

CANADA / JUDGMENT

Chana v. Niwa

2023 BCSC 200

COURT

Supreme Court of British Columbia

DECIDED

17 January 2023

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2023 BCSC 200 Chana v. Niwa IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Chana v. Niwa, 2023 BCSC 200 Date: 20230117 Docket: M-1812035 Registry: Vancouver Between: Hardeep Kaur Chana Plaintiff And James Robert Niwa Defendant Before: The Honourable Mr. Justice Stephens Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: T.N. Lucyk For the Defendant: No appearance Counsel for the Insurance Corporation of British Columbia: J.R. Dar Santos Place and Date of Trial/Hearing: Vancouver, B.C. January 17, 2023 Place and Date of Judgment: Vancouver, B.C. January 17, 2023

- [1] THE COURT: I am going to give my decision now and I am going to deal with the matters sought, that is the adjournment of the trial to new dates and the request for alternative service.
- [2] These are my brief reasons for judgment. I reserve the right to edit them if necessary, if they are ordered. They are as follows.
- [3] The trial of this action was scheduled to take place before me on January 16, 2023, for three days. The defendant, who is self-represented, did not appear on what was scheduled to be the first day of trial yesterday.
- [4] Counsel for the Insurance Corporation of British Columbia ("ICBC"), Mr. Dar Santos, attended the trial, but to observe only.
- [5] The trial did not commence. The plaintiff now seeks an adjournment of the trial after some further discussion with counsel for ICBC. I am therefore adjourning the trial of this action and resetting it for a duration of seven days on March 4, 2024, and I make that order.
- [6] I further order that the costs, if any, of the preparation for the trial, which was scheduled to commence on January 16, will be at the discretion of the judge who ultimately hears the trial of the action on its merits.
- [7] In adjourning the trial, I have made no ruling that the rescheduled trial will proceed or not, pursuant to R. 12-5(76), in the event the defendant does not appear on the rescheduled date or dates. That matter again will be at the discretion or determination of the judge that this action comes before on March 4, 2024.

- [8] The plaintiff further makes an application before me, pursuant to R. 4-4, for alternative service on the defendant on a go-forward basis. I heard that application today without notice, as is permitted by R. 4-4(1).
- [9] As an initial matter, I direct that the affidavits provided to the Court in support of that R. 4-4 application by the plaintiff shall be filed in this proceeding, and I think it will be apparent, which ones I am referring to, but I note that the affidavits do not appear to be filed yet, and I direct that they be so.
- [10] I have considered the R. 4-4 and the evidence that plaintiff's counsel has referred me to. I have had regard to some case law that concerns alternative service by electronic means, including *Burke v. John Doe*, 2013 BCSC 964, as well as *Cash Flow Recoveries v. Crate*, [2017] O.J. No. 931, 2017 CanLII 9446 (S.C.) [Cash Flow], and *Jewish Family and Child Service of Greater Toronto v. K.B.*, 2016 ONCJ 259.
- [11] I return to R. 4-4, which provides:
- (1) If it is impracticable to serve a document by personal service or if the person to be served by personal service
 - (a) cannot be found after a diligent search, or
 - (b) is evading service of the documents, the court may, on application without notice, make an order for substituted service granting permission to use an alternative method of service.
- [12] The defendant initially filed a response to civil claim in this action on April 30, 2019. Subsequently, the defendant was represented by legal counsel in this action, who filed a response to civil claim on behalf of the defendant on July 18, 2019. That counsel for the defendant subsequently withdrew by way of notice of intention to withdraw as lawyer filed on April 7, 2021, and then a notice of withdrawal of lawyer filed on October 19, 2022. The notice of withdrawal of lawyer referenced a last known address for the defendant.
- [13] The response to civil claim that was filed personally by the defendant listed an address in Alberta as well as an email address. The notice of withdrawal of lawyer filed by the defendant's counsel on October 19, 2022, referred to a last known address of the defendant as a different address in Alberta.
- [14] In the last six months, the plaintiff has attempted to personally serve the defendant at the residential addresses identified in both the defendant's filed response to civil claim from April 2019, and the defendant's counsel's notice of withdrawal, and has been unable to successfully personally serve the defendant.
- [15] The plaintiff now applies for an order for alternative service on the defendant going forward.

- [16] I am satisfied that it is impracticable or has been impracticable to serve a document by personal service on the defendant and diligent efforts have been made to do so. I am satisfied that an order for alternative service should be made to serve the defendant at the email address listed in the defendant's filed response to civil claim, that is to say, at the Gmail address.
- [17] The plaintiff also proposed alternative service at a Facebook account. I have considered the case law I referred to briefly at the outset, and I have referred to the factors set out in Cash Flow at para. 16. Having regard to those considerations and the evidence tendered by the plaintiff, that is of Wendi Majic, I find that service on the defendant at the Facebook account is appropriate, and I also so order.
- [18] Therefore, I make an order for alternative service on the email address set out in the response to civil claim filed by the defendant, that is the Gmail address, and also at the Facebook account, as identified in Ms. Majic's affidavit at para. 14, and permit the plaintiff going forward to use that alternative method of service.
- [19] A copy of this order will be served on the defendant as required by R. 4-4(2).
- [20] I believe that attends to the matters that were before me. I should say you had raised, I believe, in the brief provided to me, a matter concerning the application of R. 11-7(6) as to expert reports. I am making no finding or ruling on that. That would be a matter for the trial judge.
- [21] And, is there anything further, counsel? [SUBMISSIONS FROM COUNSEL]
- [22] THE COURT: Yes. All right, so Madam Registrar, I will make an order that the first order I made shall be subject to any further order of the court or consent of the parties.
- [23] CNSL T. LUCYK: And then for alternative service, I just want to be clear, is that an "and" order or an "or" order?
- [24] THE COURT: It is an "and".
- [25] CNSL T. LUCYK: So, service has to be on both?
- [26] THE COURT: At both.
- [27] CNSL T. LUCYK: Both, okay. So, if we just do one, that would not suffice.
- [28] THE COURT: Yes, and I will make that order as well, subject to any further order of the court. In other words, if there is another address that becomes apparent, and that may be something that would stand in any event, but the order for substitute service could be amended by further court order.

- [29] CNSL T. LUCYK: I'm just wondering if it makes more sense for it to be an "or" order, only in the unlikely event that the defendant starts responding to, say, the Facebook account and D.A. King is asking that we stop serving that account, we can just continue to serve things on the Facebook account?
- [30] THE COURT: I would be--my inclination is for it to be an "and".
- [31] CNSL T. LUCYK: Okay.
- [32] THE COURT: If the circumstances have changed, counsel, and that needs to change, then it is a brief appearance for a request for court order to do that.
- [33] CNSL T. LUCYK: That's fine.
- [34] THE COURT: And it will be apparent from the manner in which I disposed of the alternative service application that I was not satisfied on the evidence that the Hotmail address had a sufficient evidentiary nexus to the defendant, and I therefore did not make that a form of alternative service. [SUBMISSIONS FROM COUNSEL]
- [35] THE COURT: All right, I will make an order dispensing with the signature for the defendant. [SUBMISSIONS FROM COUNSEL]
- [36] CNSL T. LUCYK: Do you require us to file a requisition for the trial, or is it already booked?
- [37] THE COURT: I do not know the answer to that. I would simply say anything you need to file, you ought to file, but it has been made by order.
- [38] Madam Registrar, can we just, before we break, just make sure that the orders are sufficiently clear.
- [39] The first is an order adjourning the trial to be rescheduled on March 4, 2024, for seven days, subject to any further order of the Court or consent of the parties.
- [40] The second one is the costs thrown away, if any, from these dates will be at the discretion of the trial judge at the trial when it continues.
- [41] The next order is an order for alternative service at the addresses, subject to any further order of the Court.
- [42] And was there anything further, Madam Registrar?
- [43] CNSL T. LUCYK: Just the--
- [44] THE COURT: An order dispensing with the signature of the defendant on the order.
- [45] THE CLERK: Justice, I have a couple more things that I think are just directions, but--
- [46] THE COURT: Yes?
- [47] THE CLERK: --I've got: affidavits provided and shown to the Court by the plaintiff should be filed in the court registry, Tabs 3 to 8.

[48] THE COURT: Yes.

[49] THE CLERK: Copy of this order will be served on the defendant as required by R. 4-4(2).

[50] THE COURT: Yes.

[51] THE CLERK: That's all.

[52] THE COURT: All right. The only other thing, I take it that you will provide a copy of this order to Mr. Dar Santos, yes?

[53] CNSL T. LUCYK: Yes.

[54] THE COURT: All right. Counsel, I believe that is all. Unless there is anything further, we will adjourn. "Stephens J."

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