

CANADA / JUDGMENT

Elsen v. Elsen

2009 BCSC 1282

COURT

Supreme Court of British Columbia

DECIDED

18 September 2009

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2009 BCSC 1282 Elsen v. Elsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Elsen v. Elsen,

2009 BCSC 1282

Date: 20090918

Docket: S045170

Registry: Vancouver

Between:

Thomas Christian Elsen, a.k.a. Thomas Elsen and Boris Nikolaus Maurice Elsen, a.k.a. Boris Elsen, Personal Representatives of the Estate of Guido Antonius Josef Elsen, otherwise known as Guido Elsen, Deceased

Plaintiffs

And

Edgar Elsen, Touran Salimifard a.k.a. Touran Elsen and Jafar Ehsan

Defendants

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:

Carey D. Veinotte

Counsel for the Defendants on May 26 and 27, 2009:

Rupert M. Shore

Counsel for the Defendants Edgar Elsen and Touran Salimifard a.k.a. Touran Elsen on June 9, 2009:

Morris C. Soronow

Counsel for the Defendant Jafar Ehsan on June 9, 2009:

Rupert M. Shore

Place and Date of Trial:

Vancouver, B.C.

May 26, 27 and June 9, 2009

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2009

- [1] On May 27, 2009, given a judicial admission in the statement of defence filed in these proceedings by Jafar Ehsan, I granted the application of all of the defendants to withdraw their application pursuant to Rule 18A of the Rules of Court, B.C. Reg. 221/90, for summary judgment in these proceedings, and invited the parties to make written submissions as to costs.
- [2] Thereafter, on June 9, 2009, the defendants Edgar Elsen and Touran Salimifard a.k.a. Touran Elsen, brought on a new application for summary judgment represented by different counsel, but relying on the material filed and submissions made in support of the initial application that was withdrawn on May 27, 2009.
- [3] On August 6, 2009, I dismissed the application for summary judgment of Edgar Elsen and Touran Salimifard a.k.a. Touran Elsen and again invited written submissions from counsel with respect to the costs of that application.
- [4] I have now had the benefit of the written submissions of counsel.

Background

- [5] The plaintiffs were two of the sons of the late Guido Elsen and the representatives of his estate.
- [6] The defendant Edgar Elsen is the brother of the late Guido Elsen and the defendant Touran Salimifard is his wife. The defendant Jafar Ehsan is the nephew of Touran Salimifard.
- [7] These proceedings concern four single family detached homes located in North Vancouver, British Columbia (the "North Vancouver properties") at:

- a) 194 West Windsor Road, purchased in November, 1982;
 - b) 274 West Kings Road, purchased in September 1983;
 - c) 1485 Ross Road, purchased in September 1983; and
 - d) 1436 Williams Avenue, purchased in September, 1989.
- [8] All four properties are registered in Touran Salimifard's name. The plaintiffs maintain that they are entitled to a one-half interest in each of the properties. They seek various remedies with respect to rents collected from the properties and the properties themselves.
- [9] The defendants, other than Jafar Ehsen, deny that the plaintiffs are entitled to any interest in any of the properties, whereas Jafar Ehsen admitted that he was aware that Guido Elsen (the "Testator") had some sort of interest in the North Vancouver properties.

The Position of the Parties

- [10] The plaintiffs' position is that they are entitled to the Tariff Scale B costs of \$4,911.63 against Jafar Ehsen for the application that was withdrawn on May 27, 2009, and Tariff Scale B costs of \$9,100.44 against the other defendants for their application of June 9, 2009.
- [11] All of the defendants argued that the general, although not invariable, rule relating to costs pertaining to Rule 18A applications is that costs are not awarded against a party who makes an unsuccessful application under the rule, as that party may be successful at trial. Indeed that is what was determined in *Falkoski v. Osoyoos (Town)*, [1995] B.C.J. No. 1346 [Falkoski]. *Falkoski* has recently been followed in *Antrobus v. Antrobus re costs*, 2008 BCSC 1789 [Antrobus] and in *656925 British Columbia Ltd. v. Cullen Diesel Power Ltd.*, 2009 BCSC 1088 [Cullen Diesel].

Discussion

- [12] In *Falkoski*, the unsuccessful party on a summary judgment application was ordered to pay costs, despite the recognition that an applicant for such relief bears a "burden generally more onerous than that which his opponent is required to carry" and that generally his task should not be made more difficult by the fear of being mulcted in costs if unsuccessful.
- [13] This was due to the fact that counsel for the successful party had long taken the position in discussions with the applicant's counsel that the case was unsuited for disposition under Rule 18A, and that the means of the opposing parties were described as having something of a "David and Goliath" aspect. Newbury J., as she then was, concluded in those circumstances that even if the applicant ultimately succeeded at trial it would have no cause for complaint if it were obliged to pay Mr. Falkoski's costs of this application, but that Mr. Falkoski would have cause for complaint were costs not awarded to him given the circumstances of this case.

[14] In *Antrobus*, Smith J. recognized that the general rule stated in *Falkoski* is not invariably applied, and will not be applied where exceptional circumstances such as those in *Antrobus* exist. At paragraph 9, Smith J. said:

I agree that the conflicts in the evidence and a careful reading of the law of constructive trust should have made it apparent to the defendants that the Rule 18A application had little chance of success. But similar statements can be made, with the wisdom of hindsight, in almost any case where the Court finds a matter to be unsuitable for determination under Rule 18A. Those circumstances alone cannot be considered extraordinary and cannot justify departure from the general rule set out in the authorities.

In *Cullen Diesel*, Dardi J. refused to award the successful party to an application for judgment under Rule 18A, finding no exceptional circumstances, but referred to *Jost v. Western Railco Products Ltd.*, 2000 BCSC 255, where costs were awarded on an application under Rule 18A because the Court there concluded that there was "no prospect of success" and the 18A application "was destined to fail".

- [15] The plaintiffs in this action, as counsel for the successful party in *Falkoski* did, took the position that the case was unsuitable for disposition under Rule 18A in correspondence with counsel for the defendants. The plaintiffs have also been put to the costs of two Rule 18A applications because the first application was withdrawn given the judicial admission by Jafar Ehsen.
- [16] In my view, the circumstances of the withdrawal of the first application and the need to bring a second application are sufficient to amount to exceptional circumstances warranting an award of costs for that application in any event of the cause.
- [17] As the defendants were jointly represented on the first application, I see no basis for an award of the costs relative to that application against Jafar Ehsen alone and award those costs to be paid forthwith to the plaintiffs, jointly and severally by all the defendants.
- [18] The defendants complain that if costs are awarded against them, payable forthwith, and they succeed at trial, they will be unable to recover the sum paid. As I have indicated, I do not intend that the costs awarded to the plaintiffs will be repaid even if the defendants succeed at trial. I am awarding the plaintiffs their costs as they should not, in my view, have been forced to incur them and were only forced to incur them due to the defendants' error in proceeding with their first application in the face of the judicial admission made by Jafar Ehsen.
- [19] Insofar as the amount of costs is concerned, the plaintiffs seek the lump sum of \$4,911.64 which they contend to be the costs to which they are entitled on a taxation under Tariff Schedule B.

- [20] The defendants argued that if lump sum costs are to be awarded they should be nominal only. I do not agree. I have already concluded that the costs of the first application were unnecessary and ought to have been avoided. The plaintiffs are not seeking special or increased costs, only Tariff costs, which by design are not intended to place them in the position that they would have been had the first application not been made. I consider that to be a reasonable position.
- [21] I see nothing to be gained by requiring a taxation of the plaintiffs' Tariff Schedule B costs relating to the first application. I have reviewed the plaintiffs' draft bill of costs pertaining to the first application. It claims the maximum number of units for each Tariff item claimed and one half of the disbursements the plaintiffs claim to have incurred for both applications. I have concluded that the claim for the maximum units is reasonable, but the claim under item Rule 13A is unwarranted. I have also concluded that many of the disbursements claimed would have been necessary for the second application.
- [22] In the result, I will reduce the lump sum claimed for costs to 34 units and allow costs of \$4,220.90, inclusive of applicable taxes, together with disbursements of only \$150.00, inclusive of applicable taxes, for a total lump sum award of costs of \$4,370.90. The remainder of the plaintiffs' disbursements can be dealt with in the event they are successful at trial.
- [23] I am unable to conclude that there is anything "exceptional" in the second application, as that term has been applied in the authorities, and thus consider that the general rule that costs are not awarded against a party who makes an unsuccessful application under the rule must be applied to the second application. Thus, I will make no order with respect to the costs of the second application.

"Hinkson J."

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