

CANADA / JUDGMENT

Foster v. Westfair Properties (Pacific) Ltd.

2008 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

1 December 2008

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2008 BCSC 1658 Foster v. Westfair Properties (Pacific) Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Foster v. Westfair Properties (Pacific) Ltd., 2008 BCSC 1658 Date: 20081201 Docket: 07 4667 Registry: Victoria Between: DONNA FOSTER PLAINTIFF And: WESTFAIR PROPERTIES (PACIFIC) LTD., LOBLAW PROPERTIES PACIFIC INC., WESTFAIR FOODS LTD., and REAL CANADIAN WHOLESALE CLUB DEFENDANTS Before: Master McCallum Reasons for Judgment Counsel for Plaintiff A. R. Atwood-Brewka Counsel for Defendants P. E. Norell Date and Place of Hearing: 4 November 2008 Victoria, B.C.

INTRODUCTION

- [1] The plaintiff claims damages in this proceeding for injuries alleged to have been sustained in a fall at premises owned or occupied by the defendants. She commenced her action by issuing an endorsed Writ of Summons. Following service and the filing of an Appearance by the defendants, the plaintiff filed an amended Writ of Summons. The only amendment was the addition of the endorsement: "Subject to Rule 68" in the style of proceeding. The defendants applied to strike out the amendment or alternatively remove the action from Rule 68.
- [2] For the reasons that follow I have concluded that the defendants' motions must be dismissed.

BACKGROUND

- [3] There is no real dispute about the facts. The plaintiff's position is simply that shortly after the Writ was filed and served, counsel for the plaintiff realized that the action was one within the scope of Rule 68 and ought to have been commenced with the required endorsement.
- [4] Although the action was commenced by the filing of an endorsed Writ of Summons, it appears that a Statement of Claim was filed the same day but not served with the Writ. The Statement of Claim was also amended by adding the Rule 68 endorsement and it was delivered in June of 2008.

- [5] The defendants took exception to the amendments made by the plaintiff but filed a Statement of Defence in any event. The parties have exchanged some documents but not proceeded further pending the outcome of this motion. DISCUSSION
- [6] Rule 68 is the "Expedited Litigation Project Rule". By its terms, the rule applies to certain actions ("expedited actions") described in Rule 68 (2): Actions to which this rule applies
- (2) Subject to subrule (5), this rule applies to an action commenced in the Vancouver, Victoria, Prince George or Nelson registry after September 1, 2005, and to every action commenced in any registry after January 1, 2008, if
- (a) the only claims in the action are for one or more of the following:
- (i) money; (ii) real property; (iii) personal property, and
- (b) the total of the following amounts is \$100,000 or less, exclusive of interest and costs:
- (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss; (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss; (iii) the fair market value, as at the date the action is commenced, of all real property, all interests in real property, all personal property and all interests in personal property claimed in the action by the plaintiff.
- [7] The evidence shows that counsel for the plaintiff determined that Rule 68 applied because the plaintiff's claim was only for money and the amount of money to be claimed was \$100,000 or less as set out in Rule 68 (2). Counsel elected to proceed by way of amendment as a simple device to inform the defendants of the application of Rule 68 and comply with Rule 68 (6) that requires the "Subject to Rule 68" endorsement in the style of proceeding for expedited actions.
- [8] The defendants took the position that the plaintiff could not amend and bring Rule 68 into play. It was their position throughout that Rule 68 does not permit existing actions (not brought under Rule 68) to be brought into the rule unless the parties' consent as allowed in Rule 68(3) that states: Actions to which this rule may apply
- (3) Subject to subrule (5), this rule applies to any action not referred to in subrule (2) if the parties to the action consent.
- [9] The defendants' submission seems to conflate two distinct situations. Rule 68 applies, on its face, to certain defined actions. Alternatively, parties can agree that Rule 68 applies to actions that do not fall within the definition of an expedited action. This action is an expedited action and Rule 68 applies to it regardless of the positions of the parties. The rule does permit parties to apply for an order that Rule 68 does not apply but, absent that order, the rule applies to every expedited action.

- [10] In actions that are expedited actions (as in this case) the failure to include the Rule 68 endorsement is, at worst, a failure to comply with the rules that ought, in this case, to be treated as an irregularity. Rule 2(2)(c) specifically permits the court to allow amendments under Rule 24 where there has been a failure to comply with the rules. That is the course that should be followed in the case at bar.
- [11] The defendants' motion also asked for an order that the action be removed from Rule 68 if the rule was found to apply. The only evidence on the application relates to the history of the proceeding. There is no evidence upon which the court could conclude that the rule ought not to apply. On the contrary, given the limited information available, the action seems one admirably suited to the use of expedited process.

CONCLUSION

- [12] Rule 68 is mandatory and requires that actions qualifying as expedited actions proceed under the provisions of the rule. The absence of the required endorsement is an irregularity that may be remedied by amendment. The commencement of a proceeding without the Rule 68 endorsement does not change the character of the proceeding to permit process outside the limits of the rule.
- [13] The defendants' motion is dismissed. The action is an expedited action and Rule 68 applies. The amendments stand. Costs of the motion will be to the plaintiff as costs in the cause. "W. McCallum" Master William McCallum

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