
CANADA / JUDGMENT

Canada (Attorney General) v. Khonsari

2016 BCSC 632

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 632 Canada (Attorney General) v. Khonsari

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Canada (Attorney General) v. Khonsari,

2016 BCSC 632

Date: 20160412

Docket: S062459

Registry: Vancouver

Between:

Attorney General of Canada

on behalf of Her Majesty the Queen in Right of Canada

as represented by the Minister of National Revenue

Plaintiff

And

Babak Khonsari

Defendant

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff

D.B. Devine

Counsel for the Defendant

J.E. Shragge

Place and Date of Hearing:

Vancouver, B.C.

February 12, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 12, 2016

- [1] The defendant applies for an order setting aside the default judgment in this matter entered on May 26, 2008, for a total of \$59,345.10 including interest and costs; an order for a permanent stay of the action, or in the alternative an order that the writ of summons and statement of claim in this action be struck as an abuse of process.

Background

- [2] A writ of summons with attached statement of claim in action number S062459 (the "Second Action") were filed on April 13, 2006, alleging that the plaintiff owed \$53,864.30 on a judgment in favour of the plaintiff in action number C962372 (the "First Action") and had paid nothing on the judgment.
- [3] Service in the First Action was not effected and the writ of summons was renewed for 12 months on April 10, 2007. Service was again not effected in the following months. On April 2, 2008, Anita Chand, a legal assistant with the office of the solicitor for the plaintiff, made an affidavit in support of a further renewal of the writ of summons and in support of an order for substitutional service by posting the documents on the front entrance door of 7235 Salisbury Avenue in Burnaby and by mailing the documents to the defendant at that address. Ms. Chand deposed that she believed that as a result of information received from a "locate agent" the defendant's parents resided at that address and were aware of how to contact the defendant. The renewal and substitutional orders were made.
- [4] On May 2, 2008, substituted service was effected in accordance with the order. The defendant was given 14 days to file an appearance. No appearance was filed and default judgment was taken.
- [5] A garnishing order after judgment was issued on September 12, 2014, in the Second Action. By that time the accumulation of interest and costs had increased the amount to be attached to \$71,246.94. On November 13, 2014, on the application of the defendant Master Baker ordered that:
- a. the funds paid into court pursuant to the garnishing order be paid out to the defendant;

- b. the defendant was to make it two \$50 payments to the plaintiff;
 - c. the defendant was to make financial disclosure and the plaintiff was entitled to examine the defendant in aid of execution or to issue a subpoena to debtor.
- [6] On November 14, 2014, a certificate of judgment was issued out of this court certifying that the plaintiff in the Second Action had obtained judgment against Babak Khonsari for the total sum of \$59,345.10. A notice from the registrar of land titles was addressed to the defendant at #602, 7235 Salisbury Avenue, Burnaby advising the defendant that the certificate of judgment had been registered against his interest in the Salisbury Avenue property.
- [7] A further garnishing order after judgment was issued on June 5, 2015, in the Second Action with the amount to be attached now \$72,042.91.
- [8] On February 1, 2016, Mr. Khonsari filed the notice of application described in para. 1 above.

The Evidence

- [9] Mr. Khonsari lives at #602, 7235 Salisbury Avenue, Burnaby.
- [10] From 1983 to 1991 he attended various universities and colleges including UBC, Langara College, BCIT and Capilano College. To do so he borrowed money through the Canada Student Loans Program. He does not dispute that the principal sum borrowed was \$23,712.
- [11] Mr. Khonsari denies he was served with the writ of summons and statement of claim in either of the actions. He deposes that he first saw the writ in the First Action on May 20, 2015.
- [12] In an affidavit of service made on April 25, 1996, in the First Action the deponent swore that he is a process server and "did serve Babak Khonsari at 6:31 PM on April 23, 1996 at apartment 207, 1949 Comox Street, Vancouver with the writ of summons and statement of claim [by] leaving a true copy of the same with Babak Khonsari". The process server does not depose to his means of knowledge that the person he served was the defendant.
- [13] Mr. Khonsari deposes that he lived away from Canada for about two years prior to October 1993 when he returned and lived with his parents at 402, 1949 Comox Street, Vancouver until the spring of 1996 when he moved along with a roommate to suite 207, 1949 Comox Street. He rarely spoke with his roommate who did not tell him that a process server was attempting to locate him. He denies he was served with a writ of summons and statement of claim at 207, 1949 Comox Street. He deposes it was not until the time of the first garnishing order that he learned that "court proceedings had been commenced against me in relation to my Canada student loans". Mr. Khonsari's evidence is that he became aware of the default judgment in the First Action in May 2015.

- [14] In 2002, Mr. Khonsari enrolled in Capilano College. He attended classes until the end of 2005. He then worked away from Canada returning in late 2007; travelled to Brazil; returned to Canada in 2008 and lived in Vancouver until about December of that year when he went to Brazil to visit the woman who later became his wife. They were married in Ontario in February 2009 and then went to Japan where Mr. Khonsari taught English for two years.
- [15] Mr. Khonsari became aware of the Second Action in September 2014 when his wages were attached. He has read the affidavit of Anita Chand and deposes that his parents were residing at 120, 13275 Salisbury Avenue, Burnaby in April 2008 when Ms. Chand deposes the writ of summons and statement of claim in the Second Action were served substitutionally by posting them on the front door of that address.
- [16] Mr. Khonsari's evidence is that the apartment was located on the 12th floor and the building could be entered only by means of a key. He deposes that his parents have informed him that they have no knowledge of mail addressed to him which was posted on the entrance of the building at 7235 Salisbury Avenue. He deposed they have no recollection of "ever receiving mail addressed to me in relation to the [Second Action]".
- [17] In an affidavit of service, a process server deposes that on May 2, 2008, he substitutionally served Babak Khonsari by posting the writ of summons, statement of claim and substitutional service order to the main entrance door of 7235 Salisbury Avenue, Burnaby.
- [18] In April 2014, Mr. Khonsari purchased his current condo residence at 602, 7235 Salisbury Avenue which was partially financed by a loan from the Royal Bank of Canada secured by a mortgage. When he applied for the loan he deposes he told the bank representative that he had borrowed through the Canada Student Loans Program. Nevertheless, he was told that a credit check revealed a "clear" credit report showing no debts or judgments. He deposes that because of the lengthy time that had gone by from 1991 when he had last borrowed through the Canada Student Loan Program he believed that he "was no longer required to pay back my Canada Student Loans".
- [19] The purchase by Mr. Khonsari of the Salisbury Avenue condo was completed in April 2014 and the judgment from the Second Action was registered against the title on November 17, 2014.
- [20] Mr. Khonsari deposes that if he had known about the judgment obtained against him he "would not have gone through with the purchase" of the condo. He testifies that he has no means of paying the judgment.

Analysis

- [21] Rule 11 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 that prevailed in 2008 provided service of a writ of summons was to be affected on an individual "by leaving a copy of the document with him or her". Rule 12(1) in 2008 provided that if it "is impracticable to serve a document as set out in Rule 11, the court may order substituted service, whether or not

there is evidence that the document will probably reach the person to be served".

Substituted service was to be "effected by taking steps that the court has ordered to bring the document to the attention of the person to be served" See: Rule 12(2). The substituted service order made on April 22, 2008, provided that the writ of summons, statement of claim and a copy of the substituted service order were to be posted "to the main entrance door of 7235 Salisbury Avenue and by mailing them to that address by regular mail". That form of service was deemed to be good service.

[22] Rule 12(4) provided that substituted service could be effected without an order of the court by leaving the document in a sealed envelope at the place of residence of the person to be served with anyone who appears to be an adult member of the same household and by mailing the document to that place of residence. Rule 12(11) provided that even though a document was served in accordance with Rule 12(4) a person was entitled to show "on an application to set aside the consequences of default (a) that document did not come to the person's attention".

[23] The plaintiff did not take advantage of the provisions of Rule 12(4) but instead obtained an order for substituted service.

[24] Rule 4-4 of the present Supreme Court Civil Rules also provides for substituted service through "an alternative method of service". That method is left to the discretion of the court making the order.

[25] Rule 4-7, which governs the present application, reads:

If service is alleged to be ineffective

(1) If a document has been served in accordance with this Part but a person can show that the document

- (a) did not come to his or her notice,
- (b) came to his or her notice later than when it was served, or
- (c) was incomplete or illegible,

the court may set aside an order, extend time, order an adjournment or make such other order as it considers will further the object of these Supreme Court Civil Rules.

[26] I am persuaded the originating process in neither action came to Mr. Khonsari's notice until he became aware of the garnishing proceedings in 2014. In that circumstance the default judgment entered on May 26, 2008, must be set aside.

[27] Mr. Khonsari submits the extended delay of the plaintiff in taking steps to enforce its judgment has amounted to an abuse of process. No issue is taken by Mr. Khonsari with the plaintiff's right to commence a Second Action to enforce a judgment taken in an earlier action. I will refer to the authorities in that regard because they bear on the defendant's abuse of process argument.

[28] In *Young v. Younge*, [1985] 62 B.C.L.R. 154 (C.A.), the Court of Appeal considered circumstances not unlike those before me in which an action had been brought to enforce a judgment pronounced in an earlier action. Esson J.A. observed at pages 156 and 157:

The action is somewhat unusual in that not many instances will be found of actions being brought here upon a judgment in an earlier action in this province. Actions on foreign judgments, of course, are quite common. However, there is no rule which would prevent such an action and, indeed, it obviously is contemplated by the provisions of the Limitations Act to which I have referred.

The only case to which we have been referred which has arisen under the present Limitations Act in respect of this issue is *Toore v. Braich* (1979), 12 B.C.L.R. 303 (SC). That is a judgment of Judge van der Hoop, sitting as a local judge. The circumstances there were somewhat similar in that a second action has been commenced just before the ten-year limitation period expired. The plaintiff applied for default judgment and the matter was referred to van der Hoop L.J.S.C. by the registrar to determine whether it was an appropriate case in which to give judgment. He held that it was. He went on to say this [p. 304]:

Obviously, a plaintiff cannot, immediately after obtaining one judgment of the court, start action on that judgment, obtain judgment on such action together with costs of the second action and thereafter ad infinitum pile judgment after judgment with costs on the original judgment, and, therefore, it must be determined in each case whether the new action does constitute an abuse of the process of the court.

I think that that is a correct approach to the issue; that is, there must be limits upon the right of a plaintiff to rest upon his judgment and to extend the time for pursuing the defendant by issuing new writs. Essentially, that is to be determined by deciding whether there has been an abuse of process.

We have been referred to the affidavits filed by both parties here. There were efforts by the plaintiffs to recover but, for a long time, they were unable to locate the defendant. It therefore became necessary to issue a writ to preserve their right of recovery. There is no evidence of any effort by the defendant to in any way meet his obligations. I can see nothing which could raise a triable issue as to whether there has been an abuse of process.

- [29] In *Young v. Verigin*, 2007 BCCA 551 Newbury J.A., with whom the other judges agreed, considered a circumstance where judgments had been obtained against the defendant on January 18, 1996, but no steps were taken to execute on the judgments and nothing was paid by the defendant for 10 years. On January 16, 2006, to avoid the expiration of the 10 year limitation period to realize on the judgment a new action was commenced seeking judgment for the principal sum owed by the judgment debtor along with interest and costs.
- [30] Newbury J.A. held there was no impropriety in commencing the second action and referred, *inter alia*, to *Young v. Younge*, *supra*. She described the first argument on the appeal which was to the effect that the court should countenance the commencement of a new action to avoid the effect of the Limitation Act only when the plaintiff was able to demonstrate "good faith but unsuccessful efforts to collect on the earlier judgment". Newbury J.A. did not agree and wrote at paras. 15, 16 and 17:
- [15] The real question for us on this appeal is where the onus lies in respect of an allegation of abuse of process. On behalf of Mr. Verigin, Mr. Millen argued that the plaintiff is required to adduce some evidence of reasonable and good faith efforts to collect on the judgment debt, which have been unsuccessful for some reason. Again with respect, I do not read *Young v. Younge* or *Toore v. Braich* as laying down such a rule and I know of no reason why the usual rule of procedure -- that the defendant must plead the facts of and prove the existence of any "special defence" -- would not apply: see *Odgers on Civil Court Actions* (24th ed., 1996) at 242-5. The matter of onus was not dealt with directly in the cases to which we were referred, but again I note another decision of the English Court of Appeal, *E.D. & F. Man (Sugar) v. Haryanto*, (unreported, 17 July 1996), where Leggatt L.J. reasoned:

Suing on a judgment, at all events for the first time, cannot be said to defeat legislative policy. That is plain from the very language of s.24 Here the second action was, of course, brought within that limitation period, There are two relevant ways of enforcing a judgment: by execution and by action. It is plain that the Court will not give judgment in an action on a judgment unless satisfied that the action does not constitute an abuse of process, having regard, amongst other things, to the availability of execution. It would, in my judgment, be for a defendant (or a person in the position of defendant) to show that a second action did constitute an abuse of process; the primary obligation is not that of a plaintiff to justify the bringing of further proceedings, Because, in the event of abuse of process, the court may intervene and refrain from giving judgment in the second action, it cannot be said that a second action proceeds without judicial scrutiny, even if the second action is a matter of right and not discretion. Of course, it favoured the applicant in the present proceedings that it was a matter of discretion, even though, when he came to exercise it, he exercised it against the applicant. The authorities to which our attention has been drawn show that the courts have always held the bringing of the second action to be a matter of right, and in my judgment that is what it is

This passage was quoted with approval by the Court of Appeal in *Bennett v. Bank of Scotland*, supra, at para. 4; and in *Johnson v. Gore Wood & Co.* [2000] UKHL 65, 1 All E.R. 481 at 499, the House of Lords noted in passing that the onus to prove abuse of process is on the defendant.

[16] Consistent with the foregoing, British Columbia courts have held on many occasions that where an application is made under R. 19(24) for the striking out of an action on the basis of abuse of process or any of the other grounds stated in the rule, the onus is on the applicant to prove those grounds: see, e.g., *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1996) 17 B.C.L.R. (3d) 187 at para. 37, 68 B.C.A.C. 241 (C.A.); and *Mohl v. University of British Columbia*, 2006 BCCA 70 at para. 41, 52 B.C.L.R. (4th) 89 (C.A.).

[17] In my opinion, it was for Mr. Verigin to show that in the circumstances of this case, the plaintiffs' action to enforce their previous judgment was an abuse of the court process. No evidence having been adduced to this effect, and no other basis for abuse of process having been found by the summary trial judge, he correctly allowed the action to proceed and granted judgment to the plaintiffs.

[Emphasis in original]

[31] "Abuse of process" imports the proposition that a party's conduct has been reprehensible. In *Federal Business Development Bank v. Holm*, 1995 CanLII 2259 Mr. Justice Robinson of this court considered the general principles which define abuse of process in a context similar to that before me. At para. 8 Robinson J. wrote:

8 These are of course general principles but they indicate, in my view, that for an abuse of process to be found, there must exist some reasonably obvious aspects of vexation or oppression, or unfairness or dishonesty, in sufficient depth to awaken the conscience. Here, if I understand it correctly, the major ground upon which defendant's counsel relies, is the inactivity of the plaintiff in the year since the judgment was obtained in carrying out at least some form of execution proceedings, or perhaps examination in aid of execution, or garnishment, to an extent that to come forward now seeking to keep alive its judgment, as it were, is oppressive, or sufficiently vexatious so as to fall within the concept of abuse of process. That submission would have considerable strength if the plaintiff were now successful in its application, and sat by for a further ten year period and attempted to realize upon its judgment, having done nothing in the ten year period. It is acknowledged that there were unsuccessful negotiations between the plaintiff and defendant during the preceding ten year period, all without success. No voluntary payment in reduction of the judgment has been made by the defendant. As many judgment creditors do, F.B.D.B. filed a judgment against lands and premises owned by the judgment debtor, in reasonable hopes that one of several events might occur so as to produce successful recovery for the judgment creditor by virtue of the judgment against lands and premises. No one can say when an event precipitating recovery might occur. I am not prepared to find the action, or perhaps inaction, on the part of the plaintiff in standing by for this ten year period, including of course the negotiations that went on, to constitute abuse of process. The application by the defendant is dismissed and the application for judgment by the plaintiff is granted.

- [32] The plaintiff has taken various steps to enforce its judgment. I cannot find it has been guilty of inactivity of a type that can reasonably be described as oppressive or vexatious amounting to an abuse of this court's procedures. Its efforts to serve Mr. Khonsari were thwarted but I can find no impropriety in the plaintiff's conduct. The plaintiff's inability to serve the defendant was no doubt made more difficult by the defendant's frequent and lengthy absences from Canada.
- [33] Mr. Khonsari submits that there is an injustice or unfairness and that he is prejudiced because the plaintiff did not pursue collection procedures against him until he had purchased real property. There is no evidence the plaintiff deliberately waited until Mr. Khonsari had purchased an exigible asset before it took execution proceedings. Even if it had, I see no basis for criticism. A judgment creditor has several years to take steps to execute on a judgment and if the judgment debtor acquires an exigible asset in those years the creditor is entitled to pursue its rights.
- [34] I declined to impose a permanent stay of proceedings in the Second Action, nor is it appropriate to strike pleadings in that action as an abuse of process.
- [35] The default judgment entered in the Second Action will be set aside. The defendant will have 21 days from the date of these reasons to file a response to civil claim in that action.
- [36] Cost of this application will be in the cause.

"Affleck J."

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