

CANADA / JUDGMENT

Forster v. Sage

2025 BCSC 1783

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1783 Forster v. Sage

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Forster v. Sage,

2025 BCSC 1783

Date: 20250915

Docket: S2846

Registry: Powell River

Between:

Joshua Ormond Forster

Plaintiff

And

Gregory David Sage

Defendant

And

Joshua Ormond Forster and John Doe

Defendants by Counterclaim

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

B. Henderson

Counsel for the Defendant:

M. Ostensen

Place and Date of Hearing:

Powell River, B.C.

June 5, 2025

Place and Date of Judgment:

Powell River, B.C.

September 15, 2025

Introduction

- [1] The plaintiff has commenced this proceeding against the defendant for damages for an alleged assault that occurred November 7, 2022 (the "incident"). The parties were involved in the incident at the defendant's property, which was rented to the plaintiff at the time.
- [2] After being served with the notice of civil claim, the defendant took no steps in this proceeding until December 20, 2024, when a response to civil claim was filed on his behalf by his counsel, Brian L. Hoffman. On the same day, a counterclaim was filed on his behalf by a separate lawyer, Martin Ostensen. The response to civil claim and counterclaim were filed in breach of in Rule 3-4(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 and nearly one month after the expiry of the basic limitation period in s. 6 of the Limitation Act, S.B.C. 2012, c. 13.
- [3] On this application, the defendant seeks an order extending the time to file his counterclaim notwithstanding his failure to file it within the time prescribed in Rule 3-4(1) and s. 6 of the Limitation Act. The plaintiff seeks orders that the defendant's counterclaim be struck and dismissed.

Background

- [4] The plaintiff alleges he was assaulted by the defendant on November 7, 2022 and suffered damages stemming from the incident. He commenced this action on January 11, 2023 and the notice of civil claim was served January 27, 2023.
- [5] On May 17, 2024, a consent order was made requiring the RCMP detachment in Powell River to provide information concerning the incident. That consent order was approved and consented to by Mr. Hoffman, lawyer for the defendant, notwithstanding the defendant had not filed a response to civil claim.

- [6] As noted above, no response to civil claim was filed until December 20, 2024, at which time a response was filed on behalf of the defendant by Mr. Hoffman. On the same day, a counterclaim was also filed on the defendant's behalf which indicated that the lawyer for the defendant was Mr. Ostensen. The defendant's counterclaim was served on the plaintiff's solicitor on January 27, 2025. In his counterclaim, the defendant alleges that the plaintiff physically attacked him at the time of the incident and caused significant injuries which he photographed and included in his affidavit on this application.
- [7] It is clear that plaintiff's counsel had an agreement or understanding with Mr. Hoffman to allow time for filing of the response to civil claim which did not specify the date by which that step was to be taken. However, on December 2, 2024, plaintiff's counsel wrote to Mr. Hoffman seeking to arrange dates for examinations for discovery into 2025. At that time, plaintiff's counsel also advised defence counsel that the "limitation period" for commencing the defendant's counterclaim had expired, and demanded that the defendant file a response to civil claim within 14 days. It appears that plaintiff's counsel then agreed to additional time for filing the response until mid-December 2024.
- [8] It is clear that Mr. Hoffman was the only lawyer of record for the defendant in this proceeding although there was some consideration about Mr. Ostensen appearing at an examination for discovery in the action.
- [9] Regrettably, there was no affidavit evidence from Mr. Hoffman explaining the delay in filing the response to civil claim and counterclaim on behalf of his client or his reasons for not filing a counterclaim for the defendant. It may be that Mr. Hoffman was appointed by the defendant's home insurer but he did not say what had transpired between himself and the defendant. This gap in the evidence is problematic because the only reasons for why neither pleading was filed sooner are the defendant's assertions. I would have expected more complete information and affidavit evidence on the defendant's part, particularly from Mr. Hoffman.
- [10] In his affidavit, the defendant tried to explain the gap in time between the service of the notice of civil claim and the filing of his counterclaim. In his first attempt to explain why no counterclaim had been filed he said:

I did not retain counsel in relation to Forster's assault of me, for three reasons: I did not have the financial resources to pursue a claim, I was completely burnt out from the residential tenancy arbitration with Forster, and sic I was severely depressed from my injuries, my inability to work and from difficulties in my relationship with my partner, Faon Steele.

- [11] This assertion was followed by the following:

I was not aware of the correspondence between Mr. Henderson and Mr. Hoffman in the fall of 2024. I had not heard anything in relation to the claim, and I thought that Forster had abandoned his claim; that was why I took no steps to initiate the counterclaim.

Discussion

The Parties' Positions

The Defendant

- [12] The defendant argues that at the time of the incident, he was in a personal financial relationship of dependency with the plaintiff and his claim was not statute barred because it is exempted from the limitation period because of s. 3(1)(k)(ii) of the Limitation Act.
- [13] He also argued that he met the test for granting leave to file a counterclaim as set out in court's decision in *Evans v. Dumitrean*, 2019 BCSC 203 at paras. 47-50.

The Plaintiff

- [14] The plaintiff argued that the defendant's counterclaim was not viable and had been canvassed earlier in this proceeding and reasons issued by Justice Baird on March 31, 2025.
- [15] The plaintiff contends that the defendant is responsible for two errors, failing to file the counterclaim within the time required by the Rules and filing the claim after expiry of the limitation period.
- [16] The plaintiff contends he will suffer prejudice if the counterclaim is permitted to be filed. He contends that memories can be expected to deteriorate over time and simple delay can impair one parties ability to prosecute its claim. Additionally, he contends that examinations for discovery have been delayed for more than two years pending the defendant's decision to make his counterclaim or not.
- [17] There will be additional expense to the plaintiff in defending the counterclaim and, when balanced against the criteria, the court should exercise its discretion to refuse the application. If the application is refused, the plaintiff seeks special costs.

The Limitation Act

- [18] I will first address the defendant's argument that his counterclaim is not barred by s. 6 of the Limitation Act because of his relationship with the plaintiff.
- [19] Section 3 of the Limitation Act provides that certain claims are exempt from the limitation periods set out in the Act, including:

Exempted claims

3(1) This Act does not apply to the following:

- (k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant

- (i) was a minor, or
- (ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery;

[Emphasis added.]

- [20] I do not accept the defendant's contention that the Limitation Act does not apply to the claim he proposes in his counterclaim because, at the time of the alleged assault by the plaintiff he was in a relationship of financial dependency with the plaintiff. More specifically, the defendant contends that he, as landlord, was reliant on the plaintiff, as tenant, for income to a sufficient degree that their relationship was one of financial dependency. The defendant says that, at the time of the incident, the plaintiff was in arrears of rent and indebted to him in the amount of \$5800, with the result that the defendant forced his eviction.
- [21] I am satisfied that the Limitation Act applies to the defendant's counterclaim, and that the s. 6 limitation period for his counterclaim expired on November 7, 2024.
- [22] Although the defendant argued he was financially dependent on the rents paid by the plaintiff, there was no evidence concerning this relationship or any details of his dependence on the plaintiff other than an assertion that the plaintiff was obligated, as a tenant, to pay rent.
- [23] Absent evidence of this relationship of dependency on the plaintiff, I cannot find that he is entitled to rely on the provisions of s. 6 to avoid the limitation. He said he had terminated the plaintiff's lease for non payment of rent and had pursued the plaintiff's eviction from the property. He said the plaintiff had threatened to beat him up. Although he had approached the plaintiff for payment of some rent arrears, he did not suggest that he was financially dependent on those rents nor did he explain how this alleged dependency arose. Put simply, his evidence did not support the assertion that he was in a financially dependent relationship with the plaintiff nor provide any basis for exempting him from the Limitation Act.
- [24] The defendant candidly acknowledged he could find no authorities from this Court or other courts in British Columbia supporting the argument that a landlord-tenant relationship constitutes a relationship of financial dependence whereby the landlord is dependent on the tenant based on the tenant's obligation to pay rent. Instead, the defendant relies on a decision of the Employment Standards Tribunal (the "Tribunal") in 0708964 B.C. Ltd. (Re), 2011 CanLII 152378 in which the tribunal member made a finding regarding relationship between an owner/landlord of a school premises leased to an operating body with a substantial relationship extant between the two.
- [25] 0708964 B.C. Ltd. involved an appeal from an earlier determination made by a Tribunal that the landlord in that case was an associated employer of the operating company as defined by s. 95 of the Employment Standards Act, R.S.B.C. 1996, c. 113 [the ESA]. The operating body

and the landlord were intrinsically connected to the premises and the school operations. Because the "two entities were in a symbiotic relationship" and were thus closely linked and were "common employers" the Tribunal concluded they were common employers under s. 95 of the ESA.

- [26] On appeal, the Tribunal Member explained that the operating company had no financial ability to lease premises absent the special relationship it had with the landlord. The landlord had funded the tenant's operations through interest-free loans and allowed the tenants to accrue significant rent arrears without commencing proceedings.
- [27] There was an interrelatedness of the two entities as a result of the fact that the principal of the landlord had caused it to refrain from enforcing payment of the arrears because it wanted to keep tuition fees within a certain range and ensure the continued operations of the school. The landlord had acquired the land for the sole purpose of locating the operating company's school and there was no evidence that the operating company had the financial ability to locate elsewhere: 0708964 B.C. Ltd. at para. 36.
- [28] The defendant contends that his landlord-tenant relationship with the plaintiff constituted a similar connection and that he was dependent on the tenant for his income.
- [29] In my view, the relationship between the parties in this case was entirely dissimilar to the relationship between the parties in 0708964 B.C. Ltd., and the decision of the Tribunal is therefore of no help to the defendant in his reliance on the exemption in s. 3(1)(k)(ii) of the Limitation Act.
- [30] In 0708964 B.C. Ltd., the Director of Employment Standards found that the two entities were much more closely aligned than are typical landlords and tenants in that they were parties in a joint endeavour, namely, the establishment, and subsequent operations and funding, of the school: 0708964 B.C. Ltd. at para. 39. In the result, I find that the limitation period for the defendant's counterclaim expired on November 7, 2024, by operation of s. 6 of the Limitation Act and was not exempt under the Limitation Act.

Discretion to extend period to commence counterclaim

- [31] I now turn to whether this Court should exercise its discretion to grant the defendant leave to file and serve his counterclaim at this stage.

Legal framework

- [32] Both the Rules and the Limitation Act provide time periods within which claims, including counterclaims, must be filed.

- [33] Rules 3-3(3) and 3-4(1), taken together, provide that a counterclaim must be filed within 21 days of service of the notice of civil claim. As above, s. 6 of the Limitation Act provides that, subject to the provisions of that Act, a court proceeding in respect of a claim must not be commenced more than two years after the day on which the claim is discovered.
- [34] The counterclaim in this case was filed almost 22.5 months past the time period for filing under the Rules, and nearly a month past the expiry of the limitation period in s. 6 of the Limitation Act.
- [35] That said, both the Rules and the Limitation Act provide for late-filed counterclaims.
- [36] Rule 22-4(2) allows a court to extend or shorten a period of time provided for in the Rules, even if the application for extension has been made after the time period has expired. A court will extend a time period set out in the Rules if it is just and convenient to do so: *Smith v. British Columbia*, 2010 BCSC 928 at para. 8.
- [37] Similarly, s. 22 of the Limitation Act allows a defendant to commence a counterclaim after the expiry of the limitation period. It provides:

Counterclaim or other claim or proceeding

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
- [38] The issues to be considered in an application to extend time to file a counterclaim were set out in *Evans* at para. 47, citing *Smith* at para. 15, as follows:
- [47] In considering whether to grant Ms. Dumitrean's application for leave to file an amended counterclaim, there are two issues that must be considered:
1. Is the matter in the proposed counterclaim "related or connected with the subject matter of" the plaintiff's claim?
 2. Should the court exercise its discretion to extend the period of time for issuance of the counterclaim?

Relation to the Plaintiff's claim

[39] The plaintiff did not assert a lack of connection between the plaintiff's claim and the proposed counterclaim. There was a single incident giving rise to the parties claims against each other and the issues to be decided will be the liability of either party for the other party's injuries sustained in the altercation.

Discretion to extend the time period

[40] The factors to be considered when deciding whether to exercise discretion to extend time were summarized by Madam Justice Grey in Smith, as follows:

[19] In *Squamish Indian Band v. Canadian Pacific Ltd.*, 1998 CanLII 3909 (BC SC), [1998] B.C.J. No. 1726 (S.C.), Saunders J. (when she was a member of this Court), held that the following factors should be considered in making any determination of whether it is just and convenient to extend the time to permit a counterclaim to be filed:

- a) What was the length of the delay between receiving the statement of claim and proposing the draft counterclaim;
- b) What were the reasons for delay;
- c) Whether the counterclaim would be time barred but for s. 4(1) [now s. 22] of the Limitation Act;
- d) The connection between the proposed counterclaim and the plaintiff's claim;
- e) Whether there will be prejudice to the defendant, such as would arise if denial of the application to file a counterclaim would prevent the defendant from making full answer and defence to the claim brought against it; and
- f) Whether there will be prejudice to the plaintiff by permitting the proposed counterclaim, such as if the counterclaim would require additional investigation and potentially delay the trial of the matter.

[41] Similarly, in *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315, 1985 CanLII 155, (C.A.) at 327, Lambert J.A. explained that there were a number of factors that should be considered in the exercise of this discretion, including:

What is the fair thing to do? Who suffers prejudice if the discretion is exercised? How much prejudice? Who suffers prejudice if the discretion is not exercised? How much prejudice? Have the parties acted properly and reasonably in their own interests? If a party has not acted properly and reasonably, should he be relieved from the consequences of his own behavior? And is there another course available to one or other of the parties? Where does the balance of convenience lie? This list is illustrative but not exhaustive of the questions that should be asked with respect to the parties for the court. But part of the purpose of the Rule is to avoid multiplicity of proceedings for the benefit of other litigants, so that congestion in the courts is avoided. So it is

proper to ask questions in that area as well.

[42] I will consider each of these factors in order.

(a) The length of delay

[43] A significant amount of time (22.5 months) has elapsed between the service of the notice of civil claim on January 27, 2023 and filing of this application on April 7, 2025. Mr. Forster argues, and I agree, that this delay has been inordinate.

[44] However, the plaintiff agreed with defence counsel to waive the defendant's responsibility to file a response to civil claim and took no steps to proceed with the action pending the expiry of the limitation period.

[45] Although the plaintiff did not specifically waive the time for filing the counterclaim, the delay in proceeding with the action was acceded to by the plaintiff's decision to delay further steps in the litigation until after the two year limitation.

(b) The reasons for delay

[46] I summarized above the defendant's reasons for his delay in filing his counterclaim. I have reservations about his explanations for the delay.

[47] The defendant indicates he did not retain counsel "in relation to Forster's assault of me" for three reasons including his mental and physical health, financial difficulties, difficulties with his partner and his inability to work. He did not explain how these difficulties prevented him from instructing Mr. Hoffman (or someone else) to file a counterclaim earlier. There was no information given concerning Mr. Hoffman's role in representing his client. It is clear Mr. Hoffman was not instructed earlier to file a counterclaim on the defendant's behalf or when he was informed of the existence of the limitation period.

[48] The defendant said that, in December 2024, he believed:

a) he could file the counterclaim then by virtue of Rule 3-4 of the Rules, ss. 3 and 22 of the Limitation Act;

b) It is curious the counterclaim was filed the same day as the response to civil claim.

c) He said "I thought Forster had abandoned his claim; that was why I took no steps to initiate the counterclaim."

[49] It seems the defendant invites me to infer he had no conversations with Mr. Hoffman concerning the claims or his right to file a counterclaim before December 2024. There is no explanation of when Mr. Ostensen was retained to advance a counterclaim in late December 2024.

- [50] While the evidence is equivocal on how the events transpired up to the filing of the response to civil claim and the counterclaim, it is in my view reasonable to infer that Mr. Hoffman informed the defendant of his right to advance a counterclaim in December 2024 but not prior.
- [51] It is clear to me the defendant was aware of his right to make a claim against the plaintiff from January 2023 and chose not to make that claim. His reasons for not making the claim are contradictory and not helpful in this analysis.
- (c) Whether the counterclaim would otherwise be time-barred by the Limitation Act
- [52] The defendant concedes that the limitation period for the counterclaim will have expired unless he is granted an extension of the time for filing and serving his counterclaim.
- (d) The connection between the proposed counterclaim and the plaintiff's claims
- [53] The plaintiff concedes there is a strong connection between the defendant's proposed counterclaim and the plaintiff's claims. Both claims arise from a single event and the principal question to be decided is whether either party assaulted the other and caused injuries in doing so.
- [54] This factor weighs in favour of permitting the defendant's counterclaim to proceed. I consider it to be in the interests of justice for that issue to be explored at the trial.
- (e) Prejudice to the defendant of no counterclaim
- [55] The defendant contends he will suffer prejudice if the trial proceeds without his counterclaim.
- [56] On this factor, I consider that avoiding prejudice to the defendant aligns with the interests of justice and the exploration of all issues at trial.
- (f) Prejudice to the plaintiff of permitting counterclaim
- [57] The plaintiff alleges that he will be prejudiced if the counterclaim is allowed to proceed. He said examinations for discovery were delayed while the plaintiff waited to see if the limitation period would expire. He also contends that because of the delay, memories can be eroded. He contends the defendant was always aware of his right to counterclaim but simply failed to ask questions of his counsel on that point. He also contends he will be prejudiced simply because he would be required to defend against a claim that was otherwise statute-barred.
- [58] There is no obvious prejudice to the plaintiff, such as the requirement for further investigation and potential delay of the trial of the matter. The plaintiff could, at any time during the two years after service of the notice of civil claim, have set the matter for trial, conducted examinations for discovery, and demanded discovery of documents. Instead, it is clear that no steps were taken by the plaintiff between January 27, 2023 (the date of service of the notice of civil claim) and May 2024 (the date of the Consent Order for the RCMP

records) because he did not wish to proceed further until the limitation period had expired because he wanted to take advantage of the Limitation Act that would deny the defendant the opportunity to advance a counterclaim. This delay up to that point, was as much caused by the plaintiff's strategic plan. There appears to have been no steps taken in the proceeding between May 17, 2024 (a consent order concerning disclosure of documents in the possession of the RCMP) and the December 2024 demand by plaintiff's counsel that the defendant file a response to civil claim.

- [59] I again acknowledge that the length of the defendant's delay in filing the counterclaim is significant, and his reasons for it not well explained. However, in my opinion, there is nothing arising from the delay that will interfere with or impact Mr. Forster's claim. The issue of the plaintiff's alleged assault on the defendant is raised in the defendant's response to civil claim and liability for the incident, in which both parties claim to have been injured, can be resolved without prejudice to either party stemming from the late filing of the counterclaim. Without being too simplistic, one would think that if the plaintiff is successful in the action, it is unlikely the counterclaim can succeed.
- [60] In my view, there will be no delay caused by the filing of the counterclaim that has not occurred already and could not have been remedied by the plaintiff moving the litigation forward sooner. The plaintiff's strategy appears to have been to take no steps in the litigation between January 2023 and March 2024 to avoid provoking the defendant into filing a counterclaim until December 2024, after expiry of the limitation period.

Analysis

- [61] My analysis on this issue is informed by the comments of Justice Kirchner in *Fang v. Fang*, 2022 BCSC 1880 where, in discussing the right to advance a counterclaim after the expiry of a limitation, he said:
- [29] Section 22(1) does not confer an absolute right to bring a "related claim" past the limitation period. The court still has the power to permit or prevent those proceedings having regard to the passage of the limitation period and its effect on the parties: *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (B.C.C.A). However, as Lambert J.A. said in that case, when the related claim is only between the original parties to the original proceedings, which is the case here, "there is no injustice in permitting all issues to be raised that, in the words of s-s 4(1) [now s. 22(1)], relate to or are connected with the subject matter of the original action." The plaintiff has pointed to no prejudice, other than delay, in responding to the claimed set-offs. In some cases inordinate delay will give rise to a presumption of prejudice but I find that is not the case here.

- [62] Notwithstanding my reservations concerning the evidence of the defendant on this application, I cannot find those shortcomings to be a reason for rejecting the defendant's application. My decision is informed, in part, by the comments of Lambert J.A. in *Lui* and conclude there will be no injustice in permitting the defendant's issues to be raised in this proceeding.
- [63] In my opinion, extending the time for filing the defendant's counterclaim will involve minimal prejudice to the plaintiff and is intrinsically connected with the plaintiff's claim against the defendant, in circumstances where delay was an object or goal of the plaintiff to take advantage of the Limitation Act. The plaintiff was alive to the potential of the counterclaim and delayed litigation in an effort to take advantage of the effluxion of time.
- [64] I conclude that interests of justice will be best served if all potential issues, including the defendant's counterclaim, are explored at the trial of this action. I am therefore satisfied that it is just and convenient to extend the time for filing the counterclaim to date it was filed, that is December 20, 2024.

Conclusion

- [65] The defendant's application is allowed. The plaintiff's application is dismissed.
- [66] Unless the parties make submissions on the question of costs within 30 days, costs of these applications are to be resolved by the trial judge.

"Armstrong J."

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