

CANADA / JUDGMENT

Grandmaison v. Berkenbos

2018 BCSC 1329

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Supreme Court of British Columbia

DECIDED

9 August 2018

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2018 BCSC 1329 Grandmaison v. Berkenbos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grandmaison v. Berkenbos,

2018 BCSC 1329

Date: 20180809

Docket: S172623

Registry: Vancouver

Between:

Joseph Alain Grandmaison

Plaintiff

And

William Berkenbos and

William Berkenbos, Executor of the Will of Cheryl Anne Berkenbos, Deceased

Defendants

Before: The Honourable Madam Justice Forth

On appeal from: An order of the Supreme Court of British Columbia,

dated June 6, 2018 (Grandmaison v. Berkenbos, 2018 BCSC 966, VA S172623).

Reasons for Judgment

Counsel for the Plaintiff:

A.Y. Mallek

Counsel for the Defendant William Berkenbos, in his personal capacity:

J.L. Porciuncula

Place and Date of Hearing:

Vancouver, B.C.

June 20, 2018

Place and Date of Judgment:

Vancouver, B.C.

August 9, 2018

Introduction

- [1] The defendant William Berkenbos, in his personal capacity, appeals from an order of a master dated June 6, 2018, requiring that he produce an affidavit verifying his list of documents dated May 29, 2018.

Background

- [2] This action concerns the estate of Cheryl Anne Berkenbos (the "Deceased"), who died on December 15, 2015, leaving a will dated July 27, 1999 (the "Will").
- [3] The Deceased married the defendant William Berkenbos on June 14, 1989. They were never divorced prior to her passing. Mr. Berkenbos was appointed the sole executor and trustee and sole beneficiary under the Will.
- [4] On April 25, 2016, a grant of probate was issued out of the Chilliwack Registry of this Court to Mr. Berkenbos, in Action No. P-14515 (the "Probate Action"). The gross value of the Deceased's estate was set out in the statement of assets and liabilities at approximately \$3.9 million.
- [5] The plaintiff in this action and respondent on this appeal, Joseph Alain Grandmaison, alleges that he was the Deceased's common-law spouse at the time of her death.
- [6] On March 22, 2017, Mr. Grandmaison filed an application in the Probate Action seeking the following relief:
1. a declaration that he is the spouse of the Deceased pursuant to s. 2(1)(b) of the Wills, Estates and Succession Act [WESA];
 2. an order that the grant of probate to William Berkenbos be revoked and declared null and void; and

3. a grant of administration of the Deceased's estate to the Deceased's sister, Darlene Burnson.
(the "Revocation Application")

- [7] On March 28, 2017, Mr. Grandmaison filed an amended notice of civil claim in this action seeking an order under WESA for variation of the Will in his favour, and a declaration that the Deceased's estate is indebted to him in the amount of \$2,010,000 (the "Estate Action"). The claim was made against Mr. Berkenbos in his personal capacity and in his capacity as the executor of the Deceased's estate. Throughout these reasons when referring to Mr. Berkenbos, I am doing so in his personal capacity unless otherwise indicated. He has separate legal counsel acting for him in each capacity.
- [8] On June 13, 2017, in the Probate Action, Master Vos ordered that the implied undertaking rule be waived so that documents disclosed, evidence obtained on examination for discovery, and expert reports delivered in respect to both the Probate Action and the Estate Action are not prohibited from being used for the purpose of either proceeding.
- [9] On June 28, 2017, Mr. Berkenbos, in his capacity as executor, delivered his first list of documents in the Probate Action.
- [10] On July 4, 2017, Mr. Berkenbos served a list of documents in the Estate Action.
- [11] On November 10, 2017, Mr. Berkenbos, in his capacity as executor, delivered his second list of documents in the Probate Action.
- [12] On March 19, 2018, Mr. Berkenbos was examined for discovery in the Estate Action. During the examination, counsel for Mr. Grandmaison made requests for multiple documents and classes of documents that had not been provided.
- [13] On March 20, 2018, Mr. Grandmaison was examined for discovery in the Estate Action. During this discovery, counsel for Mr. Berkenbos referenced an affidavit of Darlene Burnson, the Deceased's sister, which was purported to be filed in the Estate Action. This affidavit had not been listed on any of the lists of documents.
- [14] On April 5 and 6, 2018, by way of an exchange of emails, counsel for Mr. Grandmaison demanded production of the affidavit of Darlene Burnson and any other affidavit(s) potentially being held in reserve. The demand was refused by counsel for Mr. Berkenbos on the basis that the requested affidavits were covered by solicitor's brief privilege.
- [15] On April 6, 2018, counsel for Mr. Grandmaison sent a letter requesting production of the outstanding documents from Mr. Berkenbos's discovery.
- [16] On May 16, 2018, counsel for Mr. Grandmaison reiterated his requests for production. That same day, Mr. Grandmaison filed a notice of application in the Estate Action seeking the following relief:

1. A supplementary list of documents be produced listing:

- a. unproduced layperson's affidavits; and
 - b. various other documents listed as items i to xxxvii.
2. In the alternative, that Mr. Berkenbos, in his personal capacity, serve an affidavit verifying his current list of documents dated July 4, 2017 in this action as current and complete.

(the "Document Production Application")

[17] The Document Production Application was unilaterally set for May 29, 2018. It was adjourned by consent to June 6, 2018.

[18] On May 29, 2018, Mr. Berkenbos delivered his third list of documents dated May 28, 2018, in the Estate Action. On the same day, unfiled copies of the following affidavits sworn in the Probate Action were delivered:

1. Affidavit #1 of Darlene Burnson made on April 13, 2017;
2. Affidavit #1 of William Berkenbos made on June 9, 2017;
3. Affidavit #2 of Paul Emerson made on June 9, 2017;
4. Affidavit #1 of Glenn George made on May 22, 2018;
5. Affidavit #3 of Paul Emerson made on May 23, 2018;
6. Affidavit #1 of Janet Milne made May 24, 2018;
7. Affidavit #2 of Darlene Burnson made on May 24, 2018; and
8. Affidavit #1 of Hans Doniak made on May 28, 2018.

[19] On May 30, 2018, counsel for Mr. Berkenbos delivered a letter, dated May 29, 2018, answering all of the outstanding requests for discovery. For some of the requests, the letter stated: "Mr. Berkenbos has searched his records and does not have anything to produce at this time." The letter also set out an objection to the request for Mr. Berkenbos's PharmaNet records on the basis that they were not relevant. At the end of the letter, the following explanation was provided: "Mr. Berkenbos has maintained throughout these proceedings that many potentially relevant documents have been removed or stolen from his property."

[20] On May 31, 2018, Mr. Berkenbos filed his application response to the Document Production Application setting out that the layperson affidavits had been produced, a letter answering the discovery requests had been delivered, an amended list of documents was delivered, certain documents had been requested (items xii and xiv), and there was an objection to producing the PharmaNet records (item xx).

[21] The Document Production Application proceeded on June 6, 2018 before Master Muir. The application was limited to the request for production of non-party witnesses' affidavits, the PharmaNet records, and an affidavit verifying the May 29, 2018 list of documents.

[22] The order made was as follows:

1. dismissing the application for production of layperson's affidavits and PharmaNet records of Mr. Berkenbos;
2. granting an order that Mr. Berkenbos produce an affidavit verifying the accuracy of his list of documents dated May 29, 2018, identifying what steps have been taken to locate documents, and what steps, if any, remain to be taken in that regard, with a deadline of June 18, 2018 for service; and
3. costs to the plaintiff in the cause.

[23] Mr. Berkenbos appeals from the order on the basis that the master made the following errors in ordering production of an affidavit:

1. failing to apply the correct legal test as to when the court will make such an order;
2. in the alternative, misapplying the legal test to the facts that were before her; and
3. in the further alternative, ignoring evidence essential to the outcome of the application.

Issues

[24] The two issues before me on this appeal are as follows:

1. What is the proper standard of review on an appeal from the decision of a master? and
2. Did the master err in ordering the swearing of an affidavit?

Analysis

What is the proper standard of review on an appeal from the decision of a master?

[25] The law is clear that the following standards apply:

1. Review of a purely interlocutory decision of a master is a true appeal, and the master's decision is not to be interfered with unless it is clearly wrong.
2. A question of law, a final order or a ruling that raises questions vital to the final issues in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

(Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd., 2011 BCSC 999 at para. 7)

[26] The first issue is the category in which this appeal falls.

- [27] The appellant takes the position that the errors alleged in failing to apply or misapplying the correct legal test should be reviewed on their merits since they both involve an error of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 43 and 44. The ignoring of evidence would fall in the "clearly wrong" standard.
- [28] The respondent takes the position that an order for the production of an affidavit made under subrule 7-1(8) is purely an interlocutory matter and the standard of review is whether it was "clearly wrong". Furthermore, the master did apply the correct legal tests and as such did not make an error of law.
- [29] To determine the standard of review, the first exercise is to determine the correct legal test for ordering an affidavit verifying a list of documents.
- [30] The test was set out by Justice N. Smith in *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939 at para. 38 [Centura]:
- [38] The court has the discretion under Rule 26(3) to order such an affidavit where document production has been "clearly inadequate" or where a party has displayed a "dilatory or casual attitude" to document production. (See *Bank of Nova Scotia v. Imperial Freeholds*, [1989] B.C.J. No. 118 and *Synergy Management Group v. Walker Systems Corp.*, [1992] B.C.J. No. 2109). However, an affidavit will not be ordered where there has been a genuine dispute about what is producible. (See *Siddon v. Mair*, [1997] B.C.J. No. 17.) Where a case involves a large number of documents, some flexibility may be required. (See *Privest Properties v. Foundation Co. of Canada* (1991), 64 B.C.L.R. (2d) 41.
- [31] The term "clearly inadequate" was described by Justice T. Schultes in *Copithorne v. Benoit*, 2010 BCSC 130 at para. 11 [Copithorne] as:
- [11] Rule 26(3) of the Rules of Court provides that a court may order that a party provide an affidavit verifying a list of documents. A useful authority on this issue is the decision of Mr. Justice Legg (as he then was) in *Foundation Co. of Canada Ltd. v. Burnaby (District)*, [1978] B.C.J. No. 557 (S.C.) at para. 7:

When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.

- [32] The term "a dilatory or casual attitude" has been described as an attitude that gives the other parties reasonable cause to suspect that either deliberately or by willful indifference, relevant documents may be hidden from them: *Synergy Management Group Ltd. v. Walker Systems Corp.*, [1992] B.C.J. No. 2109 at para. 15 (S.C.) [Synergy Management], cited in *Copithorne* at para. 12.

- [33] The respondent asserts that recent case law has expanded the test beyond what is outlined in *Centura*, and now provides additional circumstances in which an order for verifying an affidavit is appropriate, including to alleviate suspicion between the parties. In support, the respondent refers to *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 749 at paras. 29-30 [Cambie], *Totzauer Holdings Ltd. v. Nanaimo Forest Products Ltd.*, 2012 BCSC 1882 at paras. 47, 65-66 [Totzauer], and *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816 [Gardner].
- [34] In my view, those cases have not expanded the legal test to the extent argued.
- [35] The authorities before me support that the court may order a party of record to serve an affidavit verifying a list of documents in circumstances including:
1. when document production has been clearly inadequate (*Centura* at para. 38), meaning documents that are significant to the defence or claim of one party have been omitted from any list delivered under the Rule, and there is no adequate explanation or reason for the omission (*Copithorne* at para. 12); or
 2. when a party has displayed a dilatory or casual attitude to document production (*Centura* at para. 38), giving the other party reasonable cause to suspect that, either deliberately or by wilful indifference, relevant documents may be hidden from them (*Synergy Management* at para. 15, cited in *Copithorne* at para. 12).
- [36] In addition, an affidavit will not be ordered where there is a genuine dispute as to what is producible (*Centura* at para. 38).
- [37] I am not persuaded that *Cambie* is authority for the proposition that "suspensions" by themselves are sufficient for an order pursuant to R. 7-1(8). Mr. Justice Steeves' reasons indicate, at para. 29, that the "suspensions" in that case were supported by conduct that gave the other party reasonable cause to suspect that relevant documents may be hidden from them:
- [29] The plaintiffs say very little has been produced and they are suspicious that not all documents have been listed or produced. For example, they question how it could be that senior officials such as the deputy minister was not more involved and the subject of more correspondence and communications.
- [38] Moreover, the reasons in *Cambie* should be appreciated in the context of that litigation - a unique 165-day trial, which was adjourned for a full year half-way through, and which has led to numerous interlocutory disputes over evidentiary matters. For example, prior to the reasons in 2018 BCSC 749, the *Cambie* litigation had already produced over 35 published judgments.

- [39] I am also not persuaded that the decisions of Master Taylor in Totzauer or Mr. Justice Pearlman in Gardner expand the legal test. These decisions merely reinforce that the lack of a satisfactory explanation for having a casual attitude or failing to list documents is a consideration in the analysis that may ultimately favour the ordering of an affidavit: see e.g. Totzauer at paras. 65-66; Gardner at para. 54.
- [40] Moreover, in Gardner, Pearlman J.'s framing of the legal test mirrors what I have outlined above:
- [52] Rule 7-1(8) permits a court to order that a party provide an affidavit verifying its list of documents when in the absence of any adequate explanation, relevant documents have been omitted from a list of documents. Such an order may also be made where a party has shown a "dilatory and casual attitude to production of documents" leading to an inference that "either deliberately or by wilful indifference relevant documents may be hidden".

Error of Law

- [41] The appellant submits that the master did not apply the correct legal test - the master made no explicit finding that the appellant's document production had been "clearly inadequate" nor did she make a finding that the appellant had displayed a "dilatory or casual attitude". The appellant submits that the master's only finding was with respect to the letter dated May 29, 2018, written by appellant's counsel (the "Letter"). The Letter was sent as a response to the respondent's notice of application filed May 16, 2018, the examination for discovery of Mr. Berkenbos in his personal capacity on March 19, 2018, and the respondent's counsel's email of May 24, 2018, in which several production requests were made. With respect to requests (ii), (iv), (xxi), (xxvi), (xxvii), (xxviii), (xxix), (xxx), (xxxi), and (xxxiii), the Letter states that "Mr. Berkenbos has searched his records and does not have anything to produce at this time."
- [42] From that, the master found that:
- [3] There is no evidence from Mr. Berkenbos as to what that means or whether there are steps that remain to be taken for him to be confident that document production is complete.
- [4] I agree with the applicant that such a response creates suspicion that a complete search for and production of relevant documents has yet to be done despite the fact that the first list of documents of his in this matter was produced in July of 2017 and the requests were made on discovery in March 2018.
- [5] Thus, I will order that Mr. Berkenbos produce an affidavit verifying his most recent list of document and identifying what steps have been taken to locate documents and what steps, if any, remain to be undertaken in that regard.
- [43] The respondent submits that the master's reasons indicate that the test set out in Centura was applied. I agree. Although the master did not explicitly use the wording "casual attitude" in her reasons, paras. 2-4 indicate that the master applied a test with the same meaning and

effect. For example, the master's discussions of the Letter, stating that the appellant does not have anything to produce "at this time", and of the timeliness of the lists, are evidence of a casual attitude to disclosure, and I infer that the master considered it such. The master's reasoning at para. 4, in which she found a "suspicion that a complete search has yet to be done", is likewise similar to a "reasonable cause to suspect" that relevant documents may be hidden. Overall, I find the master's line of reasoning sufficiently consistent with the dilatory or casual attitude test from *Centura* and the other cited case law.

- [44] As a result, I find no reviewable error of law. Therefore, I will not interfere with the master's order unless it is clearly wrong.

Did the master err in ordering the affidavit?

- [45] The appellant submits that a "suspicion" must be reasonable and it must arise from a dilatory or casual attitude to document production. He submits that in this case, the Letter does not display such attitudes, nor does any other evidence. On the contrary, the Letter sets out responses to all of the plaintiff's requests for documents and information. The appellant notes that the Letter explicitly states that the appellant "has maintained throughout these proceedings that many potentially relevant documents have been removed or stolen from his property". In addition, at the hearing with the master the appellant relied on his affidavit #3, sworn April 25, 2017, and the affidavit #1 of Paul Emerson, sworn April 12, 2017.
- [46] In his affidavit #3, the appellant deposes, among other things, that the respondent had entered his home without authority, that the respondent had been in his business office without authority, and that a safe had been stolen from his office. He deposes that he believes several documents belonging to him and the Deceased were taken. The affidavit of Paul Emerson, manager of the appellant's business, corroborates that the office had been broken into multiple times and that at one point the respondent had been in the office unauthorized.
- [47] The appellant also submits that the only documents the respondent suggests were omitted from the appellant's list of documents were the affidavits of non-party witnesses, and that there was a genuine dispute about whether those documents were privileged and need to be produced.
- [48] The respondent on the other hand submits that a master is not required to expressly include in her oral reasons every bit of evidence placed before her during a hearing. Instead, the master is only obliged to indicate the findings of fact upon which her decision was based, and she did this.
- [49] I agree with the respondent that a master is not required to expressly include in oral reasons every piece of evidence before her. Furthermore, in my view, the master's finding at para. 3 that, "[t]here is no evidence from Mr. Berkenbos as to what that means or whether there are steps that remain to be taken for him to be confident that document production is complete", is entirely consistent with the Letter and the affidavits. The Letter was not written

by the appellant, but by his counsel: see Totzauer at paras. 60-62. Moreover, the affidavits were sworn over a year prior to the hearing with the master, and their contents do not provide any current information on whether there are steps that remain to be taken to ensure complete document production of the following items, as requested in the May 16, 2018 notice of application:

- (ii) Proof that William Berkenbos paid any of the \$2,150,000 to buy the house on 0 Avenue.
- (iv) Any photographs showing William Berkenbos and Cheryl Anne Berkenbos, deceased living together at 0 Avenue.
- (xxi) Any photographs of William Berkenbos and Cheryl Anne Berkenbos, deceased together at 0 Avenue or 14th Avenue.
- (xxvi) Any Christmas cards or photographs in relation to Christmas 2007.
- (xxvii) Any birthday cards from Cheryl Anne Berkenbos, deceased to him during their marriage.
- (xxviii) Information as to whether William Berkenbos and Cheryl Anne Berkenbos deceased took any trips together between 2002 and 2015.
- (xxix) Documentary proof of travel that William Berkenbos took by himself or with anyone else between 2002 and 2015, including receipts, tickets, photographs.
- (xxx) Any photographs of William Berkenbos with Cheryl Anne Berkenbos, deceased, any Christmas cards to and from him and Cheryl Anne Berkenbos, deceased, Valentine's Day cards, or anniversary cards.
- (xxxi) Proof of any travel in the form of plane tickets, train tickets, bus tickets both for William Berkenbos alone, or with him and Cheryl Anne Berkenbos, deceased or with anyone else.
- (xxxiii) Copies of any rent cheques made out to Cheryl Anne Berkenbos, deceased by Adam James Pilcher.

[50] The affidavit of Paul Emerson merely provides that as of April 12, 2017, Mr. Emerson "was not advised on what the police were going to do" with respect to four break-ins at the office, and that he was "going to be asking for a copy of the police report". Affidavit #3 of Mr. Berkenbos merely provides that as of April 25, 2017, he believed that the Deceased's Will as well as a number of documents of his and the Deceased's were in a safe that was stolen from his office. The affidavit also mentions a list of items, including automobiles, believed to be in the possession of the respondent.

[51] Based on the whole of this evidence, it was not clearly wrong for the master to have reasoned that the appellant's attitude to production brought reasonable cause to suspect that relevant documents may be hidden.

- [52] With respect to the appellant's submission on privileged third-party affidavits, I note that on May 29, 2018, counsel for Mr. Berkenbos sent counsel for the respondent eight third-party affidavits, including two from Darlene Burnson, whose unfiled affidavit formed part of the basis for the Document Production Application. Paragraphs 2 and 8 of the master's reasons indicate that she was aware of this disclosure prior to the hearing. Therefore, I am not persuaded by the appellant's argument.
- [53] As a result, I find that the master was not clearly wrong in her reasoning. The appeal is dismissed, and the defendant/appellant is to provide the verification affidavit per the master's order no later than August 24, 2018.
- [54] Costs of this appeal plus the costs already granted in the underlying action are awarded to the plaintiff/respondent.

"The Honourable Madam Justice Forth"

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