

SUPREME COURT OF YUKON

Citation: *Humphrey v Speiss*,
2022 YKSC 56

Date: 20221031
S.C. No. 19-A0070
Registry: Whitehorse

BETWEEN:

LAURA LYNNE HUMPHREY

PLAINTIFF

AND

SHARON LYNN SPEISS

DEFENDANT

AND

ADAM WAYNE HUMPHREY

DEFENDANT BY COUNTERCLAIM

Before Justice K. Wenckebach

Appearing on her own behalf

Laura Humphrey
(by telephone)

Counsel for the Defendant

Shaunagh Stikeman

Appearing on his own behalf

Adam Humphrey

This decision was delivered in the form of Oral Reasons on October 31, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The plaintiff, Laura Humphrey, commenced an action on July 24, 2019, against defendant Sharon Speiss for repayment of a loan. Ms. Speiss

added Mr. Adam Humphrey as a defendant, stating that the loan was provided to both of them. Ms. Speiss has now filed an application to dismiss Ms. Humphrey's claim for want of prosecution. Both Ms. Humphrey and Mr. Humphrey oppose the application.

[2] The test on an application for dismissal for want of prosecution was set out in *Secerbegovic v Media North Ltd. et al*, 2010 YKSC 49 at para. 3, and is as follows:

1. Has there been an inordinate delay?
2. If so, is the delay inexcusable?
3. If so, has the delay caused serious prejudice to the defendants, or is it likely to do so?
4. Even if all three of the above questions are answered in the affirmative, does the balance of justice demand that the action be dismissed?

[3] I will address each prong of the test in turn.

[4] First, the issue of inordinate delay.

[5] I find that there has been inordinate delay. The time period used to assess the delay may encompass both the time since the last step was taken in the proceedings and the delay since the inception of the proceedings, if relevant (see *Michael Wilson & Partners Ltd. v Dow*, 2022 BCSC 1136 at para. 5). For the purposes of calculating delay, a step is defined as any act which materially moves the actions toward trial.

[6] In the case at bar, the timeline is brief:

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|------------------|---|
| July 24, 2019: | Ms. Humphrey filed her statement of claim; |
| August 14, 2019: | A case management conference was held. At the case management conference, there was discussion about whether Ms. Humphrey's claim was going to be determined in another related action; |

- [Redacted]: The related action decision was released. The claim was not decided by the judge;
- September 30, 2019: Sharon Speiss filed a statement of defence and counterclaim against Adam Humphrey;
- September 15, 2020: A case management conference was held but adjourned because Ms. Humphrey was unable to attend due to ill health. Her mother appeared on her behalf;
- July 7, 2022: Adam Humphrey filed a statement of defence against counterclaim; and
- July 12, 2022: An appearance day appearance was held.

[7] Both Ms. Speiss and Ms. Humphrey state that the last step Ms. Humphrey took was in 2020. Ms. Speiss says Ms. Humphrey's last step was on August 5, 2020, when she asked that a case management conference be set down. Ms. Humphrey says that her last step was on October 6, 2020, when, due to her ill health, she asked to adjourn the case management conference which had been set for October 7, 2020.

[8] In this case, I do not believe that delay should be calculated as of 2020. Rather, the relevant period for considering delay is about three years.

[9] First, I do not agree with either Ms. Speiss' or Ms. Humphrey's position about Ms. Humphrey's last step. Ms. Speiss argues that the last step was taken when Ms. Humphrey asked that a case management conference be set down. However, asking for a case management conference does not move an action toward trial. At best, it creates the possibility that the action will move toward trial.

[10] Ms. Humphrey says that the last step was when she adjourned the case management conference. Asking for an adjournment of a case management conference in this case halted the action rather than moving it to trial. Ms. Humphrey's first and last step that materially advanced the claim was when she filed for statement of claim.

[11] However, Ms. Humphrey could not move forward with her claim until the decision was issued in the related claim, as it was possible that the judge would resolve the issue in that proceeding. The decision was released [redacted]. Ms. Humphrey was then free to pursue her claim.

[12] She did not pursue her claim and an appearance day was held on July 12, 2022. At that point, she expressed her desire to set the matter down for a summary trial. The delay here then is three years. I find that this is an inordinate delay.

[13] The next question is whether the delay is inexcusable.

[14] On this point, I find that Ms. Humphrey's delay is excusable. In considering whether the delay is inexcusable, the Court will consider the reasons for delay. Whether the reasons for delay amount to an excuse turns on the facts of the case.

[15] Ms. Humphrey attests that between November 2019 and October 2022, she had many difficult and debilitating health issues. She argues that her health issues excuse the delay in the proceedings.

[16] Ms. Speiss does not deny that Ms. Humphrey has been ill. Rather, Ms. Speiss' counsel says that all Ms. Humphrey had to do to avoid an application for want of prosecution was to take a step in the proceedings. A step is defined so broadly that Ms. Humphrey should have been able to take a step even with her health issues. Thus, for example, she could have set dates down.

[17] As noted above, a step in an action is an act which materially moves the proceedings towards trial. Setting a date can only advance the proceedings to a hearing if the parties are able to follow through. If they cannot, then the proceedings are not materially advanced: they are stagnant.

[18] Here, based on Ms. Humphrey's evidence, even if she had set dates down, she would not have been able to follow through. Thus, she may have been able to schedule a date of exchange of documents but would not have been able to provide her list of documents. I therefore conclude the delay is excusable.

[19] I now turn to the issue of prejudice.

[20] I conclude that Ms. Speiss was not unduly prejudiced. Where the delay is excusable, the applicant must demonstrate serious prejudice and that there is a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after it has been reactivated.

[21] Here, Ms. Speiss says credibility will be an issue in this case and with the passage of time, it will be more difficult to tender evidence.

[22] I agree that credibility will likely be important. However, fading memories arise in most litigation where credibility is an issue. The difficulties Ms. Speiss faces are not unusual and do not cause her serious prejudice.

[23] Ms. Speiss also says that the legal costs she has incurred have caused her prejudice. I conclude, though, that her costs have not been so excessive as to cause her undue prejudice.

[24] Finally, Ms. Speiss says that the stress the litigation has caused, which is on top of the related proceedings, has also caused her prejudice.

[25] Again, while I agree that dealing with multiple proceedings is stressful, it is not sufficient to warrant dismissing Ms. Humphrey's claim.

[26] The last factor I must address is the balance of justice.

[27] I find that the balance of justice lies in Ms. Humphrey's favour. This part of the test directs the Court to only sparingly dismiss actions for want of prosecution. It is generally only in cases where the delay is intentional or where the plaintiff's actions have been in bad faith that the Court will dismiss the claim. In addition, where the delay has not been intentional and the plaintiff has not acted in bad faith, they should be given the opportunity to remedy their default.

[28] In this case, it would not be in the interests of justice to dismiss Ms. Humphrey's claim. However, it is also in the interests of justice that the matter move forward expeditiously. I therefore expect that Ms. Humphrey will now take the necessary steps to get her action to trial.

[29] With regards to costs, Ms. Humphrey is seeking costs. The costs she described having incurred, however, are nominal and I therefore decline to order costs.

WENCKEBACH J.