

CANADA / JUDGMENT

Humanity for Horses Foundation v. Nessel

2022 BCSC 2198

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Supreme Court of British Columbia

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2022 BCSC 2198 Humanity for Horses Foundation v. Nessel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Humanity for Horses Foundation v. Nessel,

2022 BCSC 2198

Date: 20220920

Docket: S-2012506

Registry: Vancouver

Between:

Humanity for Horses Foundation and Rebecca Sanesh

Plaintiffs

(Defendants by Counterclaim)

Respondents

And

Angela Nessel

Defendant

(Plaintiff by Counterclaim)

Appellant

Before: The Honourable Justice Ahmad

On appeal from: An order of the Supreme Court of British Columbia, dated August 4, 2022 (Nessel v. Humanity for Horses Foundation, S-2012506).

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, Defendants by Counterclaim and Respondents:

A. Beddoes

(September 15, 2022)

S. Gomez

(September 20, 2022)

Counsel for the Defendant, Plaintiff by Counterclaim and Appellant:

H. I. H. Yu

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 15, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2022

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[1] THE COURT (by videoconference): This application was heard last week and, as it will become apparent in these reasons, there is some urgency that these reasons be delivered as soon as possible. For that reason, these reasons are being delivered orally. If these reasons are transcribed, I reserve the right to edit for clarity. However, both the reasoning and the conclusion will remain the same.

I. Introduction

[2] On this application, the appellant, Angela Nessel, the defendant in the action, appeals the August 4, 2022 order of a Master of this Court dismissing her application to adjourn the trial that is scheduled to commence in two weeks, on October 3, 2022.

II. Background

The pleadings

[3] By way of brief background, on November 24, 2020, the respondents, the plaintiffs in the action, commenced an action against the appellant in defamation. They claim that the alleged defamatory statements have been made over a wide range of forums and continue to have a negative pecuniary and non-pecuniary effect on them.

[4] On January 8, 2021, the appellant filed a response to civil claim. At the time, she was represented by counsel. She remained represented by counsel until June 6, 2022.

[5] In September 2021, the respondents filed an amended notice of civil claim. In October 2021, the appellant filed an amended response to the amended claim, together with a counterclaim in which she alleged that the respondents defamed her.

[6] The respondents filed a response to the counterclaim on August 25, 2022.

Withdrawal of counsel

[7] On approximately May 17, 2022, the appellant's previous counsel, Joanna Lee, suggested to the appellant that she find new counsel, citing among other things, her caseload.

- [8] The appellant contacted new counsel, Charles Lugosi, who she believes to be diligent and appropriately qualified to represent her in the action. However, he is not available for the trial scheduled to commence on October 3, 2022.
- [9] By letter dated May 31, 2022, Mr. Lugosi advised counsel for the respondents that the appellant was seeking to retain him. He set out a number of steps that, in his view, required attention in the action and requested an adjournment of the trial. The respondents refused that request.
- [10] On June 6, 2022, Ms. Lee filed a notice of intention to withdraw as lawyer. Despite the respondents' objection, on June 22, 2022, Ms. Lee filed a notice of withdrawal as solicitor. As Mr. Lugosi is not available for the October 3, 2022 trial, he has not filed a notice of change of solicitor.
- [11] The appellant has been without counsel of record since June 22, 2022.
- [12] On approximately June 14, 2022 and between July 4 to 7, 2022, the appellant contacted seven lawyers, from three different law firms. None were willing or available to represent the appellant at the trial.
- [13] Other than Mr. Lugosi's attendances at the trial management conference and the adjournment application, the appellant has taken no other steps to retain any other counsel for the trial.

The adjournment application

- [14] On June 29, 2022, Mr. Lugosi attended at a trial management conference at which he advised the Court that he would be willing to become the appellant's counsel of record if the trial was adjourned. However, as the respondents did not consent to an adjournment, the Court directed the appellant that she would have to apply to adjourn the trial.
- [15] Given the respondents' counsel availability, the adjournment application was heard on August 4, 2022. As noted, the Master dismissed the application for an adjournment.

The Master's reasons

- [16] I refer to the Master's reasons in detail in the discussion and analysis section of these reasons. In brief:
- [17] In his reasons, the Master sets out the law governing the adjournments of trial.
- [18] At para. 10 of the reasons, he sets out the reason that the adjournment application was made, stating:

The [appellant] seeks an adjournment of the trial because her previous counsel has withdrawn as her lawyer for the case and she has not retained new counsel who could appear on her behalf on the scheduled trial date.

[19] He then goes on to set out the facts giving rise to her being without counsel and the steps she had then taken to obtain new counsel. Having considered the relative prejudice to the parties if the trial is or is not adjourned, he concluded at para. 24 that:

In the circumstances, the prejudice to the plaintiffs if the trial is adjourned outweighs the prejudice to the defendant if the trial is not adjourned.

[20] The Master dismissed the appellant's application to adjourn the trial.

III. Preliminary matter

[21] As a preliminary matter on this appeal, the appellant seeks to introduce and rely on an affidavit that was not before the Master. In the affidavit, the appellant sets out: (a) evidence of two medical conditions that will affect her ability to conduct a trial without counsel; and (b) updates her attempts to seek out counsel for an October 3, 2022 trial date.

[22] The respondents oppose the introduction of that evidence.

[23] The test to be applied in determining whether to admit fresh evidence on an appeal of a Master's decision was set out in *Sommerey v. Tasci*, 2012 BCSC 2042, more recently affirmed in *Anderson v. Steffen*, 2021 BCSC 252, which mirrors the well-established decision in *R. v. Palmer*, [1980] 1 S.C.R. 759. To satisfy that test, the appellant must demonstrate all of the following:

- a) The evidence was not available at the time of the hearing despite due diligence;
- b) The evidence would have affected the ruling had it been put before the court of first instance; and
- c) The ultimate question is whether it is in the interests of justice to introduce the fresh evidence.

[24] In the new affidavit in this case, the appellant deposes that she did not rely on the first of her medical conditions on the adjournment application because she "preferred not to disclose this medical information publicly". That information was clearly available at the time of the application. The first factor was not met in respect of that evidence.

[25] She deposes that the second medical condition was diagnosed on August 19, 2022, after the adjournment application. However, although she deposes that "I believe that this may further impact my ability to prepare for and represent myself at the trial ", she does not provide any medical evidence regarding how it would do so. Without that evidence, it is unclear how that evidence would have affected the Master's ruling.

- [26] The appellant also failed to engage the second factor with respect to her renewed efforts to retain counsel after the date of the adjournment application. In fact, at para. 19 of his reasons, the Master found the appellant's efforts to obtain new counsel in the two and half months prior to the application was "not a sufficient response to a desire to obtain new counsel for an approaching trial date". It is unlikely that efforts made after the application and closer to the trial date would change that view.
- [27] In my view, the factors that would support the hearing of new evidence on this appeal have not been met. I reject the admission of the affidavit for the purpose of this appeal.

IV. Standard of review

- [28] The standard of review on an appeal from a Master's order is well-settled and uncontested on this appeal: An appeal from a master's order is a purely interlocutory matter which should not be entertained unless the order was "clearly wrong": *Abermin Corp. v. Granges Exploration Ltd*, 1990 CanLII 1352 (BC SC), [1990] BCJ No 1060 (QL) at 19, [1990] BCJ No 1060 (QL); *Gillespie v. Pompeo*, 2013 BCSC 843 at para. 2.
- [29] The "clearly wrong" standard "brings with it a high degree of deference to the master's decision" : *Bhimji Khimji v. Dhanani*, 2004 CanLII 12037 (ON CA), [2004] OJ No 320 (QL) at para. 14; *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 72 [Giles]; *Ashton Service Group Inc. v. Vaughan*, 2021 BCSC 2656.
- [30] In *Giles*, the Court of Appeal added that, in addition to being "clearly wrong", a discretionary order will also be set aside if there is a "misdirection". Adopting the decision in another Court of Appeal case of *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27, the Court went on to state:
- [24] Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle.
- [emphasis added]
- [31] In *Jagpal v. Jagpal*, 2018 BCSC 1698, the Court found that the presence of those same factors will also render an interlocutory order "clearly wrong". The Court stated:
- [19] A Master's decision can only be found to be clearly wrong where the appellant can demonstrate, with necessary reference to the Master's reasons, that the Master did not consider relevant facts, issues and relevant law - which resulted in a flawed analysis

[emphasis added]

V. Discussion and analysis

[32] The well-established leading authority for determining an adjournment application in British Columbia is *Navarro v. Doig River First Nation*, 2015 BCSC 2173 [Navarro], which sets out the test at para. 19 as follows:

There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).

[emphasis added]

[33] Referring to various other decisions, the Court sets out the other factors or considerations to be considered, in no particular order of priority at para. 20 as follows: (a) the expeditious and speedy resolution of matters on their merits; (b) the reasonableness of the request; (c) the grounds or explanation for the adjournment; (d) the timeliness of the request; (e) the potential prejudice to each party; (f) the right to a fair trial; (g) the proper administration of justice; (h) the history of the matter, including deliberate delay or misuse of the court process; and (i) the fact of a self-represented litigant.

[34] Generally speaking, the appellant argues that the Master focussed his analysis on the prejudice to be incurred by the parties by an adjournment. In doing so, she argues that the Master erred two ways:

- a) By failing to fully consider and to properly and generously apply to the evidence the paramount principle that the interest of justice requires that there will be a fair trial on the merits of the action; and
- b) By failing to consider the interests of the appellant and placing undue weight upon a single factor, prejudice, to the exclusion of all of the other relevant factors.

[35] Also with respect to prejudice, she argues that the Master erred by erroneously determining that there is no evidence of prejudice to the appellant if the trial is not adjourned.

[36] I will consider each of those alleged errors in turn.

A. Did the Master err in failing to consider the interest of justice in ensuring a fair trial on the merits?

- [37] The Master began his analysis at para. 9 of his reasons by referencing para. 19 of Navarro and, in particular, by noting that "the interests of justice govern whether the court should grant an adjournment of a trial". He stated that the "paramount consideration" in determining the interests of justice is whether the adjournment is "needed to ensure that there would be a fair trial on the merits". Given that the overall interests of justice must prevail, he acknowledged that "courts are generous rather than overly strict in granting adjournments".
- [38] In light of that express reference, there is no doubt that the Master turned his mind to the relevant law in his analysis. The appellant rightly concedes that he did. She argues however that he did not apply that law to the facts of this case, focussing on the prejudice to the parties, rather than on the broader, paramount consideration of "interest of justice".
- [39] On my review of the decision, I agree with that assessment.
- [40] Having acknowledged the importance of the "interest of justice", and the "need to ensure a fair trial on its merits", the Master concludes para. 9 with the proposition that "Prejudice to be suffered by either side if an adjournment is or is not granted, must be weighed and balanced".
- [41] Paras. 10-15 and 18-20 of the reasons consist of the Master's review of the facts giving rise to the appellant being without counsel for trial. He was expressly aware that dismissing the adjournment application would leave the appellant without counsel. He considered that fact through the lens of analyzing the prejudice that the appellant would suffer as result, concluding at para. 21 that there was no evidence of "actual prejudice".
- [42] His reference to "prejudice" comes full circle at para. 23 of his reasons, where he concludes, not that the "interest of justice" dictate that the adjournment be denied, but rather that:
- In the circumstances, the prejudice to the plaintiffs if the trial is adjourned outweighs the prejudice to the defendant if the trial is not adjourned.
- [43] The respondents argue that, effectively, the prejudice to the parties is not far removed from the notion of the "interest of justice". In that way, they argue that the Master's focus on the relative prejudice to the parties does consider the interest of justice.
- [44] However, that argument, which appears to equate the interest of justice with the weighing of prejudice, is not well-founded on the law.
- [45] As Navarro clearly provides, prejudice is one of numerous other factors to consider on an adjournment application, in addition to, not in lieu of, the "paramount consideration" of the interest of justice.

- [46] That is not to say that the relative prejudice to the parties cannot inform an assessment of the "interest of justice". I accept the respondents' submission that it can and does. However, I do not accept that the two considerations are one and the same or that relative prejudice is the only factor that will determine the "interest of justice".
- [47] There was evidence before the Master that there were several steps that warranted legal consideration in contemplation of trial. As set out in Mr. Lugosi's May 31, 2022 letter to counsel for the respondents, they included: the potential application of the Protection of Public Participation Act, S.B.C. 2019, c. 3, [PPPA] a change in venue for the trial, further document discovery by the respondent Society, examinations for discovery, and the preparation of a trial brief, all of which require strategic legal thinking and knowledge and most of which require specific legal expertise. That is in addition to the actual conduct of the trial, including the conduct of cross-examinations and making submissions on the law.
- [48] Although the Master noted that the appellant "has not indicated why she would not be able to deal with the case on her own" (para. 21), he did not consider the effect her doing so would have on obtaining a "fair trial on the merits" in light of those significant outstanding matters.
- [49] In my view, had the Master considered the steps that were and remain outstanding, he could not help but to conclude that it would be difficult, and likely immensely so, for any self-represented litigant to be able to address those matters in a way that would ensure that all the of the relevant facts and arguments are before the trial judge.
- [50] In my view, the failure to consider the steps that were required and the impact on the appellant's ability as a self-represented litigant (and, I note, self-represented not by choice) to adequately address those steps so as ensure a "fair trial on the merits" constitutes an error that is "clearly wrong".
- [51] In any event, I will now consider the second ground of appeal.

B. Did the Master err in placing undue weight on prejudice to the exclusion of all other factors?

- [52] As noted, in declining to grant the adjournment, the Master relied on his assessment of the relative prejudice to the parties in dismissing that application to adjourn. As prejudice is one of the Navarro factors, it was appropriate for him to do so.
- [53] However, there are other factors and considerations, apart from prejudice, for the Court to consider. The Master failed to consider many of those factors, all of which were raised in the notice of application for the adjournment.
- [54] Most notably:
- a) It was the first time that the appellant had requested an adjournment;
 - b) The request for an adjournment was made within two weeks of being advised that her former counsel would not continue to act; and

c) There was no history of deliberate delay or misuse of the court process by the appellant.

[55] The Court considered those same factors, among others, in granting the adjournment in Navarro, stating at para. 29:

[29] In this case, the adjournment application was made against the following relevant background. This is the first application notwithstanding the request made at the first trial management conference. It is made at a time when the plaintiff is essentially self-represented. There is no significant history of delay by the plaintiff and any delay has not been prolonged. There was a year delay by the defendants in filing a response to the initial Notice of Civil Claim and the defendants had not filed a response to the Amended Notice of Civil Claim, filed on June 29, 2015, by the time of the second trial management conference on October 20, 2015, even though trial was about a month away. The adjournment application was brought soon after the case management judge was appointed.

[56] Also similar to the defendants who opposed the plaintiff's adjournment application in Navarro, the respondents in this case also delayed in filing pleadings, in this case, their response to counterclaim, until August 22, 2022, less than a month and half before the trial date. That, too, was a factor in Navarro. The Master did not refer to the respondents' delay.

[57] It is also notable that, other than prejudice, the only other factor the Master considered was the "speedy and expeditious resolution of the matter", noting at para. 22 that "the defendant's application seeks a general adjournment, which could put the trial well into the future". However, as noted as para. 22 of Navarro, the preference for a speedy and expedition trial "raises the question of whether there has been a previous adjournment " In this case, there had not. The Master failed to take that factor into account in his consideration of the requirement of obtaining a speedy and expeditious trial.

[58] It is fair to say that, unlike the situation in this case, the defendants in Navarro did not establish that they would be prejudiced by the adjournment of the trial. However, in my view, the Master's failure to even consider the other relevant factors, all of which favour an adjournment, constitutes an error that makes the decision "clearly wrong", as defined in the case law.

[59] I uphold this ground of appeal.

[60] For completeness, I now turn to the final alleged error on appeal.

C. Did the Master err in finding the appellant would not suffer prejudice?

[61] As set out above, the Master based his decision on his balancing of the prejudice that each of that parties would suffer: the appellant if the adjournment was not granted, and the respondents if the adjournment was granted.

- [62] Regarding the appellant, he found at para. 21 that her argument that she would suffer prejudice was "largely based on conjecture, as there was no evidence of prejudice". That conclusion was based on what the Master concluded was a less than diligent search for counsel and her failure to indicate, by way of affidavit evidence, "why she would not be able to deal with the case on her own".
- [63] In my view, the Master's conclusion, and the basis for that conclusion, is not supported by the law.
- [64] As set out in a "Statement of Principles on Self-represented Litigants and Accused Persons" adopted by the Canadian Judicial Council, it is widely accepted that those persons who are unrepresented by counsel face special challenges with respect to the court system. On that basis, "it is desirable that each person seeking access to the court should be represented by counsel".
- [65] That a self-represented litigant may be overwhelmed "by even the simplest of court procedures" was accepted by the Court, without evidence: *C.A.T. v. S.T.B.*, 2020 BCSC 593 at para. 44.
- [66] In this case, I have set out the steps that were (and remain) outstanding in this action for the trial that is now set to commence in less than two weeks. Most are not simple, and at least a couple, including a consideration of the PPPA, are complex. That is in addition to the law regarding bringing a claim for defamation. In my view, the Master's failure to consider the prejudice that would be visited upon the appellant by having to attend to those matters as a self-represented litigant on the basis that she did not provide affidavit evidence to that effect constitutes an error.
- [67] In addition, relying on the fact, as he did, that the appellant has been able to attend to the litigation for the two and half months after her counsel withdrew, overlooks the fact that no significant steps have been taken, except for the adjournment application for which she had counsel.
- [68] This is not a case in which the appellant has chosen to represent herself throughout and only seeks to obtain counsel on the eve of trial.
- [69] The requirement that she would have to produce express evidence to prove the prejudice of not having counsel ignores both the law and facts of this case in that regard.
- [70] I find that the Master's finding that the appellant would not suffer prejudice by having to self-represent leading up to and at trial misconstrues the issue and was an error that made the decision clearly wrong. I uphold this ground of appeal.

VI. Disposition

- [71] For the reasons set out above, the Order of the Master dismissing the appellant's application to adjourn the trial generally is set aside.

VII. Costs

- [72] In light of the decision, which effectively adjourns the trial that was to commence in two weeks, the respondents have asked for costs thrown away, relief that was contemplated at para. 24 of Navarro.
- [73] On that application, I have given consideration to the Master's finding that the appellant did not diligently pursue finding alternate counsel which, ultimately, has led the adjournment application. On that basis, I conclude that some award for costs thrown away for trial preparation is appropriate.
- [74] However, while the respondents' position on the adjournment application and this appeal may have been understandable, the respondents' position did not ultimately succeed.
- [75] Furthermore, I understand that the adjournment application was only heard as late as it was on August 4, 2022 due to the respondents' counsel's schedule. That delay should not be laid at the feet of the appellant.
- [76] While I am inclined to award some costs thrown away, in my view, it is appropriate that they be limited.
- [77] I am going to pause here on the reasons for a moment. Ms. Gomez, I am going to anticipate that you do not have an estimate before you of the costs that your clients say have been thrown away for trial preparation?
- [78] Cnsl S. Gomez: That is correct, Your Honour, I do not.
- [79] The Court: Okay. So I think what I will do then is -- I do want to have that matter determined as to the amount of costs thrown away; so, as I said, I will award the costs thrown away. However, they are to be limited to account for the respondents' contribution to this matter being only heard now less than two weeks before the trial and to account for the appellant's success on this appeal.
- [80] So if the parties are unable to agree to what the costs of the trial are thrown away, they are at liberty to attend before me for further direction regarding the amount of costs that are to be awarded for costs thrown away. Is that clear to counsel?
- [81] Cnsl H. Yu: Yes. That is clear to me, Madam Justice.
- [82] The Court: Okay. Ms. Gomez?
- [83] Cnsl S. Gomez: Yes, that's clear. Thank you.
- [84] The Court: Okay. So I do encourage the parties to work out that amount, and a number for costs thrown away which are awarded. I will also encourage the parties to find the first next available date for the trial that is reasonably suitable for counsel -- who I am assuming will be Mr. Lugosi -- and, of course, the parties as well.

- [85] And subject to anything further, that will -- have I missed anything in my reasons that I should be addressing, counsel?
- [86] Cnsl H. Yu: Will you be ordering any costs for the application and the appeal?
- [87] The Court: I will award costs to the appellant -- on this application. Forgive me.
- [88] Cnsl H. Yu: So is it costs in any event of the costs for both the application and the appeal, Madam Justice?
- [89] The Court: The costs on this will be regular costs in the cause for this application. --
- [90] Cnsl H. Yu: As well as the application before the Master? Sorry. I did have some trouble hearing you because the speaker is a little bit far.
- [91] The Court: Yes, as well as the costs of the application before the Master.
- [92] Cnsl H. Yu: Okay. So just to be clear, costs in the cause for both the applications before the Master and the appeal before madam justice?
- [93] THE COURT: Yes.
- [94] Cnsl H. Yu: Understood.
- [95] The Court: Okay. But costs thrown away are awarded to the respondents in that limited amount that I have indicated. Okay? Anything else? Ms. Gomez?
- [96] Cnsl S. Gomez: No. Thank you, Justice.
- [97] The Court: Okay. Thank you, then. That concludes my reasons. Again, I appreciate your quick change and pivoting on the hearing of the reasons this morning. I much appreciate it. Thank you. Thank you, Madam Registrar.
- [98] The Clerk: Thank you. Justice Ahmad, can I just confirm something quickly? So Master Vos's orders set aside in -- so that's an adjournment of the trial; is that correct?
- [99] The Court: It's setting aside the order of the Master dismissing the application to adjourn a trial.
- [100] The Clerk: Okay. So am I letting the registry know it's adjourned or no? I just want to make sure I am not missing that.
- [101] The Court: The trial on October 3 is adjourned.
- [102] The Clerk: Okay. Thank you. That's what I needed to confirm. Thank you very much, Justice Ahmad.
- [103] The Court: Yes. Thank you.
- "Ahmad, J."

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