

SUPREME COURT OF NOVA SCOTIA

Citation: *Distinguished Properties Inc. v. First Mutual Properties Ltd.*,
2025 NSSC 387

Date: 20251203

Docket: *Hfx*, No. 520164

Registry: Halifax

Between:

Distinguished Properties Inc.

Plaintiff

v.

First Mutual Properties Ltd.

Defendant

Motion to Discharge Certificate of <i>Lis Pendens</i>
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Judge: The Honourable Justice Gail L. Gatchalian

Heard: December 2, 2025, in Halifax, Nova Scotia

Counsel: Jeff Aucoin and Noah Yao, for the Plaintiff

J. Andrew Fraser, K.C. and Daniel MacKenzie, for the Defendant

By the Court:

Introduction

[1] The question before me is whether I should discharge a Certificate of *Lis Pendens* (“CLP”) where the Plaintiff failed to take any steps to advance the litigation for a period of 26 months. What distinguishes this case from other reported cases is that there is no associated lien on the property.

[2] The Plaintiff, Distinguished Properties Incorporated, commenced this action and registered a CLP against the property at 70 First Lake Drive in Sackville, Nova Scotia, PID 003625442, in January of 2023. The CLP was registered pursuant to s.58(1) of the *Land Registration Act*, S.N.S. 2001, c.6.

[3] The Defendant, First Mutual Properties Limited, filed a defence and counterclaim on February 28, 2023, which was served on Distinguished Properties on March 1, 2023.

[4] In reply, Distinguished Properties filed its defence to the counterclaim on April 21, 2023, which was delivered to First Mutual’s counsel on April 24, 2023.

[5] Distinguished Properties took no steps to advance the litigation from April 24, 2023 to June 13, 2025, which is when First Mutual filed this motion to discharge the CLP.

[6] Subsequent to this motion being filed, Distinguished Properties produced its Affidavit Disclosing Documents on July 2, 2025. First Mutual then produced its Affidavit Disclosing Documents. No discovery examinations are scheduled.

[7] First Mutual may move to discharge the CLP under s.58(2)(b) of the *Land Registration Act*, S.N.S. 2001, c.6, using the legal test developed at common law, as described in Anger and Honsburger, *Law of Real Property*, 3rd ed. (Canada Law Book, 2007): see *Dempsey v. Dempsey*, 2008 NSSC 137 at para.16.

[8] Section 58(1) and (2) of the *Land Registration Act* provide as follows:

58 (1) A certificate of *lis pendens* in prescribed form may be recorded with respect to the parcel described in it.

(2) *A certificate of lis pendens may be removed from the register on the earliest of*

- (a) cancellation of the recording;
- (b) ***the recording of an order of the court dismissing the action or discharging the lis pendens***
- (c) the recording of a certificate of a prothonotary of the court that the action was discontinued; and
- (d) the expiration of five years from the recording of the certificate of *lis pendens*.

...

[emphasis added]

[9] Section 34:100 of Anger and Honsburger describes when a CLP may be vacated:

A certificate of *lis pendens* may be vacated upon application to the court. It must be clear that the plaintiff's claim can in no circumstances give any right in lands. It must be certain that the action will fail, or if successful, will not give the plaintiff any interest in the land. Once an interest in land is in dispute, only in the most special and unusual cases should the certificate be vacated. Apart from special and unusual circumstances, if the action is vexatious or frivolous, ***or if the plaintiff has been guilty of delay in pursuing the action, the certificate may be vacated.*** The certificate will not be vacated in a summary way when the existence of some interest in land is in dispute.

[emphasis added]

[10] First Mutual does not challenge the merits of Distinguished Properties' claim on this motion. Rather, First Mutual says that Distinguished Properties is guilty of delay in pursuing the action.

Position of the Parties

[11] First Mutual relies on two decisions dealing with builder's liens to argue that Distinguished Properties had an implied duty to take all steps to advance its claim in a timely fashion and that the CLP should be discharged for delay: (1) *JPA Construction Ltd. v. Saad*, 2024 NSSC 409, where the Honourable Justice Scott Norton would have vacated a builder's lien and a CLP had they not already been vacated and replaced by money paid into the defendant lawyer's trust account, and he ordered that the money held in trust be returned to the defendant; and (2) *Kaulback v. Burke*, 2000 NSSC 105, where the Honourable Associate Chief Justice Michael MacDonald, as he then was, vacated a mechanic's lien.

[12] Distinguished Properties says that *JPA* and *Kaulbach* are not helpful because a CLP is distinguishable from a lien. Distinguished Properties says that a lien is a charge on the land, whereas a CLP is “merely a public notice indicating that litigation involving the property is underway,” creates no interest in land, and therefore the burden imposed on First Mutual by the CLP is “minimal compared to a lien,” simply preserving the status quo: Distinguished Properties’ Brief, paras.47-49 and 58. Distinguished Properties asserts that the balance of equities is in its favour: Distinguished Properties’ Brief, paras.58-62.

[13] Distinguished Properties also put forward an explanation for the delay from June 2023 to January 2025. Gerard MacIntyre, the owner and president of Distinguished Properties, filed an affidavit in which he attests that he is also the Chief Executive Officer and an owner of Lahey Glass, which was a tenant of First Mutual. Mr. MacIntyre states that he learned in 2023 that First Mutual planned to tear down the building that Lahey Glass was occupying. As a result, from May of 2023 to January of 2025, Lahey Glass and Mr. MacIntyre were occupied with purchasing land, building a new building and relocating Lahey Glass, during which they had to negotiate three lease extensions with First Mutual. Mr. MacIntyre’s evidence is that, as a result, “the time period from June 2023 to January 2025 was extremely busy” for him and his staff, and that this “significantly impacted” his ability to spend time related to the action.

Same Test?

[14] The question is whether *Kaulbach* and *JPA* should guide the exercise of my discretion in determining whether I should discharge the CLP on account of Distinguished Properties’ 26-month delay in moving its action forward.

[15] In *Kaulbach*, the Plaintiff had filed a lien pursuant to the *Mechanics’ Lien Act*, R.S.N.S. 1989, c.258 and commenced an action. The plaintiff did nothing to advance the action for approximately six years after pleadings closed and the Defendants filed their list of documents. MacDonald ACJ held that:

- The *Mechanics’ Lien Act* is a very powerful tool that allows a lien holder to encumber real property simply by filing an affidavit and filing an action: at para.7.
- With such power must inferentially come a corresponding responsibility to move the matter along with dispatch: at para.8.

- This is consistent with other forms of interim relief, such as injunctive relief, which requires an undertaking to promptly move the matter along to trial: at para.9.
- The purpose of the *Mechanics' Lien Act*, which protects the value of human labour, should not be extended into a lien holder's right to encumber the property indefinitely: at paras.6 and 11.
- Fairness to the land owner commands a prompt resolution of the claim: at para.11.
- The delay in prosecuting the lien claim was inexcusable in the circumstances, where the Plaintiff acknowledged that he did not prosecute the claim promptly: at paras.10 and 12.

[16] In *JPA*, the plaintiff had filed a Claim of Lien pursuant to the *Builder's Lien Act*, R.S.N.S. 1989, c.277 and registered it at the Land Registration Office. The Plaintiff perfected the Claim of Lien by commencing the action and registering a CLP. The parties later consented to an order vacating the Claim of Lien and CLP and requiring the Defendant to pay money into his lawyer's trust account as security in place of the lien. Pleadings then closed. Eighteen months passed without the Plaintiff taking any steps to advance the action. Norton J. held as follows in the context of a motion to dismiss the action based on want of prosecution:

- The test for dismissal of an action for want of prosecution is: (1) the plaintiff is to blame for inordinate delay, (2) the inordinate delay is inexcusable, and (3) the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant satisfies these requirements, the court, before granting the application, must take into consideration the plaintiff's position and strike a balance to do justice between the parties: at para.7, citing *Young v. Merrill Lynch Canada Inc.*, 2013 NSSC 225 at para.8.
- In cases involving claims for builder's liens, the threshold is lower for proving that delay is inordinate 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 on 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: at para.8, citing *Kaulback* at paras.7-8.

- The Plaintiff caused a lapse of more than 18 months by failing to take any steps to advance the claim, and failed to provide evidence of any reason explaining the cause of the inordinate delay: at paras.10-11.
- The total lack of communication from the Plaintiff regarding the proceeding was inherently inexcusable: at para.11.
- Within the context of lien claims, there is always a presumption of serious prejudice to the property owner because the claimant has effectively interfered with another party's use of its property through the prejudgment security mechanisms of a builder's lien and a CLP: at para.13, citing *Tam v. PD Plumbing & Heating*, 2023 BCCA 457 at para.30.
- The Plaintiff's delay in advancing the Claim of Lien was inordinate, inexcusable and raised a presumption of prejudice that was not rebutted: at para.16.
- By taking no steps to advance its claim in a timely manner, the Plaintiff had foregone the right to the security offered under the *Builder's Lien Act*: at para.17.

[17] In my view, *Kaulback* and *JPA* provide appropriate guidance for the exercise of my discretion in this matter, even though we are dealing with a CLP, and not a lien.

[18] As stated by the Honourable Justice Robert Wright in *Dempsey*, relying on Anger and Honsburger, once a CLP is filed, it serves as notice to everyone that the title to a particular piece of land is being questioned in a legal proceeding and warns against dealing with the defendant with respect to that land until the title dispute is determined: *Dempsey* at para.14. Its practical effect is to act as an injunction so as to prevent the defendant from dealing with the land until the lawsuit is determined: *ibid.*

[19] Distinguished Properties recognizes as much in its brief, where it states that the CLP at issue “safeguards that interest [in property] by ensuring the Plaintiff does not lose the benefit of the remedy sought,” and that “[w]ithout a CLP, the likelihood of the property being sold or otherwise dealt with is significantly higher.”

[20] Thus, in addition to servicing as notice to everyone that the title to a particular piece of land is being questioned and warning against dealing with the defendant

with respect to that land, a CLP is a form of interim relief, like a builder's lien or an interlocutory injunction: see *Kaulbach* at para.9.

[21] Based on the above authorities, I conclude that a claimant has an implied duty to prosecute their claim without delay where they have registered a CLP against the property in dispute.

[22] During oral argument, counsel for Distinguished Properties acknowledged that his client has an obligation to move the action forward beyond the normal obligations set out in the Civil Procedures Rules. However, he asserted that, in the circumstances of this case, discharge of the CLP would not be justified.

Has Distinguished Properties Failed to Prosecute the Action Promptly?

[23] I find that Distinguished Properties has failed to promptly prosecute the action.

[24] A 26-month lapse during which Distinguished Properties did nothing to advance the action, when the only steps taken by it were to file the action and its defence to the counterclaim, is inordinate.

[25] Distinguished Properties' inordinate delay in prosecuting the action is inexcusable. The total lack of communication by Distinguished Properties during the 26-month lapse is inexcusable. I agree with the submission of counsel for First Mutual that, like Mr. MacIntyre, many litigants before this court are busy. This does not excuse such an inordinate delay. The steps that Distinguished Properties was expected to take are "elementary," in the words of Norton J. in *JPA* at para.10, and are not onerous: some form of communication, the exchange of Affidavits Disclosing Documents and the scheduling of discoveries. Moreover, Mr. MacIntyre's proffered excuse does not explain the six-month lapse in time between January and June of 2025. I find that the only reason Distinguished Properties eventually filed its Affidavit Disclosing Documents was because First Mutual moved to discharge the CLP.

[26] Prejudice to First Mutual is presumed because the CLP has effectively interfered with its use of the subject property. The presumption of prejudice has not been rebutted by Distinguished Properties.

What Would Do Justice Between the Parties?

[27] On the one hand, there has been inordinate and inexcusable delay giving rise to serious prejudice to First Mutual. The CLP has effectively interfered with First Mutual's use of its property for almost three years. During 26 months of that time, Distinguished Properties did nothing to advance the claim. Until this motion was filed, the only steps taken by Distinguished Properties were the filing of the action and the defence to counterclaim.

[28] On the other hand, Distinguished Properties adduced no evidence to substantiate the claims in its brief that the land is a unique commercial asset, and that a monetary remedy will be an inadequate remedy. Moreover, if the CLP is vacated, Distinguished Properties is not left without recourse: it may move for an interlocutory injunction, on evidence.

[29] Distinguished Properties asserts that, if the CLP is discharged, First Mutual could proceed with selling or otherwise dealing with the property, potentially undermining the Plaintiff's claim and rendering any future judgment ineffective. That may be so, but this does not mean that Distinguished Properties has the right to interfere with First Mutual's property rights indefinitely: see *JPA* at para.16, citing *Kaulback* at para.11.

[30] The balance of equities favours First Mutual. Although not a charge on the land, the CLP is a significant tool that permits Distinguished Properties to interfere with First Mutual's use of the property simply by registering the certificate without providing evidence of the merits of its claim. Allowing it to continue in the circumstances of this case would be unfair to the land owner. By taking no steps to advance the claim in a timely manner, Distinguished Properties has foregone the benefit of the CLP.

Conclusion

[31] I order that the Certificate of *Lis Pendens* registered against the property at 70 First Lake Drive in Sackville, Nova Scotia, PID 003625442 be discharged.

[32] If the parties cannot agree on the issue of costs by the end of next week, I will receive written submissions as follows: from First Mutual by December 16, 2025 and from Distinguished Properties by December 19, 2025.

Gatchalian, J.

