

CANADA / JUDGMENT

Connor Financial Services International Inc. v. Carver

2016 BCSC 1363

COURT

Supreme Court of British Columbia

DECIDED

22 July 2016

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2016 BCSC 1363 Connor Financial Services International Inc. v. Carver IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Connor Financial Services International Inc. v. Carver, 2016 BCSC 1363 Date: 20160722 Docket: S064941 Registry: Victoria Between: Connor Financial Services International Inc. Plaintiff And Fred George Carver and Jane Christine Carbert Defendants And Connor Financial Corporation and JG Gerry Connor Defendants by Counterclaim Before: The Honourable Madam Justice B.J. Brown Reasons for Judgment on Costs Counsel for Plaintiffs: E. Pedersen Counsel for Defendants: D. Juteau Written Submissions of Plaintiffs: April 1, 2016 Written Submission of Defendants: April 4, 2016 Place and Date of Judgment: Victoria, B.C. July 22, 2016

- [1] In my decision in this matter of December 2015, indexed at 2015 BCSC 2320, I determined that Mr. Carver and Ms. Carbert succeeded at trial and would have costs at Scale B unless there were matters of which I was not aware.
- [2] I determined that Mr. Carver and Ms. Carbert did receive \$25,000 from CFSI which should be set off against the losses in Mr. Carver's investment portfolio. I concluded that at a reasonable rate of interest a \$25,000 loan would be approximately the same value as the investment losses by 2007. As after set-off, nothing was payable to the plaintiff Connor Financial Services International Inc. ("CFSI").
- [3] Having considered the submissions of CFSI with respect to its success on its action and its entitlement to costs, I am not persuaded that I erred in refusing costs to CFSI. As I said, and develop below, they did not succeed in the action in any real way.
- [4] For their part, Mr. Carver and Ms. Carbert seek double costs based on offers they made on April 26, 2013, and April 15, 2015. In each of these offers, the defendants made a formal offer to settle on the basis that each party would abandon their claims and each side would bear their own costs. Discussion Success of the Parties in Respect of a Claim to Set-Off

- [5] The plaintiff and defendants by counterclaim submit the matter involved two separate claims: first, a claim by CFSI against the defendants in respect of a loan extended to them, plus interest; and second, a counterclaim by the defendants against Connor Financial Corporation ("CFC") and Mr. Connor in respect of losses they suffered as a result of advice given to them by Mr. Connor which constituted a breach of his duty of care and his fiduciary duty as a financial advisor. CFSI submits it was awarded repayment of the principal of the loan plus a "reasonable rate of interest", and having established liability and obtaining its remedy it was the successful party as those terms are set out in *Loft v. Nat*, 2014 BCCA 108 at paras. 46-47.
- [6] The normal order where a plaintiff is successful on a claim and a defendant is successful on a counterclaim is that the plaintiff receive costs of the claim and the defendant the costs of the counterclaim with a general set-off. In such cases the plaintiff's costs are assessed as if her claim was a separate action with no counterclaim. The costs of the counterclaim are then assessed as though they were part of the costs of a separate action. Any items which have been incurred partly on account of each should be divided (*The Honourable Peter G. Fraser, John W. Horn, Q.C. & Madam Justice Susan A. Griffin, Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (consulted on 15 July 2015), (Toronto: LexisNexis 2007) at 38.21, citing *Baxter v. Wallace*, [1944] 1 W.W.R. 319 (B.C. Co. Ct.) per Wilson C.C.J.).
- [7] The exception to this normal order of costs is where the plaintiff of the counter-claim elects to proceed by way of set-off (*Frederick M. Irvine, McLachlin & Taylor British Columbia Practice*, 3rd ed. loose-leaf (consulted on 15 July 2015) (Toronto: LexisNexis Butterworths, 2006) at 3-35-36; see also *Supreme Court Civil Rules*, R. 3-4(8); *Pos v. Pos* (1985), 61 B.C.L.R. 388 at 393 (S.C.), *Huddart L.J.S.C.*).
- [8] The defendants clearly elected to proceed by way of set-off. Their amended counterclaim was clear that the amount of any indebtedness for the loan advanced was to be set off by the investment losses suffered by the defendants as a result of the wrongful and negligent conduct of the plaintiff and defendants by counterclaim. At trial, they proved the plaintiff's loan was made in breach of its principal's fiduciary duty and that it would be unjust to allow the plaintiff to enforce its agreement without taking into consideration the losses the defendants suffered as a result of that and Mr. Connor's negligence.
- [9] As the set-off offset any recovery to the plaintiff, the defendants were the successful parties to the action and are entitled to costs. *Effect of the Offers to Settle*
- [10] As addressed above, the defendants and plaintiffs by counterclaim delivered two offers on April 26, 2013, and April 15, 2015, respectively.
- [11] Rule 9-1(1)(c) provides that an "offer to settle" means an offer that:

- (i) is made in writing by a party to a proceeding, (ii) has been served on all parties of record and (iii) contains the following sentence: "The [party(ies)] , [name(s) of party(ies)] , reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

[12] There is no argument that these offers do not meet the requirements of R. 9-1(1)(c).

[13] Rules 9-1(5) and (6) provide: Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle. Considerations of court
- (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 served 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.
- a) Should the Offer Reasonably have been Accepted?

[14] Reasonableness is to be assessed by considering such factors as the timing of the offer, its relationship to the claim (as opposed to being simply a nuisance offer), whether it could be easily evaluated and whether some rationale for the offer was provided (Hartshorne v. Hartshorne, 2011 BCCA 29 at para. 27). In this case both offers provided a rationale and were given at a time the plaintiff and defendants by counterclaim should have been able to assess the strength of their positions compared to the offer provided. There was further adequate

opportunity to consider them. Finally, the offers were each within the range of likely outcomes.

b) The Relationship between the Terms of Settlement Offered in the Final Judgment of the Court

[15] The decision of the court resulted in each of the claims being offset so that no monies were payable from or to any party. I also awarded costs Scale B to Mr. Carver and Ms. Carbert. The offers each offered essentially the same result to the plaintiff and defendants by counterclaim; however, the offer was more advantageous to the plaintiff and defendants by counterclaim as it provided that no costs would be payable by any party.

c) The Relative Financial Circumstances of the Parties

[16] I do not have information with respect to the current financial circumstances of any of the parties. Accordingly I cannot assess the relative positions of the parties and their ability to finance the trial.

d) Other Factors

[17] The plaintiff argues that I have already deprived it of the costs of its action and that it is unfair that the defendants are asked to pay double costs after the offer was made, citing *CP v. RBC Life Insurance Company*, 2015 BCCA 30. In my view, this submission is incorrect for primarily two reasons:

1. I have concluded that the plaintiff did not succeed on its claim;
2. The defendants having elected to pursue their cross-claim by way of set-off, costs are not assessed with respect to both the claim and the counterclaim -- they are assessed as one set of costs and general to the action.

[18] An award of double costs is a punitive measure against a litigant for their failure to accept an offer to settle that should have been accepted. Costs rules are in place to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer. More specifically their purposes include: deterring frivolous actions; encouraging conduct that reduces the duration and expense of litigation; encouraging litigants to settle whenever possible; and to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at all points of the litigation and discouraging the continuance of doubtful cases or defences (see *Hartshorne* at para. 25).

[19] It is my view that the appropriate award for the costs in this matter would be to award the defendant costs of all matters at Scale B and double costs for those four days of hearing before the Court. Joint and Several Liability for Costs

- [20] In the particular circumstances of this case, it is appropriate that costs be joint and several as against the plaintiff and defendants by counterclaim. Ordinarily joint and several liability for costs is awarded in cases where numerous parties have acted jointly in bringing or defending an action: see *Westsea Construction Ltd. v. Veale*, 2014 BCCA 217 at paras. 20-21. In this case the plaintiff's ability to recover on its loan was intimately tied to its relationship to CFC and Mr. Connor and their wrongs or omissions. Those parties were represented by the same counsel. Finally, as there is no meaningful difference between the three parties, there would be no disproportionate burden on the plaintiff and defendants by counterclaim.
- Judicial Assessment of Costs
- [21] The court has jurisdiction to assess costs on a summary basis. This discretion should be exercised sparingly in circumstances of great length and complexity and where a judge is familiar with the matter (*Buchan v. Moss Management Inc.*, 2010 BCCA 393 at paras. 12-13). In my view this is an appropriate case to assess costs on a summary basis: the subject transaction of this dispute was made approximately 16 years ago and the action filed more than 10 years ago; a further reference to the registrar will only delay what has already been the already-too-long-coming settling of the issues between the parties.
- [22] Turning to the bills of costs provided by both parties, the majority of costs and disbursements are agreed upon.
- [23] However, issues arose with a number of disbursements, including amounts submitted for transcripts, parking fees, file administration fees, and filing fees. Having reviewed them, I accept the plaintiff and defendants by counterclaim's submissions they should be disallowed.
- [24] With respect to the transcripts, the defendant is correct in suggesting they are generally considered a luxury and the recovery of their costs disallowed (*Jamieson v. Jamieson* (1980), 22 B.C.L.R. 11 (S.C.)). While the defendants submit the passage of time necessitated requesting the transcripts, Madam Justice Proudfoot (as she then was) held in *Jamieson* that despite the lapse of five months between the first and the final hearing, the transcript was not anything more than a convenience for counsel (at 13). The defendants did not outline an aspect of this case that would distinguish *Jamieson*.
- [25] With respect to the parking fees, the defendants have provided no evidence the proceedings for which the parking costs relate were held more than 40km from his office and those amounts are disallowed: *Smagh v. Gumbrah*, 2010 BCSC 988 at paras. 94-99.
- [26] Likewise, the defendants have not provided submissions on the contested "file administration fee" and or particulars of the additional \$61.55 claimed under "BC Online Search / Filing Fees" without receipt and those amounts are not allowed.
- [27] Those matters dealt with, costs can be set. Considering the units billed, the disbursements properly claimed, and adding the double costs for the hearing dates required, the plaintiff will have costs fixed at \$38,985.63. "B.J. Brown J."

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