
CANADA / JUDGMENT

Hughes v. Davies

2009 BCSC 68

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 68 Hughes v. Davies

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hughes v. Davies,

2009 BCSC 68

Date: 20090127

Docket: S052438

Registry: Vancouver

Between:

Cedric Hughes

Plaintiff

And

Daniel Davies and Insurance

Corporation of British Columbia

Defendants

And

Lawrence E. Pierce

Third Party

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

No one appearing on behalf of the Plaintiff

Appearing on his own behalf:

D. Davies

Counsel for the Third Party:

A. Oh

L. Pierce

Date and Place of Hearing:

March 9, 2007; August 10, 2007;

December 17, 2008

Vancouver, B.C.

(I) NATURE OF THE PROCEEDING AND RELIEF SOUGHT

- [1] This hearing pertains to the cross-applications brought by the Defendant Daniel Davies and the Third Party Lawrence Pierce. Both parties have applied for payment out to each of them respectively of the balance of certain monies presently held in Court - that amount being \$2,966.00. Both parties say that if they are successful, the other party should not receive any payment out of Court. For various reasons which are set out subsequently, this hearing has been protracted. As all of the claims of the Plaintiff had already been resolved, the Plaintiff did not participate in this hearing.
- [2] Initially, there was a third application - namely, an application by Mr. Pierce for the dismissal of the Third Party action. That application was granted at the commencement of this hearing by consent.
- [3] Essentially, the focus of this hearing is Mr. Pierce's application for costs of the Third Party action. Mr. Pierce makes the following submissions:
- (a) that he is entitled to an order for costs on the Third Party action as that matter was ultimately dismissed;
 - (b) that the quantum of these costs should be \$5,034.15 as assessed by Master Bolton;
 - (c) that the monies presently held in Court should be paid out to him in partial payment of those costs; and
 - (d) that an order should be made against Mr. Davies for payment of the balance of \$2,068.15.
- [4] Mr. Davies, on the other hand, opposes Mr. Pierce's costs application on the basis that the Third Party involvement in this action was minimal and that the action was ultimately dismissed by consent.

(II) ISSUES

[5] The issues in this hearing are:

- (a) whether I should exercise my discretion and award costs to the Third Party Mr. Pierce;
- (b) if so, whether the amount of those costs should be in the amount as taxed by Master Bolton;
- (c) if those costs should not be awarded in the amount as taxed by Master Bolton, the appropriate amount at which they should be awarded; and
- (d) if the Third Party is not entitled to costs, whether an order should be made that the balance of the monies held in Court be paid out to the Defendant Mr. Davies.

(III) BACKGROUND CIRCUMSTANCES

- [6] In 2000, Mr. Davies retained the Plaintiff, Cedric Hughes, to represent him in an action in which Mr. Davies was seeking damages arising from injuries suffered in a motor vehicle collision. Approximately three years later, on January 17, 2003, Mr. Davies terminated his retainer with Mr. Hughes. To secure payment of his legal fees, Mr. Hughes filed a solicitor's lien on the action.
- [7] In October 2003, Mr. Davies retained the Pierce Law Group (and, in particular, Mr. Lawrence Pierce) to represent him in the personal injury action.
- [8] On March 31, 2005, the personal injury action settled. Because of Mr. Hughes' solicitor's lien, a portion of the Settlement Funds was held back to cover any legal fees found to be owing to Mr. Hughes.
- [9] About a month after the Settlement, on May 2, 2005, Mr. Hughes commenced the present action against Mr. Davies for the payment of his legal fees in the personal injury action.
- [10] Within a couple of weeks of that date, Mr. Davies third-partied Mr. Pierce. He contended that the monies owed to Mr. Hughes had been paid to Mr. Pierce who, in turn, was to have paid these monies to Mr. Hughes. Given these circumstances, Mr. Davies contended that Mr. Pierce should indemnify him (Mr. Davies) for any monies still owed to Mr. Hughes.
- [11] On June 15, 2005, Mr. Hughes sought judgment against Mr. Davies pursuant to Rule 18. That application was dismissed on the grounds that the Court was unable to decide the matter on the materials presented. In particular, Mr. Davies was defending the action on the basis that the account of Mr. Hughes had already been paid by Mr. Pierce or, alternatively, that the quantum of the account was not appropriate. As the account for legal services had not been assessed and as there was no evidence pertaining to the payment by Mr. Pierce, the matter could not proceed under Rule 18.

- [12] As a consequence, at the conclusion of this Rule 18 hearing on June 15, 2005, the Court recommended that there be a reference to the Registrar and that Mr. Hughes' account be assessed. Mr. Pierce was not in attendance at this June 2005 hearing nor did any one attend on his behalf. Furthermore, he did not file any evidence.
- [13] It was also at this time that the Court ordered that the monies held back in the Settlement be paid into Court pending the outcome of the present action.
- [14] During the 6-month period following the June 2005 hearing, Mr. Davies and Mr. Hughes examined each other for discovery. Neither Mr. Pierce nor anyone on his behalf participated in these discoveries. In addition, Mr. Pierce was not discovered. Moreover, a two day Registrar's Hearing was held in which Mr. Hughes' legal services account was assessed and a Recommendation and Report was prepared for the Court. Neither Mr. Pierce nor anyone on his behalf attended that Registrar's hearing.
- [15] On December 14, 2005, Mr. Hughes applied to this Court for an order that Judgment be granted in the amount reported and recommended by the Registrar. At the request of the Court, Mr. Pierce made a brief appearance at that hearing to clarify some aspects of the proceedings. In Reasons issued on January 9, 2006, the Court granted judgment to Mr. Hughes in the amount requested: *Hughes v. Davies et al.*, 2006 BCSC 35. These monies were subsequently paid out to Mr. Hughes from the monies held in Court, leaving the present balance of \$2,966.00. The December 14, 2005 hearing did not address the issues raised in the Third Party action.
- [16] In response to Mr. Pierce's application that he be awarded costs for his brief attendance at the December 14, 2005 hearing, McEwan J. held at para. 31 that "While I see the merit in his position, the amount would be nominal. In the particular circumstances of this case, I decline to make such an order." I note that Mr. Pierce did not file any materials in that December hearing and would not have attended but for the request of the Court.
- [17] On January 27, 2006, Mr. Davies filed a Notice of Motion which sought an order that Mr. Pierce be found liable for the payment of the Hughes Judgment. A review of the Court file does not disclose any materials filed by Mr. Pierce in response to this Notice of Motion.
- [18] It does not appear that this application was ever heard. Rather, the form of the proceeding was changed to a review of Mr. Pierce's account for his legal services in the personal injury action. This review was conducted in a separate action - namely, *Pierce Law Group v. Davies*, Vancouver Registry Number L052424. Though that action was commenced by Mr. Davies, the standard form documents that Mr. Davies used are formatted in such a way that it appears as if it was the law firm instituting the review proceeding.

- [19] This review was heard over a 3-day period at the end of May and the beginning of June 2006. Written Reasons for Judgment were issued in September 2006 which set out the quantum of costs awarded to Mr. Pierce in the personal injury action: *Pierce Law Group v. Davies*, 2006 BCSC 1464. At the beginning of this present hearing, all but just over \$800.00 of those costs had been paid. Since this hearing, that \$800.00 has also been paid.
- [20] In January 2007, Mr. Davies notified Mr. Pierce of this present application - that is, this application for payment out to him of \$2,966.00, the balance of the monies paid into Court in the present action. He set that application down for February 15, 2007.
- [21] Mr. Pierce then made his cross-application for:
- (a) a dismissal of the Third Party action;
 - (b) an order that he be granted costs associated with the Third Party action;
 - (c) that those costs be awarded in the amount of the Bill of Costs attached to his materials (namely, \$7,014.16); and
 - (d) that the monies in Court be paid out to him as partial payment of those costs.
- [22] On February 15, 2007, the application was adjourned. The matter came before the Court on March 5, 2007. There was apparently some confusion about the date as Mr. Pierce was present but Mr. Davies was not. Mr. Davies was contacted by the Court during this hearing and the matter was adjourned over until March 9, 2007. Madam Justice Gerow presided at the March 5, 2007 hearing, and she ordered that the costs of that hearing be argued on March 9, 2007.
- [23] On March 9, 2007, the present hearing began. Mr. Oh, a member of Mr. Pierce's law firm, appeared on behalf of Mr. Pierce. It was adjourned for continuation to allow for an assessment of the Bill of Costs presented by Mr. Pierce for the Third Party action. Costs of the March 9, 2007 hearing (which incorporated costs of the March 5, 2007 hearing) were awarded to Mr. Davies and set at \$750.00.
- [24] A hearing of the Third Party costs was held before Master Bolton on May 16, 2007, after which he assessed those costs at \$5,034.15. In his Reasons, Master Bolton emphasized that he had only assessed the costs, leaving the issue of entitlement to be addressed in this hearing: *Hughes v. Davies et al.*, (16 May 2007), Vancouver S052438 (S.C.).
- [25] The Bill of Costs presented at the hearing before Master Bolton was different than the Bill of Costs tendered by Mr. Pierce at the beginning of this hearing. The Bill of Costs presented to Master Bolton was for \$4,670.04 more than the initial Bill of Costs presented to me. Specifically, it was for \$11,684.20 rather than \$7,014.16. This later Bill of Costs included the costs for the March 5 and March 9, 2007 hearings, costs which had already been awarded to Mr. Davies and the costs of the assessment hearing itself - that is, the hearing before Master Bolton.

- [26] After Master Bolton completed the costs assessment, the present hearing next continued on August 10, 2007. As had occurred on March 9, 2007, Mr. Oh appeared on behalf of Mr. Pierce. One issue that arose was whether Master Bolton had addressed the question of whether any of the work done in this Third Party action was, for all practical purposes, a duplication of the work that had been done for the review of Mr. Pierce's account in the personal injury action. (As was touched on earlier, an order for payment of those costs had already been made against Mr. Davies.)
- [27] Mr. Davies submitted that there had indeed been duplication of work and that Master Bolton had not addressed this issue. Mr. Oh was unable to respond to that submission because he had not been in attendance at the hearing before Master Bolton. The matter was adjourned over again so that the issue could be addressed. Master Bolton was contacted. He responded that he was unaware of the other matter and therefore had not addressed it.
- [28] The present hearing continued on December 17, 2008. At that hearing, Mr. Davies submitted that, aside from the pleadings, the Third Party had not been involved in the present action. There had been no List of Documents produced or any other documentation exchanged.
- [29] Mr. Pierce, on the other hand, contended that there was considerable work done on the file, including the issuance of a List of Documents which he produced. In response to the question of whether this List was different from the list that Registrar Sainty had required that he produce in preparation for the review of his legal fees account in the personal injury action, he submitted that it was, indeed, different. Unfortunately, although Mr. Pierce did have both files with him during the hearing, and although he endeavoured to location the other List of Documents, he was unable to do so.
- [30] Mr. Pierce did clarify that there was one mistake with respect to the assessment of the Bill of Costs before Master Bolton. In that Bill of Costs, he had claimed, and Master Bolton had allowed, costs for the process of delivering a Notice to Admit. In fact, a Notice to Admit had not been prepared or delivered in this action.
- [31] I have reviewed all of the materials presented. Assuming that Mr. Pierce did prepare and deliver a List of Documents in the present action, that was different from the List in the other actions (aside from the work done in this protracted hearing, which includes the assessment before Master Bolton), the only other work done in this action is the preparation and filing of the Third Party pleadings and Mr. Pierce's brief attendance at the December 14, 2005 hearing.

(IV) ANALYSIS AND DECISION

- [32] As was set out earlier, the issues in this hearing are as follows:
- (a) whether I should exercise my discretion and award costs to Mr. Pierce, the Third Party;
 - (b) if so, whether the amount of those costs should be in the amount as taxed by Master Bolton;

- (c) if those costs should not be awarded in the amount as taxed by Master Bolton, the amount at which they should be awarded; and
- (d) if the Third Party is not entitled to costs, whether an order should be made that the balance of the monies held in Court be paid out to the Defendant Mr. Davies.

[33] As far as entitlement is concerned, pursuant to Rule 57(9), barring exceptional circumstances, costs follow the event. Even though Mr. Pierce is a lawyer who (with a few exceptions) represented himself throughout this action, he is nevertheless entitled, if successful, to party and party costs. However, those costs are to include only necessary costs: *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, 122 D.L.R. (4th) 330 (C.A.); *Middlekamp v. McMath* (1994), 93 B.C.L.R. (2d) 386, 27 C.P.C. (3d) 308 (C.A.); and *Arnold v. Goldstein*, [1920] 2 W.W.R. 424 (B.C. Co. Ct.).

[34] As was held in *Arnold*, quoting with approval from *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B. 872 at 876, [1881-1885] All E.R. 1111 (C.A.), "necessary costs" are defined as follows:

The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing by a solicitor, subject to this restriction, that no costs, which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances.

[35] Mr. Pierce was successful in this action generally as the Third Party claim against him was dismissed, albeit by consent. There are no exceptional circumstances barring an award that costs follow the event. Consequently, Mr. Pierce is entitled to be awarded costs.

[36] The pivotal issue is the extent of that award and, in particular, whether it should extend to any of the costs arising from this hearing. As was touched upon earlier, Mr. Davies was already awarded costs for the March 5 and 9 portions of this hearing.

[37] A review of the outcome of this hearing reveals that success was divided.

[38] With respect to the actual application for the dismissal of the Third Party action, the evidence does not support Mr. Pierce's submission that the dismissal was actually an issue. To the contrary, in the hearing itself, there was no hesitation on Mr. Davies' part to the granting of this order. Moreover, none of his hearing materials indicated that he was intending to object to it. Furthermore, the material of the Third Party did not show that he anticipated it would be contested. Rather, all of the evidence indicated that the application could probably have been addressed by consent without a hearing or Court appearance.

[39] As far as the actual application for costs is concerned, the amount assessed by Master Bolton was considerably less than the amount claimed by Mr. Pierce. Furthermore, that assessment should have been for an even lower amount as it included items which have already been

awarded to Mr. Davies - namely, the costs of the March 5 and March 9 hearings. In addition, the assessment included an amount for work that had never been done. Moreover, as was conceded by Mr. Pierce during this hearing, the award by Master Bolton for costs associated with the issuance of a Notice to Admit was in error as no such notice was ever issued in this action.

- [40] Put another way, the 94 units claimed by Mr. Pierce was reduced to 40.5 units in the assessment by Master Bolton. Of the 40.5 units assessed, 25.5 units pertained to work done for this protracted hearing, 20.5 units pertaining to preparation and attendance at these hearings (including the hearing before Master Bolton) and 5 units pertaining to Item 1B - namely: correspondence, conferences, instructions by a party after the commencement of the proceeding. Presumably, these last 5 units were for instructions given to Mr. Oh prior to his attendance on Mr. Pierce's behalf on this matter on March 9, 2007, as instructions to himself would be necessary and therefore not recoverable.
- [41] Given the divided success in the present hearing, I have concluded that Mr. Pierce is not entitled to the costs of this hearing. The assessment of Master Bolton should therefore be reduced to reflect that fact as well as the mistaken inclusion of an award for the preparation of a Notice to Admit.
- [42] Mr. Pierce's costs should therefore be assessed at 14 units. At \$110.00 per unit, his costs are \$1,540.00. In my view, these costs probably were "necessary" as Mr. Pierce did have to prepare the documentation and to make arrangements to have it filed and delivered respectively.
- [43] As was touched upon earlier, Mr. Davies was awarded costs in the amount of \$750.00 on March 9, 2007, for the first portion of this hearing. If those costs have not been paid, they are to be set-off against the costs awarded to Mr. Pierce, thereby reducing the award to Mr. Pierce to \$790.00. That award of \$790.00 is then to be paid to Mr. Pierce from the balance of the monies paid into Court.
- [44] If, on the other hand, Mr. Pierce has already paid the \$750.00 in costs owed to Mr. Davies, Mr. Pierce is to be paid the \$1,540.00 from the balance of the monies paid into Court.
- [45] After the payment of the monies owed to Mr. Pierce, the balance of the monies paid into Court are to be paid out to Mr. Davies.

"SINCLAIR PROWSE, J."

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