

CANADA / JUDGMENT

Carnovale v. De Jong

2023 BCSC 950

COURT

Supreme Court of British Columbia

DECIDED

9 May 2023

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2023 BCSC 950 Carnovale v. De Jong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carnovale v. De Jong,

2023 BCSC 950

Date: 20230509

Docket: M188710

Registry: Vancouver

Between:

Christopher Richard Carnovale

Plaintiff

And

Mink De Jong and Norma Lorraine Steiner

Defendants

Before: The Honourable Justice Chan

Oral Reasons for Judgment

Re: Adjournment Application

Counsel for the Plaintiff:

R. Bisbicis

R. Fang

Counsel for the Defendants:

I.A. Wiesel

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 8 & 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2023

- [1] THE COURT: This is an oral ruling. If a transcript is ordered I reserve the right to make corrections for grammar, style and citations. However, the substance will not change.
- [2] This is the court's ruling on the adjournment application brought by the defendants. This matter is set for trial for seven days starting May 8, 2023. Counsel for the defendants applied on May 8, 2023 to adjourn the trial. The plaintiff opposes the adjournment.

Background

- [3] This action concerns a motor vehicle accident from December 6, 2017, near Squamish. A notice of civil claim was filed by the plaintiff on August 2, 2018, and served on the defendants on June 6, 2019. Liability has been admitted by the defendants.
- [4] On November 8, 2019, counsel for the defendants served a response to the civil claim along with an initial list of documents. Counsel for the defendants requested from the plaintiff's counsel a list of documents and copies of medical, financial and employment records.
- [5] On November 3, 2020, counsel for the plaintiff served their first list of documents listing 14 documents consisting of physician referral notes and clinical records.
- [6] On August 19, 2021, counsel for the plaintiff served the first supplemental list of documents. It contained one additional document, a set of clinical notes from a physician.
- [7] On April 14, 2022, counsel for the plaintiff filed a notice of trial setting down a five-day trial to start on May 8, 2023. I am advised this was filed after plaintiff's counsel was not successful in canvassing trial dates with the defendants' counsel.
- [8] In December 2022, the defendants' counsel requested from the plaintiff's counsel available dates so the examination for discovery of the plaintiff can be set. In addition, defendants' counsel sought an amended list of documents, as well as additional documents. As plaintiff's counsel was not responding, defendants' counsel set the examination for discovery date unilaterally for January 10, 2023.

- [9] On January 4, 2023, defendants' counsel received an email from Ms. Fang's legal assistant advising that the plaintiff would not be attending the examination for discovery as that date had not been agreed to. This was the first time defence counsel was made aware that Ms. Fang and her law firm, Bisbicus Law, had conduct of this matter along with Mr. Granger, counsel of record for the plaintiff.
- [10] The defendants' counsel sent a letter dated January 10, 2023, where defence counsel relay a conversation with Mr. Granger from January 4, 2023. Mr. Granger had advised defence counsel that he had the "bulk" of the plaintiff's medical and wage loss records and would produce them to defendants' counsel.
- [11] The examination for discovery of the plaintiff was reset to January 19, 2023. The plaintiff attended and was examined for approximately three hours. During that examination for discovery defendants' counsel requested 33 items be produced. The plaintiff during examination for discovery testified to additional injuries that were not pleaded in the notice of civil claim. Plaintiff's counsel brought an application to amend the notice of civil claim to add the additional injuries. This was granted by the court in February 2023, along with an order the plaintiff attend for a further examination for discovery on March 1, 2023, on matters arising from the amendments and documents produced since the examination for discovery.
- [12] The second examination for discovery took place on March 1, 2023. Defendants' counsel followed up with a letter dated March 22, 2023, listing the documents requested to be produced from the examination for discovery. This letter was sent to both Mr. Granger and Ms. Fang. This letter was not responded to by plaintiff's counsel. This was followed up with additional letters and emails from defendants' counsel on March 24, 29, April 17, 24 and 26, 2023.
- [13] Plaintiff's counsel produced an amended list of documents on April 17, 2023. Further amended lists of documents were produced on May 5 and 6, 2023.
- [14] Defendants' counsel advise many documents were received from plaintiff's counsel in April 2023. He advises that he received documents relating to income and wage loss claims for the first time in April 2023.
- [15] The parties agree the following documents were disclosed by the plaintiff in April 2023: the plaintiff's income tax returns for the years 2017 to 2021; the notices of assessment by Canada Revenue Agency for tax years from 2015 to 2021; T-4 slips from the plaintiff's employers for the tax years 2015 to 2022; emails and correspondence from one of his employers with respect to the plaintiff's employment; the plaintiff's employment record from two of his employers; and some further clinical records.

- [16] Defendants' counsel requested a further examination for discovery of the plaintiff on the basis of the new documents. On April 24, 2023, counsel for the plaintiff sent an email agreeing to a "discovery continuation on the newly produced documents". A further examination for discovery was scheduled on May 2, 2023. About 10 minutes after the start of the examination for discovery counsel for the plaintiff took the position that seven hours of discovery have elapsed and the examination for discovery ought to be ended.

Position of the Defendants

- [17] Defendants' counsel argues an adjournment of the trial ought to be granted as he has not had an opportunity to apply to the court for an order that the plaintiff attend at a further examination for discovery so the new documents can be canvassed. The defendants argue this is a trial by ambush as they ought to have an opportunity to conduct an examination for discovery on the plaintiff on the new documents as they go to the relevant issue of income loss and earning capacity.
- [18] The defendants argue the plaintiff has disclosed documents late in a piecemeal fashion and without a timely updated list of documents, creating a chaotic atmosphere. They argue allowing the trial to proceed would severely prejudice them. They argue the actions of plaintiff's counsel were tactical and ought not to be sanctioned by the court.

Position of the Plaintiff

- [19] The plaintiff argues the defendants have not been diligent in seeking disclosure. The defendants took no steps to bring any applications for disclosure to the court. With respect to the late disclosed documents, the plaintiff's position is the defendants have not shown anything new in those documents and the defendants have had an opportunity to examine the plaintiff in the discovery process about the subject matter of his employment and income.
- [20] The plaintiff argues the Supreme Court Civil Rules [Rules] provide for seven hours of discovery and the defendants exhausted the time limit. The plaintiff's position is it is not sharp practice to rely on the rules.

Analysis

- [21] The factors to be considered in whether an adjournment ought to be granted is set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173. The Navarro decision makes clear whether to grant an adjournment is a discretionary decision which seeks to balance the interests of the parties. The paramount consideration is the interest of justice and ensuring there will be a fair trial on the merits: para. 19 of Navarro. The interest of justice requires both parties to have a "fair chance to make out his case": para. 19 of Navarro.

- [22] Some of the factors to be considered by the court include the expeditious resolution of the matter, the reasonableness of the adjournment request, the grounds for the adjournment, the timeliness of the request, the potential prejudice to each party, the right to a fair trial, the proper administration of justice, the history of the matter, and if there is a self-represented litigant: see para. 20 of Navarro.
- [23] I have considered all of these factors. In my view, the most significant factor is the prejudice to the defendants if an adjournment is not granted. It is not disputed the documents relating to past loss of income, employment and tax records were not disclosed to the defendants until April 2023, after the examination for discovery of the plaintiff had already occurred. The defendants did not have an opportunity to discover the plaintiff on those documents.
- [24] Counsel for the defendants advised he was under the impression that by agreeing to schedule the examination for discovery for May 2, 2023, counsel for the plaintiff was agreeing that he could question the plaintiff on these newly produced documents. Counsel for the plaintiff take the view defendants' counsel ought to have been aware of how much discovery time was remaining pursuant to the Rules.
- [25] This is not an exercise in apportioning blame as between counsel. The court must be concerned with a fair trial for both parties. The reality is the defendants have not had an opportunity to apply to the court for further time to examine on discovery the plaintiff on the recently disclosed documents. Whether further discovery time would be granted is not the issue today. The point is the defendants in fairness ought to be provided an opportunity to seek further discovery.
- [26] With respect to the plaintiff's argument that the defendants have already examined in the discovery process the subject matters of the plaintiff's income and employment, I note that an examination conducted with the relevant tax records may be a very different examination than one conducted without the tax records. With the documents in hand, counsel may choose to ask different questions or move the examination in a different direction. It may be the end result of the examination will be the same, but that misses the point. Counsel have to be provided an opportunity to seek further time to discover the plaintiff on these documents.
- [27] I acknowledge an adjournment of the trial will prejudice the plaintiff due to the delay. However, the income, employment and tax records are significant documents as one of the live issues at trial is assessment of damages for past income loss and loss of earning capacity. The court has to balance the interests of the parties. The interests of justice require the defendants be granted an adjournment so they can seek that further discovery. Unfortunately, this requires an adjournment of the trial.
- [28] Costs of this application will be determined by the trial judge.
- [29] That concludes the court's ruling. Is there anything further?

- [30] CNSL R. FANG: Thank you, Justice. Just a quick question or submission for the court, which is an advance against the tort to the plaintiff. The defendants in their submissions stated that an advance could be made in situations -- if the adjournment is granted. Therefore, that takes away the prejudice to the plaintiff because it is compensable, and the plaintiff submits that that would be an appropriate order to be made in this case here, and the plaintiff proposes \$50,000 for that advance.
- [31] CNSL I. WIESEL: We have the court's reasons. I do not have instructions to offer that advance at this time and the court has already ruled on the adjournment.
- [32] THE COURT: I think the court has dealt with the adjournment application. I do not believe I have any further jurisdiction to deal with anything that is not by consent.
- [33] CNSL I. WIESEL: Nothing further from the defendants. Thank you, Justice.
- [34] CNSL R. BISBICIS: Madam Justice, it was part of the defendants' original submissions in their adjournment application that as part of an adjournment they would be prepared to provide an advance against the tort. That was one of the earliest things that counsel for the defendants submitted.
- [35] THE COURT: All right. The court was not alerted to that, that it is what the plaintiff would be seeking, and the court has already made its ruling.

"Chan J."

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