

CANADA / JUDGMENT

Aulakh v. McBoyle

2020 BCSC 849

COURT

Supreme Court of British Columbia

DECIDED

8 June 2020

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2020 BCSC 849 Aulakh v. McBoyle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aulakh v. McBoyle,

2020 BCSC 849

Date: 20200608

Docket: M215317

Registry: New Westminster

Between:

Inderjit Kaur Aulakh

Plaintiff

And:

Robert McBoyle

U-Haul Co. of Arizona.

U-Haul Co. (Canada) Ltd., U-Haul Co. (Canada) Ltee, and

Gurbachan Aulakh

Defendants

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:

K. Gill, Articled Student

Counsel for the Defendants:

No Appearance

Date of Written Submission:

June 3, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 8, 2020

Introduction

[1] This is an application by the plaintiff to renew a notice of civil claim under Rule 3-2(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, to allow for service of one of the defendants, U-Haul Co. of Arizona ("U-Haul Arizona"). The application is brought by written submissions pursuant to a Practice Directive entitled COVID-19: Expansion of Civil and Family Matters - Applications by Written Submission dated 27 April 2020 (COVID-19 Notice #14). I granted the application by way of a memorandum to counsel dated 4 June 2020, with reasons to follow.

Facts

[2] I would summarize the relevant facts as follows:

- a) The plaintiff Ms. Aulakh filed a notice of civil claim on 5 June 2019. The claim is for damages in connection with a motor vehicle collision alleged to have taken place on 10 June 2017, in Surrey.
- b) The claim alleges that a Ford truck owned by the defendant U-Haul Arizona backed into and collided with a Jeep Cherokee driven by the defendant Mr. Aulakh, in which the plaintiff Ms. Aulakh was a passenger.
- c) The claim alleges that the defendant U-Haul Arizona was negligent in various ways, including failing to properly maintain the Ford truck. The claim further alleges other theories of liability on the part of the defendant U-Haul Arizona. The claim also alleges negligence of various kinds against the other defendants, the details of which are not germane for this application.
- d) The defendant U-Haul Arizona is, as the name suggests, an Arizona-based company with a registered office in the city of Phoenix.

- e) On 5 March 2020, plaintiff's counsel retained a British Columbia based process serving company to arrange for service of the claim on the defendant U-Haul Arizona. Various efforts were then made to effect personal service of the notice of civil claim on this defendant between 5 March 2020 and 27 May 2020.
- f) Included within the application record is an affidavit from a process server in Phoenix, Arizona. The affidavit states that on 5 March 2020, the process server attended the business address of U-Haul Arizona and was met by a security guard, who refused access to the defendant's business suite and re-directed the process server to the defendant's "statutory agent", CT Corporation, at another address in Phoenix.
- g) The other attempts at service are set out in an affidavit from a legal assistant to plaintiff's counsel, supported by emails from the Arizona process server attached as exhibits. By virtue of Rule 22-2(13), the legal assistant's "information and belief" evidence is admissible on an interlocutory application. The legal assistant's affidavit indicates that:
 - (i) On 26 May 2020, the Arizona process server personally served the notice of civil claim on "CT Corporation" - identified by a security guard as the "statutory agent" for the defendant U-Haul Arizona as described above - by delivering the notice personally to an employee at CT Corporation's business address in Phoenix.
 - (ii) On 26 May 2020, the Arizona process server again attempted to serve the notice of civil claim on the defendant U-Haul Arizona, but was once again refused access to the defendant's business suite by a security guard. The process server then tried to leave the notice of civil claim with the security guard, but the security guard threw the document back in the process server's face.
- h) Plaintiff's counsel now applies for an order renewing the notice of civil claim for six months, to allow for proper service on the defendant U-Haul Arizona.
- i) Plaintiff's counsel says the notice of civil claim has been served on all other defendants, who have yet to file appearances. Counsel has not given the other defendants notice of this application, taking the position that there is "no prejudice" to these defendants arising from the renewal of the notice of civil claim.

Discussion

- [3] This application is governed by Rule 3-2(1), which provides that a notice of civil claim "does not remain in force for more than 12 months", but where a defendant has not been served, the court may order that the notice of civil claim can be "renewed for a period of not more than 12 months". An order under Rule 3-2(1) can be made on application by the plaintiff brought "before or after the expiration of the 12 months". In this case, the application was filed on 29 May 2020, and made returnable on 3 June 2020, two days before the expiration of the 12 months. The plaintiff seeks renewal of the notice of civil claim for six months, until 4 December 2020, to effect service on the defendant U-Haul Arizona.

- [4] Renewal of a notice of civil claim, which in the parlance of the case law is a form of "writ", is a discretionary matter. The objective of the court is to see that "justice is done", having regard to the particular facts of the case. If refusing to renew the writ would do an "obvious injustice" to the plaintiff, while renewing it would not result in any "substantial injustice" or "prejudice" to the defendant's position, then the writ should be renewed: *Simpson v. Saskatchewan Government Insurance Office* (1967), 61 W.W.R. 741 (Sask. C.A.) at p. 750, cited with approval in *Bearhead v. Moorhouse* (1978), 5 B.C.L.R. 380 (C.A.) at para. 8.
- [5] Although each case must be decided on its own facts, a list of factors commonly considered in such applications was set out in *Fast Fuel Services Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 at para. 9. Addressing each of the five factors in *Fast Fuel* by reference to the facts of this case, my reasoning is as follows:
- (a) Whether the application to renew was made promptly: The application to renew came before the court a mere two days before the expiry of the 12 months. However, the application has been made before the expiry date, after a number of bona fide efforts to serve the defendant. These efforts were not left until the last minute. They began months ago.
 - (b) Whether the defendant had notice before the writ expired: There is no evidence that the defendant had notice of the claim before the expiry of the 12 months. The defendant's "statutory agent" has been served, but without more information about the role of a "statutory agent" in the state of Arizona, I cannot conclude that the defendant has had notice of the claim up to this point in time.
 - (c) Whether the defendant was prejudiced: There is no evidence before the court, at least at this point, that the defendant will be prejudiced by a renewal of the writ for a number of months. That issue could in theory be revisited by the defendant on an application to set aside the writ, a step which would be available to the defendant who has not had notice of this application. I note that many of the cases on renewal of writs arise in a context where the original application was brought and dealt with ex parte, with the defendant later applying to set aside the renewal order. See *Weldon v. Teck Metals Ltd.*, 2011 BCSC 489 at para. 2, *aff'd Weldon v. Agrium Inc.*, 2012 BCCA 53; *Wilder Estate v. Davis & Co.* (1994), 92 B.C.L.R. (2d) 385 (C.A.); *Castonguay v. Ebrahim*, 1995 CanLII 952 (B.C.S.C.).[1]
 - (d) Whether the failure to effect service was attributable to the defendant: I cannot attribute the failure to effect service to any action or conduct on the part of the defendant U-Haul Arizona. It appears that there are restrictions on public access to the defendant's business premises in Phoenix, but one could not say there is anything inappropriate about this. Indeed, it appears that the practice in Arizona may be for companies to accept service through a "statutory agent", although again I have no information about how this works.
 - (e) Whether the plaintiff, as opposed to plaintiff's counsel, was at fault. There is certainly no reason to believe that the plaintiff bears any personal fault or responsibility for the failure to serve the defendant within the original 12 months. Indeed, I would not necessarily fault

plaintiff's counsel. Plaintiff's counsel engaged a professional process serving company to arrange for service on the defendant in Arizona, months before the expiry of the writ. Several efforts were made at personal service and were frustrated. One might argue that more could have been done, and earlier, but on my view of the matter I do not find any true lack of diligence on the part of plaintiff's counsel.

- [6] Weighing up all of these considerations in light of the principles discussed above, my conclusion is that refusal to renew the notice of civil claim would prejudice the plaintiff to the point of being unable to pursue her claim against one of the named defendants. It would be unjust to allow this to occur, when genuine efforts were made to serve that defendant well in advance of the 12 month limit, and there is no reason to believe that renewal would work any discernible injustice or substantive prejudice to the defendant. The just result is to grant the plaintiff's application and order renewal of the notice of civil claim for six months, until 4 December 2020, to permit service on the defendant U-Haul Arizona.
- [7] There is one final point to address. The other defendants, having been served with the notice of civil claim but having not yet filed appearances, were not given notice of this application. Plaintiff's counsel took the position that it was not necessary to serve them because they have no interest in the application and could not possibly be prejudiced by the renewal of the notice of civil claim to permit service on the remaining defendant. Of course, that is the position of plaintiff's counsel. It seems rational on its face, but if there is a contrary view, no one has been given an opportunity to express it. On the other hand, there was some urgency to the application in the sense that it came before the court a mere two days before the expiry of the 12 month time period in Rule 3-2(1). I use the term urgency loosely here, as it must be acknowledged that the plaintiff has had a fair degree of control over the steps taken to secure service, and the timing of this application. Still, as noted above, efforts to serve the one remaining defendant began months ago and were frustrated by circumstances beyond the control of the plaintiff or her counsel.
- [8] In the circumstances, I found it appropriate to hear the application *ex parte*, on the basis that the other defendants are not yet parties of record, and have no obvious legal interest in the order sought. To address any residual concern about this aspect of the matter, the order renewing the notice of civil claim shall include a term requiring that it be served on each of the other defendants. Those defendants will then be in a position to consider whether the order affects their interests, and whether there is a basis to challenge it. A similar approach was taken in another recent case, *Singh v. Young*, 2020 BCSC 791 at paras. 5, 20.

- [9] Costs of the application will be in the cause.

"Riley J."

- [1] All of these cases were dealt with under earlier versions of the Rules, but I see no reason why the same approach would not be taken under the new Rules.

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Prepared on 27 October 2026 · Esheria