
CANADA / JUDGMENT

Gehlen v. Rana

2009 BCSC 1484

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1484 Gehlen v. Rana

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gehlen v. Rana,

2009 BCSC 1484

Date: 20091030

Docket: M080022

Registry: Vancouver

Between:

Hina Gehlen

Plaintiff

And

Sukhdip Rana

Defendant

Before: The Honourable Mr. Justice Leask

Reasons for Judgment on Costs

Counsel for the Plaintiff:

U. Ghani

Counsel for the Defendant:

B. Martyniuk

Place and Date of Hearing:

Vancouver, B.C.

August 13, 2009

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2009

- [1] This was a civil jury trial arising from a motor vehicle accident. Although the defendant admitted being responsible for the rear-end collision, liability was denied on the basis that the plaintiff, who claimed to have been the front seat passenger in the family vehicle driven by her husband, was not present in the vehicle at the time of the accident. This defence had a significant impact on the conduct of the trial. The first witness called by the plaintiff was her son, a child who was 13 years old when he gave evidence and 11 at the time of the accident. He testified that he had been seated in the rear seat with his sister, that his father was driving and that his mother was in the front passenger seat. In response to a question on cross-examination he testified that if his mother had not been in the car he would have been seated in the front passenger seat. He gave his evidence in a straightforward convincing manner and I found him to be completely believable. Both the plaintiff's husband and the plaintiff herself gave evidence that she had been in the front passenger seat at the time of the collision. They also testified that the defendant had telephoned their home several times in the days following the accident and inquired about the plaintiff's health.
- [2] At the close of the plaintiff's case, in the absence of the jury, I had a discussion with counsel for the defendant concerning proposed defence evidence. He indicated he was intending to call the defendant driver and the driver's father (who had been a passenger in his son's vehicle at the time of the accident) principally to give evidence that the plaintiff had not been present in the family's car at the time of the accident. In light of the evidence called by the plaintiff, particularly the evidence of her son, I invited counsel to review his client's instructions with him before commencing the defence case. I pointed out that there might well be costs implications to the defence strategy.
- [3] After taking the opportunity to consult with his client, counsel did, in fact, call both his client and his client's father to testify. Both stated that the plaintiff was not present at the accident scene. On cross-examination by plaintiff's counsel, both witnesses were given the opportunity to acknowledge that the plaintiff may have been present and they simply failed to notice her. Both insisted that she was not present.
- [4] The jury found the defendant liable and awarded the plaintiff:
- (i) \$10,000 for non-pecuniary damages;

- (ii) \$720 for past income loss;
 - (iii) \$1,686 for special damages; and
 - (iv) \$1,080 for cost of future care
- for a total of \$13,486.

- [5] On the basis of the plaintiff's success on the issue of liability, her counsel seeks costs. On the basis of the defendant alleging that the plaintiff's claim was fraudulent and the jury's rejection of that claim, plaintiff's counsel says that costs should be awarded at 1.5 times Scale B.
- [6] The defendant's costs submissions focus on a different issue. On January 8, 2009, the defendant made an offer to settle under Rule 37B for \$22,000 plus necessary and reasonable disbursements. On June 15, 2009, the plaintiff made an informal counter-offer (not pursuant to Rule 37B). The plaintiff says that the counter-offer revokes the defendant's offer to settle and the Court should not consider it. The defendant says:

... that this Honourable Court is in law entitled and required to consider the Defendant's Offer to Settle in respect of the issue of costs of these proceedings. More specifically, the Defendant's position is advanced on three alternative grounds: (i) first, that the Defendant's Offer to Settle was not revoked by the the [sic] Plaintiff's informal offer as it specifically stated that the offer would not expire in the event of a counter offer by the Plaintiff; (ii) in the alternative, the Plaintiff's informal offer did not, for the purposes of determining costs under the Rule 37B regime, constitute a counter offer that would in law revoke the Defendant's Offer to Settle; and (iii) in the further alternative, the Defendant submits that Rule 37B of the Rules of Court permits the Court to consider the Offer to Settle in any event, whether it was revoked by a counter offer or simply not accepted by the Plaintiff.

- [7] The defendant's first position responds to a series of cases in this Court interpreting Rule 37B. In *More Marine Ltd. v. The Ship (Western King)*, 2009 BCSC 504, Satanove J. decided that there was no settlement agreement between the parties. The plaintiff argued that they had accepted a Rule 37B offer that was unconditional and had never been withdrawn. The defendant argued that their Rule 37B offer had been rejected by two counter-offers by the plaintiff and was not available to be accepted at the time the plaintiff purported to accept it. Satanove J. accepted the defendant's argument and said:
- [7] In my view, Rule 37B does not change the common law with respect to settlement agreements, which in themselves are just another form of contract. The old Rule 37 expressly changed the common law in this regard, but the old Rule 37 is repealed. If the Legislature had intended the provisions of old Rule 37(8), (10), and (13) to continue to apply to the new Rule 37B, it would have retained the wording of those subsections.

- [8] Turning then to the common law of contracts, it is trite to say that a counteroffer constitutes non-acceptance of a previous offer. The previous offer must be revived in order to be accepted after a counteroffer has ensued. (*United Pacific Capital v. Piché*, 2004 BCSC 1524; *Cowan v. Boyd* (1921), 49 O.L.R. 335 (C.A.)).
- [8] Her judgment was followed by Joyce J. in *Oliver v. Moen*, 2009 BCSC 874, [2009] B.C.J. No. 1296, a civil jury trial concerning a motor vehicle accident. Earlier Grauer J. in *ICBC v. Patko*, 2009 BCSC 578 decided that it was proper to consider a revoked Rule 37B offer to settle when dealing with costs. In an unreported oral judgment in *Singleton v. Morris*, (August 6, 2009) Vancouver Registry No. M060288 (BCSC), I said:

More Marine was not brought to the attention of Grauer J. in *Patko*. *Patko* was not brought to the attention of Joyce J. in *Moen*.

I regard *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) as requiring me to follow *More Marine* and *Moen* on the effect of the plaintiff's counter-offer. Equally, I am bound to follow *Patko* on the Court's ability to consider rejected offers under Rule 37B.

- [9] All of these matters were discussed with counsel during the costs submissions in this case. The new element argued by the defendant was the fact that his offer to settle included a provision which said:

This offer to settle does not expire by reason that a counter offer has been made by the plaintiff.

- [10] Counsel were in fundamental disagreement on the significance of this term in the offer to settle. In light of my views on the defendant's second and third arguments, I do not consider this to be the proper case to resolve the issue of the effect of such a term in an offer to settle.
- [11] Although various judges of this Court have made decisions interpreting different aspects of Rule 37B, I am not aware of any case that deals with whether an informal offer could revoke a Rule 37B Offer to Settle. The defendant relies upon *Mackenzie v. Brooks*, 1999 BCCA 623, [1999] B.C.J. No. 2411, (1999) 130 B.C.A.C. 96, interpreting Rule 37 as it stood in 1999:
- [20] In our view, the decision by the chambers judge on this point is not in accord with the purpose and effect of Rule 37, or with the understanding and practice of lawyers operating under it.
- [21] Rule 37 is clearly designed to encourage the early settlement of actions. It does so by rewarding the party who makes an early and reasonable settlement offer, and by penalizing the party who declines to accept such an offer. The reward or penalty takes the form of costs (in some cases, double costs) from the date the offer is made. The significant role which costs now play in the litigation process operates as a powerful incentive to parties to make early offers of settlement under the Rule and to accept reasonable offers.
- [22] In order to ensure its efficacy, Rule 37 sets up a formal structure for ensuring that the process of offer and acceptance is clearly defined. The structure is designed to remove any doubt at the end of the trial as to what the offer was, whether it was accepted, and what the

resulting costs will be. Thus, an offer and acceptance must be in writing in the forms provided for under the Rule. Similarly, the withdrawal of an offer must also be in writing in order to be effective. (See *Smith v. Acadia Hotels Ltd. (Dominion Hotel)* and *Dominion Hotel* (1983), 43 B.C.L.R. 202, at p. 208, per Mr. Justice Lambert.)

- [23] It is interesting to note that the Rule permits each of the parties to make a formal offer and specifically provides that a formal counter-offer does not revoke the formal offer of the opposite party. This is in contradistinction to the traditional law of contract in which a counter-offer automatically revokes a prior offer. Thus, Rule 37 does not purport to incorporate all aspects of the traditional law of contract in its treatment of offers to settle.
- [24] In our view, Rule 37 can operate in tandem, or on a parallel track, with the usual informal procedures by which counsel daily seek to settle their cases. The process of making, accepting, or withdrawing formal offers to settle under the Rules is entirely cost-focused. It is not inconsistent with the informal process of offer and counter-offer which characterizes negotiations for settlement. Except in those limited cases in which a Calderbank letter applies, the informal process operates on a "without prejudice" basis. Unlike the formal process under Rule 37, none of the offers or counter-offers arising during this informal process may be raised before the trial judge in relation to costs, or otherwise.
- [25] There is much to be said for a system which permits the parties to pursue two co-existing avenues to settlement. This was recognized by Mr. Justice Lambert in *Smith v. Acadia*, supra, where, in discussing the predecessor to Rule 37, he stated, at p. 208:

In my opinion an offer of settlement in Form 61 under R. 57(13)(a) can only be effectively revoked by delivery of a revocation in Form 62 under R. 57(13)(b). The offer can only be accepted by compliance with R. 57(14) or with R. 57(17).

That is not to say that effective negotiations for settlement can no longer take place outside the Rules once an offer is made under the Rules. Either the plaintiff or the defendant could make an oral or written offer of settlement outside the Rules. That offer could be accepted, orally or in writing, outside the Rules. It could be revoked, either orally or in writing, before acceptance, outside the Rules. Any settlement that was reached outside the Rules might be in the same terms as an offer under R. 57(13)(a) that was then outstanding, or it might be in different terms. But, in my opinion, any oral or written offer in such negotiations would have to be made separately and independently from the offer that had been made and that was still outstanding under R. 57(13)(a).

In short, the formal system under the Rules and the informal system of reaching a bargain under the law of contract, are completely independent.

[Emphasis added]

- [12] When the Rules of Court were amended to include Rule 37B, the legislative intent was clearly to make a major change in the manner in which offers to settle were considered by the Court when deciding costs issues. The previous Rule 37, and the cases interpreting it,

had developed into an extremely inflexible system. Rule 37B was intended to change that and re-introduce judicial discretion into this aspect of costs rulings. Nevertheless, I am persuaded that the reasoning of the Court of Appeal in *Mackenzie v. Brooks* is applicable to the "new" Rule 37B regime. Counsel and litigants need the flexibility of being able to conduct settlement negotiations and make offers and counter-offers informally and expeditiously. I am in complete agreement with the Court of Appeal's statement in *Mackenzie v. Brooks*, at paragraph 25:

[25] There is much to be said for a system which permits the parties to pursue two co-existing avenues to settlement ...

and their quoting, at paragraph 25, with approval Lambert J.'s language from *Smith v. Acadia Hotels Ltd. (Dominion Hotel)* and *Dominion Hotel* (1983), 43 B.C.L.R. 202:

[25] In short, the formal system under the Rules and the informal system of revoking a bargain under the law of contract, are completely independent.

[13] For that reason I accept the defendant's submission that the plaintiff's informal counter-offer does not have the effect of revoking a Rule 37B offer to settle made between July 1, 2008 and July 1, 2009. Of course, after July 1, 2009, the matter is dealt with by s-s. (8) of the Rule which came into effect on that date:

Counter offer

(8) An offer to settle does not expire by reason that a counter offer is made.

[14] This means I must consider the defendant's offer to settle made January 8, 2009.

[15] I should also say that, as previously discussed, I regard myself as bound by Grauer J.'s decision in *ICBC v. Patko*, to consider the defendant's offer to settle in the period between January 9, 2009 and June 15, 2009.

[16] Thus, it is necessary for me to consider the factors outlined in Rule 37B(6) in relation to the plaintiff's failure to accept the defendant's offer to settle.

[17] As to Rule 37B(6)(b), the terms of settlement were more favourable to the plaintiff than the final judgment of the Court. As to s-s. (c), the plaintiff urges me to take into account her limited financial means; I have no evidence concerning the defendant's financial circumstances. Counsel for the defence urges me to ignore insurance in considering this factor.

[18] As to s-s. (d), I consider two other factors to be relevant. First, the defendant's choice of trial by jury, which considerably increases the costs. Second, the manner in which the defence was conducted - to accuse the plaintiff and her family of fraud - that accusation having been rejected by the jury.

- [19] Turning last to s-s. (a) - the most important question - whether the offer was one that ought reasonably to have been accepted. On this issue, I agree with Goepel J.'s judgment in *A.E. v. D.W.J.*, 2009 BCSC 505, at paragraph 55:
- [55] ... this analysis is not one to be done based on hindsight once the final result is known. The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision.
- [20] I am satisfied that the defendant's denial of liability, and the allegations of fraud that underlay that denial, dominated the plaintiff's thinking at the time the offer to settle was made and, indeed, throughout the entire pre-trial period. Knowing that her claim was not fraudulent and knowing the persuasive evidence she had to rebut the allegation of fraud, the plaintiff thought she had a good answer to the defendant's "low ball" offer to settle. With hindsight, it is obvious that her counsel did not anticipate the defendant's vigorous attack on her credibility including the detailed attack on her employment resumé and the emphasis on her second accident. Her counsel's trial preparation did not include preparing her or her witnesses for these issues. However, analyzing the plaintiff's decision not to accept the defendant's offer to settle without the benefit of hindsight, I am satisfied that it was not an offer that ought reasonably to have been accepted.
- [21] Analyzing all the Rule 37B(6) factors, I am satisfied that the plaintiff is entitled to a judgment under Rule 37B(5)(c) and is entitled "in respect of all ... of the steps taken in the proceeding after the date of delivery ... of the offer to settle, costs to which the party would have been entitled had the offer not been made" (emphasis added).

I turn now to the plaintiff's submission for 1.5 times Scale B costs because of the allegation of fraud made by the defendant and the manner in which those allegations were pursued at trial. Having taken that factor into account in my analysis of Rule 37B(6), I believe it would represent a form of "double counting" to award increased costs for this factor. My conclusion is that the plaintiff is entitled to her costs and reasonable disbursements of the entire proceeding on Scale B.

"P. LEASK, J."

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