

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Greer v. Jacmar Holdings Ltd.*,
2025 BCSC 1084

Date: 20250516
Docket: S215960

Registry: New Westminster

Between:

Justin Greer

Plaintiff

And

Jacmar Holdings Ltd. & Hans Sawatzky

Defendants

Before: Associate Judge Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Corbett

Counsel for the Defendants:

K. Rahmati, Articled Student

Place and Date of Hearing:

New Westminster, B.C.
May 2, 2025

Place and Date of Judgment:

New Westminster, B.C.
May 16, 2025

[1] **THE COURT:** These oral reasons have been edited for publication by adding complete case citations, but the substance and result have not changed.

[2] The defendants apply, pursuant to Rule 22-7(7), to have this action dismissed for want of prosecution.

[3] The plaintiff largely agrees that not much has happened in this action since 2020, but says that there has been activity in a related action and that the matters should be viewed holistically when assessing whether there has been delay sufficient to warrant dismissal.

[4] By way of brief background, the plaintiff was employed by the corporate defendant, Jacmar Holdings Ltd. (“Jacmar”), from May 2014 until December 2015. Mr. Sawatzky was and is a director and shareholder of Jacmar.

[5] In December 2015, Mr. Sawatzky confronted Mr. Greer about theft of company property and alleged that Mr. Greer then threatened him and his children. As a result, the plaintiff was charged with theft and uttering threats. Following separate trials on both charges, in 2016 and 2017, Mr. Greer was acquitted on all counts.

[6] On December 12, 2017, the plaintiff commenced an action for wrongful dismissal and breach of contract in the New Westminster Registry, Action No. S196900 (the “Wrongful Dismissal Action”).

[7] On June 17, 2019, the plaintiff commenced the within action seeking damages for malicious prosecution. Plaintiff’s counsel, Mr. Drinovz, initially sought consent to amend the wrongful dismissal claim to add the malicious prosecution allegations in the same action. When consent was not forthcoming, this action was commenced.

[8] Trial in the Wrongful Dismissal Action was initially set for November 25, 2019, but was adjourned by consent at the trial management conference so that the two actions could be joined for the purpose of trial. The parties then scheduled a seven-day trial to commence on December 7, 2020.

[9] In May 2020, consent orders were granted in both actions to have the two matters heard together for trial, subject to the discretion of the trial judge. The consent orders did not include any of the common ancillary orders regarding waiver of the implied undertaking as between the two actions, which would allow documents and examination for discovery evidence to be used in both actions. No evidence was tendered as to the reason for the omission of such ancillary terms, so I draw no inference from that.

[10] The December 2020 trial was struck off the trial list. Although the court record shows that it was struck for failure to schedule a trial management conference, the parties agree that the December 2020 trial did not proceed for reasons related to the COVID-19 pandemic.

[11] Mr. Drinovz did not contact defendant's counsel again until May 31, 2022, when he sought the defendants' availability for new trial dates for both actions and for an examination for discovery in this action. The plaintiff filed a notice of intention to proceed in this action on June 27, 2022. Trial was not rescheduled, and defendants' counsel did not respond regarding availability for discovery.

[12] On July 15, 2022, Mr. Drinovz and defendants' counsel discussed both claims, including the possibility of mediation. Mr. Drinovz also agreed to clarify the plaintiff's position on the malicious prosecution claim. Unfortunately, Mr. Drinovz did not provide the promised clarification for quite some time. He drafted a letter in September 2023, but did not send it until May 29, 2024.

[13] On May 24, 2024, the plaintiff filed another notice of intention to proceed. In May and July 2024, Mr. Drinovz again sought trial dates from the defendants.

[14] The Wrongful Dismissal Action has had a bit more activity. Lists of documents have been exchanged and examinations for discovery conducted in June 2019. The plaintiff attended an independent medical examination ("I.M.E.") in July 2019.

[15] The evidence of Mr. Drinovz on this application is that the plaintiff's list of documents served in the Wrongful Dismissal Action includes documents pertaining to both actions, including the information sworn for the criminal charges, Crown particulars, witness statements to the police, and transcripts of the criminal proceedings. Mr. Drinovz also says that, in his discovery of Mr. Sawatzky, he questioned him about matters relating to the malicious prosecution claim and that the I.M.E. report was intended for use in both actions.

[16] For his part, Mr. Greer's evidence is that he always intended to pursue both actions. After the December 2020 trial was adjourned, he waited to follow up with Mr. Drinovz until October 2021, as he knew there would be delays. Mr. Drinovz's assistant said she would follow up with Mr. Drinovz and get back to Mr. Greer. Not having heard anything, Mr. Greer contacted Mr. Drinovz's office again on March

16, 2022. The following day, Mr. Drinovz drafted a letter to opposing counsel canvassing trial dates, but did not deliver that letter until May 31, 2022. He also followed up on outstanding requests from the discovery of Mr. Sawatzky in June 2019, but received no response.

[17] The plaintiff telephoned Mr. Drinovz on April 11, 2022, looking for an update on his file. He followed up again by email on May 12, 2022. On May 30, 2022, Mr. Greer finally had a telephone call with Mr. Drinovz. Mr. Greer said he wanted to make sure his claim was proceeding, and Mr. Drinovz assured him that it was. As a result, the plaintiff did not follow up with Mr. Drinovz again for some time as he assumed things were progressing normally.

[18] In 2023, Mr. Greer contacted Mr. Drinovz's office looking for an update on September 1 and 22 and October 18 and then again on May 16 and 23, 2024. Mr. Drinovz finally called him on May 31, 2024.

[19] New notices of trial have now been filed in both actions, setting the trial for seven days commencing February 9, 2026.

[20] Mr. Greer's evidence is that he has always wanted to proceed with both claims as promptly as possible. Mr. Drinovz's evidence is that the delays have been due to his own inadvertence, busy practice, and personal events such as his wedding and an extended honeymoon. The plaintiff says that he should not have his claim dismissed due to the negligence of his counsel.

[21] The test for dismissal for want of prosecution was revised by the Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [*Giacomini*]. The first two questions are:

- (1) whether the plaintiff's delay in prosecuting the action is inordinate; and
- (2) whether it is excusable.

If the delay is both inordinate and inexcusable, then the court moves on to the third and final question, which is whether it is in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay: *Giacomini*, paras. 69 & 70.

[22] The applicants bear the onus of demonstrating that a delay is inordinate: *Singh v. Media Waves Communications Inc.*, 2022 BCSC 1611 at para. 44.

Inordinate delay is a delay that is immoderate, uncontrolled, excessive, and out of proportion to the matters in question: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9; and *Wiegert v. Rogers*, 2019 BCCA 334 at para. 32. Delay in an action should not be considered piecemeal, but rather the overall delay should be considered holistically: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 [*Ed Bulley*] at para. 38.

[23] The defendants argue that the length of the delay in this action is almost six years, being from the date of filing of the notice of civil claim (June 17, 2019) to present. The plaintiff submits that there were two periods of delay in this action -- May 2020 to May 2022 and July 2022 to July 2024 -- with a flurry of activity in between those two periods.

[24] The Court of Appeal has confirmed that what matters is the plaintiff's delay in prosecuting the action once it has been commenced: *Ed Bulley*, para. 38. On a holistic analysis, I have no difficulty in concluding that the plaintiff's delay in prosecuting this case, including lengthy periods of complete inactivity, is inordinate.

[25] The next question is whether the delay is excusable. The following factors may be relevant:

- (a) whether the delay was intentional or tactical;
- (b) whether the delay was as a result of dilatoriness, negligence, impecuniosity, illness, or some other relevant cause; or
- (c) whether the delay was as a result of lack of diligence on the part of plaintiff's counsel.

Giacomini, at para. 40.

[26] Here, the reasons advanced for the delay are the effects of the COVID-19 pandemic and the lack of diligence on the part of plaintiff's counsel. There was no suggestion that the delay was intentional or tactical. The defendants suggested some dilatoriness on the part of the plaintiff, but I am satisfied on the evidence before me, which includes affidavits from the plaintiff and from Mr. Drinovz, that the plaintiff made reasonable efforts to pursue his claims through counsel. The plaintiff followed up repeatedly with Mr. Drinovz's office, albeit with some gaps in time, but those gaps are not unreasonable for an unsophisticated litigant who was being reassured by his lawyer that his matter was being dealt with.

[27] Some delay can rightly be attributed to the COVID-19 pandemic, including the loss of the December 2020 trial date. However, this was a small part of the overall delay. The greater delay was due to Mr. Drinovz's lack of diligence and inattentiveness to this file. Mr. Drinovz frankly acknowledges in his affidavit that he did not spend as much time on this matter as he should have done during 2020 and 2021. Given the chronology of events as set out in the affidavits, I also conclude that Mr. Drinovz's inattention to this file continued in 2022, 2023, and on until May of 2024 when the plaintiff once again contacted Mr. Drinovz's office looking for an update.

[28] Mr. Drinovz's excuses for his lack of diligence in this matter as set out in his affidavit sworn on November 14, 2024 include the following:

- a) "The [COVID-19] pandemic placed significant stressors on me and my practice. My employment practice and the employment group that I was managing grew substantially during this time. As a result, I did not focus on this file as much as I should have during 2020 and 2021." (para. 15)
- b) "In addition, throughout 2021 I was preparing for a 19-day trial that was scheduled to begin on November 15, 2021, and again, I did not spend as much time on the within claims as I should have done." (para. 16)
- c) On March 17, 2022, his paralegal drafted a letter to opposing counsel, but he was still very busy with his practice and did not review the letter in March or April. The letter was finalized and delivered on May 31, 2022. (para. 18)
- d) As a result of discussion with Mr. Magnus on July 15, 2022, and his understanding that they were working towards a resolution or mediation, he did not press on setting new trial dates. (para. 24)
- e) He was married in the summer of 2022 and then honeymooned in Europe for several weeks. (para. 25)
- f) When he returned from his honeymoon, it took several weeks to catch up on his files. (para. 26)
- g) In early 2023, his paralegal had a medical emergency and took immediate medical leave. (para. 26)

h) In September 2023, he was in a lengthy arbitration. (para. 27)

[29] Where the reason for the delay is a lack of diligence on the part of plaintiff's counsel, this might amount to a reasonable excuse in some cases, but in others it might not: *Giacomini*, para, 40, citing *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 and *Weigert v. Rogers*, 2019 BCCA 334.

[30] I am satisfied that the delay in this case was due to a lack of diligence on the part of Mr. Drinovz, and that the plaintiff was not to blame for that delay. In my view, counsel's lack of diligence in this case renders the delay excusable.

[31] Accordingly, having found inordinate but excusable delay, I need not consider the third part of the *Giacomini* test.

[32] The defendants' application is dismissed.

[33] With respect to costs, I agree with Mr. Corbett's submission that the plaintiff should bear the cost of this application despite being the successful party. The defendants are entitled to their costs of this application in any event of the cause.

[34] There was also a suggestion by Mr. Corbett of putting some tight timelines on this case in order to keep matters moving forward. I did not hear specific submissions as to what those timelines may be. My thought -- and I am open to hearing from counsel on this -- is that unless the parties agree otherwise a case planning conference ought to be booked by the plaintiff within seven days from today, and is to be scheduled on a mutually available date not later than July 31st of this year. To broaden the available dates, it may be held in either New Westminster or Vancouver. I am happy to hear from counsel if you have other thoughts in terms of what orders might be helpful to keep this matter on track.

[35] CNSL J. CORBETT: I'm certainly happy to hear from my friend on that and would agree to listen to anything that's proposed, but that sounds reasonable to me.

[36] THE COURT: All right. Ms. Rahmati, any thoughts?

[37] K. RAHMATI: I would just have to check with my office in terms of availability but I don't see how any of that would be an issue.

[38] THE COURT: Fair enough. So that will be the order that I will make then, which is unless the parties agree otherwise -- and I am going to give you that leeway if you decide that you can sort things out between yourselves and you do not need a case planning conference. I do not want to impose that on you. But unless the parties agree otherwise, a case planning conference is to be booked by the plaintiff within seven days from today and is to be scheduled for a mutually available date not later than July 31st, 2025 and may be held in either New Westminster or Vancouver. I did check a couple of days ago and there are plenty of CPC dates available in both registries in that timeframe.

[39] THE COURT: Anything else requiring clarification?

[40] CNSL J. CORBETT: Not from me. Thank you.

[41] THE COURT: No. Ms. Rahmati?

[42] K. RAHMATI: I'm okay.

[43] THE COURT: All right. Thank you. Our clerk will give you your materials back.

“Associate Judge Hughes”