

CANADA / JUDGMENT

Harden v. Katerberg

2016 BCSC 2066

COURT

Supreme Court of British Columbia

DECIDED

9 September 2016

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2016 BCSC 2066 Harden v. Katerberg IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Harden v. Katerberg, 2016 BCSC 2066 Date: 20160909 Docket: M153921 Registry: Vancouver Between: Elsie Harden Plaintiff And John Katerberg, Mary Katerberg and Lea Deanna Ouida Defendants Corrected Decision: The text of the Oral Reasons for Decision was corrected at paragraph 23 on November 7, 2016 Before: Registrar Cameron Oral Reasons for Decision Counsel for the Plaintiff: J. Corbett Counsel for Marti Katerberg: P.S. Boles Defendants: No appearances Place and Date of Hearing: New Westminster, B.C. September 9, 2016 Place and Date of Judgment: New Westminster, B.C. September 9, 2016

Introduction

- [1] This is an assessment of special costs that are due to the applicant, Marti Katerberg, and that are payable to her by the plaintiff, Elsie Harden.
- [2] In this personal injury action, the plaintiff alleged she suffered serious injuries to her left hand while involved in the loading of a horse into a trailer for transport.
- [3] The accident took place on June 9, 2013 on a rural farm property near Fort St. John, B.C. The action was commenced on June 2, 2015 and shortly thereafter, on or about August 21, 2015, then-plaintiff's counsel determined that it was appropriate to apply to add another party, Marti Katerberg, the applicant of this hearing, as a defendant to this action. The application to add Ms. Katerberg as a defendant would not be entirely straightforward as the applicable limitation period had expired.
- [4] Ms. Katerberg received the plaintiff's application and retained Ms. Pamela Boles as her counsel. Ms. Katerberg knew Ms. Boles as a senior litigator and a colleague at the bar who she had worked with on other matters. What followed over the course of the next 11 months was, to say the least, perplexing and out of the ordinary in matters such as these.
- [5] Ms. Boles is an experienced litigator. She reviewed the application materials and quickly determined that the application was defective and/or deficient. She contacted plaintiff's counsel, and while the date of the hearing of the application that was set for September 4, 2015 was adjourned, the adjournment only occurred on the eve of the hearing date.

- [6] Plaintiff's counsel considered abandoning the application shortly thereafter, but she was not unequivocal about that decision. Ms. Boles pressed for clear answer and made a claim for special costs on behalf of Ms. Katerberg.
- [7] On September 25, 2015, the matter was before Mr. Justice Skolrood for directions on the claim for special costs and the matter was adjourned.
- [8] Ms. Boles continued to investigate the merits of the claim, which was not well defined by the plaintiff in her application materials. Initially, the allegation was that Ms. Katerberg owned the horse that spooked and caused the injury to the plaintiff. Ms. Katerberg was not insured for any claim made against her and Ms. Boles recognized that, if Ms. Katerberg were added as a party, she would likely incur significant cost to defend what was described as a substantial claim for injuries to the plaintiff's left hand and, as matters transpired, post-traumatic stress disorder.
- [9] Matters lay unsettled and mostly as they were as it related to the claim for special costs and the plaintiff's application remained dormant until May of 2016, when plaintiff's counsel amended the application to join Ms. Katerberg to this action, asserting that her liability was no longer as an owner of the horse but because she was present when the accident occurred on the farm property.
- [10] Another hearing took place before Master Tokarek on May 25, 2016. Ms. Boles, by this time, had obtained evidence that put in real question the factual foundation for any claim against Ms. Katerberg. Colouring the matter further was an allegation that Ms. Katerberg had asserted to the plaintiff shortly after the accident that she could not be sued by the plaintiff as she was a lawyer.
- [11] Master Tokarek adjourned the hearing and it was anticipated that there would be cross-examination on affidavits in support of the application to join Ms. Katerberg before it would come on for hearing. The court directed that that hearing must occur within four months.
- [12] At or about this time, plaintiff's counsel wisely turned the matter over to fresh counsel to advise the plaintiff on the course to follow due to her perceived conflict of interest that had developed with her client. Successor counsel, who also appeared on this assessment, promptly obtained instructions to formally abandon the application to join Ms. Katerberg and later received instructions to agree to pay special costs to Ms. Katerberg, to be assessed.
- [13] Before that resolution was reached, Ms. Boles had done extensive preparation for cross-examination of the plaintiff and her then counsel. Ms. Boles had retained another senior litigator, Mr. Richard Gibbs, Q.C., to review the matter and prepare a detailed letter in support of the claim for special costs. The Principles Governing this Assessment
- [14] Rule 14-1(3) of the Supreme Court Civil Rules states as follows:
- (3) On an assessment of special costs, a registrar must

- (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
 - (b) consider all of the circumstances, including the following:
 - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved; (ii) the skill, specialized knowledge and responsibility required of the lawyer; (iii) the amount involved in the proceeding; (iv) the time reasonably spent in conducting the proceeding;
 - (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding; (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained; (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; and (viii) Rule 1-3 and any case plan order.
- [15] In *Gichuru v. Smith*, 2014 BCCA 414, the Court of Appeal summarized the relevant principles in respect of an assessment of special costs saying, *inter alia*:
- [155] When assessing special costs [the court must] only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. [A court must inquire] into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).
- [156] [The court should inquire into] the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. The Rule 14-1(3) Considerations The complexity of the proceeding and the difficulty or the novelty of the issues involved
- [16] Ms. Bowles submitted that this matter was more complex than might generally be the case because there was a lack of clarity and conflicting evidence was presented on the joinder application. I agree with that submission.
- [17] Mr. Corbett submitted that an application to add a party after the limitation period has expired is decided on well-established legal principles and should not be overly challenging for experienced counsel. I also agree with that submission.
- [18] The result is, I conclude, that this matter was of at least average complexity. The skill, specialized knowledge and responsibility required of the lawyer
- [19] The successful defence of this application required skill and, given the nature of the allegations made against Ms. Katerberg, there was clearly added responsibility on counsel. The amount involved

- [20] This factor is not, in my view, significant in the assessment, given the narrow compass involved in the retainer, but I am satisfied that Ms. Katerberg faced an exposure to a claim that would likely have been expensive to defend. The time reasonably spent in conducting the proceeding
- [21] It is in this respect of the matter where the parties are most at odds. Ms. Boles reconstructed her time from her recollection and file notes to estimate that she spent approximately 210 hours on this retainer. Mr. Gibbs spent another 15 hours providing his advice to Ms. Boles.
- [22] Mr. Corbett submitted that, while all this time may well have been spent, it was not, in the words of Rule 14-1(3)(a), "proper or reasonably necessary to conduct the proceeding". He pointed to the significant time spent by Ms. Boles to investigate the merits of the claim, including the identification of an expert on the liability issues pertinent to this claim.
- [23] Looking at the matter objectively, as I must, while also not inordinately second-guessing counsel who invested the time and effort to reach a successful outcome, I am not satisfied that this much time was necessary to prepare for and to successfully defend the application for joinder, or to press the claim for special costs. It must not be overlooked that these applications did not need to proceed to hearing on the merits.
- [24] Having said that, and in making an evaluation of the amount to be allowed, I find that this matter was made more complex and challenging due to the nature in which it proceeded, none of which was the responsibility of Ms. Katerberg or her counsel. The conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding
- [25] As I have just noted, plaintiff's counsel from the outset conveyed an approach to the application to join Ms. Katerberg that made matters difficult, and clearly more time-consuming for her and her counsel. The importance of the proceeding of the party whose bill is being assessed and the result obtained
- [26] It was common ground that the matter was very important to Ms. Katerberg, not the less so due to the comments allegedly made by the plaintiff as to Ms. Katerberg's lack of professionalism. The result obtained was as good as it could have been for Ms. Katerberg. Benefit to the party
- [27] Ms. Katerberg received excellent advice and representation throughout, to her ultimate benefit. Rule 1-3 of the Supreme Court Civil Rules
- [28] Proportionality is an express consideration on the assessment of special costs. In his submissions, Mr. Corbett noted that the court should ask itself whether it is proportional to allow Ms. Katerberg an allowance for legal fees of approximately \$105,000 for Ms. Boles and another \$9,000 for Mr. Gibbs, before applicable taxes. He submitted this amount is objectively out of proportion to the task that was at hand, that is, to successfully oppose the joinder of Ms. Katerberg and to recover her costs at the highest level, in this case, being special costs. He submitted that the sum of \$35,000 would fairly compensate Ms. Katerberg for special costs.

- [29] Ms. Boles submitted that all of the time spent by Mr. Gibbs and herself was necessary and proper for the defence of the application and the sum of \$114,000 plus applicable taxes should be allowed. Decision
- [30] Taking into account of all of the factors, and applying the principles set out in Gichuru, supra, I consider that a fair allowance to Ms. Katerberg for her special costs is \$60,000 plus applicable taxes.
- [31] In addition, Ms. Katerberg is entitled by agreement to disbursements of \$6,500.
- [32] Counsel agreed that special costs of the assessment are recoverable by Ms. Katerberg, and after hearing their submissions, I assess those costs to Ms. Katerberg, inclusive of disbursements, at \$7,000 plus taxes. "Registrar Cameron"

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