
CANADA / JUDGMENT

Gadhri v. 0760815 B.C. Ltd.

2017 BCSC 1121

COURT

Supreme Court of British Columbia

DECIDED

30 June 2017

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2017 BCSC 1121 Gadhri v. 0760815 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gadhri v. 0760815 B.C. Ltd.,

2017 BCSC 1121

Date: 20170630

Docket: S129050

Registry: New Westminster

Between:

Sarbjeet Gadhri

Plaintiff

And

0760815 B.C. Ltd.

Defendants

And

Harmadan Gadhri and Raj Kumar Gupta

Defendants by way of Counterclaim

- and -

Docket: 134046

Registry: New Westminster

Between:

Harmadan Singh Gadhri

Plaintiff

And

Simranjeet Singh Dhanoa, 0760815 B.C. Ltd., and 078528 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff S. Gadhri, Defendant by Counterclaim and Third Party H. Gadhri:

D. Gautam

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R. Davidson

Place and Date of Hearing:

Vancouver, B.C.

May 5, 2017

Place and Date of Judgment:

New Westminster, B.C.

June 30, 2017

INTRODUCTION

[1] There are three motions before the court arising out of my Reasons for Judgment issued on March 24, 2016, indexed at 2016 BCSC 521:

1. Mr. Dhanoa, 0760815 and 0758528 (the "Applicants") seek an order that special costs apply to all proceedings (except a certain few) as per my order for special costs against Mr. Gadhri and Mrs. Gadhri (the "Gadhris") in my Reasons for Judgment.
2. In addition the Applicants seek an order for the Gadhris to post security for special costs for the upcoming assessment of special costs.

3. The Gadhris bring a cross-application for (a) an order that Mr. Gadhri, Mr. Gupta, and the Applicants submit to an accounting of their joint venture within 30 days of the order and (b) an order that Mr. Gupta and Mr. Gadhri submit to an accounting of their partnership within 30 days. In response to the Gadhris' cross-application, Mr. Gupta seeks to have the motion adjourned and an order for the Gadhris to pay his costs.

ISSUES

[2] The issues are as follows:

1. Are all the proceedings, except those noted, to be included under my previous order for special costs against the Gadhris?
2. Should the Gadhris be required to post security for special costs for the upcoming assessment of special costs?
3. Should an order be made that an accounting of the joint venture and/or the partnership occurs within 30 days, and with or without costs to Mr. Gupta?
1. Are all the proceedings, except those noted, to be included under my previous order for special costs against the Gadhris?

Parties' Positions

- [3] The Applicants seek an order confirming they are entitled to special costs for all proceedings with the exception of any matters relating to the appeal and the application heard on May 13, 2016 and June 3, 2016.
- [4] At the hearing of this application, the Gadhris conceded that the Applicants are entitled to an order for special costs in the manner sought and consented to that order.

Legal Principles

- [5] Under R. 18-1(12) of the Supreme Court Civil Rules, the court has the discretion to give special directions with respect to an assessment.
- [6] The general rule is that an award of special costs of a proceeding carries with it the entitlement to special costs of the subsequent assessments subject to a limited discretion that may be exercised by the Registrar to depart from this general rule. Any such discretion must be exercised sparingly and only in very compelling circumstances: *Le Soleil Hospitality Inc. v. Louie*, 2017 BCSC 162 at paras. 8, 13.
- [7] The same scale of costs will generally apply to post-judgment portions of the litigation unless the unsuccessful party can establish a rational reason for applying a different measure of costs for the steps taken after judgment: *Wiebe v. Gunderson*, 2003 BCSC 1931 at para. 29.

- [8] The standard underlying special costs is whether the behaviour in question is "reprehensible", which encompasses milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

Application

- [9] The order is therefore granted in the manner sought pursuant to R. 18-1(12).
2. Should the Gadhri be required to post security for special costs for the upcoming assessment of special costs?

Parties' Positions

- [10] The Applicants submit that the Gadhri are liable to pay substantial special costs, estimated at \$500,000 and that in view of their poor conduct post-trial, notably causing delays and disobeying court orders, should be ordered to post security for special costs at \$500,000 to ensure that those funds can be recovered.
- [11] The Gadhri's position is that it would not be fair to order them to post security for special costs. They say they have complied with the orders made against them and can explain the supposed delays. They also claim that an order to post substantial funds would prevent their participation in the upcoming assessment of special costs.

Legal Principles

- [12] The court has the inherent jurisdiction to order an individual to post security for costs. In exercising this discretionary jurisdiction, it must weigh all of the circumstances, and make a fair and just order based on sound evidentiary and legal principles: *Royal Bank of Canada v. CTL Steel Ltd.*, 2015 BCSC 803 at para. 14.
- [13] Considerations a court may take into account when determining whether to grant an order for security for costs were set out in *Kropp v. Swanest Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.) at para. 17:

[17]

1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
 7. The lateness of the application for security is a circumstance which can properly be taken into account.
- [14] Additional factors a court may consider when security for costs is sought against an individual claimant were set out in *I.J. v. J.A.M.*, 2013 BCSC 270 at para. 14:
- [14] A number of factors have been considered by the Court in determining whether it is appropriate to make an order for security costs against an individual claimant: (a) the merits of the plaintiff's claim; ; (b) the inability of defendants to recover costs from a plaintiff such as where the plaintiff is bankrupt or insolvent; ; (c) whether the plaintiff has demonstrated an intention not to comply with previous orders relating to costs payable; (d) if there is a risk that the plaintiff is not "findable"; ; and (e) where there was evidence suggesting that a false description of residence or a false name had been given to the court or used generally:

Application

- [15] Based on the jurisprudence and all relevant factors, the Gadhris are ordered to provide security for costs pending the assessment of special costs which is scheduled for December 2017.
- [16] With respect to the Kropp factors, the Gadhris argue that requiring them to post substantial costs would put their participation in the assessment at risk. They provided some general affidavit evidence in support of their alleged financial difficulties; including indicating a need to sell a property owned by Mrs. Gadhri to pay legal expenses. No detailed information about their finances was however provided.
- [17] The "possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security": Kropp at para. 17. Something more than a mere possibility of not being able to participate in the assessment is needed to avoid an order for security for costs.
- [18] There was no allegation, and I find there is no risk, of the Applicants using "security as an instrument of oppression" or using security to put "unfair pressure" on the Gadhris: Kropp at para. 17. Rather, the Applicants appear to have a genuine concern that they will not be able to recover their costs in the end.

- [19] The Gadhri says their claims are meritorious. They say there are real issues that need to be addressed at the assessment, like, for instance, challenging expenses on the Applicants' bill of costs. Following Kropp, I avoid going into detail on the merits of these allegations but note success or failure is not obvious.
- [20] There is also a possible concern with the lateness of the application for security. The Applicants complied with the Rules of Court regarding notice periods. Yet the circumstances here are unique because security is being sought post-judgment for an assessment. The Gadhri maintain to order security in these circumstances would be unprecedented. While I agree this is somewhat novel that alone does not prevent this order. The amount of the costs is at issue between the parties and remains to be determined by the Registrar.
- [21] With respect to the factors identified in I.J. to order security for costs against an individual, the most relevant appears to be the inability of the Applicants to recover costs from the Gadhri. As noted, the Gadhri have deposed they are having financial difficulties, particularly with paying their legal fees. This suggests a serious risk that they will be unable to pay the Applicants' substantial special costs.
- [22] That being said, the Gadhri do have some funds available to them, including funds held by the joint venture in trust and assets from the partnership with Mr. Gupta.
- [23] In terms of other relevant factors, the Applicants say the sale of Mrs. Gadhri's interest in the relevant property to her son was an attempt to dispose of assets and judgment-proof the Gadhri. The Gadhri deny that allegation and attribute the sale to the need to acquire funds to pay legal fees. Suffice it to say, this raises a sufficient concern which supports the Applicants in this matter.
- [24] The Applicants also allege the Gadhri have caused much delay and have disobeyed court orders since the trial. They point to instances where counsel for the Gadhri was slow to respond and uncooperative with agreeing to draft materials. They also say counsel for the Gadhri failed to remove a CPL on the relevant property as I had ordered.
- [25] The Gadhri maintain the order requiring them to pay special costs for the 35-day trial was enough rebuke of their past conduct. No further rebuke is warranted by way of an order to post security, especially given their cooperation more recently.
- [26] The Gadhri provided explanations for their alleged post-judgment delays, indicating some delays were caused by their counsel being involved in another trial and their counsel required changes to be made to draft materials.
- [27] They also said the allegations about disobeying orders are based on misinformation, such as, for instance, the Applicants assuming they needed the Gadhri's approval to remove the CPL at issue when that was not the case, given the court order to that effect.

[28] As there is a distinct conflict on this point in the material, I am unable to reach a conclusion on this point. Overall, however, based on the factors as set out above, I have concluded an order for security for costs should be granted.

[29] With respect to the amount, the Applicants have set out a calculated formula as follows:

- a. The Gadhri's claims were dismissed in their entirety.
 - b. The Gadhri are liable to pay special costs, which are approximately \$500,000.
 - c. The costs of the Assessment, scheduled to take (5) days are conservatively estimated to be another \$50,000 in legal fees, plus expert costs of another \$10,000 for an additional \$60,000.
 - d. Post-judgment interest will be at least another \$25,000.
 - e. The Gadhri have not paid damages for abuse of process in the amount of \$25,000.
 - f. This totals \$610,000.
 - g. There is currently no action by the Joint Venture/442 against 815, 528, or Mr. Dhanoa.
 - h. 815 and 528 have a right of set-off of any amounts owing to the Joint Venture/442 that would ultimately be paid to Mr. Gadhri.
 - i. The accounting shows a total of \$504,093 to be paid to Mr. Gadhri and Mr. Gupta as business partners (see para. 315 of Reasons for Judgment).
 - j. However, that does not take into account the costs to decommission the pond on Lot 22, which would need to be allocated between the parties. The estimated cost as of 2014 was \$200,000 (Tab 7, p. 29). At a rate of inflation of 3.5% per year that's now \$221,000. Mr. Gupta and Mr. Gadhri's share of that would be 31.65% as per the Cost Sharing Agreement for a total of \$69,947, reducing the total to \$434,146.
 - k. On a generous assumption, if we assume Mr. Gadhri is entitled to half of that as Mr. Gupta's partner, it totals \$217,073.
 - l. However, Mr. Gupta says that he is owed \$134,259 from Mr. Gadhri to even out their partnership so that number is reduced to \$82,814.
 - m. If we deduct \$82,814 from \$610,000 there is a shortfall of -\$527,186.
 - n. So it is clear that at the end of the day, it is clear that Mr. Gadhri who will owe 815, 518, and Mr. Dhanoa \$527,814 even after applying the amounts owing to the Joint Venture/442.
- [30] These calculations appear to be an estimate. Accordingly while I accept the premise set out above, the amount the Gadhri must post as security is modified to \$300,000. This reflects the possibility that the amount of special costs may not ultimately result in the amount claimed of \$500,000.

3. Should an order be made that an accounting of the joint venture and/or the partnership occurs within 30 days, and with or without costs to Mr. Gupta?

Parties' Positions

- [31] The Gadhri is concerned their interests in the parties' joint venture and the Gupta-Gadhri partnership are vulnerable and in order to put protections in place, they seek an order that an accounting of both arrangements occur within 30 days of the order.
- [32] The Applicants take the position that an order for a final accounting of the joint venture to occur on a timeline cannot be made at this time. There are still too many unknowns with respect to the real estate development at issue in terms of costs and timing.
- [33] Mr. Gupta's position is that an adjournment of the Gadhri's late application should be ordered so that it can be properly heard with costs against the Gadhri.

Legal Principles

- [34] The court may give special directions with respect to an accounting pursuant to R. 18-1(12) of the Supreme Court Civil Rules.
- [35] The cost provisions found in R. 14-1 give the court wide discretion in awarding costs of an application.

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- [36] In my view, a timeline with respect to a final accounting cannot be set at this time.
- [37] At paras. 138-139 of my Reasons for Judgment I noted that:
- [138] The City also required a second pond to control the erosion and limit the particles into the City water. The engineers identified several suitable lots, seven of which were used to accommodate the sedimentary pond.
- [139] The detention pond, however, has not yet been decommissioned. While originally the detention pond was to be removed once the City had built a large detention pond, estimated to be in two years, the City has to date not acquired the land to do so. There is therefore no definite answer as to how long the development is required to keep the detention pond.
- [38] The Applicants point out that 0758528 is still waiting on the City with respect to decommissioning the pond on lot 22 and has no control over its timing. They also say they cannot sell that lot until the pond has been decommissioned.
- [39] The Applicants further point out that the estimated cost as of 2014 was \$200,000. At a rate of inflation of 3.5% per year, that is now \$221,000. However, it is still not known when it will ultimately be decommissioned and how much it will cost as costs will likely continue to rise at 3.5% per year.

- [40] I agree with the Applicants' conclusion that a final accounting cannot be achieved until that task has been completed.
- [41] Moreover, Mr. Gupta says that he was only served with the Gadhris' cross-application materials on April 27, 2017, and as the application proceeded on May 5, 2017, did not have enough time to prepare a proper response.
- [42] He also says the Gadhris did not allot sufficient court time to do the cross-application justice and he says that in the end, he was given only a few minutes to respond at the hearing.
- [43] I conclude the cross-application was premature and a final accounting cannot be ordered at this time. It is not necessary for me to hear from Mr. Gupta as a response to the cross-application was adequately set out by Mr. Dhanoa and the numbered companies.
- [44] On the costs issue, I agree with Mr. Gupta that the Gadhris did not provide adequate time to prepare and argue a proper response. Importantly, the Gadhris did not comply with the service rules set out in R. 8-1(7), serving the materials one week before the application date rather than the required eight business days, and were not otherwise accommodating with Mr. Gupta. I order the Gadhris to pay the costs of Mr. Gupta in respect of their cross-application.

SUMMARY

[45] In summary, I have decided that:

1. The order for special costs includes all proceedings except those specified.
2. The Gadhris must post security for costs in the amount of \$300,000.
3. The Gadhris' cross-application is dismissed with liberty to reapply. I am, however, not seized of this or any other applications.
4. The Gadhris must pay the costs of Mr. Gupta of their cross-application.

The Honourable Madam Justice E. Burke

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