

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Akomas v. Azu*,  
2023 BCSC 812

Date: 20230512  
Docket: S148200  
Registry: New Westminster

Between:

**Chris Akomas**

Plaintiff

And

**Rosemary Azu**

Defendant

Before: The Honourable Mr. Justice Armstrong

## Reasons for Judgment

Counsel for the Plaintiff:

M. Power

Counsel for the Defendant:

M. Kajoba

Place and Dates of Hearing:

New Westminster, B.C.  
October 18, 2022  
December 5, 2022

Place and Date of Judgment:

New Westminster, B.C.  
May 12, 2023

**Introduction**

[1] In January 2013 the plaintiff commenced an action against the defendant for debt in the amount of \$646,902. He also sought a declaration that he has a beneficial interest in certain lands owned by the defendant, held for the plaintiff in trust. The plaintiff registered a certificate of pending litigation against these lands owned by the defendant.

[2] This application was brought by the defendant seeks cancellation of the certificate of pending litigation, an order dismissing the plaintiff’s action for want of prosecution and an order directing that certain funds held in a solicitor’s trust account be paid to the defendant.

**Background**

[3] The facts in this case are disputed and the central issue concerns the plaintiff’s delay in prosecuting his claim.

[4] The third party claim has been dismissed by agreement.

[5] The plaintiff, Chris Akomas, claims in the notice of civil claim that the defendant, Rosemary Azu, approached him asking for a loan to purchase a property at 1739 Hampton Drive, Coquitlam, BC (the “Property”). The plaintiff says he loaned Ms. Azu \$400,000 so that Ms. Azu could purchase the Property and do some improvements. He says it was agreed that upon the sale of the Property, Ms. Azu would repay him the \$400,000 loan plus 60% of the net profit from the sale of the Property.

[6] The plaintiff further alleges he agreed to loan Ms. Azu \$6022.00 per month to pay the mortgage payments, property taxes and all other expenses related to the Property, commencing July 1, 2009 and that Ms. Azu agreed to repay that loan amount.

[7] The plaintiff says that lawyer Jane Rukaria prepared a loan agreement detailing the above, that he signed and that it was sent to Ms. Azu to sign (the “Loan Agreement”).

[8] He alleges that despite numerous requests, Ms. Azu has neither sold the Property nor paid back the loan amount to the plaintiff.

[9] In her response to civil claim and her counterclaim, Ms. Azu denies having ever entered into or signed the Loan Agreement. She contends that in March 2009, Chris Akomas instructed her to either purchase or rent a home in Coquitlam for him and between April 2009 and August 2009, remitted to Ms. Azu \$226,853.41 as security for either renting or purchasing a home from Ms. Azu.

[10] Ms. Azu says that on or about June 16, 2009, she purchased the Property at 1739 Hampton Drive, Coquitlam, BC for \$1,130,000. She says the Property and the mortgage were both in her name. She contends Mr. Akomas and/or his family and/or employees have occupied the Property since she purchased it.

[11] The defendant contends that in or around the end of June 2009 she agreed to sell the Property to Mr. Akomas for \$350,000 plus the balance of the mortgage which was approximately \$800,000. She says this agreement, which was reduced to writing by Ms. Rukaria, included both monthly and yearly payments by Mr. Akomas with title to the Property being transferred to Mr. Akomas at the end of a five-year period so long as the mortgage had been paid off and discharged.

[12] Ms. Azu contends Mr. Akomas owes her \$8,146.59 of the \$350,000 purchase price, after remitting \$226,853.41 as security and two further payments totalling \$115,000. Ms. Azu contends that between September 2009 and May 2014 she spent \$637,999.18 on the plaintiff's behalf and the plaintiff repaid only \$546,696.41. This shortfall of \$91,302.94 added to the balance of the \$8146.59 payable to the defendant toward the purchase price results in a total balance owing of \$99,449.53.

[13] Ms. Azu says Mr. Akomas has refused to make monthly payments since December 2012 and that to avoid the mortgage going into default, Ms. Azu has had to make those payments from her own funds.

[14] Mr. Akomas commenced this action on January 19, 2013 seeking judgment against the defendant for \$646,902 in debt and a declaration that the defendant

holds the Property for him in trust. He also seeks a certificate of pending litigation and damages for unjust enrichment.

[15] Ms. Azu counterclaimed on April 16, 2013 seeking judgment in debt for \$63,199 and a declaration that the plaintiff is in breach of the terms of their agreement. She also claims damages for the plaintiff's breach of the agreement and in the alternative occupational rent for residing in her home.

[16] In this case, there are factual controversies and disagreements regarding entitlements each claims against the other.

### **Litigation Chronology**

[17] This application concerns the defendant's allegation that the plaintiff has failed to prosecute this action in a timely way and the question of whether the defendant is entitled to a dismissal of the action due to the alleged inexcusable and inordinate delay in prosecuting this action.

[18] In the defendant's notice of application and the plaintiff's response, each sets out a chronology of steps that have been taken in this litigation. I have combined those chronologies and added additional information here:

- a. January 10, 2013 - plaintiff filed notice of civil claim and certificates of pending litigation against the Property (the "First CPL") and other lands belonging to Ms. Azu which are unrelated to this litigation (the "Second CPL");
- b. April 16, 2013 - defendant filed response to civil claim, counterclaim, and third party notice;
- c. July 3, 2013 – notice of application was filed;
- d. July 17, 2013 - application response was filed;
- e. July 19, 2013 – the Court ordered joint conduct of sale of the Property and that the proceeds of the sale be placed in an interest-bearing trust account;

- f. July 30, 2013 – response to third party notice was filed;
- g. September 6, 2013 - notice of application was filed;
- h. September 16, 2013 – application response was filed;
- i. September 19, 2013 – the Court ordered for joint conduct of sale, and Brian Lamb appointed as Realtor;
- j. May 29, 2014 – the Property was sold, following which the mortgage and associated costs were paid out and the balance of the proceeds (\$258,751.33) were paid into the trust account of Kojo Frempong Law Office;
- k. June 16, 2014 - notice of application was filed;
- l. June 20, 2014 - application response was filed;
- m. June 25, 2014 – the Court ordered document exchange within 30 days, that Ms. Azu provide all documentation in her possession or control relating to her purchase of the Property and an accounting of any sum received by her from Mr. Akomas in connection with the purchase of the Property, and adjourned application for release of funds;
- n. July 14, 2014 - requisition for resetting application for release of funds filed by the plaintiff;
- o. July 18, 2014 – the Court made an order for the release of \$160,000 of the proceeds of the sale of the Property to the plaintiff with \$98,751.33 remaining in trust, and costs of the application were awarded to the defendant;
- p. October 9, 2019 - notice of intention to proceed filed by the defendant;
- q. February 1, 2021 - notice of intention to proceed filed by the defendant;
- r. February 23, 2021 – counsel for the plaintiff advised counsel for the defendant that they were in the process of being retained with respect to the litigation and requested that no further steps be taken without prior notice;

- s. May 17, 2021 – plaintiff’s counsel received a letter from defendant’s counsel advising of his intention to move the litigation forward;
- t. June 8, 2021 – plaintiff’s counsel wrote to counsel for the defendant and third party requesting lists of documents;
- u. August 3, 2021 - notice of discontinuance of third party action filed by defendant;
- v. October 13, 2021 – plaintiff’s counsel wrote to defendant’s counsel regarding the earlier request for a list of documents and availability for trial dates in January and February 2023;
- w. October 20, 2021 – defendant’s counsel provided plaintiff’s counsel with two spreadsheets relating to expenses at issue in the action and advising that a list of documents would be provided shortly;
- x. October 29, 2021 – defendant’s counsel provided plaintiff’s counsel with a list of documents, following which plaintiff’s counsel requested via email copies of certain documents listed; and
- y. November 4, 2021 – defendant’s counsel provided copies of the requested documents on a USB.

[19] No examinations for discovery have been conducted and no trial date has been set.

[20] The defendant has yet to produce an accounting of any sums received by her from the plaintiff in connection with the purchase of the Property as required by the Court.

[21] The plaintiff issued a list of documents on July 25, 2014 but no list of documents was delivered to the plaintiff until October 29, 2021.

[22] A response to counterclaim was filed by the plaintiff on November 28, 2022, after the first date of the hearing of this application and one week prior to the second date of the hearing.

[23] It is important to note that the Second CPL filed by the plaintiff on January 10, 2013 was against another property owned by the defendant which is unrelated to this dispute, which remained on title as late as January 2022. The presence of the Second CPL against the defendant's property encumbered her title, preventing her from remortgaging at a lower interest rate or selling that property.

### **Positions of the Parties**

#### **Defendant**

[24] Ms. Azu relies on Rules 8-1 and 22-7 of the *Supreme Court Civil Rules* and *Wiegert v. Rogers*, 2019 BCCA 334 to argue that Mr. Akomas' inexcusable, inordinate delay in prosecuting his claim requires a dismissal of the action. She argues that the plaintiff's son picked up the file from Mr. Akomas' previous counsel in October 2017 but never filed a notice of intent to act in person. As such, she says that the plaintiff has sat on the file and chosen not to do anything on the matter for five years despite having representation. She says this constitutes inordinate and inexcusable delay. Ms. Azu contends that as such, prejudice is presumed and can be inferred by the passage of time.

[25] In her notice of application, Ms. Azu sought at para. 1 of Part 1 for the certificate of pending litigation filed against her personal property to be cancelled and discharged. As the plaintiff consented to that order in his application response, Ms. Azu did not argue that issue at the hearing of the application.

[26] Ms. Azu informed the Court that, should the application for dismissal of claim for want of prosecution be granted, she would be seeking an adjournment before appearing again to argue the third issue raised on this application, that the remaining funds held in trust by Kojo Frempong Law Office should be paid out in her favour.

**Plaintiff**

[27] The plaintiff takes the position that although the delay is likely inordinate, in the circumstances the delay is excusable because “the delay is attributable to the conduct of the [p]laintiff’s previous counsel, along with the significant competing responsibilities of the [p]laintiff’s son”.

[28] Mr. Akomas contends that even if the delay is inordinate and inexcusable, the action should not be dismissed as the defendant has suffered little or no prejudice as a result of the delay. He says the delay in this case has had no effect on the defendant’s ability to call evidence or have a fair trial and that the three key witnesses (Ms. Azu, Mr. Akomas, and Mr. Akomas Jr.) all remain available to provide evidence at trial.

[29] He asserts that Ms. Azu has produced no evidence of any prejudice at all and that her August 30, 2022 affidavit suggests that her ability to recall the events at issue remains clear and detailed. As a result, the plaintiff says any prejudice based on witness memory is minimal or negligible. In the further alternative, if the defendant has suffered any prejudice, the plaintiff says it does not rise to the serious level required on an application for want of prosecution.

[30] On the other hand, the plaintiff says that he will suffer significant prejudice if he is not permitted to have his claim decided on the merits. Mr. Akomas says he has incurred costs in this litigation and substantial damages as a result of the defendant’s conduct. Further, entitlement to the remaining funds held in trust with Kojo Frempong Law Office must be determined on the merits.

[31] The plaintiff submits that it would not be in the interests of justice to allow the defendant to proceed with her counterclaim while simultaneously dismissing the plaintiff’s claim for want of prosecution. The plaintiff is prepared to schedule dates for examinations for discovery and set dates for trial.

[32] Mr. Akomas provided the Court with the following context and reasons for the delay in proceeding to trial on this action. From the commencement of this litigation,

the plaintiff has not resided in Canada and has relied on his son, Alozie Chiedoziem Chris Akomas (“Mr. Akomas Jr.”), who does live in Canada, to assist with the litigation.

[33] The plaintiff’s explanation for the delays from 2013 to 2022 in moving this action forward begin with Mr. Akomas Jr. assuming responsibility for his father’s affairs in Canada in 2011.

[34] Mr. Akomas takes the position that the delay from 2013 – 2017 relates to delays from counsel. Since the action was commenced in 2013, the plaintiff has changed counsel several times. At the hearing of this application, Mr. Akomas Jr. explained the breakdown in the plaintiff’s relationship with his first counsel. Mr. Akomas says he became frustrated with the progress of his second counsel in January 2014 so retained new counsel. He again became frustrated by the pace of the litigation with his third counsel so moved his file back to his first counsel. From October 2014 to October 2017, his first counsel was retained on the file however there was no progress during that time.

[35] In October 2017, Mr. Akomas attempted to retain his second counsel again, however, he was advised he was no longer practising. Following this, Mr. Akomas Jr. picked up the file from the first counsel and held it from October 2017 until around March 2021. Around February 1, 2021, plaintiff’s current counsel was retained.

[36] The plaintiff explains the delay from 2017 to 2020 on the fact that Mr. Akomas Jr. was dealing with a number of competing priorities during that period, including immigration issues, studying as a university student, acting as the primary caregiver for his three younger siblings, and working as permitted by his immigration status to provide for his siblings. In July 2016, Mr. Akomas Jr. retained an immigration consultant for the purpose of securing permanent resident status in Canada. In or around the summer of 2017, Mr. Akomas Jr. lost his immigration status and could not study or work in Canada. He said he made efforts to focus on

resolving those difficulties and attended to obtaining temporary status for his siblings to live in Canada.

[37] Mr. Akomas Jr. said that Covid–19 pandemic complications prevented him from completing his permanent residency application because he could not leave Canada.

[38] Mr. Akomas Jr. has attended a university in Surrey, BC since 2018.

[39] He said that in this interval, his finances had become tight and he maintained possession of the file but took no steps in the litigation until he moved the file to his current counsel in February 2021.

[40] Correspondence was exchanged between the parties between March 2021 and November 2021 pertaining to document disclosure and production. Mr. Akomas contends that on October 13, 2021 his counsel inquired with defendant’s counsel for possible trial dates and never received a response. When this application was filed, nothing had transpired in the time between November 2021 and September 2022.

## **Discussion**

### **Legal Principles**

[41] Rule 22-7(7) provides that “[i]f, 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”.

[42] An application for dismissal of a proceeding for want of prosecution involves the exercise of judicial discretion. The Court is not required to identify and address all of the evidence considered on the application but must consider all of the evidence pertinent to the exercise of this discretion: *Wiegert*, at paras. 24–25, 30.

[43] To succeed in an application for dismissal for want of prosecution, the applicant must demonstrate inordinate delay, that the inordinate delay is inexcusable, and that the delay caused or is likely to cause serious prejudice to the defendant: *Wiegert* at para. 31.

[44] In *Wiegert*, the Court of Appeal said:

[32] Inordinate delay is delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question: *Azeri* at para. 8; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 17. As Justice Saunders explained in *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 25, the concept is relative: some cases are naturally susceptible of fast carriage or call for more expeditious prosecution than others. Although there is no universal rule as to when time starts to run, the date of commencement of the action is typically identified as the point from which delay is measured. The delay should be analysed holistically, not in a piece-meal fashion, and the extent to which it may be excusable is highly fact-dependent: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38; *0690860* at para. 29.

[45] In *Kelly v. Dyno Nobel Canada Inc.*, 2016 BCSC 1601, the Court discussed what constitutes a “step” in the litigation for measuring delay:

[19] As to what constitutes a “step” in a proceeding, the defendant says that the type of step contemplated is a formal one, namely one that is required or permitted by the Rules which moves an action forward: *Ellis v. Wiebe* 2011 BCSC 683 (SC) at para. 12.

[20] *Ellis, supra*, also stands for the proposition that a Notice of Intention to Proceed, as it does not actually move the proceeding forward, is not a step in the litigation process: *supra*, at para. 12.

[21] Neither are exchanges of correspondence or various communications between counsel formal steps as they are not expressly required or permitted under the Rules: *Easton v. Cooper* 2010 BCSC 1079 (SC) at para. 10.

[46] If a defendant can establish inordinate and inexcusable delay, a rebuttable presumption of prejudice arises: *Wiegert* at para. 33. The issue of prejudice focuses on impediments to the mounting of a defence resulting from a delay. As mentioned in *Wiegert* at para. 33, this analysis is “highly fact-dependent” but may include:

- a. the length and reasons for delay;
- b. the stage of the litigation; and
- c. the context in which the delay occurred and the role of counsel in causing delay.

[47] The Court’s analysis of the role of counsel in causing the delay must take into account the potential injustice of depriving a plaintiff of a remedy in circumstances

where the plaintiff is blameless in relation to delay for which the plaintiff's lawyer is entirely responsible: *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45(g) [*International Capital*].

[48] However, the above must not be overstated, as plaintiffs choose and instruct their lawyers. As the Court said at para. 45(g) of *International Capital*, “[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 and should not expect to have that burden shifted wholly to the defendant who played no role”.

[49] It must be remembered that dismissals for want of prosecution are Draconian orders and should not be made lightly: see *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145 at para. 37 [*Tundra Helicopters*] and *New Rightway Contracting Ltd. v. 0790792 B.C. Ltd.*, 2023 BCSC 216 at para. 23.

### Analysis

[50] The delay in this case begins January 10, 2013 with the filing of the notice of civil claim by the plaintiff. There were multiple steps in the proceeding up to and including July 18, 2014. The order for document exchange made June 25, 2014 was not obeyed by the defendant although she produced a list of documents dated March 9, 2013. The plaintiff prepared a list of documents but the evidence does not establish that this list was delivered to the defendant. Further, the defendant was ordered to provide an accounting of certain funds but she failed to produce this statement.

[51] The first consideration on this application is whether the plaintiff's delay has been inordinate and inexcusable.

[52] I find that the delay in this case has been inordinate. The exchanges of correspondence between counsel since July 2014 are not formal steps as they are not expressly required or permitted under the *Rules*. Neither are the notices of intention to proceed, as they do not actually move the proceeding forward. There were no steps taken in the proceeding between July 2014 and October 29, 2021.

This delay of seven years and four months is excessive and out of proportion to the matters in question.

[53] The next question is whether the delay is inexcusable in all of the circumstances. It is notable that the plaintiff has not filed a defence to the defendant's counterclaim.

[54] Conversely, the defendant remains in breach of the Court's 2014 order requiring her to produce a list of documents and an accounting. The plaintiff suggests that the defendant acquiesced to the delay by failing to produce these documents. The issue of acquiescence was discussed in *Tundra Helicopters* at para. 15 and in *Jawanda v. Sra Estate*, 2021 BCSC 366 at paras. 20–21 to the effect that the defendant's inactivity is a factor in assessing whether the plaintiff's delay has been inexcusable.

[55] In this case, the failures of counsel to move the plaintiff's case forward are a principal explanation offered for the delay. Mr. Akomas Jr. indicated that by 2014 his father was frustrated with the pace of litigation and there was confusion concerning where the sale proceeds of the house was held. He described how the file was moved back and forth between two lawyers between January 2014 and October 2017. He does not say what steps he took to instruct or monitor counsel to move the file along nor was he advised of the reasons the lawyers were not moving the file toward a conclusion. Further, no steps were taken to move the litigation forward for five years between October 2017 and February 2021 while Mr. Akomas Jr. had the file; no intention to act in person was ever filed.

[56] The plaintiff's position is that the delay is excusable in part because of Mr. Akomas Jr.'s personal circumstances from 2017 to 2020. Mr. Akomas Jr. went on to discuss problems with his immigration status and said he made unsuccessful efforts to find new counsel after the fall of 2017. There is a dearth of evidence in Mr. Akomas Jr.'s affidavit concerning the reasons this action did not move along. Nothing indicates that his father could not afford to retain counsel nor that he remained active and looking for counsel until February 2021.

[57] As noted, it may be harsh for a litigant to suffer the consequences of a lawyer's delay in prosecuting a claim, but the defendant was entitled to a more timely approach and I am satisfied that considering all of the circumstances the delay is inexcusable.

[58] The third factor to be analyzed is whether serious prejudice to the defendant has been caused by the delay or is likely. A rebuttable presumption of prejudice arises once the delay is confirmed as inordinate and inexcusable: *Wiegert* at para. 33.

[59] The question of prejudice turns on the impact of the delay on the defendant's ability to mount and present a defence at trial. As noted in *Wiegert*, considerations include failing memories, availability of witnesses and the loss or destruction of physical evidence.

[60] In this case, the defendant relies on an oral agreement and rejects the terms of a written agreement she apparently signed. The former third party is a lawyer who appears to have advised both plaintiff and defendant on the transaction, therefore her availability and memory will likely be important.

[61] Taking into account the defendant's August 30, 2022 affidavit and Mr. Akomas Jr.'s affidavit, there is no indication or evidence that the relevant matters involving memory, witnesses, and physical evidence might cause prejudice in the defendant's trial preparations. There is no suggestion by the defendant that memory has faded, that witnesses have disappeared, or that physical evidence has been lost or destroyed. The only prejudice raised by the defendant stemming from the delay was the Second CPL on the title to her house (not the property at issue in this litigation).

[62] In the result, the plaintiff has rebutted the presumption of prejudice arising from the inordinate and inexcusable delay. The authorities are clear that to justify dismissing an action for want of prosecution, prejudice caused by inordinate and inexcusable delay must impact the ability of the defendant to prepare and present a defence at trial. The prejudice referred to by the defendant arising from the Second

CPL is not the type of prejudice the Court is concerned with on an application for want of prosecution: *Almas Bros. Contracting Ltd. v. Tomax Enterprises Ltd.*, 2023 BCSC 68 at para. 46.

[63] Although I accept that the plaintiff's delay has been inordinate and inexcusable, I am unable to find any serious prejudice to the defendant's ability to present and argue the case at trial. As such, the interests of justice would not be served in this case by granting the application to dismiss at this time. There is a serious claim advanced by the plaintiff and an equally serious outstanding counterclaim. The plaintiff should be allowed to proceed as expeditiously as possible to trial.

**Conclusion**

[64] In conclusion, the application to dismiss the action for want of prosecution is dismissed. As such, entitlement to the remaining funds in Kojo Frempong Law Office's trust account is to be determined through the litigation. I decline to order that those funds be paid to the defendant on this application.

[65] In his application response, Mr. Akomas consents to the Second CPL being cancelled, therefore I order that certificate of pending litigation No. BB3004428 be cancelled and discharged from the title of the property legally described as:

PID: 016-253-311

Lot 35 Section 13 Township 39 New Westminster District Plan 86154

[66] The plaintiff will be entitled to costs as costs in the cause under Rule 14-1.

“Armstrong J.”