

CANADA / JUDGMENT

Fines v. Johnson

2020 BCSC 1045

COURT

Supreme Court of British Columbia

DECIDED

20 May 2020

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2020 BCSC 1045 Fines v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fines v. Johnson,

2020 BCSC 1045

Date: 20200520

Docket: M-51154

Registry: Kamloops

Between:

Colleen Mae Fines

Plaintiff

And

Patrick Joseph Johnson

Defendant

Before: The Honourable Mr. Justice A. Mayer

(Appearing via teleconference)

Oral Reasons for Judgment

Re: Costs

Counsel for the Plaintiff

appearing by teleconference:

E.C. Hughes

Counsel for the Defendant

appearing by teleconference:

E.A. Harris

Place and Date of Trial/Hearing:

Kamloops, B.C.

May 20, 2020

Place and Date of Judgment:

Kamloops, B.C.

May 20, 2020

- [1] THE COURT: On March 16, 2020, following a trial commencing on February 3, 2020, I issued reasons for judgment in this motor vehicle accident awarding Ms. Fines damages in the amount of \$348,293.33.
- [2] At a hearing earlier this morning after being advised by counsel for both parties that the defendant consents to an order to pay damages for a larger amount, the amount of \$411,367.87 inclusive of pre-judgment interest, and hearing submissions in this respect, I varied the amount of my award to reflect the amount agreed upon by the parties. In that respect, the parties can forward an order through Court Services for my signature.
- [3] The parties also appeared before me today to speak to the issue of costs.
- [4] The first formal offer to settle was made by the defendant, Mr. Johnson, on November 8, 2017, for \$208,500.
- [5] Ms. Fines seeks double costs from the date of her first formal offer to settle her claim to the date of trial. Ms. Fines' first formal offer to settle for \$350,000 was made November 10, 2017.
- [6] The trial which was originally scheduled to commence in late November 2017 did not proceed due to a lack of an available judge.
- [7] On December 18, 2017, Ms. Fines made another formal offer to settle for a lower amount, being \$300,000.
- [8] Just under five months later, on May 7, 2018, Ms. Fines revoked all of her previous offers.
- [9] Approximately one year later, on April 30, 2019, Ms. Fines made a without prejudice offer to settle.
- [10] No further formal offers were made until April 30 2019 when Mr. Johnson offered to settle for \$298,127.95.

Law and Argument

- [11] Rule 9-1(5)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, permits the court to award double costs of all or some of the steps taken in a proceeding after the date of delivery of service of an offer to settle.
- [12] Pursuant to Rule 9-1(6) when making an order under Rule 9-1(5), the court may consider the following factors:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either when it was made 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.
- [13] The dominant and overarching objective of Rule 9-1 is to promote reasonable settlements, to attach some consequence or penalty for the failure of a party to accept a reasonable settlement, and to reward a party who makes a reasonable settlement offer: *Gonzales v. Voskakis*, 2013 BCSC 675 at para. 13; and *Warren v. Morgan*, 2015 BCSC 1168 at para. 24.
- [14] A party who rejects a reasonable offer to settle should usually face some sanction in costs. To do otherwise would undermine the importance of certainty and consequences in the application of Rule 9-1: *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at para. 95.
- [15] The reasonableness of a party's decision not to accept an offer must be assessed without reference to the award which was made at trial, but rather under the circumstances which existed when an offer was open for acceptance: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27 [*Hartshorne*].
- [16] The issue is not whether an offer is reasonable, but whether it was unreasonable to refuse it. Even where it was not unreasonable to refuse an offer, this does not necessarily immunize a party from the consequences of a reasonable offer to settle: *Cottrill v. Utopia Day Spas and Salons*, 2019 BCCA 26 [*Utopia Spas*].
- [17] Factors going to reasonableness of a decision not to accept a settlement offer include whether the offer had some relationship to the claim as opposed to simply being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided. In that respect: see *Hartshorne* at para. 27.

Position of the Defendant

- [18] Mr. Johnson takes the position that both Ms. Fines' formal offers, those made in November and December of 2017, should not be considered in determining whether Ms. Fines is entitled to double costs. He says that the November 2017 formal offer was revoked when the

second offer made in December 2017 was made, and that both offers were formally withdrawn in May 2018. He submits relying on the decisions of *Bains v. Indo-Canadian Times Inc.*, [1995] B.C.J. No. 541 [Bains] and *Bystedt v. Hay*, 2007 BCCA 84 [Bystedt], that ineffective or revoked offers are not to be considered in making an award of costs.

- [19] In the alternative, Mr. Johnson submits that if this Court decides to consider the revoked offers, that it was "not reasonable to accept the Withdrawn Offers" given the changing evidentiary foundation of Ms. Fines' case during the relevant period and therefore that double costs are not appropriate.

Can Withdrawn Offers be Taken into Consideration in Determining whether an Award of double Costs is Appropriate?

- [20] Ms. Fines refers to and relies upon the decision of *ICBC v. Patko*, 2009 BCSC 578 [Patko] and decisions which followed including *Miller v. Boughton*, 2011 BCSC 632. Mr. Johnson concedes that these decisions stand for the proposition that the court may consider revoked offers.
- [21] Mr. Johnson contends that the decision in *Patko* and the line of authority following that decision are inconsistent with the reasoning of the Court of Appeal in *Bains* and *Bystedt*. I disagree.
- [22] The decision of the Court of Appeal in *Bains* was issued at a time when Rule 37 was in place. At para. 39 of its decision, the Court of Appeal confirmed that in a situation where a plaintiff receives a judgment for an amount equal to or greater than the amount for which they offered to settle, Rule 37(23) requires that only an offer that had not expired, been withdrawn, or been accepted draws double costs.
- [23] In my view, *Bains* simply stands for the proposition that, on contract principles, the issuance of a second offer revokes a previous offer. The decision in *Bystedt* simply affirms this reasoning.
- [24] Rule 37 was replaced first by Rule 37B and now Rule 9-1 which is the applicable rule in this case. Rule 9-1(1) of the Rules provides that an offer to settle made and delivered after July 2, 2008, is one which is made in writing and has been served, and includes a notification that the party making the offer reserves the right to bring the offer to the attention of the court in relation to costs after judgment has been pronounced. There is no dispute that the relevant offers, being the formal offers made by Ms. Fines in November and December, fall within this definition.
- [25] Unlike Rule 37, there is no limitation in Rule 9-1 or Rule 9-1(5) that an offer can only be considered in determining the appropriateness of double costs if it has not expired or been revoked or accepted prior to the start of trial. I just note that this is different than the rules regime in place in other Canadian jurisdictions including, for example, Ontario where the relevant rule of court requires that an offer remain open to attract additional costs.

[26] In my view, the reasoning in Patko is valid and has not been overturned. I follow Patko and will consider the revoked offers.

Was it Unreasonable for Mr. Johnson not to Accept Either the Formal Offers made in November or December 2017?

[27] As recently confirmed by the Court of Appeal in Utopia Spas, the issue is not whether an offer is reasonable, but whether it was unreasonable to refuse it.

[28] Mr. Johnson submits that at the time Ms. Fines' formal offers were still effective (through until May 2018):

- a) Ms. Fines had undergone one shoulder surgery to repair her right shoulder tendon which was injured in the accident. I note parenthetically that a second shoulder surgery was required to complete the repairs to this tendon and that this surgery did not occur until well after the formal offers were made;
- b) Ms. Fines had not embarked on any course of study towards completing her Master's in Social Work. I note parenthetically again, that Ms. Fines did eventually start work on her Master's degree on a part-time basis after the formal offers had been revoked;
- c) Ms. Fines had not received any interventional treatment for her neck discomfort; and
- d) Mr. Johnson's current counsel had not completed what I would describe as an updated examination for discovery of Ms. Fines. An examination for discovery had been completed sometime earlier in 2015.

[29] Mr. Johnson's point in part is that the extent of Ms. Fines' injuries and the extent of her damages were not entirely known prior to the revocation of the formal offers. Further, given that after these offers were made Ms. Fines underwent a second shoulder surgery, had started work on her Master's degree, and had received rhizotomy treatments to her neck, an assessment of the impact of the accident-related injuries was in some respects a moving target. On this basis, it is my understanding that Mr. Johnson submits that it was not unreasonable for him to refuse to accept the formal offers when they were made.

[30] As set out in Hartshorne, one of the factors to be considered when evaluating reasonableness of an offer include whether they can be easily evaluated.

[31] In this case, I agree with Mr. Johnson that there was some uncertainty with respect to Ms. Fines' prognosis and therefore the extent of her non-pecuniary and pecuniary losses after the formal offers were made. In my view, this created some difficulty for him in evaluating the reasonableness of both the November and December 2017 offers, notwithstanding his willingness to proceed to trial and take his chances. Accordingly, I do not find that it was unreasonable for Mr. Johnson to have declined to accept either of them.

Other Rule 9-1(6) Factors

- [32] As set out in *Utopia Spas*, despite my finding with respect to reasonableness, this does not end the analysis. The additional factors set out in Rule 9-1(6) may also be considered.
- [33] In this case, Ms. Fines obtained a higher award at trial than the amount she offered to settle for in 2017 and this factor therefore favours her application for double costs.
- [34] I do not consider the relative financial circumstances of the parties to be a relevant factor in this case. There is no evidence that Mr. Johnson's insurer, ICBC, used its financial advantage in the litigation.
- [35] In my view, under the category of other factors, the timing of the revocation of Ms. Fines' formal offers and subsequent offers is a relevant consideration. Ms. Fines made an offer on a without prejudice basis approximately one year after she revoked her previous offer. This offer was for more than two times the December 2017 offer and I expect placed a chill on settlement discussions at that time. Ms. Fines did not make a further formal offer to settle.
- [36] Mr. Johnson made a final offer to settle a few weeks before trial and his offer was for an amount reasonably close to the amount I awarded at trial. I agree with the submissions of Mr. Johnson's counsel that this and the earlier offer made prior to the first trial date suggests a willingness to negotiate which does not demonstrate conduct worthy of punishment.

Conclusion

- [37] In consideration of all the factors set out in Rule 9-1(6), I find that it would not be appropriate to award Ms. Fines double costs for any portion of the proceedings. She is, of course, entitled to her usual costs at Scale B.
- [38] So that is my judgment with respect to costs. Any questions, Ms. Hughes?
- [39] Ms. HUGHES: No. No, My Lord, sorry.
- [40] THE COURT: All right, thank you. Ms. Harris?
- [41] Mr. HARRIS: No, thank you, My Lord.
- [42] THE COURT: All right. So, obviously, the order needs to be entered so I would just ask that that be resubmitted through Court Services, please, and I will attend to that. Thank you very much for your submissions.

"Mayer J."

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