

CANADA / JUDGMENT

Balaj v. Xiaogang

2012 BCCA 211

COURT

British Columbia Court of Appeal

DECIDED

16 May 2012

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2012 BCCA 211 Balaj v. Xiaogang COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Balaj v. Xiaogang, 2012 BCCA 211 Date: 20120516 Docket: CA039551 Between: Rodica Balaj Appellant (Plaintiff) And Yin Xiaogang and Insurance Corporation of British Columbia Respondent (Defendant) Before: The Honourable Mr. Justice Hall (In Chambers) On appeal from: Supreme Court of British Columbia, November 15, 2011 (Balaj v. Xiaogang, 2012 BCSC 231, New Westminster Registry M90439) The Appellant appeared in person: R. Balaj Counsel for the Respondents: K.R. Tonge Place and Date of Hearing: Vancouver, British Columbia April 20, 2012 Place and Date of Judgment: Vancouver, British Columbia May 16, 2012 Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] The applicant, Rodica Balaj, applies for an order granting her indigent status on her appeal filed December 15, 2011.
- [2] The applicant appellant was involved in a motor vehicle accident on January 31, 2003. A proceeding seeking damages was commenced by the applicant on January 31, 2005. She alleged that the accident caused neck, shoulder and back injuries. Liability was not an issue as liability was admitted in a statement of defence filed on December 12, 2006.
- [3] The case thereafter rather languished. Perhaps the reasons can be gleaned from this passage from the judgment of N. Brown J.:
- [9] Currently, there are eight court orders for document production and other discovery matters issued against the plaintiff, which have accumulated over the course of the litigation in the case at bar. Six of these orders include terms requiring the plaintiff to pay costs to the defendants in any event of the cause.
- [10] After the plaintiff failed to attend her examination for discovery in March 2008, a court order compelled her attendance in July 2008. She attended the rescheduled examination for discovery in July 2008, but the plaintiff, to borrow the words of the defendants, "was so obstreperous that it was adjourned to be continued at a later date with counsel." A notice of motion was served on the plaintiff's counsel at that time to compel the plaintiff to attend a further examination for discovery. That application was adjourned by consent.

- [11] The trial in the case at bar was originally scheduled for five days in January 2009, but because the plaintiff had retained new counsel, who was unavailable for those trial dates, the trial was adjourned at the plaintiff's request. At a subsequent examination for discovery in January 2009, the plaintiff, accompanied by her new and recently retained counsel, "was again disruptive and non-responsive," necessitating a further adjournment. The defendants made numerous document production requests of the plaintiff at this examination for discovery.
- [12] Further examination for discovery of the plaintiff in May 2009 likewise featured additional requests by the defendants for document production. Following this examination, three court applications in 2009 and 2010 were brought by the defendants following the plaintiff's failure to comply with these requests.
- [13] After the filing of a notice to mediate, dated August 6, 2009, mediation was scheduled for October 2009. The mediation had to be cancelled due to late notice that the plaintiff was once again self-represented.
- [14] The defendants note in their materials on this application that the plaintiff signed her notice of intention to act in person in May 2009. She did not file it, however, until August 2009; and the plaintiff's then-counsel was unaware of this until October 2009. ICBC incurred the cancellation fee for the late cancellation of the mediation.
- [15] The defendants state that despite their numerous requests in 2009 and 2010, the plaintiff failed to provide new trial dates. The defendants, therefore, set the December 2011 trial date unilaterally. By letter dated June 22, 2010, the defendants provided the plaintiff with the notice of trial that had been filed on June 9, 2010. As the plaintiff denied having received the notice of trial, the defendants sent it to her a second time, by email dated September 7, 2010.
- [16] Despite repeated requests by the defendants, the plaintiff failed to confirm her availability for a trial management conference. The defendants eventually scheduled a trial management conference unilaterally; it was only after doing so that the plaintiff disclosed her alleged reasons for being unavailable. The trial management conference was nonetheless scheduled to proceed on the unilaterally set date due to the plaintiff's failure to provide an adequate explanation for her unavailability or to provide alternative dates.
- [17] Despite repeated requests by the defendants, the plaintiff failed to prepare and file her trial brief as required by the Civil Rules.
- [4] After the applicant failed to attend a trial management conference in August 2011, the judge made a number of orders aimed at expediting the proceedings and ensuring that the plaintiff would be in a position to proceed with the trial that had been scheduled for ten days commencing December 5, 2011.

- [5] The directions given by the judge in August 2011 were not complied with. The defendants were concerned that the jury trial would have to be adjourned at considerable expense. The defendants applied in November 2011 to have the proceeding dismissed. The judge noted the concerns advanced:
- [20] The defendants state in their notice of application that the plaintiff has alleged serious injuries without any expert medical opinion on the matter. The defendants also note that, in light of the plaintiff's "clinical, social, and personal history", causation is a "significant issue".
- [21] The defendants say that if the plaintiff applies for an adjournment on the first day of the trial and succeeds, they will have "expended substantial resources in preparing for a lengthy trial." Furthermore, the defendants note that if they are required to prepare for a trial without any notice of the plaintiff's expert or lay witnesses, they will be "significantly prejudiced in being properly and adequately prepared for a fair trial in the action."
- [22] The defendants submit the plaintiff has had repeated opportunities to retain counsel in the case at bar. In fact, the plaintiff has retained and fired counsel, which has caused significant delays in the litigation proceeding to trial. As of the date of the hearing for this application, the plaintiff is self-represented.
- [6] The judge concluded that the plaintiff had demonstrated a long history of delay and non-compliance with Court orders. After observing that the Court had perhaps been overly indulgent with the plaintiff, the judge found the delays and non-compliance wholly unacceptable and dismissed the action. He said:
- [39] ... I think it is almost shocking how long this matter has continued, with successions of orders ignored by the plaintiff, and, nearly nine years after the motor vehicle accident, the plaintiff has yet to produce a medical report attesting to the injuries allegedly sustained in the accident.
- [7] In a somewhat rambling submission before me, the applicant suggested the judge had erred in not granting her further temporal indulgence. Having considered the matter, it seems to me the judge had little alternative but to make the order he did, given the history of this case.
- [8] I am satisfied that the applicant can meet the financial threshold required for an order for indigent status.
- [9] I am also satisfied that this appeal has no merit and no possibility of success. Accordingly, it would not be in the interests of justice to make an order granting the applicant indigent status. The application of the applicant must be dismissed. I would also make an order dispensing with the necessity for the appellant to endorse the form of order but I would direct that any order entered ought to be mailed to the applicant. "The Honourable Mr. Justice Hall"

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