SUPREME COURT OF NOVA SCOTIA
Citation: Veno v. Ensor Estate, 2013 NSSC 335

Date: 20131018
Docket: SY 243074
Registry: Shelburne

Between:

Neil Veno

Plaintiff

v.

Estate of the late Jill Florence Ensor
(formerly known as Jill Florence Nickerson)

Defendant

Judge: The Honourable Justice Patrick Duncan

Heard: October 4, 2013, in Shelburne, Nova Scotia

Counsel: Michael K. Power, Q.C. , for the Plaintiff
Allen C. Fownes, for the Defendant

By the Court:

Introduction

[1] On March 11, 2005 the plaintiff, Neil Veno, filed an action claiming that between 1998 and 2004 he lived in a common law relationship with the now deceased defendant, Jill Florence Ensor, in a property owned by her. He alleges that he made substantial contributions of money and labour for the improvement of the property; paid to acquire assets which were for the benefit of the couple; and contributed to the ongoing living expenses of the couple.

[2] The claim seeks damages to reflect the plaintiff's share of the value of the assets acquired or improved during the course of the relationship, but which the defendant refused to pay. He relies upon principles of unjust enrichment, *quantum meruit*; a resulting and constructive trust; and section 41 of the **Judicature Act**.

[3] The defendant died on January 30, 2013 with this claim outstanding. She appointed Rose Marie and Darrell Sampson to act as executors and trustees of her estate. They have come forward to act as the personal representatives on behalf of the estate to defend the action.

[4] They move for an amendment to the style of cause to reflect their participation as the personal representatives of the defendant and for an order pursuant to **Rule 82.18** seeking dismissal of the action on the basis that the matter has not been brought to trial in a reasonable time.

[5] The first motion is uncontested and is granted. The style of cause will be amended to reflect the inclusion of the Sampsons as personal representatives of the estate of Jill Ensor.

[6] The second motion is not agreed to by the plaintiff.

Law

[7] **Nova Scotia Civil Procedure Rule 82.18** governs the second motion:

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

[8] In *Braithwaite v. Bacich* 2011 NSSC 176, at paragraph 6, Justice Bourgeois held that the test applicable under the **1972 Civil Procedure Rules** still applies. That test as formulated under the previous rules was described as follows:

> 7 In my view, the factors to be considered in relation to such a motion are well established, and not controversial. As stated by Hamilton, J.A. in *MacMillan v. Children's Aid Society of Cape Breton*, 2006 NSCA 13:
>
> > [5] The test for dismissal of an action for want of prosecution is well established. It is summarized in *Clarke v. Sherman et al.* (2002), 205 N.S.R. (2d) 112; 643 A.P.R. 112 (C.A.):
> >
> > > [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.

Issues

1. Has the defendant shown:

i) that the plaintiff is to blame for an inordinate delay in bringing the matter to trial?

ii) that there is no reasonable excuse for the delay? and

iii) that the defendant is likely to be seriously prejudiced on account of the inordinate and inexcusable delay?

2. Should the court exercise its discretion, in doing justice as between the parties, to refuse the application?

Analysis

Has it been shown that the plaintiff is to blame for an inordinate delay in bringing the matter to trial?

[9] The history of this litigation has three phases:

2004-2006 The active prosecution

2007-2012	Period of inactivity
2013	Moving the litigation forward.

This chronology that follows is taken from the affidavit evidence filed on this motion together with a review of the court's own file.

2004-2006

[10] Following his ejection from the house where he resided with the defendant, the plaintiff retained counsel and made informal and formal demands for payment of amounts he claims are owing to him. The following is the sequence of steps taken in the first phase:

February 3, 2005:	Demand letter sent to defendant
March 11, 2005:	Originating Notice and Statement of Claim filed
April 7, 2005:	The plaintiff applied for an injunction or preservation order to restrain the defendant from disposing of property that was the subject of his claim.

April 14, 2005:	Order of court issued for substituted service on defendant
April 21, 2005:	Default Judgement entered
August 25, 2005:	Default Judgement set aside
August 29, 2005:	Statement of Defence filed
September 14, 2005:	Plaintiff files List of Documents
November 30, 2005:	Defendant files List of Documents
July 12, 2006:	Discovery (Day 1of 2)
August 18, 2006:	Discovery (Day 2 of 2)

2007-2012

[11] The second phase saw considerably less activity:

October 23, 2008:	Plaintiff files Notice of Intention to Proceed "within 30 days from the date of this Notice."
	Plaintiff files supplementary list of documents.
May 22, 2009:	Defendant files Notice of Intention to Act on One's Own.
	It set out a designated address for service in East Jordan,

	Shelburne County. Attached to the Notice is a letter from the Defendant seeking that the matter be transferred to Bridgewater because of her frequent trips there for medical treatments. She refers to spine damage which limits her mobility and to her kidney treatments.
2013	
January 30:	The defendant dies
March 4:	The Prothonotary issues a motion to dismiss pursuant to **Rule 4.22**
April 9:	Plaintiff files request for DAC
April 12:	Hearing of **Rule 4.22** Motion; Motion denied because the Defendant was notified in 2009 of intent to proceed. The plaintiff was advised to take steps to join Personal Representative by September 2013.
July 17:	Date Assignment Conference held; postponed to Sept 23
August 14:	Plaintiff filed claim against the defendant's Estate in Probate Court;

[12] There were essentially no "steps" taken in the proceeding following the Discovery on August 18, 2006, until after the defendant's death in 2013. Activity after her death was triggered by the Prothonotary's motion to dismiss and not by the plaintiff's self-initiative.

[13] I find that during the period 2004 to 2006 the plaintiff and defendant were appropriately engaged in prosecuting and defending the claim. I find that the delay from August 18, 2006 to April 9, 2013 (a period of almost 7 years) constituted an inordinate delay in advancing the claim and that the delay rests with the plaintiff.

Has it been shown that there is no reasonable excuse for the delay?

[14] Mr. Veno testified that he was waiting for the defendant or the court to deal with this case. He is incorrect in his understanding of who carries the onus to move the case forward. There is no obligation on either of a defendant to prosecute a plaintiff's claim or for the court to act to move the matter forward, other than as required by **Rule 4.22.** (The Prothonotary's motion to dismiss which did occur in this case.)

[15] After the default judgement was set aside in 2005, the defendant took the necessary steps of filing a defence, filing a list of documents, and attending for Discovery. The one thing that the defendant should have but did not do is comply with a requirement to fulfill Undertakings given at Discovery. The remedy for the plaintiff was to file a motion for production by the defendant. That was not done. In fact, nothing else was done by the plaintiff to get the matter on for trial until 2013.

[16] The plaintiff says of the defendant that "she went into hiding" and that she could not be found. The plaintiff also points out that he did not receive notice of her intention to act on her own. There is no merit in these assertions.

[17] There was a letter sent from the defendant's then solicitor, James DiPersio, in April 2009 to counsel for the plaintiff advising that his services had been terminated and that a Notice of Intention to Act on one's Own would be filed by the defendant shortly thereafter.

[18] While the Notice of Intent to Act on her Own appears not to have been served or otherwise provided to plaintiff and his counsel, the solicitor of record was still Mr. DiPersio so there was always a person for the plaintiff to contact. Had the plaintiff sought to advance the claim then a call or letter to Mr. DiPersio would no doubt have lead plaintiff to the defendant at the designated address she provided to the Prothonotary.

[19] The plaintiff acknowledges that no efforts were made to locate the defendant, either by his own inquiries or by the use of a third party such as a bailiff.

[20] In fact, he admits that he did know where the defendant was until at least November of 2011.

[21] Even if Ms. Ensor could not have been located then the plaintiff could seek an order for substituted service as he had in 2005. There is evidence that she was the owner of real property in the province which could have been identified by a Property online search. She lived in a small community and it is evident that Mr. Veno knew people who knew her. e.g. when her house burned in November 2011

a member of the Shelburne community reported this to Mr. Veno, and where Ms. Ensor had gone to stay immediately after.

[22] I conclude that there was a serious lack of diligence in prosecuting this claim and no reasonable excuse for that delay.

Has it been shown that the defendant is likely to be seriously prejudiced on account of the inordinate and inexcusable delay?

[23] The plaintiff's claim, in essence, seeks to effect an equal or unequal (in plaintiff's favor) division of assets with an allegedly common law partner of approximately six years.

[24] Determination of issues of whether the parties were living in a common law relationship, an allegation denied in the statement of defence, or whether the plaintiff acquired any interest in previously held assets or subsequently acquired assets of the defendant would have depended very much on the testimony of the two parties. Documentary evidence would be important and perhaps third party evidence as well.

[25] The defendant, by her personal representatives, states that this is a claim that depends on the personal knowledge of the parties as to their relationship and that the defence is seriously prejudiced by the death of the defendant. She is unable to give instructions on matters that would be intrinsically personal to her. This prejudices the defendant's ability to defend.

[26] Because of her demise, the defendant cannot tell her story to the court in person. The same concerns arise: the court will not have the benefit of the defendant's description of, among other things, the personal relationship with the plaintiff. Therefore there is significant prejudice to the ability to defend.

[27] The delay has put the personal representatives for the defendant in the position of having to actively consider waiver of solicitor-client privilege, something that a defendant should not have to confront except in extraordinary circumstances. Mr. DiPersio has not been counsel on this file since 2009. He retired in 2012. He may be available to testify if needed but has not been approached at this time. He has moved to a different part of the province and there is expected to be costs in seeking his assistance to defend the claim as a potential

witness. The estate's counsel has consulted Mr. DiPersio's file, but has yet to take instructions on whether to waive solicitor client privilege in order to permit him to attempt to introduce evidence of the deceased's statements to her counsel in this case.

[28] I conclude that the defendant is likely to be seriously prejudiced on account of the inordinate and inexcusable delay.

Should the court exercise its discretion, in doing justice as between the parties, to refuse the application?

[29] The plaintiff says that the prejudice is balanced by the availability of the defendant's discovery evidence which was given more contemporaneously with the event. It was extensive.

[30] The defendant is deceased and cannot testify in a matter where the plaintiff and the defendant are the only two people who can speak to many relevant and material issues in dispute. The personal representatives are significantly

prejudiced by this fact. The court would be put in a difficult position to assess credibility when only one of the parties is present to relay their story.

[31] I am not comforted by the suggestion of the plaintiff that the extensive discovery evidence mitigates the prejudice sufficiently to overcome Ms. Ensor's absence to give instructions or to testify. Cross examination of the defendant gives no assurance that the evidence she might give in direct on the trial is ever heard. Further, the restrictions on the witness in discovery and the increased latitude afforded the examiner on discovery means that there can be inadmissible evidence, or admissible evidence of little weight that forms part of the testimony. This does not assist the personal representatives in their attempts to fully defend against the claim.

[32] Mr. Veno points out that he too is prejudiced because important documents that Ms. Ensor had in relation to this case were destroyed in the November 2011 fire. This situation was created by the defendant when, according to Mr. Veno, he was evicted from her house in 2004. At that time Ms. Ensor kept all relevant documents from the time of the cohabitation. Now both parties are hampered by

the absence of documents which might have tended to corroborate or undermine the evidence of the parties.

[33] I accept that the fire in 2011 destroyed a number of documents that could have been material to the resolution of the claim. To some extent this prejudices both parties. However, the plaintiff has the opportunity to make assertions and the defendant has no opportunity to challenge or confirm the accuracy of his recall either by reference to the documents or through the testimony of the defendant herself. The loss of the documents was no one's fault, but their loss makes the personal attendance of the defendant more important.

[34] It is sufficient to say that the plaintiff should not lightly lose his right to pursue his claim. I add that he says that he is mustering third party witnesses to assist him in presenting his claim. The passage of time has created more difficulties in that witness memories, particularly if they had not previously known they would be needed, are likely not to be as good as they would have been years ago at a time closer to the events. I observed Mr. Veno during his testimony to show some difficulties with memory, even on things that were more recent. The

plaintiff is going to face challenges in presenting his case, even in the face of a diminished defence.

[35] Having regard to all of the circumstances I am satisfied that the serious prejudice to the ability of the defendant to respond to the claim created by the inordinate and inexcusable delay outweighs the harsh consequences of terminating the right of the plaintiff to have his claim adjudicated. I conclude that on the facts of this matter it is a result that is justified.

Conclusion

[36] I find that the prosecution of Mr. Veno's claim effectively came to a halt after Discoveries concluded in 2006 and did not resume until after the Prothonotary's Notice of Motion to Dismiss under **Rule 4.22** was served in March, 2013. I find that the delay was caused by the plaintiff and that the passage of almost 7 years constitutes an inordinate delay.

[37] I also find that it has been shown that there is no reasonable excuse for the delay.

[38] I further conclude that the delay is the cause of a likely serious prejudice to the defendant's ability to respond to the claim.

[39] Finally, in balancing the prejudice created to the defendant by this delay as against the termination of the right of the plaintiff to seek a remedy, I have concluded that justice between the parties cannot be achieved if the claim is allowed to continue.

[40] The motion to amend the style of cause to add the personal representatives is granted.

[41] The motion to dismiss the plaintiff's claim is granted.

Costs

[42] If the parties are unable to come to an agreement as to costs, they may contact my office to make arrangements for submissions on the issue.

Order accordingly.

J.