Date: 2003 11 03
Docket: CV 06332

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CECILIA KELL

Plaintiff

- and -

CRAIG SENYCH as Administrator for the Estate of
WILLIAM SENYCH (deceased), THE NORTHWEST TERRITORIES
HOUSING CORPORATION and WILLIAM POURIER

Defendants

Heard at Yellowknife, NT, October 27, 2003

Reasons filed: November 3, 2003

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Plaintiff:	Charles M^{c}Gee
Counsel for the Estate of William Senych:	Elaine Keenan Bengts
Counsel for the Defendant NWT Housing Corporation:	Sheldon Toner

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REASONS FOR JUDGMENT

[1] The plaintiff commenced the within action in March 1996. Pleadings were filed by all parties and issue was joined in November 1998. There has been no examination for discovery of any party. The defendants now apply to have the action dismissed for want of prosecution.

[2] Only after the filing of the defendants' present application, the plaintiff filed a statement as to documents, notwithstanding the requirement in the Rules that this be done within 30 days of the close of pleadings. This delay in excess of four years in complying with a simple requirement of the Rules of Court is symptomatic of the history of this litigation.

[3] The focus of this litigation is a residence in Rae-Edzo of an estimated value of $28,500.00. In her pleading the plaintiff alleges that she and one William Senych maintained a common-law relationship in the period 1988-1995. She says they lived in the Rae-Edzo residence from 1991-1995. William Senych died in November 1995. The

residence was, and remains, in his name only. The principal relief sought by the plaintiff in this action is a declaration of her interest in the Rae-Edzo residence.

[4] The plaintiff was approved for legal aid by the Legal Services Board in 1995. Since then she has had a succession of five lawyers to assist her in advancing her claim.

[5] The first lawyer filed the statement of claim in March 1996. In her affidavit filed in response to the present application, the plaintiff says that in 1997 she was dissatisfied with the lack of progress on her claim. The Legal Services Board assigned the file to a second lawyer in October 1997. During 1998 the second lawyer did take some steps to file a caveat against the Senych estate; however, that caveat was discharged by Court order in August 1998. The second lawyer also prepared and filed an amended statement of claim in the within action on July 9, 1998.

[6] Statements of defence were filed by the defendant estate and the defendant Housing Corporation in August 1998 and October 1998.

[7] In her affidavit the plaintiff says that in 1999 she instructed the second lawyer to explore settlement options and that there was an exchange of correspondence to that effect between January and July of 1999. Settlement discussions were for naught, and in August 1999, she says, the second lawyer asked defendants' solicitors for available discovery dates. There is no evidence or explanation before me on this application to indicate why examinations for discovery have not occurred.

[8] The second lawyer relocated to Edmonton, Alberta. Legal Services Board assigned the plaintiff's file to a third lawyer, one of its staff lawyers. The third lawyer ceased his employment with the Legal Services Board, and in November 1999 the plaintiff's file was assigned to a fourth lawyer.

[9] The fourth lawyer had conduct of the plaintiff's file from November 1999 to June 2002. The plaintiff's affidavit indicates that this lawyer's activities consisted of a) consideration of the obtaining of an appraisal of the Rae-Edzo residence and b) re-opening settlement discussions.

[10] The fourth lawyer terminated his involvement with the plaintiff's file in June 2002 (without ever having gone on the record as solicitor of record pursuant to the Rules of Court). Apparently at the same time Legal Services Board denied further legal aid to the plaintiff.

[11] The plaintiff says she tried, unsuccessfully, to privately retain counsel. She appealed her denial of coverage to the Legal Services Board. The Board allowed her appeal and in June 2003 her file was assigned to a fifth lawyer, Mr. M^{c}Gee, who is counsel for her on the present application.

[12] On this application the defendants rely on Rules 327(1) and 327(4):

> 327(1) A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court
>
> (a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or
>
> (b) shall dismiss so much of the action or proceeding as relates to the applicant, where for five or more years no step has been taken that materially advances the action or proceeding.
>
> . . .
>
> 327(4) Where, in determining an application under this rule, the Court finds that the delay in action or proceeding is inordinate and inexcusable, that delay shall be *prima facie* evidence of serious prejudice to the party bringing the application.

[13] Subrule 327(1)(b) makes dismissal of the action mandatory where no step has been taken for five or more years. *Gorf* v. *Treeshin*, 2002 NWTSC 4; *Muckpaloo* v. *M^{c}Kay*, 2002 NWTSC 12. The five-year period is the five years prior to the filing of the notice of motion under subrule 327(1)(b). *Filipchuk* v. *Ladouceur*, 2001 ABCA 26. In this case the notice of motion was filed on June 3, 2003. Therefore the inquiry under 327(1)(b) is this — was there a step taken in this action subsequent to June 3, 1998 which materially advanced the action? As noted earlier, the plaintiff filed an amended statement of claim in July 1998, and the defendants filed their respective statements of defence later in 1998. I am satisfied that the filing of each of these pleadings was a step which materially advanced the action towards trial. Accordingly, subrule 327(1)(b) cannot be invoked on this application.

[14] There remains the application for a discretionary order under subrule 327 (1)(a).

[15] Case law under the predecessor rule (Rule 260 of the 1979 Rules) developed a three-part test for dismissal of an action for delay in prosecution:

a. Has there been inordinate delay in the prosecution of the action?
b. Is the delay inexcusable?
c. Is the defendant likely to be seriously prejudiced by the delay?

Poole Construction Ltd. v. *Wood and Gardiner Architects*, [1989] N.W.T.R. 354.

[16] However, under the present Rules (see subrule 327(4) cited above) serious prejudice is presumed once inordinate, inexcusable delay is established.

[17] Careful review of the evidence before the Court on this application indicates that no steps have been taken to advance this action towards trial since the exchange of pleadings in 1998. There has been delay by the plaintiff in moving this action towards trial. That delay has continued for almost five years. That delay is inordinate.

[18] I agree with the statement of Vertes J. in *Muckpaloo*, *supra*, that settlement negotiations cannot be characterized as steps that advance an action towards trial.

[19] Delay and inaction by the plaintiff and her lawyers, as disclosed in the material before the Court, is, on its face, inexcusable. There is no evidence from the plaintiff or any of her lawyers to explain why it took so long, e.g., to realize that further settlement discussions were fruitless. There is no evidence, e.g., to suggest that the plaintiff or anyone else held a reasonable expectation, at any point in time, that settlement was imminent or likely.

[20] The plaintiff sets forth the circumstances leading to each change in her legal representation. The fact of the changes in legal representation, in itself, however, is insufficient as an explanation for the entire inordinate delay that occurred.

[21] In all of the circumstances I find the delay since 1998 to be inordinate and inexcusable. Such delay is *prima facie* evidence of serious prejudice to each of the defendant estate and the defendant Housing Corporation in defending this action at trial. That presumption of prejudice to the other litigants has not been dislodged by any evidence presented by the plaintiff. (Indeed, although there is "speculation" by the parties as to the ability or inability to today locate any hamlet employees or Northwest Territories Housing Corporation officials who were involved with the granting of ownership to the Rae-Edzo residence 12 years ago, there is no actual evidence before the

Court on that point) I do note that the defendant estate is specifically prejudiced by this prolonged litigation in administering and finalizing or winding-up the affairs of the estate.

[22] For these reasons, I find merit in the applications before the Court (separate applications under Rule 327 by each of the defendant estate and defendant Housing Corporation).

[23] An order will issue dismissing the within action as against each of these two defendants. These defendants should have their costs of the action; however, if counsel wish to address costs they may do so by written submissions to the Court within 30 days of the date of filing these reasons.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
3rd day of November 2003

Counsel for the Plaintiff: Charles McGee
Counsel for the Estate of William Senych: Elaine Keenan Bengts
Counsel for the Northwest Territories Housing Corporation: Sheldon Toner

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