SUPREME COURT OF NOVA SCOTIA
Citation: *Morrison (Re)*, 2014 NSSC 399

Date: 2014/11/26
Docket: Pictou, No. 312900
Registry: Pictou

Between:

The Builders' Lien Act being Chapter 277
Of the revised Statutes of Nova Scotia, 1989 as amended

Plaintiff

v.

A claim for lien against PID 65028839 located at
Lands of Bradley Irvin Morrison located at 448
West Branch Road Pictou County

Defendant

Judge:	The Honourable Justice N. Scaravelli
Heard:	November 25, 2014, in Pictou, Nova Scotia
Final Written Submissions:	November 14, 2014 – Jill Graham-Scanlan November 21, 2014 – E. Anne MacDonald
Counsel:	E. Anne MacDonald, for the Plaintiff Jill Graham-Scanlan, for the Defendant

Decision By the Court:

[1] This matter involves a motion by the prothonotary to dismiss the within action pursuant to *Civil Procedure Rule* 4.22.

> The prothonotary must make a motion to dismiss an action five years after the day the notice of action is filed, if no trial date is set and no request for date assignment conference is filed.

[2] The pre-requisite for the prothonotary's motion exists in this case.

BACKGROUND

[3] On May 15, 2009 the plaintiff registered a Claim for Lien, under the *Builder's Lien Act of Nova Scotia* against the lands of the defendant located at West Branch, Pictou County. A Statement of Claim and Certificate of Lis Pendens was filed and issued on June 19, 2009. The plaintiff claims a balance owing in the amount of $6,644.00 plus interest and costs relating to work performed on the defendant's residence.

[4] The defendant filed Notice of Defence on August 10, 2009 denying any balance owing to the plaintiff.

[5] There have been no further steps in the proceeding following the filing of the defence.

LAW

[6] Pursuant to Rule 4.22 the prothonotary is mandated to move for dismissal of actions that have been dormant for more than 5 years. This is an administrative procedure designed to clear the docket from cases that are presumptively abandoned. This Rule replaces former Rule 28.11 where the prothonotary would issue a Dismissal Order when parties did not respond to the prothonotary's notice to file a Notice of Intention to Proceed. These dismissal orders often resulted in applications to set aside.

[7] The considerations for determining whether to allow the prothonotary's motion under Rule 4.22 or to set aside an order under former Rule 28.11 have not changed. In *Lord v. Smith* [2013] NSCA 34, Justice Farrar reviewed the test set out in Hiscock v. Pasher 2008 N.S.C.A. 101.

> **39** The trial judge accepted, and the parties agreed, that the proper analytical framework for him to apply in determining whether to set aside the Order was as set out in **Hiscock v. Pasher**, 2008 NSCA 101. In that case this Court had to consider whether a Chambers judge erred in his consideration of an appeal from a Prothonotary's order dismissing an action.
>
> **40** In that case, Roscoe, J.A. observed that such orders were administrative and were not made after consideration of the merits of the case. She adopted the test applicable to a motion seeking dismissal for want of prosecution. She stated the test as follows:
>
> > 23 Under **Rule** 28.13, the defendant bears the burden as the applicant. On appeal from a prothonotary's **Rule** 28.11 order,

the plaintiff, as the appellant, ought to bear the burden of proving:

> 1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the plaintiff personally who is to blame for the delay;
>
> 2. That the plaintiff has always intended to proceed with the action and was either unaware of the **Rule** 28.11 notice or her solicitor's failure to respond to it;
>
> 3. That the defendant has not likely been prejudiced by the delay; and,
>
> 4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the prothonotary's order.

41 Roscoe, J.A.'s recitation of the test for dismissal for want of prosecution differs slightly from the well-established and non-controversial test set out in **Clarke v. Ismaily**, 2002 NSCA 64:

> 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. (Underlining in original)

42 The main distinction is that under the test for dismissal for want of prosecution, reference is made to the defendant likely being "seriously prejudiced" whereas in Roscoe, J.A.'s test in **Pasher** the word "seriously" was not included.

43 Although the wording may be slightly different, I take the two tests to be the same; not simply any likelihood of prejudice would be sufficient to deny the plaintiff a remedy but that there has to be a likelihood of serious prejudice.

ANALYSIS

[8] A period of five years has elapsed since the date of commencement of the action. As indicated there have been no further steps taken in the proceeding. There has been no disclosure of documents or discoveries. The plaintiff, Mr. Rae has been represented by counsel throughout.

[9] The plaintiff has filed an affidavit in response to the prothonotary's motion explaining the litigation delays. Mr. Rae indicated he encountered serious health problems since 2009. He has suffered a stroke in 2010 which affected his speech and motor skills, he is still receiving treatment. No medical evidence has been provided to the court. In 2011 Mr. Rae indicated there was a fire that seriously damaged his home and contents and he had been occupied with dealing with his insurance claim following that period. Mr. Rae also indicated he intends to proceed with the action and is now available to commence discoveries, although his counsel has advised that he is scheduled for an operation in February, 2015. Counsel advised Mr. Rae would be available for discovery prior to that date. Mr. Rae was not cross-examined on his affidavit.

[10] The defendant, in his brief filed with the court, submits he has suffered significant prejudice as the Builder's Lien is recorded in the land registration office

and appears as a encumbrance upon his lands. The defendant did not give evidence.

[11] The court is required to balance the factors and make a determination in the interests of justice. The guiding principles for the application of the *Civil Procedure Rules* is to provide for the "just, speedy and inexpensive determination of every proceeding". Clearly the plaintiff is obliged to move the action forward. On the other hand as stated by Roscoe, J. in ***Hiscock***, dismissal "is an extreme remedy and the plaintiff should not lightly be deprived of her day in court".

[12] Based on the un-contradicted evidence before me, I am satisfied Mr. Rae intends to pursue his claim and that the delay in proceeding is in great part excusable due to medical reasons. While a Builder's Lien could potentially be problematic, there is no evidence of any actual prejudice to the defendant. Certainly there was no interim motion by the defendant to vacate the lien under the *Builder's Lien Act*, nor was there a motion to dismiss the claim, for want of prosecution, pursuant to *Civil Procedure Rule* 82.18.

[13] Balancing all factors I find it is not in the interests of justice to grant the prothonotary's motion to dismiss the action. I will however, provide directions to the plaintiff on proceeding forward.

[14] Mr. Rae is to provide his affidavit of documents by December 5, 2014.

[15] Thereafter, Mr. Rae shall have until December 15, 2014 to set discovery dates in consultation with the defence with a view to completing discoveries before February, 2015.

[16] Obviously it is open for the prothonotary to motion under Rule 4.22 or for the defendant to motion under Rule 82.18 in the event the plaintiff fails to take further steps as directed.

Scaravelli, J.