

CANADA / JUDGMENT

Brennan v. Colindres

2017 BCCA 413

COURT

British Columbia Court of Appeal

DECIDED

14 November 2017

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2017 BCCA 413 Brennan v. Colindres COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Brennan v. Colindres, 2017 BCCA 413 Date: 20171114 Docket: CA43768 Between: Ronald Joseph Gerald Brennan Respondent (Plaintiff) And Inger V. Colindres, Luis Armando Galo and Key Enterprises Ltd. Appellant (Defendant) Before: The Honourable Mr. Justice Groberman The Honourable Madam Justice Fenlon The Honourable Mr. Justice Fitch On appeal from: An order of the Supreme Court of British Columbia, dated June 7, 2016 (Brennan v. Colindres, 2016 BCSC 1026, Vancouver Docket No. M133263). Oral Reasons for Judgment Counsel for the Appellant: A. du Plessis The Respondent in Person Place and Date of Hearing: Vancouver, British Columbia November 14, 2017 Place and Date of Judgment: Vancouver, British Columbia November 14, 2017 Summary: The plaintiff sued the defendant for personal injuries he alleged were suffered in a motor vehicle accident. A paragraph of the notice of civil claim set out the particulars of the accident, and that paragraph was denied in the response. Twelve days before trial, the defendant applied to amend the response to specifically allege that the plaintiff was not, in fact, in the vehicle that was hit in the accident. The amendment was denied, but the master expressly refrained from giving an opinion on whether the existing response to civil claim was sufficient to raise the defence that the plaintiff was not in the vehicle at the time of the accident. At trial, the defendant led evidence that the plaintiff was not in the vehicle. After hearing final submissions, the judge held that it was not open to the defendant to deny that the plaintiff was in the vehicle, as the matter was res judicata. The defendant appealed. On appeal: Held, the judge erred in finding the matter to be res judicata. The matter is remitted for a new trial.

[1] GROBERMAN J.A.: The plaintiff sued the defendants for personal injuries allegedly suffered in a motor vehicle accident. Paragraph 6 of Part 1 of the notice of civil claim read as follows:

6. On or about March 31, 2012 at approximately 12:00 PM. The Plaintiff was driving westbound on Kingsway, approaching the intersection at Hall Avenue, in the City of Burnaby, in the Province of British Columbia. The Defendant, INGER V. COLINDRES, was driving the Chrysler westbound on Kingsway, and collided with the vehicle the Plaintiff was driving, causing injury to him (the "Collision").

[2] In their response to the facts in the civil claim, the defendants stated as follows:

2. The facts alleged in paragraphs 6 through 10 of Part 1 of the Notice of Civil Claim are denied.
- [3] They also included, in their own version of the facts, the following paragraph:
1. While admitting, for the purposes of this action and not otherwise, that the accident particularized in paragraph 6 of Part 1 of the Notice of Civil Claim occurred as a result of the Defendant Inger V. Colindres, Luis Armando Galo and Key Enterprises Inc.'s negligence, the Defendants specifically deny that the Plaintiff suffered any injury, loss, damage or expense as a result thereof.
- [4] Twelve days before the trial, the defendants applied to amend their response to civil claim to specifically deny that the plaintiff was in his automobile at the time of the accident. The master denied the amendment, saying:
- [7] The pleadings now two years plus, two plus years old, ought to have been amended much sooner. Raising the question of this amendment in the week before the trial will put the plaintiff in the position of extreme prejudice, and the amendment should not go.
- [8] It may be that the defendants will be able to rely on their general denial that the plaintiff was driving a vehicle and was involved. Whether that will stand up at trial or whether that will allow the defendants the opportunity they seek to raise this remains to be seen, but it is too late in the day and there is too much prejudice to the plaintiff to now allow this amendment. All of the facts necessary to support the amendment have been known for a long time and nothing has been done.
- [5] There is an obvious inconsistency in the master's finding that an amendment would cause "extreme prejudice" and his finding that the pleadings might be sufficient to make the arguments without amendment. Nonetheless, no appeal was taken from his order.
- [6] At the outset of the trial, the plaintiff applied for an order prohibiting the defendant driver from testifying that the plaintiff was not in his vehicle at the time of the accident. The judge refused the order, and the defendant driver gave evidence that the plaintiff was not in the vehicle at the time of the accident.
- [7] In her final judgment, the judge addressed the issue as follows:
- [8] Although it is generally preferable to allow an amendment to the pleadings to conform with the evidence at trial, I have reluctantly concluded that I should not allow the amendment given the decision of [the master] and the reasons he gave for his decision. While [the master] appeared to leave the door open for this Court to allow the defendants to rely on the general denial, he had earlier stated in his Reasons: The fact of driving is clearly one of those pleadings that ought to have been specifically made (para. 3).
- [9] The master also concluded that allowing the amendment would cause "extreme prejudice" to the plaintiff". (para.7).

- [10] Given [the master]'s conclusions that the defence ought to have been specifically pleaded and that allowing the amendment so close to trial would cause extreme prejudice to the plaintiff, I conclude that those issues are res judicata. It is not open to me to conclude otherwise, notwithstanding the general denial in paragraph 2 of the Response to Civil Claim.
- [8] Notwithstanding the judge's general findings that the defendant driver was a credible witness while the plaintiff was not, she considered that, because the pleading amendment had been denied, she was precluded from finding that the plaintiff was not involved in the accident.
- [9] The defendants appeal.
- [10] In my view, the judge erred in holding that the issue of whether she could consider the defendant driver's evidence was res judicata. The master specifically refrained from giving a ruling as to whether the evidence could be given under the pleadings as they stood. The judge was not precluded from determining whether the pleadings were broad enough for the issue to be raised. The only thing that the master decided was that he would not allow the pleadings to be amended.
- [11] The plaintiff contends that even if the matter was not res judicata, the judge's decision should be allowed to stand, because the pleadings amounted to an admission that the plaintiff was driving at the time of the accident.
- [12] In my view, the pleadings cannot be interpreted in that way. The defendants' denial of the particulars of the accident included a denial that the plaintiff was in his vehicle at the time of the accident. In the context of the response to civil claim, the only admission that the defendants made was that the accident was a result of their negligence. That did not preclude leading evidence or arguing that the plaintiff was not involved in the accident.
- [13] Unfortunately, I see no other option, in the circumstances, than to allow the appeal and remit the matter to Supreme Court for a new trial. The defendants are entitled to the costs of the appeal. Costs of the original trial will be in the discretion of the judge hearing the new trial.
- [14] In light of the fact that the appeal is allowed, and a new trial is necessary, the cross appeal is moot and need not be heard.
- [15] FENLON J.A.: I agree.
- [16] FITCH J.A.: I agree.
- [17] GROBERMAN J.A.: The appeal is allowed.

The Honourable Mr. Justice Groberman

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