

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Khela Excavating Ltd. v. Olin*,  
2025 BCSC 1156

Date: 20250625  
Docket: 218984  
Registry: New Westminster

Between:

**Khela Excavating Ltd.**

Plaintiff

And

**Audrey Eileen Olin**

Defendant

Before: The Honourable Madam Justice Murray

## Reasons for Judgment

Counsel for the plaintiff: D. Benipal

Counsel for the defendant: D. Moseley

Place and Date of Hearing: New Westminster,  
April 29, 2025

Place and Date of Judgment: New Westminster, B.C.  
June 25, 2025

**INTRODUCTION**

[1] The defendant, Ms. Olin, applies to have the plaintiff, Khela Excavating Ltd.'s (Khela), action dismissed for want of prosecution. On April 29, 2025, after hearing this application, I granted Ms. Olin's application, dismissed Khela's action for want of prosecution, ordered that the Certificate of Pending Litigation (CPL) be removed forthwith, and ordered costs against Khela with reasons to follow. These are my reasons for making those orders.

[2] By way of brief background, in or around November or December 2017, Ms. Olin entered into an agreement with Khela to perform services on her residential property (the property) in conformity with blueprints that she provided. The services included excavating and backfilling. Khela started the work but did not complete it. On June 13, 2018, Khela billed Ms. Olin \$21,682.50 for their services. Ms. Olin refused to pay as she claimed that Khela had breached their agreement by failing to carry out the work in accordance with the blueprints. In addition Ms. Olin claimed that Khela was billing for work that they did not perform and that they were double-billing for some of the tasks that they did complete. Furthermore, Ms. Olin claimed a set-off as she had to hire a new excavating company to remediate Khela's work and to finish the job.

[3] There followed a number of events:

- a) On September 20, 2018, Khela filed a lien against Ms. Olin's property;
- b) In or around June 2019, Ms. Olin tried to refinance her property but was denied because of the lien;
- c) On September 17, 2019, Khela filed a Notice of Civil Claim (NOCC) in this action;
- d) On September 18, 2019, Khela filed a Certificate of Pending Litigation (CPL) against title to the property;
- e) On November 15, 2019, Ms. Olin filed a Response to Civil Claim;

- f) On November 20, 2019, Ms. Olin filed an Affidavit in support of her Response to Civil Claim;
- g) On November 23, 2019, Ms. Olin personally served the Response to Civil Claim and her Affidavit on the plaintiff by personally handing it to a director of the plaintiff. Ms. Olin's response, which she prepared herself, was thorough. She attached all relevant documents and photographs;
- h) On or about August 2020, Ms. Olin submitted a request for the deferment of property taxes for the Lands, which was denied for reason of the CPL being on title to the property. Ms. Olin has been unable to defer property taxes for the property each and every year since due to the CPL.

**THE LAW**

[4] Rule 22-7(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, provides that the court may dismiss an action as follows: 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.

[5] The test for dismissal for want of prosecution was recently reviewed and restated by a five-member panel of the BC Court of Appeal in *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 at paras. 69-70 as follows:

- (1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?
- (2) Is the delay inexcusable?
- (3) If the answer to both (1) and (2) is yes, is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[6] In revising the analytical framework, our Court of Appeal noted that prejudice to the defendant is no longer a prerequisite to an order dismissing the claim (para. 72).

**ANALYSIS**

[7] I will consider the questions in turn.

**(1) Has the defendant established that the plaintiff's delay in prosecuting the action is inordinate?**

[8] The answer to this question is yes. It has been six years from the filing of the lien and five years since the filing of the claim. No lists of documents have been exchanged. No examinations for discovery have been booked. In fact, Khela did nothing to advance this litigation until counsel for Ms. Olin sent Khela a letter stating that they were planning to bring this application to dismiss.

[9] Courts have held that delay of over four years constitutes excessive delay, particularly when it involves a lien. See: *Tam v. PD Plumbing & Heating Ltd.*, 2023 BCCA 457 at paras. 27-28 (3-4 years); *Etcheverry v. Bhatti*, 2024 BCSC 1222 at paras. 6-10 (four and a half years discounted by one year for the COVID pandemic).

**(2) Is the delay inexcusable?**

[10] The defendant bears the burden of bringing evidence to excuse the delay.

[11] Tarlochan Khela, director of the plaintiff offers the following justifications:

- a) Following the closing of the pleadings, he believed that the Court would contact him with respect to the next steps in the action;
- b) About two months after the defendant filed her Response to Civil Claim, the COVID pandemic commenced and the court shut down; and
- c) In April 2022, his father passed away, and in October 2022, he went to India for a few months to disperse his father's ashes.

[12] None of these are credible excuses.

[13] The explanation that the plaintiff was waiting for the Court to contact him is incredible. The plaintiff is a frequent litigant. According to court records filed on this application, he is a plaintiff, through his company, in over 20 other Supreme Court actions and seven Provincial Court actions. Additionally Mr. Khela is personally involved in two additional Supreme Court actions and two other Provincial Court actions. He is familiar with the court process. Nonetheless ignorance of the law is no excuse. It is the plaintiff's obligation to advance the litigation. This is particularly true when a lien is involved, effectively freezing the defendant's property.

[14] Mr. Khela's excuse that courts were closed is equally incredible. Courts were closed for just over two months, from March 30, 2020, to June 5, 2020. Even so, the court closure did not impact the plaintiff from taking steps such as providing a List of Documents. And finally, while the passing of the plaintiff's father may be an acceptable excuse, it constituted a delay of a few months at most. Plus, there had already been a significant delay: the trip to India was four years after the initial lien was placed against Ms. Olin's property, and three years after the action was commenced.

[15] Where there is no credible excuse, delay is presumed to be inexcusable: *The Matryx Corporation v. Royal Trust Corporation of Canada*, 2019 BCSC 1993 ("*The Matryx*"), at para 74. The answer to this question is yes.

[16] As the answers to the first two questions is yes, I move on to consider the third question: is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

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

[17] To assess whether it is in the interests of justice to dismiss, the Court in *Giacomini* directs us to a non-exhaustive list of factors as set out in *International Capital Corporation v. Schafer*, 2010 SKCA 48 at para. 45, which were summarized by Hori, J. in *Ghag v. Ghag*, 2024 BCSC 400, at para 14 as follows:

- a) What prejudice will the defendant suffer in mounting its case if the matter goes to trial? Relevant considerations on the question of prejudice may include failing memories on the part of witnesses, the disappearance or death of witnesses over the course of time, and the loss or destruction of physical evidence;
- b) How long is the delay? The longer the unjustifiable delay, the more likely it is that letting the matter go to trial will not be appropriate;
- c) To what stage has the litigation progressed? In general terms, a court should be less inclined to strike an action which is well-advanced than one which is in its early stages. The interests of justice will normally weigh in favour of getting a case to trial if it has somehow stalled just short of that mark;
- d) What impact has the delay had on the defendant? The court should be sensitive to the impact of claims which put in question the professional, business, or personal reputation of the defendant, which put the livelihood of the defendant at risk, or which involve significant or ongoing negative publicity for the defendant;
- e) In what context has the delay occurred? There is no obligation on the defendant to take any steps to move the plaintiff's case forward. However, the defendant's inaction in the face of lengthy delay by the plaintiff may weigh against dismissal of the action: *Giacomini* at para. 76. On the other hand, delay in the shadow of repeated requests by the defendant to move the action forward may be more serious than a delay where the defendant has not pressed the plaintiff;
- f) What are the reasons for the delay? When considering the justice of allowing a claim to move forward to trial, a court may revisit the reasons offered by the plaintiff for the delay. An explanation for the delay which falls short of establishing an "excuse" may inform the interests of justice analysis;
- g) What was the role of counsel in causing the delay? There are circumstances where it might be unjust to deprive a plaintiff of a remedy where the plaintiff is blameless in relation to the delay and his or her counsel is responsible for it. However, the Court in *International Capital Corp.* cautions that this consideration should not be given undue weight because plaintiffs select and instruct their counsel. If a litigant engages a lawyer and the lawyer then fails to move matters forward expeditiously, the litigant should bear the burden of his or her choice of counsel. Care must be taken to ensure that plaintiffs' counsel are not allowed to defeat applications to strike for want of prosecution by simply assuming the blame for not moving the action forward; and
- h) Is there a public interest in allowing the action to be decided on the merits? There is a narrow category of actions in which the public interest is served by allowing the action to proceed to trial. This category of actions includes cases of genuine public importance or cases that have significant implications reaching beyond the specific interests of the litigants themselves.

[18] I will consider these factors in turn.

***a) What prejudice will the defendant suffer in mounting its case if the matter goes to trial?***

[19] This factor is focussed on the impact of delay on the defendant's ability to defend herself. Prejudice is presumed from a lengthy delay like this. There will be difficulty locating witnesses. Credibility will be a key issue in this case as there is an oral agreement between the parties. Memories fade with the passage of time. It is likely that witnesses that corrected and/or completed the plaintiff's work will be unable to recall details. This factor militates in favour of a dismissal.

***b) How long is the delay?***

[20] As above, it has been over six years from the filing of the lien and five years since the filing of the claim. This factor militates in favour of a dismissal.

***c) To what stage has the litigation progressed?***

[21] The matter has not progressed at all. After the defendant filed her comprehensive Response to Civil Claim, the plaintiff took no further steps. No Lists of Documents have been exchanged. No examinations for discovery have been held. This factor militates in favour of a dismissal.

***d) What impact has the delay had on the defendant?***

[22] This factor is focussed on the defendant, Ms. Olin, personally. The impact on her has been significant.

[23] Ms. Olin is 76 years old. Having this law suit hanging over her like a cloud for so many years has caused her considerable worry. She has been unable to refinance her property because of the lien. Plus, she has been unable to defer her property taxes for each and every year since due to the CPL, which cumulatively adds up to \$28,560.13 of taxes that could have been deferred but for the CPL. This has created considerable hardship for Ms. Olin who is retired and on a fixed income. Of note, the amount of taxes that Ms. Olin has not been able to defer is more than the plaintiff's claim.

[24] This factor militates in favour of a dismissal.

***e) In what context has the delay occurred?***

[25] Once the plaintiff filed the NOCC and secured a CPL on Ms. Olin's property, he stopped. As noted above, Ms. Olin filed a comprehensive Response to Civil Claim and supporting Affidavit, attaching documents and photographs. The plaintiff did nothing until Ms. Olin hired a lawyer to bring an application to have the claim dismissed. In my view, this factor is irrelevant.

***f) What are the reasons for the delay?***

[26] The delay lies solely at the feet of the plaintiff. The plaintiff has the obligation to advance a claim in a timely fashion. The defendant does not have to take any steps to move the case forward. As discussed above, the excuses proffered by the plaintiff are unbelievable. The delay is inexcusable. This factor militates in favour of a dismissal.

***g) What was the role of counsel in causing the delay?***

[27] This factor is inapplicable.

***h) Is there a public interest in allowing the action to be decided on the merits?***

[28] While the action itself involves a simple breach of contract claim that does not attract public interest, in my view, the public would be outraged if the plaintiff was permitted to proceed with its action after tying up the defendant's property for years with a CPL, and not taking any steps to advance its claim causing the defendant considerable hardship. This factor militates in favour of a dismissal.

[29] Considering all of the factors, I am satisfied that it is in the interests of justice to dismiss the plaintiff's action.

**CONCLUSION**

[30] The plaintiff's action is dismissed for want of prosecution.

[31] All charges shall be removed from Ms. Olin's property forthwith.

[32] Ms. Olin is entitled to costs. If the parties are not able to agree on costs, they can set a hearing to appear before me through Supreme Court Scheduling to address the issue.

“The Honourable Madam Justice Murray”