

CANADA / JUDGMENT

Gill v. Zhang

2016 BCSC 341

COURT

Supreme Court of British Columbia

DECIDED

18 February 2016

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2016 BCSC 341 Gill v. Zhang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Gill v. Zhang, 2016 BCSC 341 Date: 20160218 Docket: S151527 Registry: Vancouver Between: Akwinder Kaur Gill, Harpinder Gill, Gurjeevan Kaur Dosanjh Plaintiffs And Jing Ting Zhang, Xining Yin Defendants Before: Master McDiarmid in Chambers Oral Reasons for Judgment Counsel for Plaintiffs: J.S. Malik Counsel for Defendants: J. Cao Place and Date of Trial/Hearing: Vancouver, B.C. February 18, 2016 Place and Date of Judgment: Vancouver, B.C. February 18, 2016

- [1] THE COURT: There are two applications before me. The first is an application to amend the notice of civil claim as attached to the application, schedule A. Counsel for the defendants, respondent to this application, correctly points out that the amendments sought in draft para. 12 are a mixture of facts and a conclusion of law, and accordingly the amendments sought are allowed, provided that what is sought in para. 12 is limited to the words "the fire damage to the property."
- [2] That amended notice of civil claim should be filed and delivered by February 26, 2016. I am going to grant the adjournment, and I have some terms that I am going to deal with when I do grant that. The defendants are granted leave to file an amended response. Can that amended response be filed by March 14, 2016?
- [3] MR. CAO: Yes, Your Honour.
- [4] THE COURT: Any filing fees associated with filing the amended notice of civil claim or the amended response are ordered waived.
- [5] With respect to that amendment application, costs in the cause of that application.
- [6] With respect to the application to adjourn, I have reviewed the materials. On hearing the submission of the defendants, I note that the pleadings show that there is a certificate of pending litigation registered against the property, and I am assuming that that is what prompted some of the defendants' concerns expressed to their counsel.

- [7] The law with respect to adjournments was briefly summarized by Master Patterson where he cited *Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82, a decision of our Court of Appeal. A recent expansion of how to deal with the principles has been expressed by Madam Justice Dillon in a case called *Navarro v. Doig River First Nation*, 2015 BCSC 2173:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).
- [20] Other factors or considerations include (in no particular order of priority): · the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10); · the reasonableness of the request (*Dhillon* at para. 16); · the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38); · the timeliness of the request (*Dhillon* at para. 16); · the potential prejudice to each party (*Dhillon* at paras. 16-17); · the right to a fair trial (*Dhillon* at para. 16); · the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36); · the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and · the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39). ...
- [24] The explanation for the need of an adjournment is an important consideration. It has been said that simple neglect to get properly ready for a hearing, while irksome for the other party, will still usually lead to an adjournment on the theory that the prejudice to the person denied the adjournment will be greater than prejudice to the person who is forced to accept an adjournment (*Michel v. Lafrentz*, 1998 ABCA 224 at para. 12). It would be unjust to decide, without more, that a party who has been less than diligent will be forced to go to trial

unprepared (*Trumbley v. Belanger*, [1994] B.C.J. No. 2178 at para. 4 (S.C.)). Failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client under the "often applied principle that the sins of the lawyer should not be visited upon the client" provided that relief can be given on terms that protect the innocent adversary as to costs thrown away and as to the security of the legal position he has gained (*Graham* at para. 10). However, counsel's simple statement that he is not ready for trial may not be sufficient (*W. Thomson & Co. v. British America Assurance Co.* (1930), 43 B.C.R. 194 at 196 (C.A.)). The fact of a medical condition that may impair a party's ability to conduct his case as well as he might does not, in itself, mandate an adjournment, but it is a serious consideration (*Sangha* at para. 15).

- [25] Prejudice to the parties if an adjournment is granted or is not granted must be considered. Any prejudice to be suffered by either side must be weighed and balanced. However, it is non-compensable prejudice that is pivotal (*Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 at para. 19 (C.A.); *Graham* at paras. 7 and 9). If the problems raised by an explanation of prejudice can be met by conditions of an adjournment, then, upon consideration of all of the circumstances, an adjournment may be granted (*Cal-Wood Door* at para. 17).
- [26] Overall delay in the history of proceedings may be a factor. Prolonged delay due to tactical considerations may be inexcusable and result in injustice to the other side because a fair trial is no longer possible (*Irving v. Irving*, 140 D.L.R. (3d) 157 at 160-163, [1982] B.C.J. No. 970 at paras. 8-11 (C.A.) (*Irving*)). However, a delay forced on a party by negligent solicitors, impecuniosity, or illness is distinguished from tactical delay. The issue is whether the delay is excusable in light of the reason for it and other circumstances (*Irving* at 163 D.L.R., para. 11 B.C.J.).
- [8] I will summarize by saying that when there is an adjournment application, it is an exercise of discretion and it needs to address the interests of justice by balancing the interests of the parties. That requires a careful consideration of all of the elements of the case, including the nature of the proceeding and the parties.
- [9] Courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits, but at the same time, the parties are entitled to having their day in court expeditiously.
- [10] There are factors that I take into consideration. One of them here is the reasonableness of the request, which is made because the plaintiffs' initial counsel, for an ethical reason which it would appear cannot properly be disclosed, was required to withdraw. That is not a fault of the plaintiffs and it is not a fault of the defendants. It puts all of them in a difficult situation.
- [11] It seems to me to be a reasonable explanation for the adjournment. It also seems to me that the need by plaintiffs' new counsel for a quantity surveyor is appropriate, and I am going to make an order which will ameliorate the potential prejudice.

- [12] The adjournment is granted on terms. The terms are, firstly, that the plaintiffs will enter into an undertaking as to damages with respect to the risk faced by the defendants. There is to be an undertaking as to damages. That is a normal order if there was a successfully opposed application to remove a certificate of pending litigation. I am making that order as a condition of the adjournment, and that I think deals with the defendants' concerns in that regard.
- [13] Secondly, the defendants are entitled to costs thrown away in any event of the cause. Those can be determined following the trial.
- [14] Thirdly, even though the plaintiffs are successful, the costs of this application are to the defendants in any event of the cause.
- [15] I am prepared to make an order, if the parties agree, setting some time for delivery of expert report and response so that those are both abrogated a little bit. That might make life easier. Mr. Malik?
- [16] MR. MALIK: I don't know that that's necessary yet. I think I should retain my expert, get some firm dates from him, and then get it. And if I need something, I think I should phone my friend and hopefully we can resolve it by consent.
- [17] THE COURT: My concern was that your friend might want not a responding report, but a separate report.
- [18] MR. MALIK: His own report.
- [19] THE COURT: But it might be better, frankly, if the two of you could agree on a joint expert. I just suggest that. Now, should we adjourn this to a date specific? When I say adjourned, it is to be adjourned to be reset in June 2016 to a date convenient to counsel. Is that order sufficient?
- [20] MR. CAO: Yes, Your Honour.
- [21] THE COURT: Thank you both. "Master R.W. McDiarmid" MASTER McDIARMID

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