

[63] As mentioned previously, Mr. Weiser failed to schedule a TMC, which resulted in the trial scheduled by the defendants being struck in June 2022.

[64] As already discussed, Master Krentz made a number of orders on August 22, 2022, designed to force Mr. Weiser to move this matter forward to trial. Mr. Weiser has failed to comply with any of them.

[65] This is clearly a case in which the plaintiff has delayed, in the face of considerable pressure from the defendants, to proceed.

[66] It is true that, as of January 27, 2023, the defendants declined to set dates for discoveries or trial because the time limits set by Master Krentz for Mr. Weiser doing so had expired and the action was, in their view, a nullity. Mr. Weiser's counsel took

the position that the action was not a nullity, and that a further application was required. Accepting that is likely true, no explanation has been provided as to why Mr. Weiser only filed his application to proceed on February 1, 2024. The defendants properly concede that Mr. Weiser is not responsible for any delay after that date.

[67] Mr. Weiser's delay in proceeding is not attributable to any dilatoriness on the part of his counsel. The delay lies squarely at his feet.

[68] I am unable to discern any genuine public importance in this case, on the materials before me, that would militate in favour of it being heard on its merits. Mr. Weiser argues that his case is meritorious. I make no finding in that regard. If it is, I do not see any support in *Giacomini* for the proposition that the meritoriousness of a case is a factor to be weighed in favour of it not being dismissed. I see only the obverse, that if a case is bound to fail, then the interests of justice favour its dismissal. Given the caution in *Giacomini* that the court not engage in any searching examination of the merits of an action, I decline to do so in this case.

[69] I conclude that this is a case in which permitting the action to proceed in the face of inordinate and inexcusable delay on Mr. Weiser's part would undermine public confidence in the justice system.

[70] In addition to failing to pursue his action, Mr. Weiser has failed to comply with the Krentz order designed to force him to do so. I, therefore, dismiss the action pursuant Rule 22-7(6) and (7) of the *Rules*.

Further Orders Sought

[71] The defendants sought an order that their counterclaim be allowed to proceed. No reason has been provided why it ought not to be permitted to proceed, and I so order.

[72] In their notice of application, the defendants sought an order that the Krentz order, made August 22, 2022, be approved and entered without the plaintiff's

signature or approval. While I would have been prepared to make that order, the defendants were asked to adjourn it generally. I so order.

[73] The defendants sought costs of the hearing before Master Krentz, set at \$2,500, payable essentially forthwith. In light of the fact that the costs of this action as a whole will have to be determined, I do not think there would be any significant advantage to me exercising my discretion to fix the costs of the Krentz hearing, and I decline to do so.

[74] The defendants sought their costs of this application, and the action as a whole, assessed as special costs and payable forthwith. The defendants are entitled to their costs, but I did not hear submissions with respect to special costs. Should the parties be unable to agree on costs, they may request to appear before me contacting Supreme Court Scheduling within 30 days of the date of this judgment.

[75] It follows from my decision dismissing the action that there is no need to address the orders sought in Mr. Weiser's notice of application.

"L.M. Lyster J."

LYSTER J.