

CANADA / JUDGMENT

Barnes v. Lima

2014 BCSC 1475

COURT

Supreme Court of British Columbia

DECIDED

5 August 2014

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2014 BCSC 1475 Barnes v. Lima IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Barnes v. Lima, 2014 BCSC 1475 Date: 20140805 Docket: M125667 Registry: Vancouver Between: Keith Barnes Plaintiff And Kirk Lima Defendant Before: The Honourable Mr. Justice G.C. Weatherill Reasons for Judgment on Costs Counsel for the Plaintiff: F. Jiwa D. Winks Counsel for the Defendant: S. Fedora Place and Dates of Trial: Vancouver, B.C. July 31, 2014 Place and Date of Judgment: Vancouver, B.C. August 5, 2014

- [1] The plaintiff applies for double costs after Reasons for Judgment were pronounced in this action.
- [2] The action arose from injuries sustained by the plaintiff in a motor vehicle accident. It was commenced on September 18, 2012. It was a fast track action commenced under Rule 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). The trial was heard on June 24 to 26, 2014. It lasted 3 days. My Reasons for Judgment were pronounced on July 11, 2014, indexed as 2014 BCSC 1282. The plaintiff was awarded \$67,214.19.
- [3] On June 23, 2014, the morning before commencement of the trial, the plaintiff communicated a formal offer to settle the claim for \$60,000 plus reasonable disbursements. The offer was stated to be open for acceptance until that same afternoon at 4 p.m. The defendant did not respond to that offer, although it had responded to earlier settlement offers from the plaintiff including by making his own formal offer to settle for \$39,651.69 plus funding for 12 active rehabilitation sessions.
- [4] The parties are in agreement that, if double costs are awarded, the plaintiff will only be entitled to an additional \$5,040, including taxes, under Rule 15-1.
- [5] The applicable rules are Rules 9-1(5) and (6) of the Rules: Cost options
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled 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;

- (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, 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, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, 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. Considerations of court
- (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 served 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.
- [6] Both counsel made extensive submissions regarding how the Court's discretion should be exercised in this case.
- [7] The plaintiff relies on the policy underlying Rules 9-1(5) and (6), which is to encourage early settlement of lawsuits by rewarding parties who make reasonable settlement offers that should have been accepted and correspondingly penalizing parties who should have accepted reasonable settlement offers: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [8] The reasonableness of the settlement offer is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne*, at para. 27.
- [9] I have considered how the offer compares to the amount ultimately awarded after trial. The award at trial was only \$7,214.19 more than the plaintiff's offer. As matters transpired, it turned out to have been a reasonable offer, although it was a short-fuse offer made on the eve of trial. It should have been made weeks earlier. Be that as it may, it was straight forward and contained no ambiguities. Counsel for the defendant candidly acknowledged that his client had sufficient time before the trial in which to consider it. However, the fact that the award at trial was greater than the offer is not determinative: *Ward v. Klaus*, 2012 BCSC 99 at para. 46. The reasonableness of a decision not to accept an offer to settle must be assessed not by reference to the award that was ultimately made but rather the circumstances existing when the offer was open for acceptance: *Ward*, at para. 36.

- [10] On the eve of the trial, the defendant had a legitimate defence to the plaintiff's claim, particularly his claim for loss of capacity which in his earlier communications to the defendant the plaintiff had indicated was significant. The plaintiff did not break his settlement offer into its components and provided the defendant with no ability to assess how much of it was to compensate the plaintiff for his loss of capacity claim. At the time the offer was communicated, there was a reasonable possibility that the plaintiff would not recover anything for that claim, which ultimately proved to be the case. It was reasonable for the defendant to wish to test the plaintiff's position that his inability to work overtime at Carter Motors was due to the accident and not to other factors such as his marriage, particularly in the absence of supporting documentation.
- [11] Moreover, most of the plaintiff's injuries were soft-tissue in nature. He had a pre-existing right shoulder injury. There were live issues regarding whether the plaintiff's T-4 vertebra fracture had healed and, if so, when, as well as the plaintiff's credibility relating to the extent that his injuries had affected his life. Parties should not be unduly deterred from bringing meritorious, but uncertain, defences because they fear a punishing costs order: *Currie v. McKinnon*, 2012 BCSC 1165 at para. 20.
- [12] In addition, the plaintiff provided the defendant with several photographs of the plaintiff's carpentry skill but gave no explanation for how he intended to rely upon those photographs until after his settlement offer had expired.
- [13] The court has a broad discretion when determining the issue of costs: *Ward* at para. 33.
- [14] In my view, having considered all of the foregoing circumstances, the offer was not one that the defendant ought reasonably to have accepted.
- [15] I am exercising my discretion against the plaintiff. There will be no award of double costs. The plaintiff is entitled to his costs on Scale B as though his settlement offer was not made.
- [16] There will be no costs of this application. ____ "G.C. Weatherill J." ____ G.C. Weatherill J.

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