

CANADA / JUDGMENT

Gray v. Kingsnorth Development Corporation

2012 BCSC 2238

COURT

Supreme Court of British Columbia

DECIDED

8 November 2012

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2012 BCSC 2238 Gray v. Kingsnorth Development Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gray v. Kingsnorth Development Corporation,

2012 BCSC 2238

Date: 20121108

Docket: 10-1990

Registry: Victoria

Between:

Mimi Evelyn Gray

Plaintiff

And:

Kingsnorth Development Corporation and 319968 B.C. Ltd.

carrying on business as "Bingo Bingo Esquimalt"

also known as "Bingo Esquimalt"

Defendants

Before: The Honourable Mr. Justice B. MacKenzie

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

F. K. Walton, Q.C.

L. Pringle

Counsel for the Defendant 319968 B.C. Ltd.:

A. Bookman

Place and Date of Trial/Hearing:

Victoria, B.C.

November 8, 2012

Place and Date of Judgment:

Victoria, B.C.

November 8, 2012

- [1] THE COURT: This is an application by the defendants for severance pursuant to Rule 12-5(67), as well as an application for summary trial pursuant to Rule 9-7. Tied in with the latter application is an application by the defendant that the claim be dismissed or, in the alternative, that liability be apportioned between the parties.
- [2] The brief facts are that Ms. Gray, the claimant, has been attending a bingo establishment for several years. On this occasion, shortly after recovering from back surgery, she was exiting the bingo hall through an alleged pathway that the plaintiff says was used regularly by other patrons of the bingo hall. Even though she had used this "shortcut" through some shrubs in the past, on the day in question she tripped on a shrub branch and suffered what appear to be fairly significant injuries.
- [3] In these circumstances, the defendant says that the issues of liability and quantum of damages should be severed on the basis that it would be practical and expedient and a proper use of court time to proceed in that fashion.
- [4] The primary basis for the application for severance is that the defendant says the matter is quite simple and straightforward, and that it would save a considerable amount of time and expense if the issue of liability could be first determined.
- [5] The defendant says not only is it possible that it will be spared substantial costs and disbursements, but also that Ms. Gray, if unsuccessful, will be spared significant costs and disbursements.

[6] The test for whether there should be an order of severance has been outlined in several of the cases that counsel have provided to me, and notwithstanding Mr. Bookman's able argument, I am satisfied that I am bound by the test as outlined in *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180, where, at paragraph 11, the court states:

There is ample authority for the proposition that an applicant must establish that there exist extraordinary, exceptional or compelling reasons for severance, and not merely that it would be just and convenient to order severance.

[7] In addition, in a more recent case of the Supreme Court *Element v. Del Mar*, 2012 BCSC 868, Justice Punnett dealt with an application to assess issues separately. He states at paragraph 98:

[98] Splitting of the issues of liability and damages should be governed by the following principles:

- a) The court should lean against splitting issues of liability and damages where issues of general credibility may arise.

[I emphasize the word "may"]

- b) A judge's discretion to sever an issue is restricted to "extraordinary, exceptional or compelling reasons, and not merely that it would be just and convenient to order severance..." (*Bramwell v. Greater Vancouver Transportation Authority* . . .)

The court then went on to note, understandably, that:

A genuine likelihood of significant savings in time and expense may constitute a "compelling reason" to order severance.

[8] In this particular case, I am of the opinion that the comment by the court in *Bramwell* is relevant to the circumstances here. At paragraph 15 in *Bramwell*, the court noted *Legrand v. Canning*, 2000 BCSC 1633, where Justice Scarth dealt with a severance application. He concluded the applicant had not established extraordinary, exceptional, or compelling reasons for severance, and noted that the liability issues were "not plain" in the circumstances. Moreover, there was a further issue of whether the plaintiff was contributorily negligent.

[9] Those observations are instructive with respect to the application before me today. In my opinion, there are clear issues surrounding the circumstances of liability, notwithstanding the questions and answers outlined to me by counsel today from Ms. Gray's examination for discovery.

- [10] Moreover, I acknowledge perhaps the obvious that, as Mr. Bookman has pointed out in argument, the most significant barrier to settlement in this particular case in all likelihood is liability. While I appreciate that a finding on liability might enhance the possibility of a settlement, given the totality of the circumstances in this case, I am not satisfied the applicant has established that this is one of those cases where there are exceptional or compelling reasons to order severance of the issue of liability from the issue of damages.
- [11] I am also mindful of the comments in *District of North Vancouver v. Fawcett* 60 B.C.L.R. (3d) 201, where our Court of Appeal suggested that in a situation where there might be two answers to a particular question that in most circumstances separating the issue might not be an orderly use of court time.
- [12] So for all of those reasons, the application for severance is dismissed.
- [13] Mr. Bookman also makes an application for a summary trial, given these particular circumstances.
- [14] Rule 9-7 allows the court to use the summary trial procedure if it is satisfied that the issues raised in the application are suitable for disposition on the basis of affidavit evidence and would result in the efficient resolution of the proceeding. If the court is satisfied that it is able, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, it may grant judgment on such an application, unless the court is of the opinion that it would be unjust to decide the issues on the application.
- [15] I agree with Mr. Bookman's direction that I consider the comments of Chief Justice McEachern, as he then was, in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, where the Chief Justice noted that a summary trial application may not furnish "perfect justice" in every case, but that "elusive and unattainable goal cannot always be assured even after a conventional trial".
- [16] As I said to counsel, I am aware of the direction that trial courts not be bashful about utilizing the summary trial provisions where the court is satisfied that it can find the facts necessary to decide the issues and it would not be unjust to do so.
- [17] The primary objection by the respondent, Ms. Gray, to this application is that there are not insignificant credibility issues and therefore it would be inappropriate to proceed by way of affidavit material or evidence from an examination for discovery.
- [18] One of the issues which the respondent says is a head-on conflict is the alleged statement by Ms. Gray to one of the defendants' employees shortly after she fell. Ms. Gray denies saying what that employee alleges she had said to him, and understandably during this proceeding counsel emphasized this alleged comment as being significant with respect to the issue of liability.

- [19] In addition, the respondent points out the evidence of Mr. Eraut, the owner of the establishment, with respect to whether people utilized this shortcut through the shrubbery. His position is in direct conflict to a witness that will be called by the plaintiff, and contradicted by Ms. Gray herself. The plaintiff says this, too, is a head-on conflict that cannot be properly determined by affidavit material.
- [20] Again, given the totality of the circumstances, and notwithstanding the able argument I have heard today, I am not satisfied that the court would be able to on the whole of the evidence find the facts necessary to decide the issue of liability. I am also of the opinion that it would be unjust to decide that issue by way of summary trial. This application is dismissed as well.
- [21] With respect to the merits of the case, I am of the opinion, Mr. Bookman, Mr. Walton, it is not necessary for me to go any further with respect to that. But, based on the material before me, I appreciate the points both of you make with respect to your positions. I do not know if anything can be usefully added by me comparing the circumstances here with the boulder case in the interior or the university and --
- [22] MR. WALTON: Whitney.
- [23] THE COURT: Whitney, the land that is out of the area. I think I will just leave it at that. I do not want to turn this into a settlement conference or anything like that.
- [24] MR. WALTON: It might be helpful.
- [25] THE COURT: Well, the planting of the shrubbery, and the closing off of the smoking area or the sidewalk because of the smoking area, for what it is worth, seems to me that by having that opening and the parking lot to the immediate right, "invitation" is too strong a word, but it does invite pedestrian traffic, in my opinion, to utilize that area. I appreciate, on the other hand, everything Mr. Bookman has said about Ms. Gray utilizing it before, knowing it was there, even though not focusing on the ground on this occasion. Both of you have got cases that go both ways with respect to an answer to that. Perhaps there is some apportionment that might be forthcoming, just based on what I have seen and heard today, and again I think that is about as far as I feel comfortable going at this point in time.
- [26] MR. WALTON: Okay, thank you.
- [27] THE COURT: Now, with respect to costs, any submissions on that. Mr. Walton?
- [SUBMISSIONS RE COSTS]
- [28] THE COURT: Thank you. I tried to make it clear throughout that I wrestled with the application. I cannot say that it was without merit or it had no prospect of success. It was a reasonable application, and so I agree with Mr. Bookman that I should exercise my discretion and award costs in the cause.

"B. MacKenzie, J."

The Honourable Mr. Justice MacKenzie

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Prepared on 29 October 2026 · Esheria