

CANADA / JUDGMENT

Brewster v. Rominn Laboratories Inc.

2008 BCSC 1463

COURT

Supreme Court of British Columbia

DECIDED

31 October 2008

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2008 BCSC 1463 Brewster v. Rominn Laboratories Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brewster v. Rominn Laboratories Inc.,

2008 BCSC 1463

Date: 20081031

Docket: S64773

Registry: Kelowna

Between:

Jackie L. Brewster and Stephen T. Collens

Plaintiffs

And

Rominn Laboratories Inc., Robert A. Bowie,

Helena C. Cormier, Giuseppe Minella and Santina Minella

Defendants

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiffs:

K.J. Ihas

Counsel for the Defendants:

C.A. Fraser

Date and Place of Hearing:

October 24, 2008

Kelowna, B.C.

Introduction

- [1] This application requires the court to consider whether the now repealed Rule 37 can nevertheless govern the terms of a settlement reached by the parties when that rule was still extant. The plaintiffs say that it does and say that they are entitled to their costs under Rule 37; the defendants say that it does not and argue that costs must be determined under the new Rule 37B. The defendant also argues that determination of costs with respect to the settlement must be put off until the defendants' counterclaim has been resolved.

The Facts

- [2] The plaintiffs commenced their claim for salaries or damages on the basis of quantum meruit on July 17, 2004. Ten days later, the defendants entered their defence and commenced a counterclaim. The counterclaim was for damages flowing from the plaintiffs' alleged tortious interference with the defendants' business interests.
- [3] On November 25, 2004, the defendants delivered offers to settle to the plaintiffs. The offers were in the form prescribed by Rule 37. The offers proposed settlement upon payment to each of the plaintiffs the sum of \$6,000 plus their costs pursuant to Rule 37. The offers were directed to the plaintiffs' claim alone - they did not hinge on a resolution of the counterclaim as well.
- [4] In December 2004, the plaintiffs set their claim down for summary trial. That application was dismissed on the ground that the case was not suitable for summary disposition: *Brewster v. Rominn Laboratories Inc.*, 2004 BCSC 1677. The claim and counterclaim were bound over for trial. The defendants were awarded their costs of the Rule 18A motion, but collection of their costs was stayed until the matter was resolved.
- [5] Considerable litigation followed the failed Rule 18A application. The parties exchanged demands for discovery documents and then fought over the adequacy of document disclosure. They conducted examinations for discovery and then fought over whether questions should be answered or information requests should be satisfied. They set the matter for trial and then fought over whether the trial should be adjourned.

- [6] Eventually, in February 2008, the plaintiffs decided to accept the defendants' offers to settle. The plaintiffs delivered their acceptances to the defendants in the forms prescribed by Rule 37. The defendants were reluctant to acknowledge the settlement. The parties then fought over whether the defendants had, as they asserted, implicitly withdrawn their offers. The parties continued their fight without resolution as July 2, 2008, came and went. July 2, 2008, is a significant date because it marks the repeal of Rule 37 and its replacement with Rule 37B.
- [7] In the end, the plaintiffs brought on the present application.

The Parties' Positions

- [8] In this application, the plaintiffs seek an order that the defendants pay them \$6,000 each, an order that they have their costs of this application under Rule 37, and an order that they have their costs under Rule 37 from the commencement of the litigation to the day the defendants delivered their offers to settle. The plaintiffs argue that post-offer costs comprise a tangle of items and disbursements relating to the now settled claim and the still extant counterclaim. They argue that any order concerning post-offer costs must be deferred to the judge before whom the counterclaim will be tried.
- [9] The defendants initially took the position that there was no settlement at all, but they ultimately acknowledged that the plaintiffs' claim was indeed settled. The defendants argue that payment of the settlement proceeds should be stayed until the counterclaim is resolved. They say a stay is necessary because if they have to pay the settlement price now, they would be deprived of the right to make a set-off in the counterclaim. They say that a stay is necessary as well because they have already been awarded some costs on interlocutory matters, and that they ought not to be required to pay the settlement price to the plaintiffs when the plaintiffs have not equally been required to pay the costs awarded against them. As for the costs of the plaintiffs' action as a whole, the defendants say that those costs must be determined by Rule 37B. They argue that those costs cannot be properly assigned between the parties until all of the issues in the litigation are resolved. That resolution cannot be achieved, they say, until the counterclaim is concluded.

Discussion

- [10] Like the parties, I am satisfied that the original claim advanced by the plaintiffs in their statement of claim was settled by the parties' exchange of offer and acceptance. There will, therefore, be a declaration that the plaintiffs' claims against the defendants arising out of the writ and statement of claim have been settled. There will be a declaration that the settlement price to be paid to each of the plaintiffs is \$6,000.

- [11] There is a fatal flaw in the defendants' argument that they should be spared having to pay the settlement price immediately because they will lose the benefit of set-off. The flaw is that if the defendants are successful on their counterclaim, the plaintiffs will owe the defendants money, and any set-off relating to the settlement price would be a set-off in the plaintiffs' favour, not the defendants.
- [12] I do not accept the defendants' argument that it is unfair to require them to pay the settlement price to the plaintiffs when the plaintiffs do not have to pay the defendants the interlocutory costs that have already been ordered. In my view, the defendants are mixing two separate concepts: their obligation on the one hand to comply with the contract they made with the plaintiffs to settle the plaintiffs' action, and the court's general discretion on the other hand to assess and apportion costs between the parties.
- [13] I do not accept the plaintiffs' argument that they are entitled to costs under Rule 37. In my opinion, the plaintiffs' entitlement to costs under Rule 37 survived up to the moment in time that Rule 37 was repealed. After that moment, the plaintiffs' entitlement to costs was governed by Rule 37B. The plaintiffs simply waited too long to come to court for an order. In consequence, they cannot now pursue the remedies they could have formerly enjoyed under Rule 37.
- [14] As to whether Rule 37B applies to the present case, I believe that it does. I have come to that conclusion because the rule permits the court to consider an offer to settle, including one made under Rule 37 but with respect to which no order has been made, when exercising the court's discretion in relation to costs: Rule 37B(4). The court's discretion relating to costs is engaged when a party asks the court to make an order. In the case of an accepted offer to settle, a party may ask the court for a declaratory order or it may apply for judgment in the terms of the settlement. Upon such an application, the court will have discretion as to costs with respect to the application itself and with respect to any costs contemplated by the settlement.
- [15] In the present case, the accepted offer did contemplate costs in the plaintiffs' proceeding. Those costs were under Rule 37, but that rule has been replaced. The costs contemplated by the settlement must now be taken to be costs under Rule 37B. Therefore, the plaintiffs' present application for a declaration that their action has been settled engages the court's discretion under Rule 37B with respect to the costs of the application itself, and also of the plaintiffs' proceeding as a whole.
- [16] As noted above, the plaintiffs argue that the court should exercise its discretion in their favour for those steps taken in the litigation up to the date that the defendants delivered their offers to settle. The defendants argue that no order for costs should be made until the counterclaim has been concluded.

- [17] Because the issue of the plaintiffs' costs of the now settled action falls to be decided under Rule 37B, the court must examine that rule to learn what principles will guide its decision. As to those principles, the new rule says:
- (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 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.
- [18] This provision makes it clear that the Legislature intends the court to at least consider conducting a detailed examination into, among other things: the circumstances that pertained at various stages of the litigation relating to the party's knowledge of the strength of its own case and that of its opponent; if the case has gone to trial, the proportionality of the offer to the judgment; and the financial circumstances of all of the parties involved. Presumably, that detailed examination will be based on some form of properly admissible evidence.
- [19] The scope of the inquiry that the court is expected to make before awarding costs under Rule 37B is, therefore, much wider than was the case under its predecessor rule. Furthermore, the parties to a piece of litigation have, I think, a legitimate expectation that the court will at least put its mind to the factors set out in Rule 37B(6). This raises the question of whether there may be cases where the court can properly decline to analyze a case in light of the factors set out in Rule 37B(6). About that I will say nothing definitive, except that this case does not appear to me to be one in which it would be judicious to ignore Rule 37B(6).
- [20] In my opinion, the parties have not adduced sufficient evidence on this application to permit the court to conduct a detailed examination of the factors outlined in Rule 37B(6). I would, therefore, decline to exercise my discretion as to costs on that ground. I would also decline to exercise it because the plaintiffs' request to award pre-offer costs to them but to defer post-offer costs to the trial judge amounts to an unwarranted severance of the court's discretion as to costs. It would be preferable by far to leave the issue of costs of the plaintiffs' action to the court that will try the counterclaim.
- [21] For these same reasons, I am not prepared to make an order as to the costs of the present application either. That order will be at the discretion of the trial judge.

Conclusion

[22] There will be an order that the plaintiffs' action has been settled and that the defendants pay to each of the plaintiffs \$6,000. The costs of the plaintiffs' action and the present motion will be at the discretion of the judge who tries the defendants' counterclaim.

"P.J. Rogers, J."

The Honourable Mr. Justice Rogers

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