

CANADA / JUDGMENT

Hughes v. Hughes

2019 BCSC 2204

COURT

Supreme Court of British Columbia

DECIDED

19 December 2019

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2019 BCSC 2204 Hughes v. Hughes IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Hughes v. Hughes, 2019 BCSC 2204 Date: 20191219 Docket: S104238 Registry: Vancouver Between: Harriet Eva Hughes also known as Maria Hughes Plaintiff And John Hughes, Rosamond M. Hughes, and Hughes Insitu Engineering Ltd. Defendants Before: The Honourable Madam Justice Gerow Reasons for Judgment on Costs Counsel for Plaintiff: No appearance Counsel for Defendants: K.E. Jamieson Place and Date of Hearing: Vancouver, B.C. October 2 and 24, 2019 Place and Date of Judgment: Vancouver, B.C. December 19, 2019 Table of Contents Introduction.. 3 Background.. 3 Legal Basis. 5 Analysis. 6 Was the offer one which should have reasonably been accepted, either on the date it was delivered or on any later date. 6 The relationship between the terms of settlement offered and the final judgment of the court 8 The relative financial circumstances of the parties. 8 Any other factor the court considers appropriate. 8 Conclusion.. 9

Introduction

- [1] The plaintiff commenced two actions, one against her parents and the other against her sister, alleging they unduly influenced her and coerced her into having a therapeutic abortion in 1992. The plaintiff claimed damages for the psychological illnesses she alleges she suffered as a result of the abortion. The plaintiff also claimed damages against the defendant John Hughes for mismanagement of a trust fund and against Mr. Hughes and the corporate defendant for placing a mortgage on property registered in her name.
- [2] The two actions were heard together in a two week trial commencing March 9, 2015. Reasons for judgment were released on June 2, 2015, and both actions were dismissed. The defendants were granted costs for both actions.
- [3] On this application, the defendants in this action apply for double costs from February 3, 2017. The initial hearing of this application was adjourned in order to provide service to the plaintiff of this application by way of email and registered mail. The plaintiff's former counsel had advised the defendants that the plaintiff preferred to be served with any documents at the email address of her spouse, Gavriel Magdalena. The application was served and the plaintiff did not appear at the hearing of the application. Mr. Magdalena responded on behalf of the plaintiff indicating that she was not opposing the application.

Background

- [4] The plaintiff commenced this action on June 14, 2010. It was set for trial three times: March 1, 2012; October 16, 2017; and January 21, 2019. The plaintiff was represented by counsel throughout the litigation except for a period between August 18, 2011 and September 15, 2011.
- [5] The examinations for discovery of the defendants took place on October 10, 11 and 12, 2012. The examination for discovery of the plaintiff began in January, 2013 but did not complete.
- [6] The parties attended a mediation on May 20, 2016 without success. Prior to the mediation, the plaintiff provided the report of her expert psychiatrist, Dr. Passey to the defendants.
- [7] The defendants served a formal offer to settle on the plaintiff in a letter dated January 16, 2017. The offer to settle provided:
- a) The defendants would pay the plaintiff the sum of \$175,000, inclusive of costs and disbursements, if the plaintiff accepted the offer by 5:00 p.m. on February 3, 2017.
 - b) If the plaintiff did not accept the offer in paragraph (a), the defendants would pay the plaintiff the sum of \$150,000, inclusive of costs and disbursements, if the plaintiff accepted the offer by 5:00 p.m. on the day before her continued examination for discovery.
 - c) If the plaintiff did not accept the offer set out in paragraphs (1) or (b), the defendants would pay the sum of \$125,000, inclusive of costs and disbursements. The offer remained open until the commencement of trial.
- [8] All offers were conditional on the plaintiff signing a release and filing a consent dismissal order in this action. The defendants reserved the right to bring the offer to the attention of the court for consideration in relation to costs after a judgment was pronounced on all of the other issues in the proceeding.
- [9] In the letter, counsel for the defendants set out that the documents provided by the plaintiff did not support her claim for the losses alleged from the investment account and the condominium, and her claims would fail. The letter sets out that the alleged losses from the plaintiff's abortion are unlikely to be proven.
- [10] The fact that credibility was in issue was identified in Dr. Passey's expert report. In his report, Dr. Passey stated that if the version of events told by the plaintiff's parents was correct then "her parents are not really to blame because they were supportive of her (the plaintiff's) decision".
- [11] The examination for discovery of the plaintiff continued on June 28, 2017 and September 28, 2017.
- [12] The defendants delivered an expert report from a psychiatrist, Dr. Semrau on November 15, 2018.

- [13] The trial commenced on January 21, 2019. The plaintiff's claims were dismissed. Legal Basis
- [14] The defendants apply for double costs under Rule 9-1 of the Supreme Court Civil Rules. The relevant portions of the rule provide:
- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs. (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle; (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [15] The leading case on double costs is *Hartshorne v. Hartshorne*, 2011 BCCA 29. As noted in *Hartshorne* at paras. 25 and 27, the award of double costs is used to encourage the early settlement of disputes by rewarding litigants who make reasonable offers to settle and to punish litigants who do not accept offers that should be accepted. The reasonableness of the offer must be considered in light of factors such as the timing of the offer, the offer's relationship to the claim, the ease of evaluation, and whether a rationale for the offer has been provided.
- [16] The discretionary nature of double costs was discussed in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282. At para. 88, the Court noted the discretion must be exercised in a just, principled and consistent way. Parties must carefully consider their positions when provided with an offer, but are not to be cowed into accepting an offer that is unreasonable out of fear of being penalized by double costs.
- [17] The court may consider a revoked offer for the purposes of the Rule 9-1: *Sauer v. Scales*, 2012 BCSC 1883 at para. 8; *ICBC v. Patko*, 2009 BCSC 578, at paras. 34-36. In *Sauer*, the court considered an earlier offer by the plaintiff that had remained open for three and a half months. In the *Patko* case the offer had remained open for a year before it was revoked.

Analysis

- [18] As noted in the case law, the factors to take into account in exercising the court's discretion are those set out in Rule 9-1(6). Was the offer one which should have reasonably been accepted, either on the date it was delivered or on any later date

- [19] The first factor to consider is whether the offer to settle was one that ought to have reasonably been accepted on the date that the offer to settle was delivered or on a later date. The defendants take the position that the plaintiff knew at the time the offer was delivered that credibility was the main issue. It was clear there were conflicting versions of the events surrounding the abortion. The defendants had set out their version in affidavits for an application. At the time of the offer was made the plaintiff was also aware of the defendants' position that her claims for mismanaging her account and for failing to remove the mortgage were likely to fail as they were not supported by the documents.
- [20] The expert opinions of Dr. Passey, Dr. Semrau, and Derek Nordin, a vocational expert retained by the plaintiff, all contained provisos regarding the credibility of the plaintiff's version of events. For example, Dr. Passey stated in his report that if the defendants' version was correct he would have to alter his opinion. He went to note that if the plaintiff was in agreement with having the abortion, her guilt could have altered "her own perception at a subconscious level of what occurred and why. This could occur in order to better deal with her guilt."
- [21] At the time the offer was delivered on February 3, 2017, the defendants had disclosed their documents, including the documents for the RBC account and the purchase and mortgage on the condominium, and Mr. Hughes and Mrs. Hughes had been examined for discovery.
- [22] While the defendants' position was known at the time of the offer, and the plaintiff had obtained an expert report from Dr. Passey, the defendants did not serve the report of Dr. Semrau, their psychiatric expert until November 15, 2018.
- [23] It was not until the delivery of Dr. Semrau's report that the plaintiff had all the evidence needed to assess the reasonableness of the offer.
- [24] In my view, the plaintiff had sufficient information to assess the offer after she had received the expert report of Dr. Semrau and had an opportunity for her expert to consider it. It would have been clear to the plaintiff after reviewing both Dr. Passey and Dr. Semrau's report that the credibility of the parties was main issue regarding the cause of her mental health issues.
- [25] The plaintiff also had ample evidence to assess her claim regarding the mismanagement of the RBC account and the mortgage. All of the relevant documents had been disclosed. There was no evidence of any mismanagement or fraud on the part of the defendants as alleged.
- [26] In my opinion, given the significance of the credibility issues, the lack of documents supporting the financial claims, and the limitations defences, the plaintiff ought reasonably to have accepted the defendants' offer.

- [27] In the circumstances, I conclude the defendants have established that the offer should reasonably have been accepted by the plaintiff, by the end of 2018. As of December 31, 2018, the offer to settle was \$125,000, which was open until the commencement of trial. The relationship between the terms of settlement offered and the final judgment of the court
- [28] The terms of settlement offered were more favorable as the plaintiffs' action against the defendants was dismissed. This factor weighs in favour of an award of double costs. The relative financial circumstances of the parties
- [29] The next factor to be considered is the relative financial circumstances of the parties. Given the very limited information about the parties' financial circumstances, it is my view that this factor is neutral in the assessment of whether or not double costs should be awarded. Any other factor the court considers appropriate
- [30] As stated earlier, the defendants submit that the plaintiff had all of the necessary information to assess the offer at the time it was delivered on January 16, 2017. They take the position the offer was well timed, having been made after examination for discovery of the defendants, a lengthy mediation and the plaintiff's receipt of Dr. Passey's report. The limitation defences and the lack of supporting documentation on the financial claims should have been apparent. It was clear that credibility was the main issue in the case.
- [31] By December 31, 2018, it was apparent to the plaintiff that there were two divergent accounts of the circumstances surrounding the 1992 abortion and the financial matters in this case. The plaintiff would have had sufficient time to consider Dr. Semrau's report. Both the plaintiff's experts and the defendants' expert made it clear in their reports that their opinion was based on one of the versions. The plaintiff proceeded to trial being fully aware that credibility was main issue.

Conclusion

- [32] Having considered the various factors outlined in Rule 9-1, the case law, and the submissions, I conclude that the defendants are entitled to their costs at Scale B up to and including December 31, 2018, and double costs thereafter. Gerow J.

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