

CANADA / JUDGMENT

Henderson v. Fisher

2020 BCSC 886

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 886 Henderson v. Fisher IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Henderson v. Fisher, 2020 BCSC 886 Date: 20200529 Docket: M177458 Registry: Vancouver Between: Mikhaila Henderson Plaintiff And Karen Fisher Defendant Before: The Honourable Justice Branch Oral Reasons for Judgment Counsel for the Plaintiff: M. Klimo Counsel for the Defendant: C. Watson Place and Date of Written Submissions: Vancouver, B.C. May 25, 26 & 28, 2020 Place and Date of Judgment: Vancouver, B.C. May 29, 2020 Table of Contents INTRODUCTION.. 3 FACTUAL BACKGROUND.. 3 LEGAL FRAMEWORK.. 3 APPLICATION OF THE TEST.. 5 CONCLUSION.. 8

INTRODUCTION

- [1] This is an application by the defendant for the adjournment of the trial in these proceedings. A 10-day trial is set to commence on September 21, 2020. FACTUAL BACKGROUND
- [2] This is a motor vehicle claim. The accident occurred on October 15, 2015. The Notice of Civil Claim was filed September 5, 2017. The Response was filed December 21, 2017. Examinations of the plaintiff were conducted on October 4, 2018 and August 22, 2019. There is no indication that further examinations are contemplated.
- [3] The matter was first set for trial commencing on January 20, 2020. The parties attended at court on that date ready to proceed, but no judge was available.
- [4] There followed some discussion about alternate trial dates. Counsel for the defendant advised that he was unavailable for trial until well into 2021 because of personal and professional scheduling conflicts. There was some discussion of a March 2021 trial date.
- [5] The plaintiff eventually secured the 10-day trial commencing September 21, 2020 without the consent of the defendant. The Notice of Trial was filed February 18, 2020. Although the notice of trial was not served, apparently as a result of counsel oversight, the defendant did become aware of the date.

- [6] The defendant's counsel says he is unavailable for the scheduled trial dates. The plaintiff says that her day in court should not be further delayed given the potential for financial hardship.

LEGAL FRAMEWORK

- [7] The relevant aspects of Rule 12-1 state as follows:
- (6) Promptly after filing a notice of trial, the filing party must serve a copy of the filed notice of trial on all parties of record.
- (7) If a party on whom a notice of trial is served under subrule (6) objects to the trial date set out in that notice of trial, the party must, within 21 days after service of the notice of trial,
- (a) request a case planning conference, or
 - (b) make an application to the court to have the trial rescheduled.
- (9) The court may
- (a) order the adjournment of a trial,
 - (b) fix the date of trial of a proceeding,
 - (c) fix the date of trial of an issue in a proceeding, or
 - (d) order that a trial take precedence over another trial.
- [8] The plaintiff does not contest that the court has the jurisdiction to consider the defendant's adjournment application. This is appropriate given that the failure to serve promptly pursuant to Rule 12-1(6) should not be a basis to deprive the defendant of their potential remedy under Rule 12-1(7).
- [9] Whether to adjourn a trial is a discretionary decision. Factors that may be considered on such an application include:
- a) the history of the matter, including any deliberate delay or misuse of the court process;
 - b) the grounds, explanation and reasonableness of the request, including the availability of the parties, their counsel, and any witnesses;
 - c) the timeliness of the request;
 - d) the potential prejudice to the parties;
 - e) the right to a fair trial; and

- f) the proper administration of justice, including the interest in the early resolution of disputes. *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paras. 18-20; *The Owners, Strata Plan VR 2000 v. Shaw*, 1999 CanLII 6154 (B.C.S.C.) [*Strata Plan VR 2000*] at para. 26; *Novak v. Bond*, 1998 CanLII 6687 (B.C.S.C.); *NMH Holdings Ltd. v. The Crestmark Developments Limited Partnership*, 2011 BCSC 496 at paras. 29-32. APPLICATION OF THE TEST
- [10] The application to adjourn was made in a timely fashion. No issues were raised about the availability of the parties or the witnesses. The key competing factors are the plaintiff's interest in prompt resolution and the defendant's wish to ensure that her counsel of choice is available.
- [11] These particular factors were also dominant in *Thibodeau v. Stanevicius*, 2006 BCSC 110. In that case, the court found that the adjournment request should be denied stating:
- [23] The defendants argue that, like the defendant in *Novak*, they are entitled to have what may be a complicated and serious trial conducted by experienced counsel of their choice. That is a factor the court must consider in balancing the interests of the parties. However, this case is distinguishable from *Novak*.
- [24] The trial of this case is still nine months away and there is no evidence that senior counsel have had extensive personal involvement or that there would be significant duplication of effort if other, equally experienced counsel from their firms became involved at this point.
- [29] In the circumstances, the plaintiff's financial hardship, and the resulting need to have this matter come to trial as soon as possible, must outweigh the defendants' wish to have their first choice of counsel. I do not believe that an adjournment at this point is necessary to ensure the fairness of the trial.
- [12] The present case has certain distinguishing characteristics. In particular, defence counsel here has managed this case from its outset.
- [13] In terms of the reasonableness of the request, defendant's counsel's availability is relevant. However, following the last adjournment in January 2020, the defendant's counsel was generally unable to provide availability for the balance of the 2020 calendar year, and the first two months of 2021. Defendant's counsel not being available for such an extended period weighs against the reasonableness of the adjournment request. A similar concern about counsel availability was expressed in *Marinescu v. Insurance Corporation of British Columbia*, 2016 BCSC 2714, where the court dismissed the defendant, ICBC's application to adjourn a trial, also unilaterally set by the plaintiff:
- [5] I acknowledge that there are difficulties in getting 10 to 15-day dates, and we may very well be looking into 2018, but that is nearly two years before counsel says they are available. That, with the greatest of respect, is just simply not acceptable.

- [6] The right to have counsel of your choice has to be read in the context of that counsel being available to conduct a trial in a somewhat reasonable period of time. A three-and-a-half-year delay simply does not meet that criteria.
- [14] The defendant suggests that the court in *Marinescu* did not adequately consider the importance of counsel of the parties' choice being available. With respect, the above excerpt makes it clear that this factor was considered. In any event, I agree with the availability concern expressed by the Master in that case.
- [15] Here, the defendant's counsel states that, at the time of the scheduling discussions, he advised that he was "booked for trials from March 2020 until mid to late 2021 and later", an extremely long period. Indeed, his firm's initial communication on January 24, 2020 proposed trial dates in August 2021, an even longer delay.
- [16] In terms of the initially proposed, and eventually secured, September 2020 trial date, the defendant's counsel says that he had previously booked off the month of September for a personal vacation out of the country. It is relevant that the conflict is not a competing trial, the progress of which would itself be jeopardized by not granting the adjournment of the present matter.
- [17] I note that the defendant's counsel acknowledges that his calendar has now changed because of the COVID-19 court closures. However, there were no particulars provided as to what additional windows may now have opened or closed as a result of the present crisis. Such particulars may have been helpful in assessing how long the further delay would be if the adjournment were granted.
- [18] In terms of the potential prejudice created by the defendant's counsel's earlier established holiday plans, I find that I can take judicial notice that the ability of Canadians to travel out of the country is now largely restricted as a result of the COVID-19 pandemic: *Dias v. Gagnon*, 2020 ONSC 1716 at para. 28. The defendant's counsel does not disclose whether any deposits he paid at the time of his vacation booking have now become refundable as a result of COVID-19 or, more importantly, whether he is still able and planning to travel at the relevant time.
- [19] Even assuming the defendant's counsel is still intent and able to travel, and accepting the relevance of counsel choice to the analysis, I note that this is a relatively simple motor vehicle matter. The defendant's counsel works at a firm with a large insurance defence practice and multiple lawyers. These factors could ease the prejudice created by any potential need for a transfer of file responsibilities.
- [20] In terms of prejudice to the plaintiff, it must be acknowledged that the plaintiff has failed to provide direct evidence of financial hardship requiring an early trial, the type of evidence which was given weight in *Thibodeau* (see paras. 18 and 40). As to the importance of such evidence, see also *Raniga v Poirier*, 2020 BCSC 780 at para. 14. That said, I accept that the affidavit restrictions imposed under COVID-19 Notice #14 may have been a factor in the

weaknesses in the evidentiary record provided by both sides. Further, some prejudice to the plaintiff from delay in having their matter heard is obvious, even in the absence of affidavit material: Strata Plan VR 2000 at para. 26.

- [21] In terms of the historical conduct of this proceeding, the defendant suggests that the present trial date was secured by the plaintiff for "paltry tactical advantage". With respect, I see no evidence of such an improper motivation. The defendant suggests that evidence of such an intent can be derived from the triple-booking plaintiff's counsel has engaged in. However, one could also view this as a simple and reasonable recognition of the pre-trial settlement rate of motor vehicle matters. Indeed, in email correspondence dated February 3, 2020, the defendant's counsel himself acknowledged that "commencing April 2020 [he was] generally double or triple-booked until December 2020."
- [22] Looking more broadly at the historical conduct of the action, while the level of cooperation between counsel in securing a prompt and convenient trial date did not reach the level that the Court would prefer to see, that failure cannot be laid solely at the feet of plaintiff's counsel. Defence counsel's long period of unavailability certainly contributed to plaintiff's counsel's frustration.
- [23] The Court is left in a position where the weight on both sides of the scales is quite light, given the absence of meaningful evidence of substantial prejudice to either side. To the extent that the defendant is relying on the threat to their right to retain counsel of their choice, the fact is that the threat is really to the need for the defendant's counsel to potentially abandon now speculative September 2020 travel plans. This tilts the balance somewhat in the plaintiff's favour, particularly when coupled with the necessary consideration of the broader interests of the judicial system. As the court stated in Strata Plan VR 2000 at para. 26: "[A]n adjournment of any trial, but particularly a long trial, is prejudicial to the judicial system." This case was already set for trial once and the plaintiff should not have to wait more than a year for a second attempt at having her matter heard.

CONCLUSION

- [24] Based on the analysis above, I conclude that the trial should not be adjourned. If a change in counsel is required, the defendant will be at liberty to reapply based on any changed availability conditions. The plaintiff shall have their costs of this application in the cause. "Branch J."

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