

CANADA / JUDGMENT

Archibald (Ivy League Developments) v. Wojtarowicz

2020 BCSC 683

COURT

Supreme Court of British Columbia

DECIDED

1 May 2020

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2020 BCSC 683 Archibald (Ivy League Developments) v. Wojtarowicz IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Archibald (Ivy League Developments) v. Wojtarowicz, 2020 BCSC 683 Date: 20200501 Docket: S108851 Registry: Kelowna Between: Lorraine Archibald doing business as Ivy League Developments Plaintiff And Sylwia Agata Wojtarowicz Defendant Before: The Honourable Mr. Justice Hori Reasons for Judgment Re: Costs The Plaintiff on her own behalf: L. Archibald Counsel for the Defendant: M.C. Sennott Place and Date of Written Submissions: Kelowna, B.C. April 20, 2020 Place and Date of Judgment: Kelowna, B.C. May 1, 2020

- [1] I heard the summary trial application in this action on January 30, 2020. I issued reasons for judgment on March 20, 2020 at 2020 BCSC 421. I granted the parties leave to address the issue of costs and they have done so by written submissions. This is my ruling on costs in this action.
- [2] The defendant hired the plaintiff to renovate her residential property in Kelowna, British Columbia. The parties entered into a written construction contract which set out the terms of their relationship. The defendant was not satisfied with the quality of the work performed by the plaintiff and claimed that the plaintiff failed to comply with the terms of the contract. As a result, the defendant refused to pay the outstanding balance on the contract.
- [3] The plaintiff commenced this action against the defendant for payment of the unpaid portion of the contract. The defendant filed a counterclaim against the plaintiff claiming damages for breach of contract.
- [4] Following the summary trial application, I held as follows:
- a) the plaintiff breached the terms of the construction contract and therefore was not entitled to payment of the outstanding balance under the contract; and
 - b) even though the plaintiff had breached the contract, the defendant failed to establish that she had sustained any damages as a result.

- [5] Based on these findings, I dismissed both the plaintiff's action and the defendant's counterclaim.
- [6] The defendant claims that she is entitled to special costs because the plaintiff attempted to mislead the court on a number of occasions. In particular, the defendant suggests that the plaintiff mislead the court by claiming that she had insurance coverage as required by the contract when she did not.
- [7] The defendant relies upon *Lakhani v. Elliot*, 2010 BCSC 281; *McIsaac v. Healthy Body Services Inc.*, 2010 BCSC 1033; and *Hundley v. Garnier*, 2011 BCSC 1317, as authority for the proposition that the lack of candour on the part of a party may attract special costs. The cases cited by the defendant do not support this proposition. Each of the three cases deal with whether it is appropriate to award double costs when a party fails to accept an offer to settle. Those decisions do not stand for the proposition that lack of candour is the basis for a special costs order.
- [8] The defendant further submits that special costs are in order in this case because the plaintiff's actions were so lacking in merit that it was an abuse of the court's process. The defendant suggests that because the plaintiff steadfastly maintained that this matter proceed to trial rather than proceed under the summary trial process, her actions amounted to an abuse of process. I am not prepared to make such a finding. It cannot be an abuse of process for one party to insist upon a trial of an action even though it is ultimately determined that it can be decided on a summary trial.
- [9] Special costs are awarded where there has been some form of reprehensible conduct and are typically awarded to address conduct in the litigation that is deserving of censure and rebuke (*West Van Holdings Ltd. v. Economical Mutual Insurance Co.*, 2019 BCCA 110 at para. 68). I cannot find that any of the factors relied upon by the defendant for her claim of special costs rise to the level of conduct that is deserving of censure or rebuke. Therefore, I am not prepared to award special costs to the defendant.
- [10] In the alternative, the defendant submits that she presented the plaintiff with formal offers to settle pursuant to Rule 9-1 of the Supreme Court Civil Rules. Accordingly, the defendant submits that she is entitled to double costs "for the entirety of the action".
- [11] The first difficulty that I have with this submission is that the consequences prescribed by Rule 9-1 for failing to accept a formal offer of settlement are an adverse costs award from the date that the offer to settle was delivered or served. There is no authority in Rule 9-1 to impose adverse cost consequences upon the plaintiff prior to the delivery of the offer to settle.
- [12] The real question in this case is whether the plaintiff ought to have accepted any of the settlement offers made by the defendant. The history of this litigation and the timing of the settlement offers is summarized as follows:

- a) October 13, 2015, the plaintiff filed a notice of civil claim;
- b) November 6, 2015, the defendant filed a response to civil claim;
- c) December 21, 2015, the defendant delivered her list of documents;
- d) December 30, 2015, the defendant offered to settle the plaintiff's claim by paying \$1,000 to the plaintiff (the "First Offer");
- e) January 21, 2016, the plaintiff delivered her list of documents;
- f) February 10, 2016, the plaintiff filed an amended notice of civil claim;
- g) March 8, 2016, the defendant filed a counterclaim against the plaintiff;
- h) May 16, 2016, the defendant examined the plaintiff for discovery;
- i) May 25, 2016 the plaintiff examined the defendant for discovery;
- j) October 16, 2019, the defendant offered to pay the plaintiff \$10,000 to settle the claims (the "Second Offer"); and
- k) the defendant offered to accept the sum of \$12,000 from the plaintiff to settle the claims.

[13] The First Offer made on December 30, 2015, was not an offer that the plaintiff ought to have accepted. At that time the defendant had not filed her counterclaim and the parties had not conducted examinations for discovery.

[14] However, by October 16, 2019, when the defendant presented the Second Offer, the plaintiff had all of the necessary information required to assess her claim and determine whether acceptance of the offer was a reasonable resolution. By that time the defendant had filed her counterclaim, the parties had disclosed documents and all discoveries were complete.

[15] The plaintiff submits that the Second Offer was severely limited in time. She submits that she only had three business days within which to decide to accept or reject the offer. The plaintiff submits that it was not reasonable for her to have consulted with a lawyer, obtain legal advice and choose to accept or reject the offer.

[16] I do not accept the plaintiff's submission on this issue. She chose to represent herself. She knew or ought to have known all of the information necessary to make that determination in relatively short order by October 16, 2019. Therefore, I find that the Second Offer made by the defendant on October 16, 2019, was an offer that the plaintiff ought to have accepted.

[17] Had it not been for the defendant's Second Offer, I would have ordered that each party bear their own costs in the action. The plaintiff was not successful in the main action but the defendant did not succeed in her counterclaim. In the circumstances, had it not been for the Second Offer, the appropriate order for costs would be that each party bear their own costs of the action.

- [18] Rule 9-1(5) allows the court broad discretion with respect to costs. However, Rule 9-1(5)(d) provides that if an offer was made by the defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, the court may award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- [19] Based on Rule 9-1(5)(d), I will award costs to the defendant of all steps taken in this proceeding after October 16, 2019. Those costs will include the costs of these submissions on costs. "Hori J."

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