
CANADA / JUDGMENT

Jackson v. Honey

2008 BCSC 771

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 771 Jackson v. Honey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jackson v. Honey,

2008 BCSC 771

Date: 20080617

Docket: S055176

Registry: Vancouver

Between:

Gary Earl Jackson

Plaintiff

And

Gale Katherine Honey

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff

Geoffrey M. Bowman

Agent for the Defendant

Ruth Lea Taylor

Date and Place of Hearing:

April 11, 2008

Vancouver, B.C.

- [1] The defendant, Gale Honey, applies to set aside the order of December 24, 2007, as it relates to the issue of costs. These Reasons deal with the issue of whether this matter falls into one of the exceptions to the rule that the court is functus officio once an order is entered.
- [2] The plaintiff, Gary Jackson, sought to recover certain personal belongings from the defendant, Gale Honey. The parties were involved in a romantic relationship over a two-year period and lived together in Ms. Honey's home from January 2004 until December 22, 2004. The belongings at issue were items of furniture and artwork that Mr. Jackson brought over to Ms. Honey's home during the relationship.
- [3] Ms. Honey defended the claim on the basis that the items in question were gifts made to her by Mr. Jackson. In addition, Ms. Honey brought a counterclaim seeking damages representing the replacement value of certain goods she alleged that she disposed of because of Mr. Jackson, and certain items belonging to her that she alleged Mr. Jackson took from her premises and neglected to return.
- [4] In Reasons for Judgment indexed at 2007 BCSC 1869, Mr. Jackson's claim was allowed and Ms. Honey was ordered to return all of the property identified in the Amended Statement of Claim that was at issue at trial. The counterclaim was dismissed with the exception of one item, which was valued in the Amended Counterclaim at \$319. The quantum of damages sought by Ms. Honey in the Amended Counterclaim was between \$62,000 and \$71,500. The Reasons were silent on the issue of costs.
- [5] By letter dated January 4, 2008, counsel for Mr. Jackson wrote to Ms. Honey. With respect to the issue of the order, the letter states:

Enclosed is draft order we have prepared for filing with the Court to conclude this matter. We ask that you please review the order and provide us with your comments at the earliest opportunity. If it is satisfactory to you, we ask that you please endorse it and return the original signed copy to our office by January 10, 2008.

Costs

You will note that the issue of costs reflects the Plaintiff's formal offer to settle dated January 11, 2007 which you did not accept. As provided by Rule 37, the Plaintiff is entitled to double costs from the date of delivery of the offer as a consequence of you failing to accept that offer to settle. We will endeavour to prepare the Plaintiff's Bill of Costs in due course, which document details the costs payable by you to Mr. Jackson as a result of the judgment.

- [6] Ms. Honey replied by letter dated January 11, 2008, in which she stated:

Would you send your calculated amount with a break down? If I can get this today, I will likely need a few days to assimilate it, and then I would be happy to talk with you Monday afternoon.

Could you please forward the settlement you refer to from January.

She followed this with an e-mail to Amber Gardner, counsel's assistant, that stated in part, "Perhaps you could send the items requested and the total Geoff is calculating as costs".

[7] A copy of the Offer to Settle dated January 11, 2007, was forwarded to Ms. Honey by e-mail dated January 15, 2008. The draft Bill of Costs was forwarded by separate letter dated January 15, 2008. The letter states in part:

We have prepared a Bill of Costs which is enclosed with this letter. It reflects the Plaintiff's Offer to Settle dated January 11, 2007 and the costs consequences provided in Rule 37. We trust that you will find the Bill of Costs to be in order, in which case we ask that you sign it where indicated at pages 9 and 10 and return it to our office as soon as possible.

[8] Ms. Honey replied by letter dated January 16, 2008. The letter states in part:

I write further to your letter and our conversation today, re-costs the Order and the items.

I can not comply with the Order. I am unable return items I do not have, have never seen or that your client has given to others.

I do believe there is a solution to end this situation.

If we can agree to vary the Order by consent, changing it to the items in my possession. Then I believe we can move forward.

...

As to costs: I have many questions. I shall have to go over the invoice a few more times and will then forward my questions.

I think at this late date, the varying of the Order is the most important.

[9] The letter from counsel to Ms. Honey dated January 15, 2008 makes reference to their conversation as follows:

I would like to have the Order from the Decision entered as soon as possible. I understand from our telephone conversation yesterday that you agree that the Order we have prepared reflects the Decision. However, you have not signed and returned the draft order because it requires you to return an item or items that you say are not in your possession or control. With respect, it is not the proper course to refuse to sign an order that is clearly and in all respects in accordance with the Reasons for Judgment and the Decision.

- [10] By letter dated January 17, 2008, Ms. Honey wrote to request that the cost of the umbrella be applied to costs and noted that she had signed the draft order. Counsel had not received a signed original of the order and more correspondence followed with respect to that issue. Shortly thereafter the order was entered.
- [11] There followed correspondence with respect to the issue of costs that consisted of exchanges with respect to particular items in the Bill of Costs and negotiations with respect to settlement of the costs. The matter was not resolved and Ms. Honey brought the present application.
- [12] Ms. Honey invokes both Rule 41(24) of the Rules of Court, B.C. Reg. 221/90 and the inherent jurisdiction of the court in support for the relief sought. It was submitted on behalf of Ms. Honey that the provision of the order dealing with costs should be set aside for three reasons.
- [13] The first ground was that Ms. Honey did not appreciate that she was settling costs when she signed the order. In that regard, her Affidavit #7 sworn April 8, 2008, states, "I did not understand that the Order had anything to do [sic] with the costs of the Trial". This assertion, however, cannot be sustained in light of the correspondence. It is clear, in my view, on a fair reading of the correspondence that Ms. Honey appreciated that the draft order dealt with costs.
- [14] The second ground was that Ms. Honey did not appreciate that there could have been a hearing to deal with the matter. This contention is at odds with Ms. Honey's Affidavit #7 in which she deposes that "Mr. Bowman was after me to sign the Order and threatened to set down another hearing". Thus it appears that Ms. Honey was aware from her conversations with counsel that if the parties did not agree with respect to the terms of the order, there would be a hearing to resolve the matter.
- [15] The third ground was that Ms. Honey was self-represented, and in the circumstances, the process of settling the order constituted an abuse of process. In *Kemp v. Wittenberg*, 2001 BCSC 273, Madam Justice Satanove provided the following useful guidance with respect to this issue at para. 9:

Dr. Kemp constantly reminded me that she was not a lawyer and did not always appreciate our rules of evidence. While I have sympathy for her, I am reminded of what Justice Platana said in *Baziuk v. Dunwoody* (1997), 13 C.P.C. (4th) 156 (Ont. Ct. Gen. Div.):

The problem of unrepresented parties, who may not be familiar with law and procedure, is one which is facing courts today with an ever increasing frequency. Courts are mindful of a degree of understanding and appreciation which should appropriately be extended to such parties. However, notwithstanding the difficulty with such parties attempting to properly represent themselves, courts must also balance the issues of fairness and be mindful of both, or all parties. Issues of fairness of course must always be determined in accordance with accepted legal principles and the law which has developed. A sense of fairness and understanding granted to

unrepresented parties ought never to extend to the degree where courts do not give effect to the existing law, or where the issue of fairness to an unrepresented litigant is permitted to over ride the rights of a defendant party.

[16] The question therefore remains whether this application falls within the parameters established by the existing law. The situations in which the court has a discretion to re-visit an entered order were addressed in *Harrison v. Harrison*, 2007 BCCA 120, 64 B.C.L.R. (4th) 318 at para. 29 as follows:

Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*, [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the Supreme Court Rules where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142; see also *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[17] Rule 41(24) was considered in *O.E.X. Electromagnetic Inc. v. Coopers & Lybrand*, [1993] B.C.J. No. 1459 (QL)(S.C.) as follows at para. 9:

The words "accidental slip" in R. 41(24) obviously refer to the product of a mental lapse experienced by someone drafting an order. The slip results from imprecision, inattention or some such mental quirk. The rule is remedial, to take cognizance of that quirk, and to forgive it, should it be necessary in the interest of accurately expressing the true intent of the order as an accurate reflection of the reasons for judgment.

[18] This definition has been consistently followed as noted in *GC Parking Ltd. v. New West Ventures Ltd. et al*, 2004 BCSC 1700. There is no such accidental slip or mistake in the circumstances of the present case. Neither is there a matter that should have been but was not adjudicated upon since, as Mr. Justice Burnyeat notes in *G.C. Parking* and as Rule 37 clearly provides, when Reasons for Judgment are issued the court will not know and is not entitled to know whether an Offer to Settle has been made pursuant to Rule 37. Likewise, the order does not fail to express the manifest intention of the court since the court expressed no intention with respect to the question of costs.

[19] It is submitted on behalf of Ms. Honey that *GC Parking* is authority for the proposition that the court retains a general jurisdiction to re-visit entered orders with respect to the question of costs. In my view, the case does not stand for a proposition that sweeping. In *GC Parking* the entered order was silent with respect to costs, the parties having failed to reach an agreement with respect to the issue. The case is authority for the proposition that the court can be *functus officio* with respect to some, but not all, issues. In the present case, for example, *GC Parking* and the cases it cites is authority for the proposition that, absent a term in the order providing for double costs, the court retained jurisdiction to consider the

issue.

- [20] However, that is not what happened here. Instead, the parties agreed and executed an order that provided for double costs pursuant to Rule 37. Ms. Honey now seeks to re-visit that decision. In my view, *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, 24 B.C.L.R. (4th) 135, is authority for the proposition that such a provision can be re-visited by the court in circumstances of mutual mistake. There is no such mutual mistake, however, in the circumstances of the present case as there was in *Buschau*. Nor does the evidence disclose any of the other grounds upon which a judgment or order made by consent may be set aside as summarized in *Morstad v. Quintal et al.* (1980), 14 Alta. L.R. (2d) 369, 21 C.P.C. 9 (Q.B.) [cited to Alta. L.R.] citing 22 Hals. (3d) 792 at pp. 370-71:

A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent given effectually.

- [21] I am satisfied that this is not a case which falls within any of the circumstances in which a court is entitled to re-visit the provisions of an entered order. The application is dismissed.

"Ross J."

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