

CANADA / JUDGMENT

Jahanshahi v. Ly

2022 BCSC 2226

COURT

Supreme Court of British Columbia

DECIDED

25 November 2022

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2022 BCSC 2226 Jahanshahi v. Ly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jahanshahi v. Ly,

2022 BCSC 2226

Date: 20221125

Docket: M198782

Registry: New Westminster

Between:

Shahayegh Jahanshahi

Plaintiff

And

Duc Ly

Defendant

Before: The Honourable Justice Blok

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Somers

Counsel for the Defendant:

M. Suderman

Place and Date of Hearing:

New Westminster, B.C.

November 7, 2022

Place and Date of Judgment:

New Westminster, B.C.

November 25, 2022

[1] THE COURT: I am about to give judgment in this matter. Should a transcript be ordered, I will reserve the right to make any minor corrections that are necessary and to put in headings and full extracts from cases and matters of that sort. In the course of doing that, I will not, of course, change any of the underlying reasoning or the ultimate result.

I. Introduction

- [2] In this motor vehicle injury case, the defendant seeks a declaration that certain issues in the case were settled by agreement between counsel.
- [3] Specifically, the defendant alleges the parties agreed that in return for an admission of liability by the defendant, the plaintiff would abandon her claims for aggravated and punitive damages and cap her damages at the defendant's policy limits of about \$2 million. The plaintiff denies that any agreement was reached.

II. Background Facts

- [4] The background facts are fairly straightforward and uncontroversial. This action arises out of a motor vehicle accident that occurred on February 18, 2016, in Coquitlam, British Columbia.
- [5] The plaintiff commenced an action on January 30, 2018, claiming general and special damages, but also claiming aggravated and punitive damages based on the allegation that the defendant failed to remain at the scene of the accident.
- [6] The defendant filed a response to civil claim on May 11, 2018, denying liability for the accident.
- [7] On July 6, 2021, the plaintiff filed a notice of trial, setting a 15-day trial commencing January 30, 2023. On July 21, 2021, the plaintiff filed a notice requiring trial by jury.

- [8] At all times material to this application, the defendant was represented by Perminder Tung, and the defendant was represented by David Machat. The key communications between the two took place on February 8, 2022, although there were earlier communications that provide context.
- [9] For convenience, I will reference some of the further facts by incorporating the paragraphs from the defendant's notice of application. These are:
7. On October 2, 2019, [] Examinations for Discovery of the plaintiff and defendant occurred.
 8. During a break at the Examination for Discovery, Mr. Tung and Mr. Machat discussed the possibility of an admission of liability in exchange for the plaintiff abandoning her claim for aggravated and punitive damages. An agreement was not reached.
 9. Following the Examination for Discovery, Mr. Tung served a notice to admit, dated October 2, 2019, which sought that the defendant admit liability for the MVA.
 10. The defendant served a reply to the notice to admit dated October 15, 2019, denying the admissions sought.
 11. On October 30, 2019, Mr. Machat received a "without prejudice" letter from Mr. Tung addressed to [him] dated October 29, 2019, wherein it is outlined:

As discussed following the discovery, we are agreeable to withdrawing the claims for aggravated/punitive damages if you are prepared to admit liability and move on to the sole issue in this case, quantum."

12. On July 6, 2021, the Notice of Trial for this matter was filed and served on Pacific Law Group on July 8, 2021.
13. On February 7, 2022, Mr. Machat wrote to Mr. Tung to see if he could schedule a time to discuss this matter over the phone.
14. At 8:37 am, on February 8, 2022, Mr. Tung advised that he would be willing to schedule a phone call "a couple of weeks from now".
15. At [10:19] on February 8, 2022, Mr. Machat replied to Mr. Tung outlining the offer he was instructed to extend. The exact wording of the offer in his email was:

"I was hoping to address a small but key issue with you. Specifically, you have plead punitive and aggravated damages. Liability has been denied. You have offered to abandon these two heads of damage for an admission of liability. My clients advised they would be willing to admit liability if you agree to abandon these heads of damage and agree to cap damages at the policy limit. Currently, there is \$1,995,684.08 remaining of a \$2,000,000 policy."

17. Mr. Tung responded three minutes later, at 10:22 am, with an email stating;

"That is agreeable. Please provide us with your amended Response to Civil and/or a Notice to Admit that effectively achieves the result you hope for. I will review those and get us to focus the issues on quantum thereafter."

19. On March 21, 2022, an appointment for a continuation of the examination for discovery of the plaintiff was served on counsel for the plaintiff.
20. On May 10, 2022, Mr. Machat emailed Mr. Tung a Notice to Admit that the plaintiff would not be seeking damages for aggravated or punitive damages for the purpose of formalizing the agreement as pleadings.
21. On May 11, 2022, at 11:02 am Mr. Tung responded to this email asking for an Amended Response to Civil Claim. He referred to the agreement as a "proposal".
22. On May 11, 2022, at 6:30 pm, Mr. Machat responded to Mr. Tung's email seeking clarification that he preferred the receipt of an Amended Response to Civil Claim rather than a Notice to Admit. Further, Mr. Machat pointed out that the agreement had been struck and this was not a "proposal".
23. On May 12, 2022, Mr. Tung responded that he wanted an Amended Response to Civil Claim.
24. On May 24, 2022, Mr. Machat received a letter from Mr. Tung enclosing the plaintiff's response to the Notice to Admit. In the response, the plaintiff denied the admissions sought. In the letter enclosing the response, which was signed by Mr. Tung, it was stated:

As you will recall, we agreed to the plaintiff not seeking damages for aggravated or punitive damages in exchange for the defendant admitting liability. We look forward to receiving your draft Amended Response to Civil Claim for our review. Upon receipt and review of your Amended Response to Civil Claim, we will revise our Reply accordingly.

[emphasis removed.]

25. On May 26, 2022, the continuation examination for discovery of the plaintiff occurred. No discussion regarding the agreement took place.
26. On June 15, 2022, Mr. Machat emailed Mr. Tung draft of an Amended Response to Civil Claim admitting liability. In the email Mr. Machat advised that he was going to send over a new Notice to Admit.
27. On June 15, 2022, Mr. Tung called Mr. Machat over the phone and advised that the plaintiff was not agreeable to dropping aggravated/punitive damages claim in exchange for an admission of liability.
28. On June 16, 2022, Mr. Tung followed up his phone call by email to confirm what he had said over the phone in writing:

[] we have considered your offer, reviewed our file, considered the best way to proceed with this claim, discussed same with our client and decided that we are not prepared to drop the aggravated/punitive damages claim in exchange for an admission of liability.

32. Mr. Machat was never informed and was never under the impression that the agreement was subject to review and instructions from Mr. Tung's client.

[10] Although the communications reflected in that list end with an email from Mr. Tung to Mr. Machat dated June 16, 2022, there were further communications between counsel after that date. I have not included these in the factual background because they merely continued the positional debate between counsel.

[11] As noted earlier, the key email exchange took place on February 8, 2022. Because of the importance of this exchange, I will set it out in full:

Mr. Machat to Mr. Tung:

I will leave the following with you, and if you would like to discuss further, please let me know. I currently have the attention of client [sic], so I would like to strike while the iron is hot.

I was hoping to address a small but key issue with you. Specifically, you have pled punitive and aggravated damages. Liability has been denied. You have offered to abandon these two heads of damage for an admission of liability. My clients advised they would be willing to admit liability if you agree to abandon these heads of damage and agree to cap damages at the policy limit. Currently there is \$1,995,684.08 remaining of a \$2 million policy.

Looking forward to hearing from you.

Mr. Tung to Mr. Machat:

That is agreeable. Please provide us with your amended Response to Civil [Claim] and/or a Notice to Admit that effectively achieves the result you hope for. I will review those and get us to focus the issues on quantum thereafter.

Thanks.

III. Positions of the Parties

A. Defendant

[12] The defendant emphasizes that plaintiff's counsel never said the agreement was subject to any conditions. He says the February 8 communication from plaintiff's counsel conveyed words clearly signifying an unconditional agreement. Plaintiff's counsel did not, for example, mention having to confer with the plaintiff prior to any agreement, as he later contended.

- [13] The defendant notes the plaintiff concedes her counsel's wording was "not the best" and that the plaintiff refers to her counsel's intent, but the defendant emphasizes the intention of counsel is irrelevant.
- [14] The defendant also notes that the plaintiff's request for documents for review does not affect or alter the fact that there is a concluded agreement: *Lacroix v. Loewen*, 2010 BCCA 224, at para. 41. There was nothing special about this agreement that required documentation. In any event, the defendant notes the plaintiff never suggested that there was anything incorrect or wrong with the documents submitted in terms of the agreement that had been reached.
- [15] The defendant also cites *Lacroix* at paras. 35 and 36 for the correct approach to be taken in ascertaining whether an agreement has been reached.
- [16] The defendant refers to the affidavit of plaintiff's counsel where the latter revealed the reasons why the plaintiff resiled from the agreement. That affidavit shows that plaintiff's counsel met with his client at some point after February 8 and at that time he noted the defendant's filing of a jury notice made the "fleeing the scene" evidence advantageous to his client. I pause momentarily to note that this statement of plaintiff's counsel is erroneous insofar as it was the plaintiff who filed the jury notice. In any event, at this application the defendant argued that this evidence shows the plaintiff resiled from the agreement for tactical reasons.
- [17] The defendant also cited *Darwish v. Advancedio Systems Inc.*, 2017 BCSC 2456 at para. 14; *Sekhon v. Khangura*, 2009 BCSC 670 at para. 119; *Hawitt v. Campbell*, 1983 CanLII 307 (B.C.C.A.) at para. 18; *Carlton v. Carlton*, 2017 BCSC 603 at paras. 20 to 23 and 37; and *Roumanis v. Hill*, 2013 BCSC 1047.

B. Plaintiff

- [18] The plaintiff noted there was a very long delay between the time the topic was first raised in 2019 and the time of the February 2022 emails, and there was also a substantial delay between February 8 and the later exchange of correspondence on pleadings amendments.
- [19] The plaintiff focused on the post-February 8 email exchanges between counsel, then noted that on May 11, 2022, plaintiff's counsel told defence counsel that he wanted to see the draft amended response to civil claim and would then "consider this proposal". After further discussion along those lines, on June 16, 2022 he told defence counsel that they were not prepared to proceed with the dropping of damages claims in exchange for a liability admission. On July 4 he asserted that all communications had been subject to the "review and instructions" from the client.
- [20] The plaintiff asserts that these communications show there was "always some sort of conditional aspect to any potential agreement".

- [21] The plaintiff concedes her counsel could have "used better word choices", but said "saying 'agree' does not mean there is an agreement". She submits her counsel was merely agreeing in principle, creating an agreement to agree, not a binding agreement.
- [22] The plaintiff cited Lacroix at para. 36 for the test to be applied in determining whether the parties intended to contract and whether the essential contractual terms can be determined with reasonable certainty. The plaintiff argues that the post-February 8 debate over the appropriate pleadings amendments show the parties never reached the point of an agreement.
- [23] The plaintiff also submits that this is not a case of enforcing a settlement agreement because a settlement agreement must involve a settlement of the case as a whole, not on points of law or procedure within an action. Even if it were a settlement agreement, which the plaintiff denies, the court retains a discretion to refuse an application to enforce it: Carlton at para. 36.
- [24] In the course of submissions, the plaintiff informed the court that she wished to bring an application to withdraw admissions in relation to the exchange between counsel but said this had been thwarted by insufficient time to bring that application in proper form. However, when I asked counsel if he was making an adjournment application in order to enable him to bring that application, counsel replied that he was not. He then confirmed he was satisfied to proceed with the application as currently framed.

C. Defendant's Reply

- [25] In reply the defendant submits the post-February 8 discussion of admissions and pleadings amendments and, specifically, whether admissions were to be conditional upon the required admissions being made by the other side, does not affect the underlying agreement. As a practical matter, the reciprocal admissions were simple ones and no formal admissions or pleadings amendments were even required in order to make the agreement effective.
- [26] The defendant also noted that the delay between February 8 and the mid-May dialogue over pleadings amendments actually reinforces the defendant's argument that these pleadings matters were not part of the agreement.

IV. Discussion

A. General Principles

- [27] The principles concerning the formation of a settlement agreement are the same as those for the formation of a contract.
- [28] In Lacroix, a case involving a settlement agreement, the Court of Appeal said at para. 35 and 36:

[35] The principles of contract formation are set out in *Fridman, The Law of Contract* (Toronto: Thomson Carswell, 2006) at 15:

... the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract.

The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. ...:

The parties will be found to have reached a meeting of the minds, in other words *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.

[Emphasis added in *Lacroix*.]

[36] The correct interpretation in such a case is to analyze the evidence to determine whether it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and whether the essential terms of that contract can be determined with a reasonable degree of certainty. Not only must there be an offer and acceptance, but the evidence must be capable of demonstrating that there is an agreement on all essential terms. In this case, a correct analysis would have led the judge to consider the evidence and determine whether it showed, objectively, that the parties intended a tort settlement, or a tort and Part 7 settlement, or whether the evidence was incapable of supporting either conclusion. To answer the first *Fieguth* question, the trial judge had to be able to determine the entire scope of the settlement.

[29] If there are no specific terms in the agreement addressing the completion of the agreement, either party is entitled to submit whatever documents thought to be appropriate, without resigning the settlement agreement. In *Fieguth v. Acklands Ltd.* (1989), 1989 CanLII 2744 (B.C.C.A.), the court said that the formation of a contract must be distinguished from its completion. As to completion, the court said:

[36] The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but

neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[30] That passage was quoted with approval in *Lacroix* at para. 41.

[31] This is perhaps an obvious point, but it bears mentioning that counsel may conclude an agreement on a client's behalf. In *Sekhon*, the court said at para. 110:

[110] It is settled law that a solicitor acting for a party in settlement negotiations is acting as the agent of the client. The solicitor is presumed to have the authority to bind the client to the terms of settlement. There is no obligation on other parties to make enquiries regarding a solicitor's authority to settle a matter on a client's behalf. It is in the interests of the administration of justice that solicitors be free to complete settlements with solicitors without having to enquire about or be concerned with the actual authority of the solicitor: *Scherer v. Paletta*, 1966 CanLII 286 (ON CA), [1966] O.J. No. 1017 (C.A.); *Adamoski v. Mercer*, [1984] B.C.J. No. 2872 (S.C.) at ¶6; *Harvey v. British Columbia Corps of Commissionaires*, 2002 BCPC 69 at ¶30.

[32] That passage was quoted request approval in *Hartslief v. Terra Nova Royalty*, 2013 BCCA 417, at para. 14. See also *Darwish* at para. 14.

[33] Where the parties have, in fact, reached an agreement, the remedy is set out in s. 8(3) the Law and Equity Act, R.S.B.C. 1996, c. 253, which reads:

8(3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.

[Emphasis added.]

[34] In *Roumanis* at para. 29, the court adopted a three-part approach to an application to enforce a settlement agreement. This approach was adopted by the court in *Carlton* at para. 32 as follows:

[32] In *Roumanis*, Sewell J. summarized the applicable legal principles. He adopted a three-part approach that required a determination of the following:

- First, did the parties entered into a binding Settlement Agreement?
- Second, if so, does the court have any discretion to refuse to enforce it?
- Third, if such discretion exists, how should it be exercised in the circumstances of the case?

- [35] The principles for the exercise of discretion were set out by the Court of Appeal in *Hawitt*, at para. 18, as follows:
- [18] It appears to me that once the matter is before the court (e.g., for a stay) the judge has a discretion -- it being a summary application -- to refuse or grant the stay.
- [19] The judge may refuse the stay if:
1. There was a limitation on the instructions of the solicitor known to the opposite party;
 2. There was a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;
 3. There was fraud or collusion;
 4. There was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.

B. Analysis

- [36] I am satisfied that, on an objective view of the facts in this case, a settlement of the referenced issues was reached in this case. Specifically, I conclude it would be clear to an objective reasonable bystander, in light of all the material facts, that the parties intended to contract. It is also clear that the essential terms of that contract can be determined with reasonable certainty. There is an offer in clear terms and an unambiguous acceptance.
- [37] It is only after the fact that the plaintiff revealed an intention that is inconsistent with a binding agreement, but we see from *Lacroix* that the law is not concerned with unstated intentions but instead with manifested intentions. Similarly, it is only after the fact that the plaintiff asserts that any agreement was provisional only in the sense that it was conditional on an acceptable form of documentation and specific instructions from the plaintiff. None of these matters were raised at the time the plaintiff communicated acceptance to the defendant.
- [38] I also conclude that the additional matter of documenting the settlement does not arise as a condition of the agreement by implication. There is nothing in the agreement or in the surrounding circumstances that suggests documents were by implication a necessary component of the agreement. In fact, there was no need to document the agreement beyond the exchange of emails, as counsel could have simply informed the trial judge of the settlement of liability and the specific damages issues at the outset of the trial. *Fieguth* confirms that where a settlement agreement is reached, disagreements concerning the resulting documentation do not affect the validity of the agreement itself. The situation here is no different than in a case where the parties come to an agreement on a settlement amount but disagree over the wording of a release. That disagreement does not alter the fact that the case has been settled by agreement.

C. Remedy

- [39] As noted earlier, s. 8 of the Law and Equity Act grants the court a discretion to stay a proceeding in whole or in part in order to enforce a settlement agreement. The plaintiff argued that this only applies where a case has been entirely settled, but she did not cite any authority for this proposition, and it appears contrary to the express power stated in the provision to stay a proceeding "either generally or so far as may be necessary for the purposes of justice".
- [40] The Court of Appeal in *Hawitt* set out the matters to be considered in the exercise of that discretion. Applying those to the present case, I find: (1) there was no limitation on the instructions of the plaintiff's solicitor known to the defendant; (2) there is no evidence of a misapprehension by the solicitor making the settlement of the instructions or the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce a settlement; (3) there is no evidence of fraud or collusion; and (4) there is no issue to be tried as to whether there was such a limitation, misapprehension, fraud, or collusion in relation to the settlement.
- [41] In brief, there is no basis to deny the plaintiff a stay of proceedings that reflects the settlement reached.

V. Conclusion

- [42] Accordingly, for the reasons given, I am satisfied that on February 8, 2022, the parties reached a binding agreement that in return for an admission of liability by the defendant, the plaintiff would abandon her claims for aggravated and punitive damages and cap her damages at the defendant's third-party liability policy limits of about \$2 million. Accordingly, I grant a declaration to that effect. I also order that the plaintiff's claims for aggravated and punitive damages are stayed.
- [43] As for costs, in the absence of any submissions to the contrary, I conclude the appropriate result on costs is for the defendant to have costs of this application in any event of the cause. Those conclude my reasons.

"Blok J."

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