

SUPREME COURT OF NOVA SCOTIA

Citation: *JPA Construction Limited v. Saad*, 2024 NSSC 409

Date: 20250122

Docket: Hfx No. 520201

Registry: Halifax

IN THE MATTER OF:

The *Builder's Lien Act*, being chapter 277 of the Revised Statutes of Nova Scotia, 1989, as amended

Between:

JPA Construction Limited

Plaintiff

v.

Joseph Hanna Saad

Defendant

and

Jean Alphonse

Third Party

DECISION ON MOTION TO DISMISS FOR WANT OF PROSECUTION

Judge: The Honourable Justice Scott C. Norton

Heard: December 16, 2024, in Halifax, Nova Scotia

Decision: December 16, 2024

Counsel: Patrick O'Neil, for the Plaintiff and Third Party
James D. MacNeil, for the Defendant

By the Court (orally):**Introduction**

[1] The plaintiff, JPA Construction Ltd., filed a Claim of Lien, pursuant to the *Builder's Lien Act*, RSNS 1989, c. 277, on October 31, 2022, and registered it at the Land Registration Office for the County of Halifax. On January 5, 2023, the plaintiff perfected the Claim of Lien by commencing this Action and registering a Certificate of Lis Pendens ("CLP").

[2] From January 5, 2023, until June 14, 2023, the parties, including the plaintiff, the defendant, and the third party, were engaged in filing their respective pleadings. Pleadings closed as of June 14, 2023. Also, on February 22, 2023, the plaintiff and defendant consented to an Order vacating the Claim of Lien and CLP and requiring the defendant to pay the sum of \$15,398 into his lawyer's trust account as security in place of the lien.

[3] Since June 14, 2023, the plaintiff has failed to take any steps to advance the action brought against the defendant for the Claim of Lien.

[4] The defendant moves for an order dismissing the Action based on want of prosecution.

[5] The plaintiff did not file any materials in response to the motion until Friday, December 13, 2024, effectively the day before the hearing on Monday, December 16, 2024. By *Civil Procedure Rule 23.11*, the plaintiff's response was required to be filed five days before the hearing. The plaintiff's explanation for this lapse was that it did not instruct counsel to respond to the motion until late last week. This disregard for the timelines set by the *Civil Procedure Rules* is disrespectful to the court and to the opposing party and will not be condoned. What the court permits it promotes. While I exercise my discretion to allow the late filing of the response materials, I will address the plaintiff's failure to file within the timelines by an award of costs.

Law

[6] *Civil Procedure Rule 82.18* provides for dismissal for want of prosecution:

82.18 A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time.

[7] In *Young v. Merrill Lynch Canada Inc.*, 2013 NSSC 225, Justice Bourgeois affirmed the well-established test for dismissal of an action for want of prosecution as it was originally stated in *Clarke v. Ismaily*, 2002 NSCA 64, at para. 8:

[8] Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.

Analysis

[8] In cases involving claims for builder's liens, the threshold is lower for proving that delay is inordinate. This is because an encumbrance of real property by registering a lien is an extraordinary remedy. It is a type of interim relief that does not require proof of its merits. It is a form of execution before judgment in that it encumbers the Defendant's property until the claim is determined. A lien claimant is therefore under a special duty to prosecute their claim expeditiously. The increased need to prosecute claims of lien with utmost efficiency was emphasized by the MacDonald, ACJSC, as he then was, in dealing with a claim under the *Mechanic's Lien Act*, predecessor to the *Builder's Lien Act*, in *Kaulback v. Burke*, [2000] N.S.J. No. 256, at paras. 7-8:

7 At the same time the *Mechanics' Lien Act* is a very powerful tool. It allows a lien holder to encumber real property simply by filing an affidavit and starting an action.

8 I find that with such power must inferentially come a corresponding responsibility to move the matter along with dispatch.

[9] In *Kaulback*, the claim for lien and action in 1993. Pleadings closed in June 1994 and documents were produced in July 1994. The motion to dismiss was filed in April 2000, six years later. Justice MacDonald vacated the claim for lien based on inexcusable delay (para. 12). However, he found that the dismissal of the action was a separate matter. Applying the three-part test, he was not prepared to dismiss the action on the basis that in that case the delay, while borderline inordinate, was excusable (para. 14).

[10] In the present case, the plaintiff caused a lapse of more than 18 months by failing to take any steps whatsoever to advance the lien claim. The plaintiff has failed

to engage in any form of communication whatsoever with the defendant and has also failed to initiate documentary disclosure, both of which are elementary steps well within the capacity of the plaintiff to conduct.

[11] The plaintiff has failed to provide evidence of any reason explaining the cause of the inordinate delay. A potential excuse would require an explanation and communication, which has been absent. The total lack of communication from the plaintiff regarding the proceeding is inherently inexcusable.

[12] The determination of inordinate and inexcusable delay giving rise to a presumption of serious prejudice is highly contextual. Serious prejudice may be presumed in circumstances where the inordinate and inexcusable delay is unusually long within the factual matrix of a given case. In *Saulnier v. Dartmouth Fuels Ltd.*, (1991), 106 N.S.R. (2d) 425 (C.A.), Justice Chipman, at p. 430 stated:

All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.

[13] Within the context of claims of lien, the British Columbia Court of Appeal recently affirmed in *Tam v. PD Plumbing & Heating*, 2023 BCCA 457, at para. 30, that there is always a presumption of serious prejudice to the property owner:

However, I agree with the appellants that where a party has effectively interfered with another party's use of its property through the prejudgment security mechanisms of a builders lien and a CPL, there is a rebuttable presumption of prejudice, which has not been rebutted here.

[14] In *Tam*, the Court of Appeal unanimously granted the appeal and dismissed the claim of lien action for want of prosecution. There, the claim for lien was filed in September 2013 and the action was commenced in September 2014. A defence was filed in October 2014 and amended in January 2015. No further steps were taken before the defendant served a notice of intention to proceed in April 2021. The plaintiff moved for dismissal for want of prosecution in June 2021, six years after the close of pleadings.

[15] As stated in *Clarke, supra*, in exercising my discretion to determine this motion, I must strike a balance that does justice between the parties.

[16] I find that the delay in advancing the Claim of Lien has been inordinate, inexcusable and raises a presumption of prejudice that has not been rebutted. By filing the Claim of Lien and CLP, the plaintiff effectively interfered with the defendant's use of his property. The purpose of the *Builder's Lien Act* is to ensure that those supplying material and labour get paid. However, to quote from MacDonald ACJ in *Kaulback*, "this purpose should not be extended into a lien holder's right to encumber the property indefinitely. Fairness to the landowner commands a prompt resolution of the matter."

[17] I would have vacated the Claim of Lien and CLP. However, they had already been vacated and replaced by money paid into the defendant's lawyer's trust account as replacement security. As stated in *M.G. Heating & Plumbing Ltd. v. Rooth's Construction Ltd.*, 2000 BCSC 1646, at para. 26, the payment of funds into court by a defendant to vacate a lien does not negate the presumption of serious prejudice:

In my view, it makes no difference that the property owner has posted substitute security in order to clear title to the property as the prejudice remains. I am satisfied that because of the unique nature of a builder's lien claim and the special provisions in the Act which initially favour the claimant, that party must take all steps to advance his claim in a timely fashion.

By taking no steps to advance its claim in a timely fashion, the plaintiff has foregone the right to the security offered under the *Builder's Lien Act*. Accordingly, I order that the money held in trust be returned to the defendant.

[18] As to the motion to dismiss the action, while the delay of 18 months is inexcusable, I am not prepared to find, in all the circumstances, that the delay has been inordinate, nor that it has raised a presumption of serious prejudice to the defendant. The defendant has not otherwise proved any specific prejudice other than the payment of the security. The plaintiff should have an opportunity to prove his claim for unpaid services.

[19] However, given the past conduct of the plaintiff, I order that the plaintiff produce an Affidavit Disclosing Documents on or before February 15, 2025. If it does not, I will grant an order for dismissal of the action on a motion by correspondence to be filed by February 28, 2025. I will remain seized of the matter until that time.

[20] The plaintiff shall pay costs on the motion to the defendant in the amount of \$750, forthwith and in any event of the cause. In addition, for its failure to comply

with the filing timelines set by the *Rules*, I order the plaintiff to forthwith pay costs to the defendant in the amount of \$500.

[21] Order accordingly.

Norton, J.