IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kosmas v. Kosmas,*
2023 BCSC 1093

Date: 20230626
Docket: E173009
Registry: New Westminster

Between:

Andrew James Kosmas

Plaintiff

And

Peter James Kosmas, 0783986 B.C. Ltd. and Coomber Mechanical Ltd.

Defendants

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for the Plaintiff:	C. Rodocker
Counsel for the Defendants:	J.L. Zacharias R. Thomas
Place and Date of Hearing:	Abbotsford, B.C. June 8, 2023
Place and Date of Judgment:	New Westminster, B.C. June 26, 2023

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Introduction

[1] The Defendants apply for an order dismissing this action for want of prosecution. For the reasons that follow, the application is dismissed.

Governing Legal Principles

[2] The parties agree on the legal principles governing applications to dismiss litigation for want of prosecution. They are helpfully summarized in *Dias v. Sabyan*, 2022 BCSC 1384 at paras. 23-24:

> **The Law**
>
> 23 Rule 1-3(1) of the *Supreme Court Civil Rules* sets out the object of the rules of court:
>
> The object of these *Supreme Court Civil Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> 24 Rule 22-7(7) of the *Supreme Court Civil Rules* grants the court authority to dismiss a proceeding for want of prosecution. Dismissal under this provision is a discretionary order. The factors to be considered in exercising that discretion are well known and can be summarized as follows:
>
> a) the length of the delay and whether it is inordinate;
>
> b) the reasons for the inordinate delay and whether it is inexcusable;
>
> c) whether the delay has caused or is likely to cause serious prejudice to the applicant; and
>
> d) whether the balance of justice requires dismissal of the action.
>
> Irving v. Irving, 1982 CanLII 475 (B.C.C.A.); Murrin Construction Ltd. v. All-Span Engineering and Construction Ltd., 2012 BCCA 251 at para. 6.
>
> 25 The analysis of whether delay is inordinate and inexcusable is intertwined. Until a credible excuse for an inordinate delay is given, the natural inference is that the delay is inexcusable: *Scoretz v. Kensam Enterprises Inc*., 2021 BCSC 1906 at para. 42 [*Scoretz*].
>
> 26 The final factor, balance of justice, encompasses the other three and is the decisive question: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 31. It is only to be considered if the applicant establishes the first three factors: *Hanna's Construction v. Blue River*, 2006 BCCA 142 at para. 37.

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Background Facts

[3] The litigation between the parties involves ownership and control of a family business, namely the operation of a restaurant known as “Jimmy's Pub and Grill” and related private liquor stores.

[4] The Plaintiff, Andrew Kosmas, and the Defendant, Peter Kosmas, are the sons of Demetrios Kosmas, their father, and Stavroula Kosmas, their mother. Demetrios died in 2012. Stavroula died in February 2022.

[5] The Defendant Coomber Mechanical Ltd. has at all material times been the owner or licensee of the pub and the liquor stores and the leaseholder of the real property on which the pub and liquor store(s) were operated.

[6] The Defendant 0783986 B.C. Ltd. (“078 Co.”) was incorporated in February 2007 with Andrew and Peter as equal shareholders and directors. In the summer 2008, 078 Co. acquired the shares of Coomber Mechanical Ltd.

[7] Disagreements between the brothers regarding the management of the business enterprises inform much of their subsequent dispute.

[8] In 2009 Andrew Kosmas’ brief marriage fell apart and later led to divorce. The Kosmas family members agreed to shield the family business from any claims by Andrew's wife and his 100 shares in 078 Co. were transferred into the name of Stavroula and Demetrios, each of whom received 50% of the shares. Andrew Kosmas also formally resigned as a director of 078 Co.

[9] The Notice of Civil Claim in this action was filed on July 23, 2015. The pleading is commendably brief but it also contains erroneous allegations of fact. In particular, it alleges that the transfer of Andrew's shares in 078 Co. was made to his brother, Peter, and not to his parents. It alleges that he and Peter had agreed to transfer the shares back to Andrew once his marital dispute was resolved and that Peter, in breach of their agreement, refused to do so.

[10] The Notice of Civil Claim claimed extensive relief, including:

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- a certificate of pending litigation (“CPL”) over the real property on which one or more of the businesses was operated;

- the declaration that Andrew Kosmas was the beneficial owner of one half of all the assets owned by the Defendant corporations and that Peter held one half of those assets in trust for Andrew; and,

- an order that Andrew be compensated for the value of his half interest in the Defendant companies or alternatively, compensated for losses and damages incurred as a result of the Defendants’ oppressive conduct.

[11] On November 3, 2015, the Defendants filed both a Response to Civil Claim and a Counterclaim. Among other things, the Response alleged:

- 078 Co. was indeed incorporated for the purpose of purchasing the shares of Coomber Mechanical Ltd.;

- 50% of the shares in 078 Co. were indeed issued to the plaintiff, however it was the Defendants' intention that Andrew would hold the shares in-trust for his parents who were the beneficial owners of the shares;

- the two brothers did indeed operate the businesses together for some period of time;

- because of Peter's “personal hardships”, in 2009 the plaintiff did indeed transfer his shares in 078 Co. to his parents and resigned as a director of the defendant corporations; and

- “the Defendants are not aware of any intention or agreement to transfer the Shares back to the Plaintiff”.

[12] The Counterclaim, which is brought by all three Defendants, sought judgment and damages against Andrew Kosmas for (unparticularized) “business losses” arising from the latter's “personal hardships” as well as certain (unparticularized) loans made to the plaintiff which had not been repaid.

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[13] In the period May 2016 through January 2017 various settlement terms between the parties were negotiated. Whether or not an enforceable agreement was actually reached between the parties will be one of the issues in dispute in this litigation if it is allowed to continue.

[14] In September 2016 the Defendants filed and served an application to stay the litigation on the basis that the matter had been settled. Among other things, the Defendants sought an order that would result in:

- a transfer of 40% of the 078 Co. shares to Andrew Kosmas;
- a transfer of 40% of the shares in Coomber Mechanical Ltd. to Andrew Kosmas;
- a transfer of 20% of the shares in the above companies to the mother, Stavroula Kosmas (who had in any event received her husband's shares as part of the distribution of his estate);
- a transfer of 50% of “interest in Jimmy's Pub” to Andrew Kosmas;
- discharge of the CPL filed by the Andrew Kosmas against the real estate; and
- in the alternative, an order dismissing the action.

[15] The application was supported by an affidavit sworn by the Defendant, Peter Kosmas.

[16] In that affidavit he swears under oath that his brother “signed over all of his shares (in 078 Co.) to my parents” because of a concern that “his then wife would come after the shares as his assets”. He also swore that the parties had agreed to settle the litigation in accordance with the terms set out above.

[17] The affidavits include a copy of the various correspondence exchanged between the parties’ lawyers. One such letter, dated January 6, 2017, from the solicitor for the Plaintiff purports to confirm a settlement as follows:

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- removal of the CPL;
- Peter Kosmas to retain 50% of the shares in 078 Co.;
- Stavroula, the mother, to retain 20% of the shares in 078 Co.;
- Andrew Kosmas to receive 30% of the shares in 078 Co.; and,
- Stavroula's estate to be split 50/50 between the two sons on her death.

[18] The 2016 application to enforce a settlement was adjourned by consent. In October 2016 the parties each exchanged their Lists of Documents. In November 2016, the Plaintiff filed and served a Response to Counterclaim.

[19] Nothing further happened in the litigation until April 2022, almost five and half years later, and a flurry of activity has occurred in the subsequent one-year period including, among other things:

- a Notice of Intention to Proceed was filed by the Plaintiff;
- the Plaintiff served an Amended List of Documents;
- the Defendant served an Amended List of Documents;
- the Defendants filed an application to dismiss for want of prosecution on November 9, 2022 (adjourned twice);
- cross-examination on the affidavits filed in support of the application was ordered on January 30, 2023;
- such cross-examination occurred in February 2023;
- the Plaintiff filed an application for leave to add a defendant (Jimmy's Pub Agassiz Ltd.) and file an Amended Notice of Civil Claim on May 5, 2023;
- on May 31, 2023 Master Nielsen of this Court ordered an adjournment of the amendment application; and,

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- on June 8, 2023 the dismissal for want of prosecution application proceeded before me and judgment was reserved.

Analysis and Determination

[20] There is little doubt that a five-and-a-half-year delay in pursuing the litigation between October 2016 and April 2022 is inordinate. The events giving rise to the claim (refusal to return the shares) occurred well over 10 years ago and the action was not started until July 2015. Almost eight years later, no trial date has been obtained, no examinations for discovery have been held, and the plaintiff is planning to radically amend the Notice of Civil Claim (including the addition of another party) to reframe matters in accordance with the facts.

[21] Whether or not one adopts the "holistic approach" referred to in *Ed Bulley Ventures Ltd. v. Pantry Hospitality Corp.*, 2014 BCCA 52 or the "immoderate, uncontrolled, excessive and disproportionate" descriptors found in *Wiegert v. Rogers*, 2019 BCCA 334, the delay in this case is inordinate by any measure.

[22] The excuse for the delay is weak. First, Andrew Kosmas says the reason he took no steps after 2016 was because he "thought the matter had settled" in accordance with the terms set out in his brother's affidavit sworn at the time.

[23] Secondly, Andrew Kosmas pleads poverty. Among other things he says in his January 20, 2023 affidavit:

- for a period of about five years following 2016 "I was not making a great deal of money personally and could not afford a lawyer even if I wanted to hire one";

- because he had been excluded from the business, he "was forced into employment where I barely made enough to make ends meet";

- "I had to choose between hiring a lawyer or feeding my family. I obviously chose the second option. As a result, I had to simply hope that Peter would do the right thing and give me my shares. That did not happen"; and,

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- however, “I am [now] on a better financial footing and have been able to retain [his current lawyers] to hopefully bring this matter to a close."

[24] Andrew Kosmas' Notices of Assessment from the Canada Revenue Agency (the “CRA”) for the tax years 2012 to 2019 were put into evidence. They confirm that his reported income has been modest and in some years zero.

[25] The Defendants argue that, as was the case in *Ed Bulley*, the plaintiff is simply making a bald assertion of poverty and does not explain or corroborate any inability to raise funds in the five and a half year period immediately following 2016. They say the Plaintiff's “impecuniosity excuses unsupported and uncredible (*sic*)”

[26] While I agree the claim is only weakly supported, the CRA documents would seem to substantiate only a modest income during the relevant period of time. Accordingly I am giving some weight to Andrew Kosmas' evidence in the “holistic” assessment that I am undertaking here.

[27] The next question is prejudice, and, in particular, whether the passage of time and intervening events have created insurmountable evidentiary challenges such that a fair trial of the issues in dispute is not reasonably possible.

[28] The Defendants rely on the presumption of prejudice that the case law permits when the length of delay has been considerable. As well, however, they point to additional specific prejudice including:

- two key witnesses to the original share transfer transaction in 2009 have died, namely the father in 2012 and the mother in February 2022… the only living participants to the verbal agreement between the parties are now the two brothers;

- documents have been lost or their location is unknown and “it is expected that the memories of [the two brothers] and various witnesses have deteriorated”; and,

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- “the limitation period has long expired”.

[29] Peter Kosmas’ sworn affidavit in support of this application on November 9, 2022 says:

- “I no longer have confidence in my own memory and recollection of the events, conversations and oral agreements which are at the heart of this Action. I have general recall, but I cannot recall the details of what happened, when conversations took place, what conversations took place, and who participated in each conversation.”; and,

- “business records from 2010 through 2014 are unlikely to be available as the five-year record-keeping requirement has long passed”.

[30] I find this evidence unpersuasive. The lawsuit was initially started in 2015, likely within any six-year limitation period applicable under the former limitation legislation. That lawsuit triggered the Defendants’ document preservation obligations, although their original List of Documents appears to have been extremely modest. If documents are no longer available (and Peter Kosmas does not actually say this or even that any search has actually been made) no explanation has been provided for their disappearance or any inability to re-create them.

[31] For sure, the two parents have died and are no longer available as witnesses. However, the evidence before me on this application contains very little about their role in the business or as shareholders. The evidence that was placed before me regarding the settlement negotiations in 2016 seems to indicate that Peter Kosmas was directing the affairs of the two corporate Defendants, including the making of the settlement agreement which he himself attempted to enforce at the time. It certainly appears that the two brothers were and are the two principals in the drama.

[32] As to fading memories, it is highly likely that this has occurred to some degree. Nevertheless, there are documents which appear to corroborate Andrew Kosmas' version of the original share transfer transaction, not the least of which is a

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certain August 7, 2015 email that Peter Kosmas apparently sent to himself as a memorandum of the history of the business and in which he states:

> It was another scorched-earth divorce for AK and his family had a front row seat and became victims and feared the investment could be at risk. AK seeing that risk as his wife was threatening the investment, AK was happy to sign his shares back to his family [parents] till things got worked out and all three of us were grateful. The plan was to eventually transfer the shares back to AK.

[33] As well, notwithstanding the vague assertions otherwise in his November 9, 2022 affidavit, Peter Kosmas' two other affidavits, sworn September 5, 2016 and January 25, 2023 purport to describe the transactions between the parties in considerable detail and demonstrate a fairly deep recollection of relevant events. Indeed, on his cross-examination on affidavit he agreed that he “remember(s) the most important things” related to this dispute and that “reading [his] brothers affidavit and producing [his] own affidavits recently has refreshed [his] memory about what happened in the past”.

[34] In short, while I would acknowledge the long delay in prosecuting this case has caused some prejudice to the Defendants, I do not think it is of such a nature that it will preclude a fair trial at the end of the day. This conclusion is perhaps sufficient to dispose of this application without more, however I will turn nonetheless to the overarching consideration of whether a dismissal of the action would be in the interests of justice.

[35] First, I would note that this litigation involves a significant amount of money. The court was informed during the hearing that the value of the business is in the vicinity of $3 million. Should the Plaintiff succeed in his claim for a 50% ownership of that business or for compensation for its loss, the amounts involved may be considerable. This militates in favour of a judicial determination of the merits of the claim.

[36] Counsel for Andrew Kosmas submits that his client's claim “has in essence been proven through Peter's testimony and is *prima facie* meritorious on that basis”. While that may be overstating the matter, it certainly appears that Andrew Kosmas'

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claim regarding a promise to return his shares has some merit, a claim that may be corroborated by a possible settlement for their return in 2016 made in relation to litigation commenced within the applicable limitation. These factors, while by no means presently proved on the relevant standard of proof at any trial, also militate in favour of a judicial determination of the dispute.

[37] Overall, while this application is perhaps close to the line, my assessment of all the factors in the context of the evidence adduced before me, leads me to conclude that the interests of justice require the action not to be summarily dismissed for want of prosecution but rather should be determined by the court on its merits.

Conclusion

[38] The Defendant's application for an order dismissing this action for want of prosecution is dismissed.

[39] In the circumstances, however, the costs of this application should not be awarded to the Plaintiff at this time but instead should more appropriately follow the merits of the claim determined at trial. Cost of this application will therefore be in the cause.

"Kent J."

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