

CANADA / JUDGMENT

French v. Clark

2021 BCSC 1114

COURT

Supreme Court of British Columbia

DECIDED

9 June 2021

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2021 BCSC 1114 French v. Clark

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

French v. Clark,

2021 BCSC 1114

Date: 20210609

Docket: S211058

Registry: Vancouver

Between:

Adam James French

Plaintiff

And

Matthew Hayden Clark and Bart Van Iersel and

Resort Municipality of Whistler and Whistler Resort Association

Defendants

And

Matthew Hayden Clark and Bart van Iersel

Third Parties

Corrected Judgment: The text of the judgment was corrected at paragraphs 41, 43, and 47 on June 18, 2021.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff, appearing via teleconference:

T. Louis

Counsel for the Defendant and Third Party, Matthew Clark, appearing via teleconference:

E. Logan

Counsel for the Defendants, Resort Municipality of Whistler and Whistler Resort Association, appearing via teleconference:

J.A. Bank

The Defendant and Third Party,

Bart van Iersel:

No appearance

at this hearing

Place and Date of Hearing:

Vancouver, B.C.

April 7, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 9, 2021

I. Introduction

- [1] On or about September 12, 2018, the plaintiff, Adam French, and the defendants, William Clark and Bart van Iersel, were all out golfing on the Whistler Golf Course. While Mr. French was standing on the course, he was hit by a golf cart driven by Mr. Clark with Mr. van Iersel, apparently, riding as his passenger.
- [2] Messrs. French, Clark, and van Iersel were acquainted with one another prior to the accident, and there is evidence of post-accident discord.
- [3] Regrettably, sentiments have seeped into the conduct of the litigation itself. Mr. French's filing of duplicative actions, namely, Vancouver Registry Nos. S207765 ("First Action") and S211058 ("Second Action"), appears, at least in part, a by-product of that.
- [4] The two applications before me arise from that duplication. Both applications were filed in the Second Action and both by Mr. Clark, on March 12 and March 26, 2021 respectively.

- [5] In the first, Mr. Clark seeks to strike the Second Action under Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] ("Strike Application"). In the second, he applies for a stay of the Second Action under Rule 9-8(4) pending payment of his costs in the First Action ("Stay Application").

II. Facts

- [6] On July 20, 2020, Mr. French filed a notice of civil claim in the First Action, alleging injury caused by Mr. Clark's negligent operation of the golf cart.
- [7] The Resort Municipality of Whistler ("Whistler") owns the Whistler Golf Club. The Whistler Resort Association ("Association") operates the Whistler Golf Club. In addition to Mr. Clark, Whistler and the Association were also named as defendants in the First Action.
- [8] On January 6, 2021, Mr. Clark filed a response to civil claim ("First Response") denying liability and alleging the accident was caused by his passenger's conduct:
7. On or about September 12, 2018, the Defendant, Matthew Hayden Clark while operating the Golf Cart a passenger without warning pressed the accelerator and without the consent of the driver of the Golf Cart the Defendant, Matthew Hayden Clark, causing the Golf Cart to collide with the Plaintiff, Adam James French (the "Accident").
- [9] On January 20, 2021, Mr. French's lawyer, Mr. Louis, emailed Mr. Clark's lawyer, Mr. Logan, saying:

We understand the passenger in the Golf Cart was Bart Van Iersel. Kindly advise if you will be issuing a Third Party Notice. In any event, we would like to add Mr. Van Iersel as a Defendant. Please advise if you are agreeable to signing a Consent Order to amend the Notice of Civil Claim to name Mr. Bart Van Iersel as a Defendant.

- [10] Mr. Logan responded on January 22, 2021:

We do not consent to the addition of Bart Van Iersel as a party as a Defendant. The plaintiff was aware of Bart Van Iersel and his involvement since the incident occurred. What is the Plaintiff's explanation for the delay in the addition of a party until long after the expiration of the limitation period?

- [11] On February 4, 2021, Mr. French filed the notice of civil claim in the Second Action. The Second Action names the same defendants as in the First Action, but adds Mr. van Iersel. The content of the two claims is substantially identical, except that in the latter "CLARK and/or IERSEL" has been substituted for "CLARK".
- [12] On February 10, 2021, Mr. Louis asked Mr. Logan to accept service of the Second Action on behalf of Mr. Clark. Mr. Logan agreed, but asked how the duplication was going to be addressed.
- [13] On February 16, 2021, Mr. Louis emailed Mr. Logan saying:

This new Notice of Civil Claim is necessary due to the fact that Mr. Logan was not prepared to consent to the addition of the Defendant, Bart Van Iersel, even though his client's Response indicates that Mr. Van Iersel was responsible for the Incident.

With regard to the initial Notice of Civil Claim, kindly advise if you are agreeable to the Plaintiff filing a Notice of Discontinuance with no costs to either party.

[14] Mr. Logan responded:

We are not agreeable to the Notice of Discontinuance being filed unless our costs are paid, as is required under Rule 9-8.

In relation to the duplicative Notice of Claims, I find it hard to square your position that a second Notice of Claim was required because of the Defendant Mr. Clark's refusal to consent to add a party with the fact that your client was aware of Bart Van Iersel and his involvement at the time of filing of the first Notice of Claim.

[15] On February 17, 2021, Mr. Louis emailed Mr. Logan saying that he intended to "leave the first [Notice Of Civil Claim] dormant".

[16] On February 23, 2021, Mr. Clark filed a response to the Second Action ("Second Response"). The Second Response alleges the Second Action constitutes an abuse of process and seeks to have it dismissed on that basis. In the alternative, the Second Response essentially replicates the First Response.

[17] On March 2, 2021, the Second Response was served. In his covering email to Mr. Louis, Mr. Logan advised that he had instructions to apply to strike the Second Action and asked for hearing dates. Mr. Louis said he was available on March 23 through 26, 2021. Mr. Logan advised he would set the application for hearing on March 25.

[18] On March 4, 2021, Mr. French filed a notice of discontinuance ("NTD") with respect to the First Action in its entirety. Mr. Logan was not advised of the filing.

[19] As noted, on March 12, 2021, Mr. Clark filed the Strike Application setting a March 25, 2021 date of hearing.

[20] On March 15, 2021, the NTD was served on Mr. Logan.

[21] As noted, on March 26, 2021, Mr. Clark filed the Stay Application.

[22] Mr. French and Mr. Clark have been unable to agree to the amount owing to Mr. Clark as his costs in the First Action. I am advised the matter is being set before a registrar.

III. Positions

[23] The Strike Application was rendered moot on March 15, 2021. On service of the NTD, the Second Action ceased to be duplicative. In light of the circumstances of the filing, Mr. Clark seeks costs with respect to the Strike Application.

- [24] On the Stay Application, Mr. Clark seeks an order staying the Second Action until his costs of the First Action are paid. Mr. Clark also seeks an award of costs in respect of the Stay Application.
- [25] Mr. French argues that abandoning the First Action instead of applying to amend it to add Mr. van Iersel was "proper, practical and cost-effective" litigation conduct in the circumstances and, thus, no abuse of process has been established. He says it was reasonable to respond to Mr. Clark's refusal to consent to the addition of Mr. van Iersel by filing the Second Action, as doing so saved him the expense of an application to add a defendant and saved the court the time that would have been required to hear the application. He submits that the defendants in the First Action essentially refiled the same responses in the Second Action, and thus were required to invest little in terms of further time and expense.
- [26] Mr. French cites *Rossner v. Nystrom*, 2019 BCSC 583 at para. 43, for the proposition that the doctrine of abuse of process is only engaged by egregious conduct. He notes that his conduct does not meet the test under *Lindsay v. Canada*, 2005 BCCA 594, for declaring a party a vexatious litigant.
- [27] Mr. French did not squarely address Mr. Clark's request for a stay, but his response asserts that the filing of the Second Action was reasonable in the circumstances and indicates that he is not "agreeable" to paying costs in respect of the First Action.
- [28] Whistler and the Association agree with Mr. Clark that Mr. French is obliged to pay costs in the First Action as a result of the NTD, but oppose Mr. Clark's request for a stay. Mr. Bank, counsel for Whistler and the Association, stresses that a stay under Rule 9-8(4) is discretionary: *Kuzych v. White* (No. 7), 1953 CarswellBC 12; [1953] B.C.J. No. 111 (S.C.).
- [29] Mr. Bank argues there is no basis here to suppose Mr. French will fail to pay the costs of the First Action once they have been taxed. He cites *Wang v. British Columbia Medical Association*, 2011 BCSC 1659, as support for his assertion that Mr. French's likelihood and ability to pay, as well as the fact that there is no outstanding order for costs, are factors to be considered in exercising the discretion to order a stay. He also submits that a stay is a disproportionate remedy in the circumstances and notes that granting one will negatively impact his clients' wishes to proceed expeditiously.

IV. Analysis and Decision

A. The Strike Application

[30] Rule 9-5(1) provides:

Rule 9-5 - Striking Pleadings

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [31] As noted by Justice G.C. Weatherill in *Drover v. BCE Inc.* 2013 BCSC 1341 at para. 41, multiple proceedings by the same plaintiff against the same defendant on the same cause of action is a classic example of an abuse of process. Notably, Mr. French did not simply file more than one claim on the same cause of action. As in *Drover*, the multiple claims filed here were co-existent proceedings. Where duplicative actions co-exist an abuse of process follows because one of the two lacks any legitimate purpose.
- [32] Mr. French argues he had a valid purpose for filing the Second Action, that being his plan to avoid the time and cost of an application to amend the First Action.
- [33] The relevant question for purposes of the Strike Application is not whether Mr. French had a reason for filing the Second Action. The question is whether he had any legitimate reason for having two duplicative actions outstanding at the same time. Absent a positive answer to that question, one of the actions is unnecessary and the result is an abuse of process. That abuse of process will continue to exist until one of the actions has been discontinued.
- [34] A notice of discontinuance takes effect on service: *Allard v. Manahan*, [1975] 3 W.W.R. 371 (B.C.C.A.); *Hoisington v. Johnson & Johnson Inc.*, 2020 BCSC 431 at para. 76. At all times between February 4 and March 15, 2021, Mr. French had duplicative outstanding claims on the same cause of action filed against Mr. Clark, Whistler, and the Association.
- [35] When a complaint was made about the duplication, Mr. Louis expressed an intent to allow the situation to continue indefinitely. The abuse could have been quickly rectified by an effective discontinuance, but Mr. French resisted taking that step in an effort to avoid the costs obligation it would trigger under the Rules (see below). Mr. Clark was entitled to object.
- [36] The Strike Application was meritorious and appropriate at the time it was filed. I note that Mr. French could easily have advised Mr. Clark that the NTD had been filed. He chose not to do so. Mr. Clark is entitled to his costs.

[37] Mr. Clark seeks \$500 in costs. The amount sought is patently justifiable under the Rules and Mr. French made no submissions in opposition to the amount. Mr. Clark is awarded \$500 in costs under the Strike Application.

[38] Whistler and the Association do not seek costs.

B. The Stay Application

[39] The following parts of Rule 9-8 are pertinent here:

- (1) At any time before a notice of trial is filed in an action, a plaintiff may discontinue it in whole or in part against a defendant by filing a notice of discontinuance in Form 36 and serving a filed copy of the notice of discontinuance on all parties of record.
- (4) [A] person wholly discontinuing an action against a party must pay the costs of that party to the date of service of the notice of discontinuance and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.

[40] There is no merit to Mr. French's argument that Mr. Clark ought not to have his costs in the First Action because his refusal to consent led to Mr. French's choice to file the Second Action. The entitlement to costs under Rule 9-8(4) is non-discretionary and arises automatically by operation of law: *Lim v. Zhu*, 2019 BCSC 88 at paras. 156-60; *Scuccato v. Almazan*, 2007 BCSC 1314; *Bolton v. Bolton* (1876), 3 Ch. D. 276 at 277. While the amount to be paid remains to be assessed, Mr. Clark's entitlement to costs already exists.

[41] I agree that the grant of a stay under Rule 9-8(4) is discretionary. However, I do not accept the argument that it would be appropriate to decline in the circumstances of this case. Nor do I accept Mr. Bank's submission that the portions of Wang he relies upon outline factors relevant to a stay under Rule 9-8(4).

[42] The rules in effect at the time of *Kuzych* were The Supreme Court Rules, 1943. The relevant rule was M.R. 289:

ORDER XXVI.

Discontinuance

1. The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue the action against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, .

4. If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action until such costs shall have been paid.

[43] In *Kuzych*, Justice Coady held that the grant of a stay under paragraph 4 of M.R. 289 was discretionary. He then discussed the exercise of that discretion. After a review that included authority relating to the inherent jurisdiction to stay a second proceeding brought following a court-ordered dismissal or stay of a first, Justice Coady concluded that the discretion to decline to order a stay under paragraph 4 of M.R. 289 was only to be exercised in exceptional circumstances:

19 Both the *Tichborne* [v. *Mostyn* (1872) LR 8 CP 29] case and the *Denis* [v. *Gorman* (1878) LR 4 IR 356] case clearly indicate that the rule that the action will be stayed until the costs are paid is not an inflexible one and that there is a discretion, but the burden of showing special circumstances devolves on the plaintiff. In fact, these cases indicate there may be special circumstances such as fraud, perjury and such like in the original action where an order will not be made. Bovill, C.J. at p. 40 in the *Tichborne* case says:

The undoubted rule is that, where a party has once failed, he is not at liberty to try substantially the same question in a second action without first paying the costs of the former trial.

20 And he further says:

"Where the plaintiff is the same, and the question to be tried is the same, the rule must go, unless there be special circumstances to warrant a departure from the ordinary practice."

21 This latter seems to indicate a discretion exists. Brett, J. in the same case, at p. 44 says:

"Then he submitted that this is an appeal to the discretion of the Court, and that the rule upon which we are acting is not an inflexible one. *Doe d. Rees v. Thomas* (1824) 2 B & C 622 107 ER 115, shows that the rule is not inflexible. I go further. If Mr. Gifford could have made out that by any act of the defendants, or any negligence on the defendants' part, the plaintiff was prejudiced to the extent of being prevented from having a fair trial upon the former occasion, although nothing approaching fraud could be suggested, the Court ought not to interpose to prevent a second trial. I think he has failed to make this out."

22 In *Higgins v. Woodhall* (1889) 6 T.L.R. 1, the Lord Chancellor said in effect he had no doubt that the court had jurisdiction to interfere, but that the jurisdiction would only be exercised in the case of vexatious proceedings, and that a judicial discretion must be exercised as to what proceedings were vexatious. Fletcher Moulton, L.J. said in *In re Connolly Bros. Ltd.*; *Wood v. Connolly Bros. Ltd.*, [1911] 1 Ch. 731, at 746, 80 LJ Ch 409:

"It is quite clear that the Court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action proceed. Just as fraud assumes innumerable shapes, so vexation may assume innumerable shapes."

23 The question then is, it seems to me: Has the plaintiff rebutted the prima facie presumption that this second action is a vexatious proceeding? I cannot find that he has. He has not shown any special circumstances to take this action out of the vexatious class. ...

[Emphasis added.]

[44] Thus, in *Kuzych*, this Court found:

- (1) there is a presumption that a second proceeding brought while the costs of the first are unpaid is vexatious;
- (2) the burden is on the plaintiff to establish special circumstances negating the presumption; and
- (3) special circumstances will generally involve demonstrating it was the defendant's fault that a second proceeding was required.

[45] The decision in *Kuzych* was appealed, however, the Court of Appeal declined to comment on the extent of the rule, being of the opinion that the decision to grant the stay was the right conclusion in any event: 1953 CarswellBC 47 at para. 6.

[46] Mr. French submits that it was reasonable to start the Second Action because Mr. Clark had refused to consent to his proposed application to add Mr. van Iersel to the First Action.

[47] I disagree. Having filed the First Action, Mr. French ought to have been prepared to take the procedural steps involved in pursuing it. Had Mr. French filed an application to add Mr. van Iersel, and had Mr. Clark opposed that application without good reason, that is an issue to be raised on the application and, should Mr. French's position prove persuasive, one capable of being redressed by costs on the application. Mr. Clark's refusal to consent cannot be characterized as having somehow required a new action to be filed in order to obtain a fair trial.

[48] Mr. French has failed to establish any special circumstances for purposes of the discretion under Rule 9-8(4). That leaves Mr. Bank's arguments against the stay, and his reliance on Wang.

[49] The circumstances in Wang were materially different from the instant. Dr. Wang had filed a petition and had succeeded on her petition before this Court. The Court of Appeal overturned the decision, finding that the matter ought to have proceeded as a civil claim in contract. The Court of Appeal made no comments on the merits of the case and expressly stated that its decision was without prejudice to Dr. Wang's right to bring a claim for breach of contract. It awarded the defendants their costs on the appeal and before this Court ("the petition costs").

- [50] Dr. Wang interpreted the Court of Appeal's statement that its decision was without prejudice to further litigation to mean she was not obliged to pay the petition costs forthwith and did not pay them. She filed a notice of civil claim alleging breach of contract (and defamation). The defendants applied for an order requiring Dr. Wang to post security for costs in relation to her civil claim. They also sought to have the civil claim stayed until the petition costs were paid.
- [51] The first proceedings in Wang were not discontinued, and Rule 9-8 was not before Justice Dickson (then of this Court) for consideration in Wang. (At paragraph 27, Justice Dickson refers to Kuzych for the proposition that a second proceeding on the same cause of action is presumptively vexatious, however, as already noted above, the Kuzych decision discussed the court's inherent jurisdiction as well as the court rule on discontinuances.)
- [52] As outlined in Wang (at paras. 23-25), it is well-established that a natural person will only be ordered to post security for costs in exceptional circumstances. The applicable analysis centres on a balancing of injustices, and a party's failure to pay an earlier costs award may amount to a special circumstance under that analysis.
- [53] Justice Dickson concluded Dr. Wang's conduct did not warrant an order to post security for costs, but did warrant a stay pending payment of the petition costs:

31 The BCMA goes on to submit that the action should be stayed against it until Dr. Wang pays the Outstanding Costs Award based on the principles discussed in Kuzych. They say the Petition and this action relate to substantially the same cause and the Court of Appeal's decision to dismiss the Petition without prejudice to Dr. Wang's right to bring other proceedings did not countenance or contemplate her doing so without paying the Outstanding Costs Award. In these circumstances, they say Dr. Wang has failed to overcome the *prima facie* presumption articulated in Kuzych to the effect that this should be considered a vexatious proceeding. Accordingly, in their submission, the Outstanding Costs Award must be paid before the action can proceed.

32 I agree with the defendants that Dr. Wang is plainly not impecunious. Given the nature of her educational pursuits and home ownership, her sworn statement that she does not currently have enough cash "on hand" to deposit the sum claimed for security for costs and "fears" that she "may" be forced to abandon the litigation if the order is made falls short of demonstrating that such an order would probably stifle her claim. On the contrary, I am satisfied that it probably would not have this effect and Dr. Wang would continue to have access to the courts.

33 I am, however, also satisfied that the defendants have not established they will be unable to recover costs from Dr. Wang if they are successful in the litigation. While it is true that, if required, execution proceedings may be cumbersome, it is also true that they will be available and Dr. Wang will probably continue to own considerable equity in her home. In addition, her claim is not obviously weak, although it is hotly contested. Further, taking into account the Court of Appeal's comments it cannot be said that the proceeding is vexatious.

34 More significantly for present purposes, I am not satisfied that Dr. Wang will probably fail or refuse to pay the defendants' costs in the event she is unsuccessful, despite her failure to date to pay the Outstanding Costs Award. This is so because her failure to pay must be understood in context. In my view, while misguided, it does not reflect an attitude of patent disregard for a court order and, at this juncture, does not constitute an egregious circumstance or abuse of the court's process. Given what follows, however, should it persist it would.

35 Dr. Wang was initially successful in the Petition Decision. When the Court of Appeal overturned the decision, it did so expressly without prejudice to Dr. Wang if she were to attempt to pursue the claim afresh. That is precisely what she did. Although I agree with the BCMA that, standing alone, the Court's comment in this regard does not in fact countenance or contemplate delayed payment of the Outstanding Costs Award pending the outcome of any successor litigation, I accept that it could be construed, erroneously, as bearing this interpretation. Absent a stay of the Outstanding Costs Award, however, in my view Dr. Wang is immediately obliged to comply with the order.

36 Given this clarification and Dr. Wang's access to funds, any further delay in payment would amount to an abuse of the court's process. When parties bring their disputes to the court for resolution, they submit fully to the authority of the court. Amongst other things, this means that they must comply promptly with court orders, including costs awards, in accordance with their terms.

37 Taking into account the foregoing, I conclude that, on balance, the interests of justice do not support an order that Dr. Wang post security for the costs of the defendants. I also conclude, however, that the proceedings should be stayed until the Outstanding Costs Award has been paid to prevent an abuse of the court's process. I am confident that Dr. Wang will make the necessary payment promptly. In the event it is not received by September 6, 2011, however, I grant leave to the defendants to seek further relief.

[Emphases added.]

[54] Justice Dickson did not consider whether Dr. Wang was likely to continue to fail to pay the petition costs as a factor in assessing whether the civil claim should be stayed. Rather and notably, she granted a stay pending payment notwithstanding the following:

- (1) Ms. Wang had been operating under a good faith belief that the petition costs were not yet due;
- (2) the Court of Appeal decision countered the presumption that the civil claim was vexatious; and
- (3) the Court expected the petition costs would be paid promptly following its clarification that they were due and owing.

- [55] Nothing in Wang suggests a stay under Rule 9-8(4) is unwarranted absent evidence the plaintiff is unlikely to pay the costs of the first proceeding once they have been taxed. To the contrary, Wang, although not a case under Rule 9-8(4), is consistent with the holding in Kuzych that a stay should be ordered unless the plaintiff is able to establish special circumstances.
- [56] Mr. Clark's request for a stay of the Second Action pending taxation and payment by Mr. French of the costs of the First Action is granted.
- [57] Mr. Clark's request for \$500 in costs with respect of the Stay Application is also granted, consistent with reasons set out above regarding amount in respect of the Strike Application.

V. Disposition

- [58] The Strike Application is dismissed as moot.
- [59] Mr. Clark is awarded \$500 in costs in respect of the Strike Application.
- [60] The Stay Application is allowed. The Second Action is stayed until the outstanding costs payable in respect of the First Action are taxed (or agreed upon) and paid in full by Mr. French.
- [61] Mr. Clark is awarded \$500 in costs in respect of the Stay Application.
- [62] The costs awarded against Mr. French are in any event of the cause and payable forthwith.
- "Tucker J."

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