IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0761979 B.C. Ltd. v. Scorpio Security Inc.,* 2025 BCSC 183

Date: 20250205
Docket: S156228
Registry: Vancouver

Between:

0761979 B.C. Ltd. and Mackenzie Sawmill Ltd.

Plaintiffs

And

Scorpio Security Inc., Sukhdev Mann and Noni Hara

Defendants

Mark McDonald, Pacific Lumber Remanufacturing Inc., 507541 B.C. Ltd., Ken Nymark ABC #1 Co. dba 'West RIM', ABC #2 Co. and John Doe

Third Parties

Before: The Honourable Justice Hoffman

Reasons for Judgment

Counsel for the Plaintiffs:	N. Hopewell
Counsel for the Defendants:	J. Antifaev
Place and Date of Hearing:	Vancouver, B.C. January 23, 2025
Place and Date of Judgment:	Vancouver, B.C. February 5, 2025

Overview

[1] This is an application by the defendants, Scorpio Security Inc. (“Scorpio”), Sukhdev Mann and Noni Hara, for an order that this action be dismissed for want of prosecution pursuant to Rule 22-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[2] This action arises out of a fire that took place at a sawmill in Surrey, British Columbia during the evening of October 31, 2014 (the “Fire”). The plaintiff, 0761779 BC Ltd., owned the sawmill and Mackenzie Sawmill Ltd. owned certain equipment and property that was destroyed or damaged in the Fire. There were two previous fire incidents at the sawmill in 2010 and 2011 which put the sawmill out of operation.

[3] At the time of the Fire, Scorpio was providing nighttime security patrol services to the plaintiffs pursuant to a verbal contract. It is alleged that, as Scorpio’s owner, Mr. Hara entered into the verbal contract on the company’s behalf.

[4] At all material times, Mr. Mann was a Scorpio employee. He was on duty on the night of the Fire. CCTV footage from that night has been disclosed in the proceeding. The plaintiffs point to this footage as the basis for their allegations that Mr. Mann failed to detect the Fire in a timely way and that, once detected, he delayed reporting the Fire to 911.

[5] The third parties in this action are various contractors who were performing work on the premises that day. The defendants allege that they started the Fire.

[6] On July 29, 2015, the plaintiffs filed a notice of civil claim for damages caused by the Fire, including the cost of replacing damaged or destroyed sawmill equipment and the cost of repairing the premises. Scorpio did not file a response to civil claim within the time limit prescribed by the *Rules*.

[7] Scorpio reported the claim to its insurer who commenced an investigation into the loss. Counsel for Scorpio was retained in December of 2015 and gave notice of their retainer to plaintiffs’ counsel on January 12, 2016. Counsel for Scorpio asked

that default judgment not be sought while the insurer's investigation was under way. In early 2016, the defendants requested the identities of contractors working on-site on the day of the fire and the nature of the work they were performing, which information was provided by the plaintiffs.

[8] On November 4, 2016, 15 months after the notice of civil claim was filed, Scorpio filed a response to civil claim.

[9] As will be discussed further below, both the plaintiffs and the defendant took litigation steps between 2017 to 2019. These steps included:

a) applications by the defendants to add the contractors as third parties;

b) demands for and production of documents, including CCTV footage on the night of the Fire;

c) complaints by the defendants that inadequate document disclosure on the part of the plaintiffs made discoveries premature;

d) attendance at a case planning conference in August of 2018 to obtain a case planning order setting deadlines to complete outstanding document disclosure and commence discoveries by December of 2018;

e) examinations for discovery of the plaintiffs and the defendants in May of 2019; and

f) correspondence between the parties regarding outstanding examination for discovery requests in the fall of 2019 into the spring of 2020.

[10] It is important to note that the defendant, Mr. Hara, was in ill health in 2018 due to a neurodegenerative disease. In May 2019, his son, Arvind Hara, was examined for discovery in Mr. Hara's place. Despite his health condition, the evidence before me shows that Mr. Hara gave evidence in an unrelated proceeding in 2018. Since both Mr. Hara and his son share the same surname, I will refer to the latter by his first name. I mean no disrespect in doing so.

[11] The defendants argue that after the examinations for discovery concluded in May 2019, the plaintiffs took no meaningful or proactive steps to advance their claim until July 2023. The defendants say that they were required to follow up multiple times to seek responsive answers to examination for discovery requests for documents quantifying the alleged losses. The defendants threatened to bring an application to compel answers but consented to adjournments upon request. No such application was ever adjudicated.

[12] Given this lengthy period of inactivity, in April 2023, the defendants advised the plaintiffs that they would not be incurring further costs to defend the claim in the face of the plaintiff's failure to advance the litigation. The letter warned that if no steps were taken by January 2025, the defendants would bring an application for want of prosecution (the "Warning Letter"). The plaintiffs did not respond.

[13] In July of 2023, counsel for the defendant learned that Mr. Hara had passed away in 2022 and shared this development with counsel for the plaintiffs. Four days later, the plaintiffs sought to schedule a mediation and trial. Given the lack of any meaningful steps in the preceding three years, the defendants submit that this sudden sense of urgency should be interpreted as evidence of the plaintiffs' intent to defeat the defendants' promised application to dismiss for want of prosecution.

[14] The plaintiffs reject this characterization of their litigation conduct and maintain the position that they took meaningful steps between May 2019 and April 2023. In his submissions, counsel for the plaintiffs acknowledged that the progress of this claim has not been optimal. However, the plaintiffs' say that any delays are neither inordinate nor inexcusable. They submit that their litigation conduct falls far short of that required to justify the elimination of their presumptive right to have their claim adjudicated on its merits and that the interests of justice do not favour a dismissal of the claim.

[15] A 10-day trial of this matter is set to take place in June of this year. The deadline for the exchange of expert reports is mere weeks away.

Legal Framework

[16] Rule 22-7 provides that a court may, upon application, dismiss a proceeding for want of prosecution.

[17] In recognition of the fact that undue litigation delay undermines public confidence in the justice system, the Court of Appeal recently recalibrated the legal framework for want of prosecution applications: *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 at paras. 69–70 [*Giacomini*]. The three-part test is as follows:

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

b) If yes, is the delay inexcusable?

c) If yes, is it in the interests of justice for the action to proceed despite the existence of inordinate and inexcusable delay?

[18] Under the new framework, prejudice to a defendant's ability to defend the underlying action is a relevant consideration in the interests of justice analysis. However, it is no longer a threshold requirement to obtain a dismissal: *Giacomini* at paras. 57–58, 63–65, 68.

[19] In *Wiegert v. Rogers,* 2019 BCCA 334, the Court of Appeal summarized the principles relevant to the first branch of the test as follows:

> [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.

[20] As the Court of Appeal stated in *Giacomini* at para. 74, "[g]enerally speaking, a plaintiff who has filed a civil claim should be expected to get on with it."

[21] Delay is assessed by whether the plaintiff has taken formal steps under the *Supreme Court Civil Rules* to move the litigation forward. As exchanges of correspondence between counsel do not move a matter forward, they are not considered steps in the litigation for these purposes: *Gichuru v Community Legal Assistance Society*, 2021 BCSC 2018 at para 49.

[22] With respect to the second branch of the test, the degree to which the inordinate delay is inexcusable is highly fact dependent: *Wiegert* at para. 32. Unless a plaintiff can establish a credible excuse for the delay, it is presumed to be inexcusable: *Giacomini* at para. 40, citing *Irving v. Irving* (1982), 28 B.C.L.R. 318, 1982 CanLII 475 (C.A.) at para. 8. At this stage, the court must consider whether the delay was:

a) intentional or tactical;

b) a result of dilatoriness, negligence, impecuniosity, illness or some other relevant cause; or

c) caused by a lack of diligence on the part of the plaintiff's counsel.

See *Giacomini* at para. 40.

[23] In some cases, delay caused by a lack of diligence on behalf of counsel may qualify as a reasonable excuse: *Giacomini* at para. 40.

[24] In determining whether a delay is unreasonable, the complexity of the matter and the number of litigants can inform the analysis: *The Owners, Strata Plan EPS 3173 v. Intracorp S.W. Marine Limited Partnership*, 2023 BCSC 1003 at para 22.

[25] With respect to the interests of justice analysis, the following non-exhaustive list of factors guide the assessment: *Giacomini* at paras. 66, 71; *International Capital Corporation v. Robinson Twigg & Ketilson*, 2010 SKCA 48 at para. 45:

(a) the prejudice the defendant will suffer defending the case at trial;

(b) the length of the delay;

(c) the stage of the litigation;

(d) the impact of the delay on the defendant's professional, business, or personal interests;

(e) the context in which the delay occurred, particularly whether the plaintiff's delay continued despite pressure from the defendant to proceed;

(f) the reasons offered for the delay;

(g) the role of counsel in causing the delay;

(h) the public interest in having cases that are of genuine public importance heard on their merits; and

(i) the merits of the action, particularly whether it is bound to fail.

[26] With respect to factor (e) above, there is no obligation on the part of a defendant to take steps to move the plaintiff's claim forward. However, a defendant's inaction in the face of lengthy delays by a plaintiff may weigh against a finding that dismissing the action is in the interests of justice: *Giacomini* at para. 76.

[27] With its focus shifting to a consideration of all relevant circumstances rather than a narrow focus on the impact of delay on trial fairness, the framework aims to provide a more nuanced balancing between the interests of defendants and those of the justice system as a whole: *Giacomini* at paras. 72, 75. A defendant will only be successful where the court is persuaded that it is in the interests of justice to deprive the plaintiff of their presumptive right to an adjudication on the merits: *Giacomini* at para. 75.

Analysis

Is there Inordinate Delay?

July 2015 to April 2019

[28] The length of time elapsed since this matter was filed is substantial. The Fire occurred over 10 years ago and the claim was filed 9.5 years ago. It is apparent from an examination of the litigation record that the conduct of both parties has contributed to the lengthy period of time this matter has occupied. There have been periods of both substantial activity and inactivity on the part of both parties. For example, during one notable 9-month period between June 11, 2020 and February 12, 2021, no steps were taken by either party. This period coincides with the first year of the COVID-19 pandemic.

[29] At the outset of the litigation, it took 4 months for Scorpio to retain defence counsel and a further 11 months for them to investigate and prepare a response to civil claim. Subsequently, between January 2016 and April 2018, a period of over two years, the defendants were engaged in steps to add third parties to the litigation. The plaintiffs attempted to set discoveries in 2018 and the defendants took the position that discoveries were premature.

May 2019 to August 2023

[30] During submissions, the defendants took little issue with the period leading up to the completion of discoveries in May 2019. In submitting that the plaintiffs had engaged in inordinate delay, the defendants focused on the period between May 2019 to August 2023, a period of over 4 years, where they say that the plaintiffs took no proactive steps to seriously pursue their claim.

[31] In particular, the defendants wrote to the plaintiffs on September 26, 2019, setting out the outstanding requests from the examination of a representative of the plaintiff. This was followed up with a discussion between counsel and a letter on November 29, 2019. On October 23, 2019, the plaintiffs wrote to request responses to the outstanding requests made at Arvind’s discovery.

[32] On March 9, 2020, the defendants wrote again to request responses to the outstanding discovery requests. They advised that they would set down an application to compel responses if the plaintiffs failed to respond by March 27, 2020. The defendants sent a further follow up letter on June 11, 2020, but there was no reference to setting down an application.

[33] Based on COVID-19 notices issued in 2020 by Chief Justice Hinkson (as he then was) in response to the pandemic, I note that the BC Supreme Court suspended all regular court operations from approximately March 18, 2020 to June 8, 2020. During that time, only urgent matters were heard. The Vancouver Law Courts began hearing Masters' chambers applications of two hours or less via telephone on June 8, 2020, and by Microsoft Teams on October 26, 2020. It was therefore possible for the defendants to set down an application to compel responses in the period between June 2020 and February 2021.

[34] Instead, the defendants waited until February 16, 2021 to serve an application to compel responses to outstanding discovery requests. The application was set to be heard on February 26, 2021, but was adjourned generally by consent.

[35] Correspondence between the parties continued. On May 6, 2021, the plaintiffs provided responses to some of the outstanding requests. The defendants continued to follow up on the remaining requests. On September 2, 2021, the plaintiffs sent further responses along with an amended list of documents. The plaintiffs noted that they were continuing to make efforts to locate documents in respect of one request. They also objected to the relevance of another request. During submissions, counsel for the defendant indicated that the plaintiffs' responses continued to be unsatisfactory. However, there is no evidence in the record that the defendants took further steps to obtain an order to remedy the alleged deficiencies.

[36] In July of 2021, the defendants issued a notice to admit to the plaintiffs asking them to concede that they did not suffer any loss of profits or business income as a result of the Fire. In August of 2021, the plaintiffs responded with admissions that

they were not advancing any claims for loss of profits or business income. On September 2, 2021, the plaintiffs served a fourth amended list of documents.

[37] From September 2021 to August 3, 2023, a period of almost two years, the only formal litigation steps taken by the plaintiffs were in response to the defendants' efforts to particularize the plaintiffs' claim. On July 22, 2022, the defendants served a demand for particulars seeking a quantification of the plaintiffs' property losses. After exchanges of correspondence throughout the fall of 2022 regarding the nature of the demand and the possibility that the defendant would need to set an application to compel a response, the plaintiffs provided particulars on January 19, 2023 quantifying their losses at approximately $17 million.

[38] Although not a formal step, I have evidence before me that the plaintiffs initiated without prejudice discussions with the defendants in February 2022.

[39] For an additional six months, from January 19, 2023 until August 3, 2023, the plaintiffs took no further formal steps to advance their claim. This occurred despite the Warning Letter from the defendants on April 4, 2023, which was met with silence. The plaintiffs took no further steps until August 3, 2023, when they requested trial and mediation dates, four days following notice from the defendants of Mr. Hara's death.

August 2023 to Present

[40] From August of 2023 onwards, the plaintiffs diligently pursued trial and mediation dates and served an expert report on the defendants. While the defendant initially took the position that their application for want of prosecution should be heard in advance of any mediation, the latter proceeded on May 15, 2024 without prejudice to the defendants' ability to set this application down for hearing.

Conclusion on Delay

[41] Examining the progression of this litigation as a whole, I find that there was inordinate delay by the plaintiffs between September 2021 to August 2023. While the plaintiffs took some steps during this time, those steps were responsive to the

defendants' efforts to understand the plaintiffs claim rather than proactive steps aimed at advancing their claim. Moreover, the time the plaintiffs took to respond to the defendants' request for quantification of property losses was out of proportion to the nature of the information sought given that those losses had long since crystallized.

[42] The two-year delay is excessive when considered in light of the 9-year history of this claim, which is growing increasingly stale as each year passes. Although both parties failed to advance the litigation for a lengthy period of time during the COVID-19 pandemic, this external delay further heightened the plaintiffs' duty to get on with setting down a trial promptly after the completion of discoveries.

Is the Inordinate Delay Excusable?

[43] It is for the plaintiffs to advance a credible explanation for the delay. They submit that the length of time that has passed in this matter is excusable given the totality of the plaintiffs' efforts over the years. They point to the significant litigation steps taken, including conducting discoveries, issuing multiple lists of documents, serving an expert report, engaging in mediation, and securing a trial date which is now less than six months away.

[44] The plaintiffs say that certain lags in the progress of this matter were due to professional courtesies extended to the defendants to coordinate calendars. They say that they provided responses to the defendants' requests for documents and particulars. If there were concerns regarding the adequacy of those responses, the appropriate course of action was for the defendants to set down an application for further disclosure.

[45] I am not persuaded on the record before me that the plaintiffs were engaging in tactical or deliberate delay in order to prejudice the defendants. It was suggested in submissions that one interpretation of the timing of the plaintiffs' sudden request for trial and mediation dates is that they were waiting for Mr. Hara to die. This is nothing more than speculation. The defendants were in a far better position than the

plaintiffs to understand Mr. Hara's medical condition. Further, it was open to the defendants in 2018, while Mr. Hara was still capable of giving evidence, to take the necessary steps to preserve his evidence through a deposition or an affidavit.

[46] A more probable explanation for the sudden change of pace in August 2023 is that plaintiffs' counsel, who had ceased to be diligent in moving the claim forward, came to the belated realization that further delays could harm their clients' ability to advance this action. This makes sense in light of the April 2023 Warning Letter, where the defendants stated that they would be compelled to bring a want of prosecution application if the defendants failed to take steps by January 2025. It was reasonable for the plaintiffs to believe that as long as they took steps before January 2025, the defendant would not bring an application for want of prosecution.

[47] I find that the delay between September 2021 and August 2023 was due to a lack of diligence on behalf of counsel. Prior to this period, substantial steps were taken by the plaintiffs, and the defendants themselves caused delay by filing a response to civil claim late and taking months to add third parties to the matter. This contributed to the overall delay in this matter. The two-year delay attributed to the plaintiffs' failure to advance the litigation has since been remedied and the plaintiffs have taken the necessary steps to ready this matter for trial. Accordingly, I find that the inordinate delay is excusable.

Is Dismissal in the Interest of Justice?

[48] In the event I am in error on the first two branches of the legal framework, I will now address whether it is in the interests of justice for this matter to proceed to trial.

[49] There is no doubt that the defendants will suffer some prejudice should the matter proceed to trial. At the very least, their witnesses' memories will have deteriorated given the 10 years that have passed since the Fire. However, the same is true for the plaintiffs' witnesses, and it is the plaintiffs who bear the burden of proof. This prejudice cannot be said to uniquely deny the defendants their right to a fair trial. Moreover, a significant portion of the evidence relevant to the negligence

claim has been preserved via the CCTV footage from the night of the Fire, as well as in the investigations that were done following the Fire. For these reasons, I am not satisfied that proceeding to trial will result in significant prejudice to the defendants' right to a fair trial.

[50] The defendants also point to the specific prejudice arising from Mr. Hara's death. I find that this prejudice cannot be laid at the plaintiffs' feet. Once defendants' counsel became aware that Mr. Hara had a neurogenerative disorder, they were fixed with the knowledge that his ability to give evidence would likely become increasingly compromised. The evidence before me is that while Mr. Hara's son, Arvind, was offered in the place of his father for discovery in May of 2019, Mr. Hara was able to provide evidence in an unrelated court proceeding in the spring of 2018. As such, it was incumbent upon the defendants to take steps to preserve his evidence, either through an affidavit or a deposition.

[51] It is important to note that Mr. Hara's evidence was expected to largely relate to the breach of contract claim as opposed to the negligence claim as he was not present on the premises at the time of the Fire. This means that the lack of direct discovery evidence from Mr. Hara will not prejudice the defendants' ability to defend against all the allegations set out in the pleadings.

[52] The defendants also point to prejudice arising from the disengagement of one of the corporate third parties on the basis that it has ceased to exist and the owner is now elderly. The defendants submit that because of the lengthy time span of the proceedings, no third party remains actively involved in this litigation. While this may be, in part, a function of delay, I find that any prejudice resulting therefrom cannot be attributed entirely to the delay on the part of the plaintiffs.

[53] A defendant has no obligation to move a plaintiff's case forward: see *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation,* 2014 BCCA 52 at para. 67. However, a plaintiff is not responsible for prejudice arising from a defendant's failure to take steps against any third parties they allege are responsible for, or contributed to, the alleged losses: Here, the defendants had the means to secure the

evidence of the third parties and yet, according to the chronology of litigation steps provided by counsel, the defendants have failed to examine any of them for discovery.

[54] The interests of justice assessment also entails weighing the impact of delay on the defendants' professional, business, or personal interests. The defendants rely on Arvind's affidavit in which he deposes that the ongoing litigation has been a source of stress for him and his family. While Arvind gives generalized evidence that his father told him that the lawsuit was holding up certain business ventures that he wanted to pursue, no details are provided. I am not satisfied that there is any evidence of prejudice over and above that faced by any defendant in an action for breach of contract and negligence: *Giacomini* at para. 79.

[55] I further find that the defendants' conduct in sending the Warning Letter weighs against dismissal of the action. As noted above, it was reasonable for the plaintiffs to understand from this communication that an application for want of prosecution would not be brought if they took steps, prior to January 2025, to advance their claim towards trial. In so finding, I am guided by the principle articulated by Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Ltd.* (1967), [1968] 1 All E.R. 543 at 260, 2 Q.B. 229 (C.A.) adopted by the Court of Appeal in *Pacific Hunter Resources Inc. et al. v. Moss Management Inc.*, 2004 BCCA 40 at para. 38:

> ... if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay.

[56] The merits of the action is another factor to be weighed in the interests of justice assessment. In doing so, the court is not to engage in "any searching examination of the merits" but, if the action is bound to fail, the interests of justice will favour dismissal: *Giacomini* at para. 71.

[57] The defendants submit that the plaintiffs' case has little merit. They point to the paucity of evidence produced by the plaintiffs to quantify their equipment losses,

as well as evidence that the plaintiffs decided before the Fire not to rebuild the premises due to damage caused by the two previous fires. While these matters are relevant to whether the plaintiffs can prove their claim on an adjudication of its merits, they do not provide a basis for the court to conclude that the action is bound to fail.

[58] It is apparent from the pleadings that the plaintiffs have a reasonable cause of action for losses arising from the Fire. Consistent with the approach of the Court of Appeal in *Giacomini* at para. 51, I give significant, but not overriding weight, to the plaintiffs' interest in adjudication of its claim on the merits.

[59] The interest of the defendants' to have liability claims resolved expeditiously must also be weighed. Even if the delays in this case could be said to be inexcusable, in my view, the fact that this litigation is at an advanced stage weighs against dismissal of the action. Expert reports are expected to be exchanged in a few weeks, and the trial is scheduled to start in June. In my view, it is not in the interests of justice to dismiss the plaintiffs' claim based on a lack of diligence on the part of counsel between 2021 and 2023. This is particularly so given the substantial steps taken prior to that time and the subsequent steps the plaintiffs have taken to move the matter forward.

[60] Having balanced the relevant considerations, I find that it is in the interest of justice to permit this matter to proceed to trial.

Conclusion

[61] The defendants' application to dismiss this claim for want of prosecution is dismissed. The plaintiffs are entitled to the costs of this application in the cause at Scale B.

"Hoffman J."