CITATION: North Toronto Chinese Alliance Church v. Gartner Lee Limited, 2011 ONSC 4526
COURT FILE NO.: 59814/01
DATE: 20110909

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
NORTH TORONTO CHINESE ALLIANCE CHURCH	Rod Byrnes, for the Plaintiff
Plaintiff	
- and -	
GARTNER LEE LIMITED	M. Gosia Bawolska, for the Defendant
Defendant/Moving Party	HEARD: September 6, 2011

REASONS FOR DECISION

LAUWERS J.

[1] The plaintiff conditionally purchased a property in the Town of Richmond Hill on which to build a church. The defendant engineering firm prepared a Phase I hydrological study dated March 17, 1995 (the "Gartner Lee report") for the plaintiff. The plaintiff sues, alleging that the report was negligently prepared and caused it to suffer damages by inducing it to complete the purchase.

[2] The defendant seeks summary judgment dismissing this action under rule 20.04 of the *Rules of Civil Procedure*, O. Reg. 560/84, on the basis that there is no genuine issue requiring a trial. In the alternative, the defendant seeks an order dismissing the action under rule 24.01 for the plaintiff's unreasonable and unexplained delay in bringing the case to trial.

[3] For the reasons set out below, I grant the alternative relief and dismiss the action. While this renders moot the rule 20.04 summary judgment motion, a discussion of that issue reveals the

factual underpinnings of the action that are relevant to the alternative relief and helps explain the outcome.

Is there a genuine issue for trial?

[4] The defendant filed an affidavit attaching an expert report prepared by Bryan R. Whitehead, a professional engineer with Rural Developments Consultants Limited, dated July 5, 2011. Mr. Whitehead notes that representatives of his firm visited the property in October 1996, and reviewed the Gartner Lee report. Mr. Whitehead's report, despite its current date, purports to present his firm's findings from November 1996.

[5] Mr. Whitehead gives the expert opinion that the Gartner Lee report was deficient in that it nowhere stated that a substantial part of the property is located in the flood plain. That fact forced the plaintiff to redesign and relocate the church building on the site and increased its construction cost. Mr. Whitehead states:

> Since the suitability of a property for the construction of an on-site sewage treatment system is in part determined by the availability of sufficient area for the system and there are local policies regarding the construction of sewage treatment systems within flood prone areas, the approval of a sewage system on this parcel would be impacted by the presence of the flood lines on the parcel.
>
> If we had been involved in the assessment of subject property, we would have stopped our assessment on receipt of the flood risk mapping and identified the apparent constraint to the proposed client. We would have recommended that a storm water management consultant be contacted in order to determine the constraints on the property as a result of the potential flooding of the site. There would be a possible constraint of building the structure in addition to the probable constraint to the sewage system construction.

[6] While Mr. Whitehead notes that the Gartner Lee report "recognizes the presence of this water course" because it noted the impact of site development on the fishery, "the report does not discuss the potential for flooding, flood risk mapping or potential difficulties in obtaining approval of the proposed building and sewage system. The report briefly reviews the ground water availability and water requirements, however, there is no discussion with respect to the potential impact of flooding on the well."

[7] The Gartner Lee report suggested that areas of 1,000 to 2,400 square metres would be required for the septic leeching beds with equivalent areas for the reserve bed. But Mr. Whitehead notes: "We reviewed the areas available outside the flood line and found that the smaller area might be available on the site, however, the larger area could not be accommodated." The Gartner Lee report suggested that the areas could be achieved if the ponds were filled in, but did not consider the flood line and restrictions on filling in the flood plain.

[8] While the Gartner Lee report "indicates that the development is technically feasible on private water and sewage services, subject to potentially lengthy and difficult approval," Mr. Whitehead concludes:

> The report does not discuss the potentially significant difficulties (or improbability) in obtaining approval for construction of the building in the flood prone area and does not suggest caution with respect to purchasing because of the flood line encompassing most of the property.
>
> In our opinion, the report is unsatisfactory because it ignores the flood situation with respect to the sewage system. Although not within the terms of reference, the report should have advised the client regarding the potential approval problems which may result from the proposal to build below the flood line.

[9] The defendants rely on an affidavit sworn by Paul Murray who represents AECOM Technology Corporation, the successor to Gartner Lee. Mr. Murray relies on a number of statements in the Gartner Lee report and especially on its conclusion:

> Due to precedent setting nature of this proposed development and testing relatively new approval guidelines and experimental sewage technologies, caution should prevail when proceeding with the proposed development.

[10] Further, Mr. Murray notes that the Phase I study, costing $5,000, contemplated a Phase II study, to cost $15 to 20,000, where more specific problems would be identified. But the plaintiff did not proceed with the Phase II study. An issue for trial would be whether the scope of the Phase I study was sufficient for Gartner Lee to be obliged to capture the flood plain problem. Another issue for trial would be whether the warning in the Gartner Lee report was enough to address both the septic system issues that it identified, and the flood plain issues that it did not identify.

[11] Under tight contractual time constraints the plaintiff elected to proceed with the purchase of the property relying on the Gartner Lee report but its development costs were much higher than anticipated because of the need to address the issues raised in Mr. Whitehead's report, hence the lawsuit.

[12] On its face Mr. Whitehead's report raises a genuine issue requiring a trial about the adequacy of the original Gartner Lee report. At the scheduled hearing date of this motion on July 25, 2011, the defendant had filed no responding material to address the expert opinion in Mr. Whitehead's report because of its late delivery. Counsel for the defendant tendered an expert report at the return of the motion on September 6, 2011, which she received only the day before, and counsel for the plaintiff requested an adjournment so that he could consult Mr. Whitehead and get instructions from his client. The defendant also wants to cross-examine Mr. Whitehead. Accordingly I adjourned this part of the motion.

[13] The defendant asked that I proceed with the second part of the motion on the theory that the result might render the first part moot. The plaintiff did not object to proceeding in this way.

Should the action be dismissed for the plaintiff's delay?

[14] The plaintiff issued the Statement of Claim on July 6, 2001, close to the end of the six-year limitation period, as it was entitled to do under the *Limitations Act* R.S.O. 1990 c.L.15.

[15] Rule 24.01(1)(c) of the *Rules of Civil Procedure* allows the defendant to move for an order to have the action dismissed for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings on or about April 2002. The action was not set down until April 13, 2010.

[16] The plaintiff is responsible for other egregious delays in this case, including:

(a) the plaintiff's failure to serve the Statement of Claim within six months, necessitating the validating order of Goodman J. on February 6, 2001;

(b) the plaintiff's lengthy delays in scheduling and completing the discoveries and in production of documents and answers to undertakings, including the failure to provide a damages brief and supporting documents. This resulted in the defendant's 2007 motion to dismiss for delay. Boyko J. dismissed the motion on terms on June 21, 2007, but her endorsement noted: "Def says ex. for discovery adj'd pending receipt of the material on damages & has been waiting 4 years! (emphasis by Boyko J.)" As a result, the examination of Mr. Tam that began June 17, 2003, only ended on December 14, 2007;

(c) the plaintiff's failure to respond to the Status Notice of March 4, 2008;

(d) the plaintiff's need to obtain the order of Fuerst J. on June 24, 2008, setting aside the administrative dismissal of June 5, 2008;

(e) the lengthy delay in scheduling the return of this motion owing to the plaintiff's counsel's lack of availability; and,

(f) the plaintiff's late service of Mr. Whitehead's expert report on July 13, 2011, despite the service of the plaintiff's notice of motion in 2010, thereby necessitating the adjournment until September 6, 2011.

[17] The cumulative flow of time is astonishing: it has been more than 16 years since the defendant issued the report on which the action is based, more than nine years since pleadings closed, and almost four years since discoveries were completed after an abeyance of more than four years.

[18] Mr. Tam's affidavit on behalf of the plaintiff offers no explanation for the plaintiff's repeated delays. Even at a leisurely pace this case could easily have been ready for trial by 2005. The plaintiff is responsible for moving the action along: *DeMarco v. Mascitelli*, [2001] O.J. No. 3582, 14 C.P.C. (5th) 384 (S.C.) per La Forme J. at para. 22. In this case the plaintiff has manifestly failed to do so. In fact the record shows that the defendant has pursued the plaintiff without much success.

[19] I agree with the observation of D.J. Gordon J. in *Schmidt v. Hamilton (City)*, [2010] O.J. No. 539, 2010 ONSC 542 at para. 25, that "[t]he case law reveals an ongoing struggle in finding a balance between a determination of the issues in dispute on the merits and terminating those cases where it is unlikely a fair trial will occur." He added that "[p]rejudice is seen as the determining factor."

[20] The law on dismissal for delay under rule 24.01 was summarized by Borins J.A. in *Armstrong v. McColl*, [2006] O.J. No. 2055, 28 C.P.C. (6th) 12 (C.A.). He approved the test expressed by Master Dash in *Woodheath Developments Ltd. v. Goldman* (2001), 56 O.R. (3d) 658, summarized in the headnote (appeal dismissed (2003), 66 O.R. (3d) 731 (Div. Ct.)):

> The principle to be applied on a motion to dismiss for delay is that the action should not be dismissed unless: (1) the default is intentional and contumelious; or (2) the plaintiff or his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible.

[21] Master Haberman provided a helpful summary of *Woodheath* in *Novia v Saccoia Estate (Trustee of)*, [2010] O.J. No. 419, 2010 ONSC 785, 54 E.T.R. (3d) 294 at para. 21:

> ...even in the absence of delay that was intentional and contumelious, the court could dismiss an action for delay in the following circumstances:
>
> (a) The delay, caused by the plaintiff or his counsel, was inordinate and inexcusable;
>
> (b) The delay gives rise to a presumption of prejudice, in the sense that a fair trial would not be possible by the time the matter was likely to get to trial;
>
> (c) Inordinate delay will give rise to a presumption of prejudice, as the memories of witnesses tend to fade;
>
> (d) Undue delay after the expiry of the applicable limitation period will also result in a presumption of prejudice;
>
> (e) Where a presumption of prejudice arises, the onus is on the plaintiff to rebut the presumption;
>
> (f) The presumption of prejudice would be displaced, on proper evidence, to the effect that the outcome at trial would not be dependent on the memory of witnesses, that the witnesses that are available recall their evidence in detail or that the case turns largely on the documents;
>
> (g) If the plaintiff does rebut the presumption of prejudice, the onus shifts to the defendant to lead convincing evidence of actual prejudice.

[22] In *Armstrong v. McColl, supra*, Borins J.A. also quoted from his own decision in *Belanger v. Southwestern Insulation Contractors Ltd.* (1993), 16 O.R. (3d) 457 (Gen. Div.) at pp. 471-472:

> In order to succeed on a motion to dismiss a plaintiff's claim for delay the defendant must establish that the delay has been unreasonable in the sense that it is inordinate and inexcusable and that there is a substantial risk that a fair trial will not be possible for the defendant at the time the action is tried if it is allowed to continue. ...The court will then balance the right of the plaintiff to proceed to trial with the defendant's right to a fair trial and make its decision. [Citations omitted]

[23] The plaintiff's delay has been unreasonable, inordinate and inexcusable. Has it been prejudicial to the defence? Given the long-ago expiry of the limitations period, there is a presumption of prejudice to the defence.

[24] Defence counsel relies on the presumption but also points to the June 2003 discovery evidence of Mr. Tam, who said that he had conversations in 1995 with Norbert Woerns, author of the Gartner Lee report, he could not recall their substance. She notes that Mr. Woerns is no longer an employee of the firm, and intimates that he might now be hostile. In any event, she asserts, that since the presumption of prejudice runs against the plaintiff, it was the plaintiff's responsibility to adduce the evidence of Mr. Woerns. I agree.

[25] The plaintiff's counsel responds that the plaintiff's evidence is in part contained in the minutes of the board of the church that have been produced.

[26] Mr. Byrnes also notes that he wrote to Mr. Woerns on December 2, 1996, on behalf of the plaintiff and clearly put both him and Gartner Lee on notice of the plaintiff's discovery of the problem: "There was a severe impediment to the development because the vast majority of the property was within the regulatory flood line of the flood mapping of the Metropolitan Toronto Region and Conservation Authority ("MTRCA")." The letter went on to assert Mr. Woerns's negligence: "in that you did not contact the MTRCA, and did not address the issues of flood mapping and the restrictions on development because of the fact that the majority of the property is below the flood line." Mr. Byrnes asserts that this put the defence on notice of the very issue raised by Mr. Whitehead. The inference is that the defendant ought to have captured the relevant evidence in 1996 and cannot complain about its own failure to do so. Defence counsel urges me to the opposite inference: that the defence told the plaintiff that it had no information about the claim in a letter dated June 1, 2001, from Janine Kovach, then counsel for the defence, to plaintiff's counsel: "You may recall that I am the solicitor for Gartner Lee, and we last spoke in December, 1996 with respect to your correspondence to my client dated December 2, 1996." Ms. Kovach adds: "My client has very little information about the nature of your client's claim." Frankly, I am mystified by this response, given the clarity of Mr. Byrnes's letter of complaint, but Ms Kovach could have been referring only to the damages issue, which would not be known to the defendant. I do not find this exchange of correspondence helpful in the determination of the prejudice issue.

[27] Defence counsel submits, quite reasonably in my view, that nobody involved in the matter is likely to have any memory of the conversations 16 years ago. She submits that the

unanswerable but relevant questions would include whether Mr. Woerns verbally advised Mr. Tam about the existence of the flood plain and the implications for building the church on the property. Mr. Woerns would, however, presumably be available to testify as to his professional practice even if he did not have any recall of the conversations with Mr. Tam. I find this defence speculation to be thin given the hard facts in the case.

[28] Mr. Murray addresses the issue of prejudice to the defence in his affidavit:

> Gartner Lee is very concerned about our ability to obtain a fair trial, if this matter proceeds to trial at all. For example, since the creation and delivery of the report to the plaintiff, our company has been changed in numerous ways, including a change in ownership and turnover of employees.
>
> Additionally, persons with knowledge of the circumstances leading up to and following the delivery of the report to the Plaintiffs may not be able to recall those circumstances due to the 15-year lapse, or are unavailable to assist. Mr. Woerns, who conducted the original work on the Phase I report, has left Gartner Lee and is not available. I am advised by Mr. McQuay, and I believe, that John Gartner, who directed the defence of this lawsuit until a few years ago, has retired and is unwilling to re-involve himself in this matter. Gartner Lee itself no longer exists.

[29] In my view, Mr. Murray's assertions are too general. He provides no supporting detail that persuades me of the actual prejudice to the defence in light of the nature of the facts in issue. This is not a case, based on the evidence submitted to me, in which the court would be concerned with who said what to whom. This is a case about physical conditions on the ground (which appear to be well documented), about the standard of care applicable to Gartner Lee, and about whether the warning in the Gartner Lee report was effective to transfer the financial risk of site development problems to the plaintiff. I see no reason why the defendant would not be able to respond to the substantive factual issues raised in Mr. Whitehead's expert report. The presumption of prejudice is dispelled by the nature of the facts in issue. I am unable to find on the evidence provided that there is prejudice to Gartner Lee's ability to defend itself and to get a fair trial.

[30] I turn now to the other branch of the rule 24.01 test. Has the plaintiff's delay been "intentional and contumelious?" The expression has various definitions. LaForme J. said in *DeMarco v. Mascitelli, supra,* at para. 22 that it means "that the plaintiff has acted in an intentionally disdainful or disrespectful fashion."

[31] The policy on dismissal for delay is described by Sharpe J.A. in *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 at para. 25 (C.A.):

> These rules and cases rest upon an important principle: there is a strong public interest in promoting the timely resolution of disputes. "The notion that justice delayed is justice denied reaches back to the mists of time . . . .For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it": Blencoe v. British Columbia (Human Rights Commission), [2000] 2

> S.C.R. 307, [2000] S.C.J. No. 43, at para. 146. The interest of litigants involved in the civil justice system in timely justice is obvious. Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives. Delay multiplies costs and breeds frustration and unfairness.

[32] Sharpe J.A. held at paragraph 24 that the court's power to dismiss for delay is an incident of court's inherent jurisdiction to control its own process and prevent abuse; it exists even when the rules do not mandate it.

[33] There must come a point at which the plaintiff's accumulated, inordinate, inexcusable, and unexplained delays, in the face of the manifest expectations of the administration of justice as set out in the *Rules of Civil Procedure* and in the practices of the court, become reckless if not wilful and become disrespectful to the court and the defendant. In my view, the plaintiff has reached that point in this case, thus meeting the standard of "intentional and contumelious." Even if the plaintiff's dilatory behaviour were not "intentional and contumelious" within the meaning of rule 24.01, that behaviour warrants dismissal of the plaintiff's case in the exercise of the court's inherent jurisdiction over its own process.

[34] I therefore dismiss the action with costs to the defendant. If costs cannot be agreed upon between the parties I will accept written submissions on a ten day turnaround starting with the defence and concluding with the defence's reply.

P Lauwers

Justice P.D. Lauwers

Released: September 9, 2011