

CANADA / JUDGMENT

Diaz v. Nowack

2020 BCSC 112

COURT

Supreme Court of British Columbia

DECIDED

7 January 2020

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2020 BCSC 112 Diaz v. Nowack IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Diaz v. Nowack, 2020 BCSC 112 Date: 20200107 Docket: M174884 Registry: Vancouver Between: Karen Pamela Diaz Plaintiff And Eilza Nowack and Conor Pacific Canada Inc. Defendants Before: The Honourable Madam Justice Choi Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: P. Venegas G. Canniff Counsel for the Defendants: R. Raymond R. Mohan Place and Date of Hearing: Vancouver, B.C. January 6-7, 2020 Place and Date of Judgment: Vancouver, B.C. January 7, 2020

- [1] THE COURT: This is a damages-only personal injury action arising from a motor vehicle accident. Liability has been admitted by the defendants. The trial was set for 10 days to commence on January 6, 2020. The plaintiff applies for an order prohibiting the defendants from calling five witnesses, and to exclude any new witnesses except by court order. The plaintiff argues that the proposed witnesses were either not on a witness list by the ordered deadline, or their "will say" statements were not provided by the order deadline. Counsel attended a trial management conference (TMC) on November 29, 2019, at which Justice Masuhara set a defence deadline for "will say" statements and contact information for the witnesses of three weeks prior to the trial, being December 16, 2019, and for an exchange of trial schedules of two weeks before the trial, being December 23, 2019.
- [2] The plaintiff also applies to prohibit the defendants from tendering two documents into evidence because they were not produced on any lists of documents until the day before trial. There were no TMC orders respecting the deadline for production of documents from the defendants. An order was made at the TMC that the plaintiff's updated list of documents must be provided two weeks before the trial; there was no similar order made pertaining to the defendants.
- [3] The defendants ultimately provided a witness list on December 16, followed by updates to the list and evolving "will say" statements. The proposed defence witnesses at issue are as follows:

- 1) Derek Gulkison, the former spouse of the plaintiff and father to their child. He was on a witness list provided on December 16, 2019, but his "will say" statement was provided on December 30, 2019, and then expanded on January 2, 2020.
 - 2) Judith Pinto, a director of human resources at a former employer for the plaintiff. She was on a witness list of December 23, 2019, with a "will say" statement provided on December 30, 2019.
 - 3) Allison Spicer, the head of human resources of an employer where the plaintiff worked after the accident. She was on a witness list of December 23, 2019, but no "will say" statement has been provided.
 - 4) Verna Ursula was on a witness list of December 16, 2019, but no "will say" statement has been provided. The defendants no longer intend to call Ms. Ursula as a witness.
 - 5) Barry Wells, the CEO of an employer. He was on the defendants' December 16, 2019 witness list, and his "will say" statement was provided on January 2, 2020.
- [4] The defendants plan to call these witnesses mainly as rebuttal witnesses depending on the plaintiff's direct testimony. The two documents in question consist of a Provincial Court order dated December 14, 2017, respecting parenting arrangements in the plaintiff's family law case and a document titled "places mom and Parker have slept and/or lived." Both were produced on the day before trial, i.e., on Sunday, January 5, 2020, at 2:40 p.m. The defence counsel's communications noted that she only received the new documents the day prior, that being Saturday, January 4, 2020.
- [5] The plaintiff has provided three cases in support of her argument that I should not exercise my discretion to belatedly admit the evidence: *Owens v. Steveston Waterfront Properties Inc.*, 2019 BCSC 747; *Tompkins v. Bruce* (14 December 2011), Vancouver M070137 (B.C.S.C.); and *Stone v. Ellerman*, 2009 BCCA 294 at paras. 30-31. The defendants rely on *Devathasan v. Devathasan*, 2019 BCSC 1559; *Davies v. Canada Shineray Suppliers Group Inc.*, 2017 BCSC 304; *Fu v. Zhu*, 2017 BCSC 749; and *Houston v. Kine*, 2011 BCCA 358. Each of these cases sets out some basic factors the court might consider in exercising this discretionary power. These factors include whether:
- 1) there is prejudice to the other party;
 - 2) there is a reasonable explanation for the delay;
 - 3) the evidence is needed for a determination on the merits; and
 - 4) the ends of justice require the evidence.
- [6] The defendants oppose the exclusion of the witnesses and documents on the basis that:
- 1) there will be serious prejudice since the plaintiff's evidence will be largely unchallenged because these are all the defendants' lay witnesses;

- 2) the delay was caused because the instructing client did not authorize work to mobilize witnesses until close to the commencement of the trial and only after mediation was unsuccessful;
 - 3) the defence evidence is required for a determination on the merits, if the plaintiff's testimony is contrary to the information gathered; and
 - 4) the ends of justice require a determination on the merits with all available evidence.
- [7] The plaintiff argues that the instructing defence policy should not be at her expense. The plaintiff is prejudiced if the trial proceeds with the last-minute inclusion of these witnesses because counsel will not have the chance to prepare, including searching for other witnesses that may contradict the defence witnesses. The plaintiff seeks an adjournment of the trial if the court will not grant the order to exclude the witnesses and documents.
- [8] For the reasons that follow, I adjourn the trial with costs thrown away payable forthwith to the plaintiff:
- 1) I am concerned that excluding the evidence might prevent the determination of the issues on the merits. Given the submissions, I anticipate the potential for serious conflicts in the evidence and for challenges to the plaintiff's credibility. Without the ability to rely on evidence from other witnesses and to use the said documents, there is a real risk the court will be hampered in its ability to determine the issues.
 - 2) The proposed evidence may be important to the fact-finding process.
 - 3) I accept the plaintiff's argument that she will be prejudiced if the witnesses are allowed to testify at this time because she will not have time to adequately prepare.
 - 4) The plaintiff is prejudiced by an adjournment as well, however, due to the time wasted in preparing for a second trial and by being delayed in an adjudication of her case. For this reason, I am awarding her costs thrown away, payable forthwith.
 - 5) The defendants chose only to commence witness preparation at the last minute, only days before the TMC order deadline. This is a practice that deserves sanction and rebuke. Trial management conferences, the orders made there, and the deadlines set out in the Supreme Court Civil Rules are all designed to provide parties with time to prepare and to consider the strengths and weaknesses of their case, so a trial can proceed in an efficient manner. "Choi J."

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