

CANADA / JUDGMENT

Ali v. Aujla

2022 BCSC 2403

COURT

Supreme Court of British Columbia

DECIDED

1 November 2022

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2022 BCSC 2403 Ali v. Aujla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ali v. Aujla,

2022 BCSC 2403

Date: 20221101

Docket: M166653

Registry: Vancouver

Between:

Aisha Ali

Plaintiff

And

Tarjit Aujla, Devinder Aujla, Ahmed Cali, and

Xalima Mohamud

Defendants

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

M.J. Bauer

Counsel for the Defendants:

R.S. Wallia

Place and Date of Hearing:

Vancouver, B.C.

November 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2022

- [1] THE COURT: This is an application by the defendants for various forms of relief. It arises out of a motor vehicle accident which occurred in December 2015 in Surrey, BC. The plaintiff now lives in Calgary.
- [2] The trial was originally set for May 11, 2020 when COVID-19 caused all trials to be adjourned. The defendants timed their examination for discovery ("XFD") of the plaintiff for July 16, 2018, which was well before the trial date. They also timed an independent medical examination ("IME") with Dr. David Flaschner, a physiatrist, to occur in February 2020, which again was a timely decision given the upcoming trial.
- [3] Because of COVID-19, the 2020 trial was adjourned and the new trial date is now February 6, 2023 for ten days. The defendants seek an order that the trial be adjourned, presumably on the basis that the further IME that they are seeking will be after the 84-day deadline.
- [4] There is no merit whatsoever to the defence position that the trial should be adjourned, and so I have no difficulty dismissing that application.
- [5] In the alternative, the defendants seek an order that the plaintiff provide certain information that apparently arose from her XFD. The plaintiff has provided that information through her counsel. It is an email dated October 23, 2022. The defendants say that they still want the order in case the information provided by the plaintiff was inaccurate. I do not think that is a satisfactory reason to make an order that the plaintiff says was already complied with. There is no evidence before me that the defendants attempted to reach these individuals and obtained either no answer or a wrong number. October 23rd was a Sunday, but the defendants have had a whole week to try to reach these individuals, and if there was evidence that the information was flawed, it could have been provided.

[6] Therefore, I do not think that the order for the name and contact information of these individuals is relevant. It will fall on the plaintiff to suffer the consequences if the information is faulty, but I think she has adequately complied with the request made at the XFD, and it is up to the defendants to follow up in trying to contact these people, and there is no evidence that they have made any efforts at all. Therefore, paragraph 2(a) of the October 18, 2022 notice of application is dismissed.

[7] The defendants also seek an order that the plaintiff attend a continued XFD. They do this on the basis that the XFD was terminated when counsel for the defendants says:

All right. Well, subject to anything arising out of the requests that I have made and any new documents to be produced after this, those are my questions. Thank you.

And counsel for the plaintiff says, "thank you".

[8] There is now a debate as to whether the XFD was, in fact, concluded or whether it was adjourned. The XFD lasted for two hours, but that is not determinative. The fact that seven hours are available is neither here nor there if the XFD was concluded before the seven hours had elapsed.

[9] I accept the plaintiff's position that *Concord Pacific Acquisitions Inc. v. Oei*, 2018 BCSC 1368, sets out the current authority on further examinations for discovery. If there were questions to be asked of the plaintiff related to the requests made on the record, I think the defendants could have a further XFD limited to those questions, but the questions were simply to provide the contact information of these individuals, and that information was provided. There are no questions arising from that because the questions have been asked and answered.

[10] I do not think the fact that there is the passage of time is sufficient to require the plaintiff to submit to a further XFD. Trials are adjourned for many different reasons, and I agree with the plaintiff that the effluxion of time in and of itself is not sufficient reason to justify a further XFD. It may well be that the defendants are caught by surprise at trial with what the plaintiff says, but the defence has options available with respect to finding out what medical care the plaintiff has undergone since she moved to Calgary. Counsel for the plaintiff has said here in court on the record that the plaintiff will provide updated medical records on request, and I have no reason to doubt that position.

[11] The plaintiff has determined that she is not amenable to a further XFD, and I think that is her right to do so. Whether it is strategically beneficial to her to submit to a further XFD is entirely up to her, and if the defendants are not in a position to make any offer to settle her claim, that is again the plaintiff's and the defendants' prerogative, but I am not satisfied that the defendants are entitled to a further XFD. Therefore, the application for the continued XFD is dismissed.

- [12] Next, the defendants apply for an order that the plaintiff submit to an updated IME with Dr. Flaschner on November 16th, which is past the 84-day deadline. Dr. Flaschner examined the plaintiff in February 2020 and provided a report and recommendations.
- [13] Again, there is no evidence before the court that the passage of time has, in fact, changed the complexion of the case, and there is no evidence before me that a physical examination of the plaintiff is required here. If the defendants choose to, they can have Dr. Flaschner produce a new IME report in response to any reports provided by the plaintiff, and again, I agree that the passage of time is not enough to justify a second IME. If it were, every time a trial were adjourned, the defence would be entitled to a further IME.
- [14] I hasten to add that sometimes the court does order a further IME because of the passage of time, but that is when there is evidence of a new medical development or some significant new development in the plaintiff's life, and there is no evidence of that here.
- [15] I acknowledge that the reason that the defence cannot prove that there is a new event in the plaintiff's life is that they have not been able to subject her to a further XFD, but nor have they requested any updated medical records from the plaintiff which they could have done and did not, and those medical records might have formed the foundation of a new XFD and a new IME if there was a significant new development in the plaintiff's life, but there is simply no evidence of that and there is no evidence of any refusal on the part of the plaintiff to provide any such updated medical records.
- [16] Further, if there is an issue about the plaintiff's income, she probably ought to have listed her income tax returns, but it is not unusual for parties to fail to list relevant documents and they need a prompt from the party on the other side to say "please provide your client's updated income tax returns and pay stubs". That is a very standard request to make, and along with the medical records I have every confidence that counsel for the plaintiff will comply with those requests in a timely basis so that the defence and more importantly, probably the instructing adjuster, has an idea of what this claim is worth. That is the practical issue here, and although I have acceded to the plaintiff's position on these applications--having dismissed them all--it is patently obvious to me that the defence needs to know what is going on in this plaintiff's life, and the way to do is that to make the usual requests for updated medical and income loss documents. That is the next task, which I am sure counsel for the defendants will take care of. Mr. Bauer will comply with that, and Dr. Flaschner, having already seen the plaintiff, can probably do a fairly sensible rebuttal report based on document review and the reports of the plaintiff.
- [17] I dismiss all of the applications, and the plaintiff has been successful. Therefore the defendants will pay the plaintiff their costs.

[SUBMISSIONS ON COSTS]

- [18] THE COURT: Success has been divided, but the plaintiff ought to have provided that contact information earlier, but I cannot tell whether there were efforts made before. I mean, the XFD was years ago, so the time to have dealt with it was much earlier than now, but in order to parse the costs issue as best I can, the attendance today was on the issues on which the plaintiff was entirely successful. I will vacate the order for costs that I made, and it is virtually impossible to distinguish success here. Each party bearing their own costs does not adequately reflect that the plaintiff was successful on the major issue. The defendants were successful on a very minor issue. So it is almost impossible to divide the success issue here. If the contact information were the only issue, I would order costs to the defendants, but I have to say that overall the plaintiff was successful on the major substantive issues.
- [19] I will stick to my original order, that the defendants will pay the plaintiff her costs of the application, and when it comes time to assessing the costs, the unit values can take into account what was the contact information issue. So the parties can take that into account.
- [20] UNIDENTIFIED MALE SPEAKER: Your Honour, does that mean costs to the plaintiff in any event?
- [21] THE COURT: Well, liability is admitted. The plaintiff will get her costs.
- [22] UNIDENTIFIED MALE SPEAKER: Yes, I suppose so.
- [23] THE COURT: So if makes it easier for you to understand the costs order, the order is the defendants will pay the plaintiff her costs of the application in any event of the cause.

"Master Harper"

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