

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20190822  
Docket: S111913  
Registry: Vancouver

Between:

**Michael Mann**

Plaintiff

And:

**Timothy ("Tim") Ball**

Defendants

Before: The Honourable Mr. Justice Giaschi

## **Oral Reasons for Judgment**

In Chambers

Counsel for the Plaintiff:

R. McConchie

Counsel for the Defendant, Timothy ("Tim")  
Ball:

M. Scherr  
D. Juteau

Place and Date of Hearing:

Vancouver, B.C.  
May 27 and August 22, 2019

Place and Date of Judgment:

Vancouver, B.C.  
August 22, 2019

[1] **THE COURT:** I will render my reasons on the application to dismiss. I reserve the right to amend these reasons for clarity and grammar, but the result will not change.

[2] The defendant brings an application for an order dismissing the action for delay.

[3] The plaintiff, Dr. Mann, and the defendant, Dr. Ball, have dramatically different opinions on climate change. I do not intend to address those differences. It is sufficient that one believes climate change is man-made and the other does not. As a result of the different opinions held, the two have been in near constant conflict for many years.

[4] The underlying action concerns, first, a statement made by the defendant in an interview conducted on February 9, 2011. He said, "Michael Mann at Penn State should be in the state pen, not Penn State." This statement was published on a website and is alleged to be defamatory of the plaintiff. The notice of civil claim also alleges multiple other statements published by Mr. Ball are defamatory. It is not necessary that I address the many alleged defamatory statements.

[5] *0690860 Manitoba Ltd. v. Country West Construction*, 2009 BCCA 535, at paras. 27-28, sets out the four elements that need to be considered on a motion to dismiss. They are:

- a) Has there been inordinate delay in the prosecution of the matter?;
- b) If there has been inordinate delay, is it excusable in the circumstances?;
- c) Has the delay caused serious prejudice and, if so, does it create a substantial risk that a fair trial is not possible?; and
- d) Whether, on balance, justice requires that the action be dismissed.

[6] I turn first to whether there has been inordinate delay. Some key dates in the litigation are:

- a) March 25, 2011, the action was commenced;
- b) July 7, 2011, the notice of civil claim was amended;
- c) June 5, 2012, the notice of civil claim was further amended;
- d) From approximately June of 2013 until November of 2014, there were no steps taken in the action;
- e) November 12, 2014, the plaintiff filed a notice of intention to proceed;
- f) February 20, 2017, the matter was initially supposed to go to trial, but that trial date was adjourned;
- g) July 20, 2017, the date of the last communication received from Mr. Mann or his counsel by the defendant. No steps were taken in the matter until March 21, 2019 when the application to dismiss was filed;
- h) April 10, 2019, a second notice of intention to proceed was filed; and
- i) August 9, 2019, after the first day of the hearing of this application, a new trial date was set for January 11, 2021.

[7] There have been at least two extensive periods of delay. Commencing in approximately June 2013, there was a delay of approximately 15 months where nothing was done to move the matter ahead. There was a second extensive period of delay from July 20, 2017 until the filing of the application to dismiss on March 21, 2019, a delay of 20 months. Again, nothing was done during this period to move the matter ahead. The total time elapsed, from the filing of the notice of civil claim until the application to dismiss was filed, was eight years. It will be almost ten years by the time the matter goes to trial. There have been two periods, of approximately 35 months in total, where nothing was done. In my view, by any measure, this is an inordinate delay.

[8] I now turn to whether the delay is excusable. In my view, it is not. There is no evidence from the plaintiff explaining the delay. Dr. Mann filed an affidavit but he provides no evidence whatsoever addressing the delay. Importantly, he does not provide any evidence saying that the delay was due to his counsel, nor does he provide evidence that he instructed his counsel to proceed diligently with the matter. He simply does not address delay at all.

[9] Counsel for Dr. Mann submits that the delay was due to his being busy on other matters, but the affidavit evidence falls far short of establishing this. The affidavit of Jocelyn Molnar, filed April 10, 2019, simply addresses what matters plaintiff's counsel was involved in at various times. The affidavit does not connect those other matters to the delay here. It does not explain the lengthy delay in 2013 and 2014 and does not adequately explain the delay from July 2017. The evidence falls far short of establishing an excuse for the delay.

[10] Even if I was satisfied that the evidence established the delay was solely due to plaintiff's counsel being busy with other matters, which I am not, I do not agree that this would be an adequate excuse. Counsel for the plaintiff was unable to provide any authority establishing that counsel's busy schedule is a valid excuse for delay. In contrast, the defendant refers me to *Hughes v. Simpson-Sears*, [1988] 52 D.L.R. (4th) 553, where Justice Twaddle, writing on behalf of the Manitoba Court of Appeal, stated at p. 13 that:

...Freedman, J.A. said that the overriding principle in cases of this kind is "essential justice". There is no doubt that that is so, but it must mean justice to both parties, not just to one of them.

In *Law Society of Manitoba v. Eadie* (judgment delivered on June 27, 1988), I stated my preference for a one-step application of the fundamental principle on which motions of this kind should be decided. The fundamental principle is that a plaintiff should not be deprived of his right to have his case decided on its merits unless he is responsible for undue delay which has prejudiced the other party. A plaintiff is responsible for delays occasioned by his solicitors. I have already dealt with the consequence of the solicitors' conduct being negligent. Once it is established that the delay is unreasonable having regard to the subject matter of the action, the complexity of the issues, and the explanation for it, the other matter to be considered is the prejudice to the defendant. It is in the task of balancing the plaintiff's right to proceed with the

defendant's right not to be prejudiced by unreasonable delay that justice must be done.

[Emphasis added]

[11] Additionally, based upon the evidence filed, the plaintiff and his counsel appear to have attended to other matters, both legal matters and professional matters in the case of the plaintiff, rather than give this matter any priority. The plaintiff appears to have been content to simply let this matter languish.

[12] Accordingly, I find that the delay is inexcusable.

[13] With respect to prejudice, such prejudice is presumed unless the prejudice is rebutted. Indeed, the presumption of prejudice is given even more weight in defamation cases: *Samson v. Scaletta*, 2016 BCSC 2598, at paras 40-43. The plaintiff has not filed any evidence rebutting the presumption of prejudice.

[14] Moreover, the defendant has led actual evidence of actual prejudice. The evidence is that the defendant intended to call three witnesses at trial who would have provided evidence going to fair comment and malice. Those witnesses have now died. A fourth witness is no longer able to travel. Thus, in addition to finding that presumption of prejudice has not been rebutted, I also find that there has been actual prejudice to the defendant as a consequence of the delay.

[15] Turning to the final factor, I have little hesitation in finding that, on balance, justice requires the action be dismissed. The parties are both in their eighties and Dr. Ball is in poor health. He has had this action hanging over his head like the sword of Damocles for eight years and he will need to wait until January 2021 before the matter proceeds to trial. That is a ten year delay from the original alleged defamatory statement. Other witnesses are also elderly or in poor health. The memories of all parties and witnesses will have faded by the time the matter goes to trial.

[16] I find that, because of the delay, it will be difficult, if not impossible, for there to be a fair trial for the defendant. This is a relatively straightforward defamation action and should have been resolved long before now. That it has not been

resolved is because the plaintiff has not given it the priority that he should have. In the circumstances, justice requires that the action be dismissed and, accordingly, I do hereby dismiss the action for delay.

[17] Before concluding, I wish to note that the materials that have been filed on this application are grossly excessive in relation to the matters in issue. There are four large binders of materials filed by the plaintiff on the application to dismiss, plus one additional binder from the defendant. The binders contain multiple serial affidavits, many of which are replete with completely irrelevant evidence. In my view, this application could have been done and should have been done with one or two affidavits outlining the delay, the reasons for the delay, and the prejudice.

[18] Those are my reasons, counsel. Costs?

[19] MR. SCHERR: I would, of course, ask for costs for the defendant, given the dismissal of the action.

[20] MR. MCCONCHIE: Costs follow the event. I have no quarrel with that.

[21] THE COURT: All right. I agree. The costs will follow the event, so the defendant will have his costs of the application and also the costs of the action, since the action is dismissed.

[22] The outstanding application, I gather there is no reason to proceed with it now.

[23] MR. MCCONCHIE: It is academic, in light of –

[24] THE COURT: It is academic.

[25] MR. MCCONCHIE: – Your Lordship's ruling today.

[26] THE COURT: Right. Thank you, gentlemen. Anything else?

[27] MR. SCHERR: No, Your Honour.

[28] THE COURT: All right.

[29] MR. SCHERR: No, My Lord.

[30] THE COURT: Then, we are concluded and you shall have your materials back, which are these binders. Thank you, gentlemen.

“Giaschi J.”