
CANADA / JUDGMENT

Berenjian v. Primus

2009 BCSC 883

COURT

Supreme Court of British Columbia

DECIDED

5 June 2009

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2009 BCSC 883 Berenjian v. Primus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berenjian v. Primus,

2009 BCSC 883

Date: 20090605

Docket: M072679

Registry: Vancouver

Between:

Adel Berenjian

Plaintiff

And:

Andrew Primus and John Paul Primus

Defendants

Before: Master Donaldson

Oral Reasons for Judgment

In Chambers

June 5, 2009

Counsel for Plaintiff

K. Simon

Counsel for Defendants

J.V. Marshall

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: This is an application in what, to my experience, is a most unusual case. The issue as between the plaintiff and defendants is the injuries suffered by the plaintiff in which he alleges occurred when the vehicle driven by Andrew Primus and owned by his father struck him as he was crossing a street on the 5th of April, '06. That contention is strenuously objected to or argued against by Andrew Primus, indicating that his car was inching ahead as the brake had been removed, I assume, on a vehicle with an automatic transmission, and that the plaintiff then slammed the palms of his hands on the hood of the car, did not fall over, did not drop to the ground, and, in essence, then continued jogging away from the scene of what the plaintiff now contends was an accident.
- [2] The incident occurred, as I indicated, on the 5th of April, '06. The writ was issued on or about the 14th of June, '07, pursuant to Rule 66. That is to say, approximately ten months before the expiration of the usual limitation period. It was set for trial, as it was only then to be a two-day trial, for the 27th of September, '08.
- [3] An application was brought by a notice of motion of the defendant that the matter be removed from Rule 66. That was heard on the 28th of August, '08, and indeed the matter was removed from Rule 66 and set for four days. A jury notice was then filed and the trial was set to commence, and indeed did commence on the 7th of October, 2008. That is to say approximately eight months ago.
- [4] That resulted in a mistrial being declared on the first day as a result of what the trial judge considered to be inappropriate comments made by the plaintiff's counsel in the opening to the jury. The matter has been rescheduled for five days before a jury to commence in December of 2009. That is to say something in the neighbourhood of six months from today.
- [5] I am informed by counsel, although there was some difference of opinion, that neither had the benefit of affidavits, but I am satisfied the information provided me is, without dealing with specifics, generally accurate.
- [6] Counsel for the plaintiff that is appearing on this application indicated to me that it was her information that in the spring of 2010, that is to say March or April, four days would be available in Provincial Court in North Vancouver, which I think is common ground is the appropriate provincial court registry for the matter to be dealt with should it be transferred.

- [7] Counsel on behalf of the defendant indicated that she was of the understanding there would need to be a settlement conference, and that would not be able to be dealt with until late August or September of this year, and that then, in her understanding, the trial date would likely be in late 2010.
- [8] The defendants continue with their desire to have a jury trial. They contend that there are significant and dramatic credibility issues. The evidence, in essence, being that the plaintiff was unable to run, was only able to walk, things of that nature, which is not by any stretch agreed to by Andrew Primus or indeed his father, the defendant John Paul Primus, in that John Paul Primus has apparently taken a videotape shortly after the accident showing, he says, the plaintiff was running up Taylor Way, a hill of some modest distinction in the Lower Mainland area. Mr. Andrew Primus indicates on a significant number of occasions he saw Mr. Berenjian jogging when apparently, in his comments to medical professionals, he was stiff, unable to run, et cetera.
- [9] The Supreme Court Rules of course are based upon the concept that they be directed to assist and ensure that cases are brought to justice in a just and speedy fashion. At the same time, of course, the rules also enable a party, except in certain circumstances, to have the matter determined by a judge with a jury.
- [10] It is clear to me from my experience in handling pretrial matters that if a matter is to be dealt with by a jury, it would take approximately one and a half to two days of additional court time. Additionally, it is of course a civic duty on the part of the eight jurors to attend, if those jurors are employed, they could suffer a significant wage loss, unless their wages are less than \$20 per day, or indeed if they are not employed, will be taken from the usual daily life, in this instance for a period of five days. Needless to say, there is also significant expense on the part of the judicial system, court time, room scheduling, and the like, to deal with matters involving a jury.
- [11] What is of concern to me is how time has been utilized on the part of the plaintiff. The plaintiff clearly made a conscious decision in June of '07 that the matter was appropriate to be dealt with in Supreme Court as there was plenty of time for the plaintiff to delay commencing the action if there was any concern relating to his medical condition stabilizing. Quite frequently before the courts counsel will indicate at the time the action was commenced they were not sure the extent of their client's injuries and the limitation date was approaching.
- [12] Here the limitation date was approximately ten months following the date the action was commenced. One would assume, the plaintiff's counsel had in mind that the Supreme Court was the appropriate forum. That opinion apparently has changed, and so the application is brought that the matter should be dealt with in Provincial Court.
- [13] One assumes that discoveries were held before the commencement of the October 7th, '08 trial. One assumes that disclosure took place as to the surveillance that the defendant has undertaken in relation to the plaintiff's claim. Yet no application was brought before the 7th

of October trial commenced to have the matter referred to and dealt with in Provincial Court. Similarly, backing up, no such application was brought when the trial had been set for the 27th of September, '08, at the time it was removed from Rule 66 on the 28th of August, '08.

- [14] So it would seem to me that the decision on the part of the plaintiff and/or counsel to have the matter set in Provincial Court was made sometime during the time lapse between the mistrial of the jury trial having been declared on the 7th of October, '08, and this application being filed by motion, which is dated the 6th of May, '09.
- [15] It is contended on the part of the plaintiff that if this matter is moved to Provincial Court, any significant issues relating to costs can be dealt with by the Supreme Court. There are decisions where the Supreme Court has referred matters to Provincial Court but reserved unto itself the matters relating to costs, here it is suggested during argument on behalf of the plaintiff that in fact Rule 68 will, of necessity, apply. But, again, once the matter was removed from Rule 66 on the 28th of August, one would have assumed that the Rule 68 issue would have been dealt with at that time and not some eight months following a mistrial which was declared as a result of counsel for the plaintiff's actions on the 7th of October, '08. It may be that Rule 68, in essence, trumps either party's right to have a jury, but as the matter was not fully argued before me I will not deal with that matter in these reasons.
- [16] I am satisfied that counsel for the plaintiff is bringing this application as a result of deliberate tactical decisions made by the plaintiff and/or his counsel at varying stages along the way, including when the writ was issued, including the hearing of the 28th of August, '08, including preparing for and attending at the jury trial on the 7th of October, '08, and including delaying until early May of this year to bring this matter to the fore by way of notice of motion.
- [17] I am satisfied that in the circumstances it is not appropriate that the matter be transferred to Provincial Court, and that despite the fact that there may be unnecessary strain on the Supreme Court system, the delay in the matter that will result from the matter not proceeding in December of this year, were it to proceed in Provincial Court, is sufficiently prejudicial to the defendant that the order should not go.
- [18] I am cognizant of the fact that even from the very beginning the individual defendants were of the opinion that there had not been an accident such as to cause any injury to the plaintiff, and I have taken that into consideration in determining that the delay likely, if the matter is to be dealt with in Provincial Court, is sufficiently serious that the order should not go.
- [19] So the application is dismissed.
- [20] Well, thank you, counsel.

[21] MS. MARSHALL: Your Honour, with regard to costs of this application, we would be seeking our costs.

[22] THE COURT: Ms. Simon?

[23] MS. SIMON: Liability is denied. I would submit that costs in the cause --

[24] THE COURT: The defendant should have his costs as costs in the cause. Thank you.

"Master Donaldson"

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Prepared on 29 October 2026 · Esheria