CANADA / JUDGMENT

Beshr et al. v. Gendron

2003 BCSC 1794

COURT
Supreme Court of British Columbia

DECIDED
28 November 2003

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2003BCSC1794 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Beshr et al. v. Gendron, 2003 BCSC 1794 Date: 20031128 Docket: B970318 Registry: Vancouver Between: Mohamed Said Beshr and Felicitas Beshr Plaintiffs And Richard Gendron Defendant Before: The Honourable Master A.N. Patterson Reasons for Judgment Counsel for the Plaintiffs: J.D. Whyte Counsel for the Defendant: J. Wong Date and Place of Hearing: November 18, 2003 Vancouver, B.C.

[1] The plaintiff brings this application for an order for costs of the action on Scale 3 and costs of this application either on Scale 3 or as special costs.

[2] This action arises out of a motor vehicle accident which took place January 28, 1995. On April 19, 1999, the plaintiff made a formal offer to settle the action pursuant to Rule 37 which was ultimately accepted by the defendant on September 17, 2003.

[3] This application arises because of the terms of the offer which is substantially in Form 64 and reads as follows: The plaintiffs offer to settle these proceedings on the following terms:

1. The Defendant will pay a total sum of $20,000;

2. The Plaintiffs will consent to an Order dismissing this action without costs;

3. The Plaintiffs will provide the Defendant with a signed Release, in a form to be supplied by the Defendant. and costs in accordance with Rule 37(22) and (37). (Emphasis added)

[4] The terms of the acceptance are in the form provided for in Rule 37(14) that is Form 65A.

[5] A plain reading of the offer indicates that there is a contradiction concerning costs. The plaintiff agrees to consent to an order dismissing the action without costs at the same time as asking for costs pursuant to Rule 37(22).

[6] The plaintiffs argue that they are entitled to costs pursuant to Rule 37(22). The defendant argues that the offer was drafted by the plaintiff, accepted by the defendant and that the specific term that the plaintiffs consent to an order dismissing the action without costs overrides the general term contained in Form 64.

[7] There is no evidence that either side queried the apparent contradiction concerning the matter of costs.

[8] Not surprisingly, neither counsel could find any authority exactly on point. In Morck v. Soragnese (1994) 87 BCLR (2d) 263 Vickers, J. considers Rule 37 and states the general principle as follows at paragraph 26: The test of whether there has been compliance lies in the answers to two simple questions. Could the person receiving the offer have been in any doubt as its terms? If so, was there a burden on that person to clarify its terms prior to acceptance? In this case the answer to the first question is in the negative and there is no need to embark on a consideration of the second question.

[9] In Helm et al. v. Pattie, Vancouver Registry no.CA021557 (BCCA) Southin, J.A. writing for the Court of Appeal states the principles to be deduced from Rule 37 are as follows:

(1) An offer not time limited or withdrawn may be accepted at any time until commencement of the trial.

(2) An offer of a monetary amount may include pre-judgment interest, but cannot be a single sum inclusive of costs. See Webb v. Atwell (1994), 100 BCLR (2d) 135 at 147 (CA). Webb v. Atwell was concerned with Rule 37 as it existed before the 1993 amendment but the principle there expressed is equally applicable to the present Rule 37.

(3) Only unaccepted offers outstanding at the date of trial have consequences as to costs. Thus, if a defendant offers $50,000, but the offer expires before the trial and the plaintiff recovers $45,000, the defendant cannot invoke Rule 37(24).

[10] In Brydges v. British Columbia Transit et al. 2002 BCSC 808, Harvey, J. considered an offer to settle which contained these terms:

1. The Parties shall endorse a Consent Dismissal Order dismissing Plaintiff's claim, without costs to any party; and

2. The Parties shall endorse a Consent Dismissal Order dismissing Counterclaim of the Defendants Newton and Rattai, without costs [to] any party.

[11] In Brydges that offer was rejected and the plaintiff made a counter offer. The court found that the offer was not in Form 64 and consequently, Rule 37 did not apply. The court went on to consider whether the offer and counter offer qualified for consideration as a Calderbank letter. In this case there was no evidence of any correspondence between the parties that could be considered as a Calderbank letter. Apparently, the only documentation is the offer and the acceptance.

[12] In my view, there is a clear contradiction in the terms of the offer to settle. If the court were to decide the plaintiff was entitled to costs and an order to that effect were entered together with the order dismissing the action without costs, there would be two orders contradicting each other on the question of costs. A registrar required to assess costs would be faced with contradictory orders and would have no choice but to refer the case back to the court for clarification.

[13] The fact that there is a contradiction in the offer and the fact that the parties argued the issue leads me to conclude that there was no proper offer and acceptance pursuant to Rule 37. There is no agreement between the parties concerning the question of costs.

[14] If the terms of the offer had contained as paragraph 2 that the plaintiffs would consent to an order dismissing the action excluding the words "without costs," the matter would have been very straight forward. Clearly, whoever drafted the offer did not turn his mind to the problem of costs.

[15] This is not a case where there is supplemental correspondence which could be reviewed in order to consider the matter as a Calderbank letter such as the Bridges case. There is no evidence before the court that the terms of the offer were some form of typographical error.

[16] As a result, the plaintiff's application for costs of the action is dismissed and the defendant is entitled to costs of the application on Scale 3. "Master A.N. Patterson"

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