

CANADA / JUDGMENT

Austin v. Warner

2008 BCSC 1639

COURT

Supreme Court of British Columbia

DECIDED

28 November 2008

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2008 BCSC 1639 Austin v. Warner IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Austin v. Warner, 2008 BCSC 1639 Date: 20081128 Docket: 71014 Registry: Kelowna Between: Alton Bruce Austin Plaintiff And Debra Anne Warner, Larry Lyndon Warner, Amazing Grassworks Canada Ltd. and Daniel Charles Anthony Collins Defendants And Interior Turf Equipment Ltd. Defendants by Counterclaim Before: The Honourable Madam Justice Gray Reasons for Judgment Re: Costs Counsel for the Plaintiff: K.J. Ihas Counsel for the Defendants: Debra Anne Warner, Larry Lyndon Warner, Amazing Grassworks Canada Ltd.: J.D. Metherell Date and Place of Trial: May 5-9, 2008 Kelowna, B.C. Written Submissions Received: August 29, September 12, and September 19, 2008

Introduction

- [1] Mr. Austin proceeded to trial against two of the defendants, Mr. and Mrs. Warner. His claims were dismissed following a five-day trial. The trial reasons for judgment can be found at 2008 BCSC 1076. The application before me relates to the trial costs. The parties filed written submissions.
- [2] Mr. and Mrs. Warner, to whom I refer collectively as the "Warners", seek double costs, or alternatively, ordinary costs. Mr. Austin's position is that the parties ought to bear their own costs, or alternatively, the Warners should be entitled to ordinary costs, to be set-off against an order that the plaintiff be entitled to costs of the counterclaim which the Warners abandoned.
- [3] The issues are as follows:
1. What should be the effect, if any, of the Warners' offer to settle of March 16, 2007?
 2. What should be the effect, if any, of the plaintiff abandoning some of his claims prior to trial, and of the Warners abandoning their counterclaim?

Facts

- [4] The lawsuit concerned Mr. Austin's investment in a company called Interior Turf Equipment Ltd. Mr. Austin commenced this lawsuit on February 23, 2006. At that time, his claim was for the relief pursued at trial ("Trial Claims") plus additional claims ("Plaintiff's Additional Claims").
- [5] On July 7, 2006, the Warners and Amazing Grassworks Ltd. ("AG") filed a counterclaim.
- [6] Counsel for the Warners sent a facsimile letter dated March 16, 2007 to counsel for the plaintiff, which I refer to as the "March Offer." The letter reads in its entirety as follows: Without Prejudice March 16, 2007 Petraroia Langford Rush LLP Attention: Kenneth J. Ihas Re: Austin v. Warner et al SCBC Kelowna Registry No. S71014 Please find enclosed our offer to settle pursuant to Rule 37(A). Our clients, Debra and Larry Warner reserve the right to bring this offer to the attention of the Court for consideration in relation to costs after the Court has rendered Judgment on other issues in the proceedings. The offer is as follows:
1. The Defendants, Debra Warner, Larry Warner offer to settle the Plaintiff's claim against them for the amount of \$1.00 inclusive of costs and disbursements. For clarity, this is an offer to settle your client's claims against Debra Warner, Larry Warner and is not intended to be an offer to settle our clients' Amended Counterclaim. Yours truly, Pushor Mitchell LLP
Joni D. Metherell
- [7] On or about March 16, 2007, Mr. Austin and AG settled Mr. Austin's claim against AG inclusive of costs. Also, at or about this time, Mr. Austin's claim against Daniel Collins and Mr. Collins' counterclaim were settled.
- [8] Counsel's submissions were contradictory about when the Warners abandoned their counterclaim. Counsel for the Warners suggested that it was prior to March 26, 2007, while plaintiff's counsel suggested that it was "at the 11th hour". The written submissions did not provide any documentation explaining the basis on which the Warners abandoned their counterclaim.
- [9] On the first day of trial, Mr. Austin's counsel advised the court that only the Trial Claims were proceeding, and that the Plaintiff's Additional Claims were abandoned.

Analysis

(a) Effect of March Offer

- [10] The availability of double costs is a technique to promote reasonable settlements. As stated in *Mackenzie v. Brooks*, 1999 BCCA 623, [1999] B.C.J. No. 2411, at para. 21: Rule 37 is clearly designed to encourage the early settlement of actions. It does so by rewarding the party who makes an early and reasonable settlement offer, and by penalizing the party who declines to accept such an offer. The reward or penalty takes the form of costs (in some cases, double costs) from the date the offer is made. The significant role which costs now play in the

litigation process operates as a powerful incentive to parties to make early offers of settlement under the Rule and to accept reasonable offers.

[11] Rules 37 and 37A were repealed effective July 1, 2008 and replaced with Rule 37B.

[12] Rule 37B came into force effective July 1, 2008. It includes the following:

- (1) In this rule, "offer to settle" means
 - (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
 - (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
- (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
 - (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.
- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.

[13] The March Offer was made prior to July 2, 2008. In order to rely on Rule 37B, the Warners must establish that the March Offer was a valid offer under Rule 37 or 37A.

[14] Rule 37A(1) provided as follows: 37A(1) In any circumstances to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.

- [15] The March Offer was in writing and included the necessary statement. The next question is whether it was made in a circumstance to which Rule 37 did not apply.
- [16] Rule 37 provided that an offer to settle under that rule must be in Form 64. Form 64 required the offer to set out the terms, and to include the words "and costs in accordance with Rule 37." In short, an offer under Rule 37 must include the terms that costs would be payable as set out in that rule.
- [17] The March Offer proposed to settle Mr. Austin's claim for an amount inclusive of costs and disbursements. An offer dealing with costs in that way would not be in Form 64 and would not constitute a Rule 37 offer.
- [18] The court has rejected the argument that an offer to settle providing that each party bears its own costs is an offer to settle under Rule 37A. This was discussed in *Lewis v. Abel*, 2008 BCSC 140, at para. 26-29, as follows:
- [26] counsel submits that where a party wishes to make an offer of settlement that does not include payment of the offeree's costs, Rule 37 does not apply, and that such an offer may be made under Rule 37A.
- [27] This submission appears to me to be logical and persuasive. I see no underlying policy reason to require a party who believes his or her opponent's case to be entirely lacking in merit or prospect of success, to be obliged to make an offer that will result in an obligation to pay that opponent's costs in the event the offer is accepted in order to bring about the consequences provided for by subrule 37(24)(b).
- [28] If it was open to me to reach this conclusion, I would have done so, and would have made an award of double costs to the defendants Abel, Ignaszewski and Straatman.
- [29] I am persuaded, however, that the weight of authority is against the position I have set out above, and that I must conclude, reluctantly, that the defendants are not entitled to rely on Rule 37A and therefore are not entitled to consideration of an award of double costs. I refer here to the following authorities: *Cao (Guardian ad litem of) v. Natt*, 2004 BCSC 813 (B.C.S.C.), *aff'd* 2005 BCCA 351 (B.C.C.A.); *Coutu v. San Jose Mines Ltd.*, 2005 BCSC 1451 (B.C.S.C.); *P.G. Restaurant Ltd. v. Northern Interior Regional Health Board*, 2006 BCSC 1680 (B.C.S.C.); *Kerpan v. Insurance Corp. of British Columbia*, 2007 BCSC 203 (B.C.S.C.). These authorities have interpreted the decision of the Court of Appeal in *Cao* to mean that there is no possibility to escape the strictures of Rule 37 by making an offer on the condition that no costs be payable. Where an offer is made that excludes the payment of costs, it will fall outside Rule 37, but also outside Rule 37A.

- [19] The March Offer was an offer to settle all claims, including the claim for costs, for \$1. That is an offer which excludes payment of costs as provided by Rule 37, and therefore it falls outside Rule 37 and 37A. As a result, the March Offer was not an "offer to settle" under Rule 37A, and Rule 37B does not apply to give discretion to the court to award double costs for the period after the making of the March Offer.
- [20] The Warners are not entitled to double costs.
- (b) Abandoned Claims
- [21] Mr. Austin pleaded both the Trial Claims and the Plaintiff's Additional Claims. At trial, he proceeded only with the Trial Claims.
- [22] Rule 57(9) provides that except in respect of motions, "costs of and incidental to a proceeding shall follow the event unless the court otherwise orders."
- [23] The Warners succeeded at trial. Ordinarily, they would be entitled to their costs of the trial and of costs incidental to that. Even though Mr. Austin did not proceed with the Plaintiff's Additional Claims, they were incidental to the proceeding and the Warners' costs of preparing to defend against such claims would be included.
- [24] Usually, a counterclaim is heard at the same time as the trial. In this case, the Warners abandoned the counterclaim.
- [25] The pleading of a counterclaim was not essential to defending Mr. Austin's claim. Accordingly, the Warners should not be entitled to their costs in relation to their counterclaim.
- [26] Mr. Austin seeks his costs for the counterclaim. The evidence at trial and on the costs application did not disclose the basis upon which the Warners' counterclaim was abandoned. It appears that the parties did not go through the formality of a discontinuance or a consent dismissal order, and did not deal with the issue of costs.
- [27] If Mr. Austin seeks costs with respect to the Warners' counterclaim, he must make a separate application. If he wishes to do so, he must apply in writing by letter to counsel for the Warners and to the Registry, with a request that it be brought to my attention, no later than January 16, 2009. The Warners will be entitled to reply no later than January 30, 2009, and Mr. Austin will be entitled to further reply no later than February 6, 2009. Summary
- [28] In summary, the Warners' application for double costs from and after the making of the March Offer is dismissed. The Warners are entitled to their costs of this proceeding on Scale B, for matters of ordinary difficulty. The costs will include the Warners' costs in defending against the Trial Claims and the Plaintiff's Additional Claims, but will not include the costs of the Warners relating to their counterclaim. If Mr. Austin wishes to pursue a claim for his costs in relation to the Warners' counterclaim, he must apply in accordance with the schedule set out above. "Gray J."

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Prepared on 29 October 2026 · Esheria