

CANADA / JUDGMENT

Groberman v. Groberman et al

2005 BCSC 999

COURT

Supreme Court of British Columbia

DECIDED

4 July 2005

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2005 BCSC 999 Groberman v. Groberman et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Groberman v. Groberman et al,

2005 BCSC 999

Date: 20050704

Docket: L040682

Registry: Vancouver

Between:

RONALD BRUCE GROBERMAN

PLAINTIFF

And:

ALICE GROBERMAN as Executrix of the Estate of Harold Samuel Groberman,

ALICE GROBERMAN, BRIAN MICHAEL GROBERMAN, HARVEY MALCOM GROBERMAN,
PAMELA DEE EMMA GROBERMAN, BERNICE KLAUDT

and GARY KLAUDT

DEFENDANTS

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Andrew Morrison

Counsel for the Defendants, Alice Groberman and Pamela Dee Emma Groberman

Robert Millar

Date and Place of Hearing:

June 29, 2005

Vancouver, B.C.

- [1] This is an application by the plaintiff to renew the Writ of Summons in this action for a further 12 months, pursuant to Rule 9(1).
- [2] Two of the defendants, Alice Groberman and Pamela Dee Emma Groberman, oppose the application. Two of the defendants consent, Brian Groberman and Harvey Groberman, brothers of the plaintiff. The defendant Gary Klaudt takes no position; the defendant Bernice Klaudt has registered no response.
- [3] The Writ in question was filed March 12, 2004 under the Wills Variation Act, R.S.B.C. 1996, c. 490. The action arises out of the estate of Harold Groberman who died February 10, 2003 and whose Will was probated September 30, 2003. Mr. Groberman was married to Alice Groberman. The plaintiff is the son of Harold Groberman by Mr. Groberman's first wife. Harold Groberman's Will left no provision for the plaintiff, and all but one piece of jewellery in Harold Groberman's estate was left to his widow, Alice Groberman.
- [4] The Writ was issued within the six month limitation period following probate. However, the plaintiff chose not to serve the Writ on the defendants within the months following the issuance of the Writ.
- [5] Around 1978, Harold Groberman and his sister Annabelle, who had inherited shares of a company of some value from their father in 1974, in what appears to be an estate planning procedure, caused Harold's three children and Annabelle's children to receive non-voting common, non-participating, Class D equity shares in the family companies by way of gifts. Harold Groberman held 60% of the voting shares, and his sister Annabelle 40%. They continued to have the exclusive right to the dividends and income earned by the companies. The Class D shareholders received no income or dividends.
- [6] Following the death of Harold Groberman, on August 21, 2003, the three sons of Harold Groberman and the children of Annabelle commenced an oppression action in Alberta where the company assets are located. Prior to that, the children of Annabelle had caused a suspension of all payments of income to Alice Groberman as well as to Annabelle. Those payments were reinstituted by the Alberta court in December, 2003.
- [7] Thus, the considerable acrimony between these parties has been going on for approximately two years, and continues still.

[8] According to the plaintiff, he had hoped that the oppression proceedings in Alberta would be dealt with in a summary way, and would be successful as far as he was concerned, such that he would not have to proceed with his action under the Wills Variation Act in British Columbia. It was for this reason that the plaintiff deposes that he decided not to serve the Writ of Summons, but that he had caused the Writ to be issued within the six month limitation period.

[9] In his affidavit sworn April 27, 2005, the plaintiff said, in part:

If the Plaintiffs in the Oppression Action are successful, such conduct would be ruled oppressive and I may finally receive some financial benefit from the shares. Whether or not I receive any such financial benefit and the extent of it is relevant to a consideration in the current action as to whether proper provision has been made for me by my late father, Harold Groberman. Because of this, and because the Alberta action was originally launched by way of an Originating Notice, I had hoped that the Alberta action would be resolved and might then resolve the issue in this action and might then preclude the need to proceed with it. Because of that, I did not immediately serve notice of this action on the Defendants.

[10] It eventually became apparent to the parties that the oppression proceedings were not going to be determined quickly. The plaintiff submits that after he received the statement of defence of Alice Groberman in the Alberta proceedings on February 8, 2005, it became clear to him that not only was the oppression proceeding going to proceed and take some time, but he would have to serve the defendants and preserve his action in the Wills Variation claim in British Columbia.

[11] Attempts by a process server to serve Alice Groberman and her daughter Pamela Groberman on February 28, 2005 were not successful. On March 7, 2005, the process server was able to serve Alice Groberman's daughter, Bernice Klaudt, and Alice Groberman's son, Gary Klaudt, with the Writ; but on that same date, the process server attempted but was unable to serve either Alice or Pamela Groberman.

[12] On March 9, 2005 the plaintiff's process server was advised Alice Groberman may be out of town. On March 9 and 10, 2005 the process server attempted to contact Pamela Groberman at her office, without success. On March 10, 2005 the process server again attempted to serve Alice Groberman, without success.

[13] In the meantime, on March 8, 2005, the plaintiff's Alberta lawyer sent an email to Mr. Millar, counsel for Alice and Pamela Groberman, with a copy of the Writ of Summons, asking Mr. Millar whether he would accept or facilitate service of the Writ on Alice Groberman and Pamela Groberman. It was pointed out that the Writ would expire shortly.

[14] On March 12, 2005, the Writ of Summons expired. All defendants had been served with the exception of Alice Groberman and Pamela Groberman.

- [15] Discussions then followed between counsel as to whether Alice Groberman would consent to a renewal of the Writ. On April 19, 2005, counsel for Alice Groberman advised that there would be no consent to a renewal of the Writ. This application was then prepared and delivered.

POSITION OF THE PARTIES

- [16] Counsel for the plaintiff relies upon the factors set out by the Court of Appeal in *Sutherland v. McLeod*, 2004 BCCA 653. Those five factors are as follows:
- a) Was the application brought promptly?
 - b) Did the Defendant have notice of the claim?
 - c) Has the Defendant suffered prejudice?
 - d) Is the failure to serve the writ attributable in any respect to the actions of the defendant?
 - e) Was the failure to serve the writ attributable to the plaintiff?
- [17] In submitting that this application should succeed, counsel for the plaintiff reminds the court that the overall objective of the courts is to see that justice be done.
- [18] With regard to the five tests, the plaintiff says the application was brought promptly.
- [19] As to whether the defendants had notice of the claim, the plaintiff suggests that Alice Groberman's son and daughter (and Pamela's brother and sister) were served on March 7, 2005, and given the closeness of the family, it would be more than probable that they would have told their mother of this claim. Also, that counsel for Alice Groberman was aware of the Writ when it was sent to him on March 8, 2005.
- [20] As to whether the defendants have suffered any prejudice, the plaintiff contends that this has not occurred.
- [21] The plaintiff made a number of attempts to serve the Writ. There is no evidence that Alice Groberman or Pamela Groberman were avoiding service, although it seems apparent Alice Groberman was at her home in White Rock when attempts to serve were ongoing. There were no instructions to counsel to accept service.
- [22] The plaintiff accepts some portion of the blame for the failure to serve the Writ prior to its expiry. He claims he delayed service in the hopes that the Alberta oppression action would be resolved in his favour, making this action unnecessary. He further submits that he was not seeking any tactical advantage by, in effect, hiding in the weeds, and not serving the Writ; that this was not such a case. Rather, it was a desire to avoid a multiplicity of proceedings amongst the same parties.

- [23] The position of the two defendants is that Rule 9 is not there to accommodate persons who deliberately elect not to serve a writ of summons. Counsel relies on *Johnson v. Cooke*, 2000 BCSC 681. In *Johnson*, a writ was not served within the required year in a medical negligence claim, through the inadvertence of the plaintiff's lawyer. A new lawyer served the defendants late. The plaintiff later applied to renew the writ and the application was allowed. The defendants had alleged prejudice. Master Bolton referred to the decision in *Reid v. Mutual Life Assurance Co.*, [1999] B.C.J. No. 388, paras. 28 to 30. There the court confirmed there is no onus on the defendant to show particular prejudice, and the court should examine the merits of the action in deciding on renewal of the writ. At para. 30, the court said Rule 9(1), while broadening the discretion of the court to renew, should not apply "for those who neglect and or decide not to serve a Writ... for whatever reason." That the court "must exercise its discretion judicially."
- [24] The defendants further claim the plaintiff deliberately took a risk, and that when litigants do this in order to prevent a defendant from knowing of the action, the courts should not reward such a risk.
- [25] Counsel for the two defendants argues that the law and the Rules favour a defendant knowing as soon as may be reasonable that an action has been served against him or her. That this is particularly so in a Wills Variation case, which is confirmed by the relatively brief six month limitation period. That there was no valid reason why the Writ was not served shortly after issuance.
- [26] The two defendants question the validity of the reasons given by the plaintiff in his affidavits, and submit that it was not reasonable to assume that the Alberta action would be resolved early or disposed of in his favour.
- [27] On the issue of prejudice, Alice Groberman in her affidavit of June 17, 2005 stated:
- The renewal of the Writ of Summons in this matter will cause me prejudice. I assumed that any disputes associated with the Will would not be prosecuted. Due to my age it will be difficult for me to prepare for a trial and as I say above the stress and disruption of a lawsuit in respect of the Will is likely to affect my health. The limitation period has passed and the protections afforded to me under the Wills Variation Act to a timely determination of an issue in respect of the Will are lost to me.
- [28] The defence contends there is no evidence to make the assumption that Alice Groberman knew of the claim, and I agree. Nor is there evidence to suggest that she is responsible for any delay in service of the Writ.

- [29] Finally, counsel for the defence argues that it is appropriate at this stage for the court to consider the merits of the Wills Variation case determining whether the court should exercise its discretion. That this was a marriage of 31 years and that the only asset in the estate, other than a piece of jewellery, was left to the widow; that there is little or no prospect that a fully employed grown son of the deceased would be successful in altering the testamentary intentions of Harold Groberman.

CONCLUSION

- [30] Dealing with the last point first, that is, whether this claim has any merits, in my view, this court is not equipped at this time to look at the merits of the claim under the Wills Variation Act in any detail. At this stage, it certainly cannot be said that this case is obviously bound to fail. That is something I do not know. The plaintiff argues that a prima facie case has been made out.
- [31] There is not enough evidence before me to make any valid finding on the merits at this time.
- [32] In my view, the applicant should succeed and the Writ of Summons should be renewed for a further 12 months.
- [33] In assessing the factors set out in the Sutherland case, first of all, this action was brought promptly.
- [34] The defendants had no notice of this particular claim until sometime in March, 2005, almost one year after the issuance of the Writ. There was serious and continuing acrimony between these parties, as evidenced by the oppression action in Alberta. But these two defendants would not have notice of this claim under the Wills Variation Act until they heard of the Writ or actually received a copy of the Writ.
- [35] Has the defendant Alice Groberman suffered prejudice? There is no evidence to suggest that Alice Groberman has health problems because of any medical condition or because of her age, 67 years. There is always stress and disruption when a lawsuit occurs, and that has been occurring for the past year in Alberta. This lawsuit will add to that, for all parties. However, there is nothing to suggest in the evidence before me that the delay in service of the Writ has caused such prejudice that the plaintiff should be denied his application to renew this Writ.
- [36] The failure to serve the Writ is for the most part attributable to the plaintiff, and not the defendants. However, the plaintiff has set out reasons which are not meant to prejudice the defendants, but rather to try and avoid a multiplicity of actions. Under the circumstances, the plaintiff's actions are not unreasonable. Nor were they meant to trick or punish the defendants in any way, or hide matters from the defendants; hide in the weeds, so to speak.

- [37] So while the failure to serve the Writ on these two defendants in a timely manner is for the most part attributable to the plaintiff, his efforts to serve should also be taken into consideration. Those efforts were not casual, but they ended up being unsuccessful, in spite of several attempts.
- [38] In my view, it would not serve the interests of justice to deny the plaintiff his application to renew, given all of the circumstances of this case. However, costs of this application should be awarded to the two defendants, Alice Groberman and Pamela Dee Emma Groberman, under the circumstances. Costs will be at level 3.

"N. Morrison, J."

Madam Justice N. Morrison

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