

CANADA / JUDGMENT

Dhillon v. Robertson

2021 BCSC 160

COURT

Supreme Court of British Columbia

DECIDED

2 February 2021

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2021 BCSC 160 Dhillon v. Robertson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Dhillon v. Robertson, 2021 BCSC 160 Date: 20210202 Docket: S174187 Registry: New Westminster Between: Satinder Paul Singh Dhillon and Surjit Kaur Dhillon Plaintiffs And Michael Vincent Morancie Roberson, Parmjeet Singh Aujla, Shantel Lamons, Mandeep Dhillon, and Harpreet Dhillon Defendants Before: The Honourable Madam Justice Douglas Reasons for Judgment re Costs Counsel for Plaintiffs: G.A. Hooper Counsel for Defendants: T. Chan Place and Date of Hearing: New Westminster, B.C. December 11, 2020 Place and Date of Judgment: New Westminster, B.C. February 2, 2021 Table of Contents INTRODUCTION. 3 PRE-TRIAL SETTLEMENT OFFERS. 4 The First Offer 4 The Second Offer 5 The Third Offer 6 ISSUES. 8 LEGAL FRAMEWORK. 8 Rule 9-1. 8 ANALYSIS. 9 Were the Offers properly served?. 9 Is Harpreet entitled to costs?. 11 What pre-Judgment Interest is payable?. 13 SUMMARY. 14

INTRODUCTION

- [1] The trial of this action proceeded before me over 12 days, commencing in July 2019. Following the plaintiffs' request for a lengthy adjournment to permit them time to transcribe evidence, obtain legal advice, and prepare closing submissions, the trial continued and concluded in October 2019. Reasons for judgment indexed as 2020 BCSC 644 were released in April 2020.
- [2] Because a number of parties in this action share a surname, I refer to them in these reasons using first names. In doing so, I intend no disrespect.
- [3] At issue at trial was whether the October 2009 transfer of property in Abbotsford (the "Property") was a bona fide purchase and sale, a disguised mortgage, or subject to a constructive trust, verbal buy-back agreement, or option to re-purchase. The Property was subject to foreclosure under a CIBC mortgage, originally held in Shantel's name and subsequently assumed by her father, Mr. Robertson. In May 2019, Surjit bought the Property from CIBC. After the payment of the principal, interest, and costs on foreclosure, CIBC paid the excess sale proceeds of approximately \$270,000 into court. The parties' dispute focused on their entitlement to those funds, which were equal to the Property's increase in value from October 2009 to May 2019.

- [4] The defendants, Mr. Robertson, Mr. Aujla, Shantel, and Mandeep (collectively, the "Applicants") advanced a counterclaim for unpaid rent, plus accrued interest, from October 2009 to May 2019, when the plaintiffs occupied the Property before Surjit bought it under foreclosure.
- [5] The plaintiffs' claim was wholly unsuccessful at trial. The Applicants succeeded on their counterclaim and were awarded costs on Scale B, absent any consideration of pre-trial offers to settle. The parties were granted leave to apply to speak to costs, as necessary. The plaintiffs' claim against Harpreet, and Harpreet's counterclaim, were both abandoned on the first day of trial.
- [6] On June 2, 2020, the plaintiffs filed a notice of appeal. On December 4, 2020, they filed an application, returnable January 12, 2021, in the Court of Appeal seeking a stay of execution pending appeal.
- [7] The Applicants made three offers to settle this action before trial (collectively, the "Offers"). They argue that the plaintiffs ought reasonably to have accepted them given the relative weakness of their claim, the lack of corroborating documentation to support it, and the risks they faced at trial. Accordingly, the Applicants seek double costs, fixed in the amount of \$85,000 or, alternatively, as assessed. The Applicants submit that the Offers were clear, accompanied by a detailed explanation about how they had assessed the claims against them, and qualify as formal offers pursuant to Rule 9-1. They argue that the Offers conformed with the object of the Rules and ought to be recognised in deciding costs.
- [8] In response, the plaintiffs say that double costs are not warranted. They argue that the Offers failed to comply with the mandatory requirements of Rule 9-1 and cannot be relied upon to support a discretionary award of double costs. In addition, they submit that the Offers did not remain open for acceptance for a reasonable period of time, none ought reasonably to have been accepted, and there is no reason to deviate from the usual practice of having costs assessed by fixing them. The plaintiffs consent to the amounts sought by the Applicants for pre-judgment interest.
- [9] Harpreet seeks to recover costs on Scale B, fixed in the amount of \$4,000 or, alternatively, as assessed. The plaintiffs say that any such costs cancel out those they incurred to defend Harpreet's counterclaim. PRE-TRIAL SETTLEMENT OFFERS The First Offer
- [10] By email delivered at 11:01 AM on October 23, 2018, the Applicants delivered to the plaintiffs and Mr. Peter Leask QC, their legal advisor at the time, an offer to settle this action (the "First Offer"). The First Offer was expressly made before the completion of examinations for discoveries and "without prejudice except as to costs". It contemplated:
- a) Payment by the plaintiffs to the Applicants in the amount of \$375,000;
 - b) Execution by defendants, Mr. Robertson and Mr. Aujla, of a Form A freehold transfer to be delivered to Mr. Leask;

- c) Acknowledgement that the Applicants would have no responsibility for redemption of the Property in the separate foreclosure proceedings;
 - d) Discontinuance of all claims and the Applicants' counterclaims in this action; and
 - e) Execution by the parties of a mutual release.
- [11] The First Offer was open for acceptance until 5:00 PM on October 24, 2018. It concluded with the following sentence: "We do wish to emphasize that should the plaintiffs decline to accept this offer as set out, we reserve the right to put this letter before the Court for all purposes". The First Offer was not accepted. It triggered no counteroffer from the plaintiffs. The Second Offer
- [12] By email delivered at 7:25 PM on Friday, February 22, 2019, counsel for the Applicants sent the plaintiffs and Mr. Leask a second offer to settle this action (the "Second Offer"). It too was expressly made "without prejudice except as to costs". It was served after the close of business on the Friday immediately preceding the Monday then set for trial. It contemplated settlement of this action on the following terms:
- a) Payment by the plaintiffs to the Applicants in the amount of \$370,000;
 - b) Execution by Mr. Robertson and Mr. Aujla of a Form A freehold transfer to be delivered to Mr. Leask;
 - c) Acknowledgement that the Applicants would have no responsibility for redemption of the Property in the foreclosure proceedings;
 - d) Discontinuance of all claims and the Applicants' counterclaims in this action; and
 - e) Execution by the parties of a mutual release.
- [13] The Second Offer was open for acceptance until 9:00 AM on Monday, February 25, 2019. It concluded with the following sentence: "In accordance with Rule 9-1 of the Supreme Court Civil Rules, we reserve 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".
- [14] Counsel for the Applicants argues that the discount to \$370,000 is significant because it mirrors the plaintiffs' amended notice of civil claim seeking a return of the Property to Surjit on payment in that exact amount. In other words, he submits that the Second Offer proposed settlement on the precise terms sought by the plaintiffs in their amended pleading. The plaintiffs neither accepted the Second Offer nor served any counteroffer in response to it. The Third Offer

- [15] By email delivered at 11:39 AM on June 28, 2019, the Applicants sent the plaintiffs and Mr. Leask a third and final settlement offer (the "Third Offer"). It was expressly noted to be made "without prejudice except as to costs" and contemplated settlement of this action on the following terms:
- a) Payment to the Applicants of the surplus sale proceeds for the Property of \$270,148.98;
 - b) Discontinuance of the plaintiffs' claims and the Applicants' counterclaims; and
 - c) Execution by the parties of a mutual release.
- [16] By the time the Third Offer was made, the Property had been sold to Surjit for \$645,000 and the trial of this action had been re-set from February 2019 to July 2019. The Applicants say their assessment of the plaintiffs' claim, as summarised in the Third Offer, was largely supported by the reasons for judgment following trial and that the plaintiffs and their counsel ought to have seriously considered it.
- [17] The Third Offer was open for acceptance until 9:00 AM on July 3, 2020. It concluded with the following statement: "In accordance with Rule 9-1 of the Supreme Court Civil Rules, we reserve 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".
- [18] The plaintiffs neither accepted nor responded to the Third Offer with a counteroffer.
- [19] The Applicants seek double costs as follows:
- a) \$93,065.92 (calculated from October 23, 2018, the date of the First Offer, to May 4, 2020); or
 - b) \$88,507.52 (calculated from February 22, 2019, the date of the Second Offer, to May 4, 2020); or
 - c) \$86,413.12 (calculated from June 28, 2019, the date of the Third Offer, to May 4, 2020).
- [20] By letter dated May 12, 2020, they offered to settle costs on payment to them by the plaintiffs in the fixed all-inclusive amount of \$85,000. They note that costs in this amount does not include the costs of this application and therefore undervalues their claim for costs.

ISSUES

- [21] The following issues arise on this application:
- a) Are the Applicants entitled to double costs pursuant to Rule 9-1?
 - b) Is Harpreet entitled to costs?
 - c) Are the plaintiffs entitled to costs of defending Harpreet's counterclaim?
 - d) Is it appropriate to fix costs?

LEGAL FRAMEWORK

Rule 9-1

[22] Rule 9-1 provides, in part, as follows:

- (1) In this rule, "offer to settle" means
 - (a) an offer to settle made and delivered before July 2, 2008 under Rule 37 of the former Supreme Court Rules, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
 - (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A of the former Supreme Court Rules, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
 - (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, 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." Offer may be considered in relation to costs
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs. 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.

[23] The dominant purpose of Rule 9-1 is to promote the early resolution of litigation and to attach consequences to a party's failure to accept a reasonable settlement: *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16. Determination of whether or not an award of double costs is appropriate requires an exercise of judicial discretion that primarily turns on a principled application of the considerations in Rule 9-1(6): *Johal v. Radek*, 2016 BCSC 1170 at para. 37.

ANALYSIS

Were the Offers properly served?

- [24] Plaintiffs' counsel argues that "offer to settle" is a defined term in the context of Rule 9-1 and that strict compliance with the requirements set out in Rule 9-1(c) is necessary before a party can invoke the court's discretion to award double costs: *Singh v. Chand*, 2020 BCSC 1268 at para. 17, citing *Roach v. Dutra*, 2010 BCCA 264. While all of the Offers were made in writing, none was served on Harpreet, who remained both a defendant and plaintiff by counterclaim in this action until the first day of trial. Plaintiffs' counsel says that Rule 9-1(c) (ii) mandated service by the Applicants of the Offers on Harpreet.
- [25] The Applicants submit that Harpreet was a nominal party and, accordingly, they were not required to serve her with the Offers, citing *Morrison v. Van Den Tillaart*, 2013 BCSC 1647. They suggest that their failure to serve Harpreet is a mere irregularity which does not affect the validity of the Offers. They say this failure neither caused the plaintiffs any prejudice nor impaired their ability to consider the Offers.
- [26] In *Morrison*, at para. 12, Justice Dley held that "[o]rdinarily, the failure to serve all parties of record would be fatal to an offer". However, he went on to find that the party not served in that case was a "nominal defendant" who was "not a participant in the proceedings", and that it was "questionable" whether she ought to have been named as a defendant at all. Justice Dley concluded that the offer was appropriately directed to the defendants "who had liability or damages at stake" and that, since there "was no claim being advanced against Ms. Bruce and no cost consequences to her", failure to serve the offer on her did not invalidate the offer.
- [27] Harpreet was a defendant in this action until the first day of trial. In paragraph 40 of the plaintiffs' amended notice of civil claim, they pleaded that she was in breach of alleged agreements. It is unclear on the face of this pleading precisely what, if any, relief they sought against Harpreet or whether their claim against her gave rise to a valid cause of action. However, Harpreet was also then a plaintiff by counterclaim seeking both general and punitive damages against the plaintiffs related to the alleged loss of a real estate commission in connection with her unsuccessful efforts to sell the Property.
- [28] While the Applicants may have considered the claims involving Harpreet to lack merit (an assessment which is consistent with the decisions of both Harpreet and the plaintiffs to abandon them entirely on the first day of trial), Harpreet remained a party "who had liability or damages at stake" in this action until July 8, 2019. In the circumstances, I am unable to conclude that she was a nominal party whom the Applicants were not required to serve with the Offers if they wished to rely on them to engage the provisions of Rule 9-1 to seek double costs.

- [29] Rule 9-1 does not contemplate the Court embarking on a case-by-case investigation as to the impact of non-compliance: *Bronson v. Hewitt*, 2011 BCSC 482 at para. 18 [Bronson]. In that case, Justice Goepel, as he then was, found the failure to deliver offers to all parties of record was fatal and that the provisions of Rule 9-1 were therefore not engaged. In *Granja v. Jozsef*, 2017 BCSC 1087 at paras. 19-21, Justice Devlin found that Rule 9-1 clearly requires that settlement offers be served on all parties of record.
- [30] Harpreet was a party of record when the Applicants made the Offers. She was served with none. I am satisfied that the service requirements in Rule 9-1(c) are mandatory: *Bronson*, at para. 18. In my view, the Applicants' failure to serve Harpreet with the Offers is a fatal omission that precludes them from invoking the double costs provisions in Rule 9-1. The Offers did not qualify as "offers to settle", as defined in Rule 9-1.
- [31] The Applicant's failure to serve Harpreet is dispositive of their application for double costs. Accordingly, I conclude that I need not consider whether:
- a) The Applicants were required to serve the parties in the related foreclosure proceedings;
 - b) The wording in the Offers was sufficiently similar to that in Rule 9-1(c)(iii) to invoke the double costs provision;
 - c) Any of the Offers ought reasonably to have been accepted; or
 - d) The Offers remained open for a reasonable period. Is Harpreet entitled to costs?
- [32] Rule 9-8(2) provides that, after a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties or by leave of the court. Rule 9-8(4) provides that, subject to subrule (2), a person wholly discontinuing an action against a party must pay the costs of that party to the date of service of the notice of discontinuance.
- [33] The plaintiffs' claims against Harpreet, and Harpreet's counterclaim against them, were abandoned on the first day of trial. Thereafter, while Satinder conceded that he was no longer advancing any claim on his own behalf, and while Harpreet was then neither advancing nor responding to any claim, it was agreed that the names of both Satinder and Harpreet would remain in the style of cause pending submissions on costs at the end of trial.
- [34] Harpreet now seeks to recover costs. Based on the draft bill of costs she appended to her filed affidavit on this application, she seeks both the costs of defending the plaintiffs' claims against her and of advancing her abandoned counterclaim.
- [35] Harpreet's counterclaim was not tried and did not therefore succeed. Accordingly, I conclude that she is entitled to no costs of her counterclaim.

- [36] The plaintiffs abandoned their claim against Harpreet without obtaining a formal waiver of costs. Harpreet now seeks costs against them, fixed in the amount of \$4,000. She retained counsel to speak to costs on this application, but was otherwise self-represented during these proceedings. The plaintiffs suggest that Harpreet's costs of defending the claim against her are cancelled by any costs they incurred to defend her counterclaim.
- [37] Harpreet seeks costs related to her attendance at an examination for discovery by Satinder on October 25, 2018; in her affidavit, she deposes that while she was present for the whole day, Satinder did not proceed with his examination of her until the afternoon. Harpreet also attended trial management conferences on January 9, 2019 and June 7, 2019. She filed a trial brief dated January 19, 2019. She was present as an observer during the trial and was called to testify as a witness for the Applicants. She seeks to recover tariff, mileage, and parking costs for her ten days of attendance at trial, including the one day she testified as a witness.
- [38] There is no evidence that Harpreet prepared a list of documents, conducted any examinations for discovery, or engaged in any significant preparation for trial. She is entitled to conduct money as a witness, but no costs for her voluntary attendance at trial as an observer. At the opening of trial, Harpreet ceased to be exposed to any liability as a defendant.
- [39] Excluding costs and disbursements associated with her abandoned counterclaim and mileage, parking and tariff units for her attendance at trial (apart from one-half day on the first day of trial), substantially reduces Harpreet's claim for costs. While I agree that it is unlikely to be cost effective for Harpreet to assess those costs, particularly given the highly litigious nature of these proceedings, I am not prepared to fix them in the amount of \$4,000. Those costs can be assessed by the Registrar, if Harpreet elects to pursue them.
- [40] I am not in a position to fix or assess any costs the plaintiffs might have incurred in defending Harpreet's counterclaim. The plaintiffs neither sought to recover any such costs nor provided any evidence that permits me to assess or fix them. I conclude that any costs they incurred to defend Harpreet's counterclaim (apart from the cost associated with filing a response to counterclaim) would have been incurred by them in any event to advance their claim. For those reasons, I award the plaintiffs no costs, apart from the cost of filing a response to Harpreet's counterclaim, which can be deducted from Harpreet's costs of defending the plaintiffs' claims. What pre-Judgment Interest is payable?
- [41] The parties agree to pre-judgment interest on the judgment as follows:
- a) \$2,709.55 payable to Ms. Lamons; and
 - b) \$1,324.05 payable to Mr. Robertson and Mr. Aujla collectively.
- [42] I order pre-judgment interest in the agreed amounts. SUMMARY
- [43] I make the following orders:

- a) The plaintiffs shall pay pre-judgment interest in the amount of \$2,709.55 to Shantel Lamons;
- b) The plaintiffs shall pay pre-judgement interest to Michael Robertson and Parmjeet Aujla collectively in the amount of \$1,324.05;
- c) The Applicants are entitled to their costs of this action on Scale B, payable by the plaintiffs, as agreed by the parties or assessed by the Registrar;
- d) Harpreet is entitled to her costs of defending the plaintiffs' claims against her, payable by the plaintiffs, as agreed or assessed by the Registrar;
- e) The plaintiffs' cost of filing a response to Harpreet's counterclaim is deductible from Harpreet's costs of defending the plaintiffs' claims; and
- f) The plaintiffs are entitled to no other costs. "Douglas J."

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Prepared on 29 October 2026 · Esheria