

CANADA / JUDGMENT

Catalano v. Ogloff

2013 BCSC 2257

COURT

Supreme Court of British Columbia

DECIDED

9 December 2013

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2013 BCSC 2257 Catalano v. Ogloff IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Catalano v. Ogloff, 2013 BCSC 2257 Date: 20131209 Docket: M123878 Registry: Vancouver Between: Janine Teresa Catalano Plaintiff And George Ogloff Defendant Before: Master MacNaughton Reasons for Judgment Counsel for the Plaintiff: G. Kosakoski Counsel for the Defendant G. Ogloff: P.A. Mazzone Counsel for the Defendants in Action M115625: E. Lundberg Place and Date of Hearing: Vancouver, B.C. December 4, 2013 Place and Date of Judgment: Vancouver, B.C. December 9, 2013

[1] The plaintiff applies for an order declaring the defendant's jury notice a nullity.

Background

[2] The plaintiff was involved in two accidents. The first occurred on November 15, 2010. The plaintiff commenced an action with respect to it on October 18, 2011. It is file number M115625 (the "first action"). The defendants filed a response on April 1, 2012. On August 13, 2012, a notice of trial was filed in the first action and on August 17, 2012, the plaintiff filed a jury notice. No jury notice was filed by the defendants.

[3] The second accident occurred on November 1, 2011 and the plaintiff commenced this action with respect to it on June 27, 2012 (the "second action").

[4] A response to the second action was filed on September 18, 2012. On the same date, the defendant's counsel suggested to the plaintiff's counsel that both actions be heard together. Liability had been admitted in both. The plaintiff consented on the basis that both actions could be heard in the five days already scheduled for the trial of the first action and commencing February 14, 2014.

[5] On February 14, 2013, on consent, an order was granted in both actions providing that they be heard together subject to the direction of the trial judge.

[6] On May 13, 2013, a notice of trial was filed in the second action.

- [7] On May 14, 2013, the defendant's counsel in the second action advised that he did not believe that five days would be sufficient to hear both actions together. Plaintiff's counsel reminded him that the plaintiff's consent to the order had been conditional on the actions being heard during the already scheduled five days.
- [8] On May 27, 2013, the defendant in the second action filed a jury notice. It is that jury notice which is the subject of this application. The Parties' Positions
- [9] The parties fundamentally disagree about their legal positions. The plaintiff argues that when two actions are to be heard together, the only relevant notice of trial, for the purpose of issuing a jury notice, is the first one. As a result, the plaintiff submits that, because the defendants in the first action had not filed a jury notice, the defendant to the second action, now to be heard at the same time, is not at liberty to do so.
- [10] The defendant argues that he has a *prima facie* right to trial by jury and should not be denied that right as a result of the trial of the actions together. He submits that a party who comes late to a multiplicity of proceedings is entitled to elect trial by jury even if the parties to the earlier action or actions have not done so. In addition, he says that, in this case, when the matters were agreed to be heard together, the plaintiff had filed a jury notice and it was reasonable for him to presume that the trial of the first action would proceed by jury.

Conclusion

- [11] For the following reasons, I have concluded that the defendant's jury notice is a nullity.
- [12] First, under Rule 12-6(3) of the Supreme Court Civil Rules it is clear that the election of a jury trial is a two-step process. The right is preserved by serving a jury notice but the matter will not be heard by a jury unless and until the jury fees are paid. A jury trial occurs only if both steps are completed. Thus, the defendant to the second action could not presume that the first action was proceeding to a jury trial. It is for that reason that all parties to an action independently preserve their election of a jury trial by serving their own jury notice.
- [13] Second, the early cases which established the principal that it is only the first notice of trial which matters, with respect to the election of a jury, arose in the context of trial adjournments. However, that principal has been expanded. I agree with the conclusion of Master Groves (as he then was) in *Bumen v. BC Transit*, 2001 BCSC 443: when a notice of trial has previously been given in one action, without a jury notice being filed, a subsequent consent by the parties to having other actions tried at the same time ought to be treated as an election to have a trial by judge alone in all the actions. In other words, when parties consent to the consolidation of multiple actions they are bound by the mode of trial specified in the notice of trial filed with respect to the first action. (para. 20) Master Groves' reasoning mirrors that of Master Barber in *Wright v. Rose* (1995), 32 C.P.C. (3d) 319 where he said: there is no valid jury notice issued in the first action it could be argued that the jury notice is valid for the second and third action. Of course, when actions are tried at the same time they should either be all heard with a jury, or heard by a judge alone. In my opinion,

when the defendants consented to all three actions being tried at the same time, that was an election to have trial by judge alone. (para 17)

- [14] In my view, the fact that the plaintiff had delivered a jury notice in the first action does not change the result. The defendant in the second action could not rely on the plaintiff's jury notice as that was merely the first stage of the election process and did not guarantee a jury trial (I note that it has since been withdrawn). The defendants to the first action had not delivered such a notice. To ensure his right to a jury trial, the defendant in the second action should have made it a term of his consent to having the matters tried together or, if no consent was forthcoming, he could have delivered a jury notice and then applied in chambers to have the matters heard together with a jury.
- [15] By proceeding the way he did, the defendant to the second action was not at liberty to deliver the jury notice. It is a nullity. Costs
- [16] As the plaintiff has been successful, she is entitled to her costs of this application. "Master MacNaughton"
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