

CANADA / JUDGMENT

Babinski v. Lee

2017 BCSC 2743

COURT

Supreme Court of British Columbia

DECIDED

29 September 2017

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2017 BCSC 2743 Babinski v. Lee IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Babinski v. Lee, 2017 BCSC 2743 Date: 20170929 Docket: M144593 Registry: Vancouver Between: Robert Jerzy Babinski Plaintiff And Annitta Lee Defendant Before: Master Harper Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: N.W. Peterson Counsel for the Defendant: E.T. Kahs Place and Date of Hearing: Vancouver, B.C. September 29, 2017 Place and Date of Judgment: Vancouver, B.C. September 29, 2017

- [1] THE COURT: The defendant applies for an order requiring the plaintiff to attend a physical examination with Dr. Osama Gharsaa, an orthopedic surgeon, on October 6, 2017("IME"). The defendant also seeks an order extending the time in which the defendant may deliver Dr. Gharsaa's report from September 8, 2017 (the 84-day deadline) to October 20, 2017, pursuant to Rule 22-4(2) of the Supreme Court Civil Rules.
- [2] The trial of this action is scheduled to commence December 4, 2017. It is a claim for damages for personal injuries sustained in a motor vehicle accident on July 25, 2012.
- [3] The defence obtained a neurological IME in June 2016. However, the report arising out of this neurological IME was not delivered to plaintiff's counsel until the 84-day deadline. The defence waited, for some inexplicable reason, from June 2016 until August 2017 to take steps to either obtain the plaintiff's consent to the late IME or to apply for an order requiring the plaintiff to attend a subsequent IME, which is the one proposed before me today.
- [4] The defence argues that the plaintiff will not be prejudiced by the late delivery of Dr. Gharsaa's report and says that because it took steps before the 84-day deadline, the court should exercise its discretion and allow a late physical examination with Dr. Gharsaa and the late delivery of his report.
- [5] Today is a very busy day in chambers, and I am going to give my decision in a truncated form.
- [6] In my view, the evidence tendered on behalf of the defence falls far short of justifying the order sought today. There is no reasonable explanation whatsoever of the delay in pursuing this matter. The 84-day deadline applies to all parties. The application before me today is for an initiating report. In the alternative, counsel for the defence says that he seeks a

responding report arising out of Dr. Gharsaa's examination of the plaintiff. In my view, there is nothing on the evidence before me that would establish that the IME sought would be, by its definition, a "responding report".

- [7] As to prejudice, that is not the only issue. If prejudice were the only issue, the 84-day deadline would be breached constantly because it would then be up to the opposing party to establish prejudice, which they might not be able to. Capable counsel can roll up their sleeves and scramble and get cases ready well within the 84-day deadline. However, that is not the rule. That is not the approach the court should follow. The parties should not be asking the court to make that determination.
- [8] There is actual prejudice in the sense that the effect of the order, if I should grant it, would mean that the defendant and his orthopedic surgeon, Dr. Gharsaa, would have the benefit of all of the plaintiff's reports. That is not what would have happened if the IME had taken place before the 84-day deadline, assuming for a moment that an order would have been made for the subsequent IME, which is by no means certain.
- [9] It is significant that the short leave application on August 31, 2017 was denied. Without short leave, the defendant would not be in a position to be able to comply with the 84-day deadline.
- [10] However, I note that this notice of application was filed on September 14, 2017. If the defendant was not motivated by assessing its position after the delivery of the plaintiff's reports on September 8, she would have filed the application on September 1, 2017. Instead, the defendant waited another 14 days and, of course, in the meantime, the September 8, 2017 deadline arrived and all of the plaintiff's reports were delivered.
- [11] In my view, there is absolutely no justification for this late IME, and I dismiss the application.
- [12] Costs in the cause will produce the usual result. All right. Thank you. "Master Harper"

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