

CANADA / JUDGMENT

Johal v. Radek

2016 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

3 February 2016

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2016 BCSC 232 Johal v. Radek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johal v. Radek,

2016 BCSC 232

Date: 20160203

Docket: M157034

Registry: New Westminster

Between:

Kulwant Kaur Johal

Plaintiff

And

Rachel Radek, Katherine Joyce Keras also known as

Katherine Keras, Katherine Joyce Keras d.b.a.

Traffic Pro Services also known as Pro-Safe Traffic Service,

Ted W. Astells, Ted W. Astells d.b.a.

Traffic Pro Services also known as Pro-Safe Traffic Service

and West-Can Leasing Ltd.

Defendants

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. Sidhu

Counsel for the Defendants:

C. Carey

Place and Date of Hearing:

New Westminster, B.C.

February 3, 2016

Place and Date of Judgment:

New Westminster, B.C.

February 3, 2016

- [1] THE COURT: This is an application by the defendants for an order that their expert witness, Dr. Robin Rickards, be examined on oath before a court reporter by video deposition on February 5, 2016, the Friday prior to the trial of this matter, and that the record of the examination be made available to be tendered as evidence at trial.
- [2] The action arises out of a motor vehicle accident on May 30, 2012. Liability has been admitted. There was a trial management conference on January 6, 2016 and the matter remains on the trial list scheduled for trial February 15, 2016.
- [3] The plaintiff's counsel was advised by letter of October 21, 2015 that a scheduled medical examination of the plaintiff had been arranged for November 5, 2015 with Dr. Rickards.
- [4] On October 26, 2015, a retainer letter was sent to Dr. Rickards setting out the terms of his retainer and the opinion requested, and as a part of that, he was advised:

This matter is scheduled to proceed to trial on February 15, 2016, for 5 days. You may be required to attend at trial for one or more of those days. If you know now or become aware later that you will not be able to attend on those dates, please advise us immediately.

[Emphasis in original.]

- [5] By letter of October 27, 2015, plaintiff's counsel agreed to the medical examination on various terms, including the term that:

Your expert is to be advised of the trial date. If you serve your expert's report and your expert is requested for cross-examination, I will expect your expert's attendance at trial. I will not consent to a pre-trial deposition except in extraordinary circumstances. Convenience to your expert will not be a consideration and I would only consent to a pre-trial deposition if there's no prejudice to my client;

- [6] On December 2, 2015, after his opinion report was served on November 20, 2015, counsel for the plaintiff advised counsel for the defendants that Dr. Rickards would be required for cross-examination at trial.
- [7] On January 14, 2016, counsel for the plaintiff made inquiries about whether or not there was going to be an addendum report from Dr. Rickards, saying, "I assume Dr. Rickards will testify on Thursday afternoon, or Friday morning."
- [8] On January 18, 2016, an addendum report was sought by counsel for the defendants from Dr. Rickards. Dr. Rickards was again reminded that the trial of this matter was scheduled to proceed on February 15, 2016 for five days, and again he was told he may be required to attend at trial. I note he was not told specifically that he was required to attend for cross-examination. I do not know whether that was conveyed to him in a separate piece of correspondence or not.
- [9] In any event, there is no doubt that Dr. Rickards was put on notice and as a professional witness, if I can put it that way, as an expert who is commonly retained to testify regarding his expert opinion, I would assume that he is aware of his professional obligations in that regard.
- [10] On January 22, 2016, for the first time, counsel for the defendants advised that Dr. Rickards was, first of all, preparing the addendum report and then:

As for his trial schedule, he will need a pre-trial deposition as he will be in South America that entire week as well as the week prior.

Kindly provide your dates for same

I assume it means "deposition" instead of "disposition."

- [11] There is no evidence from Dr. Rickards at all. The only evidence I have from the defendants is that of Roxanne Dhanpaul, a paralegal.
- [12] The evidence regarding Dr. Rickards is triple hearsay. It is:

I am informed by Ms. Carey and verily believe that the office of Dr. Rickards contacted Ms. Carey on January 22, 2016 by telephone and advised that Dr. Rickards was unable to attend the trial of this matter as he will be in Colombia for personal/family reasons during the week of February 15, 2016. As a result, Dr. Rickards will not be available for cross-examination by the Plaintiff at trial.

- [13] So first of all, we have no idea when this trip of Dr. Rickards was planned. We have no idea why this trip was necessary and we have no evidence from Dr. Rickards, as I said, at all.
- [14] The plaintiff opposes the application and says that if Dr. Rickards is unavailable, the most just manner of proceeding is for Dr. Rickards to attend the trial by video conference at the appropriate time and, in their materials, the plaintiff provides evidence of video conferencing facilities both in Bogotá, Colombia, and Medellín, Colombia.
- [15] The defendants' submissions were that they should not be deprived of the evidence of Dr. Rickards by refusing an application for a video deposition. But there is no evidence that they will be so deprived. There is no evidence that Dr. Rickards could not be available for a video conference at some location in Colombia and, indeed, for that matter, there is no evidence that he could not fly back to attend the trial for the Friday of the scheduled trial dates.
- [16] The test with respect to video deposition is set out in Rule 7-8(3) of the Supreme Court Civil Rules, Grounds for the Order, I am directed:

In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account:

- (a) the convenience of the person sought to be examined,
- (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence,
- (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial,
- (d) the possibility and desirability of having the person testify at trial by video conferencing or other electronic means, and
- (e) the expense of bringing the person to the trial.

- [17] With respect to (a), the convenience of Dr. Rickards would certainly be to have the deposition taken in advance of the trial. With respect to (b), there is no evidence that he is unavailable for a video conference or in fact unavailable to testify other than the evidence of Ms. Dhanpaul that he has plans to be in Colombia. With respect to (c), the possibility he will be beyond the jurisdiction has been dealt with.
- [18] As for (d), the possibility and desirability of having the person testify at trial by video conferencing or other electronic means: As I said, the plaintiff has brought evidence with respect to the availability of video conferencing in Colombia and refers me to the decision of Master Young, as she then was, in *Seder v. Douglas*, 2011 BCSC 823, at para. 27 where Her Ladyship referenced the following:

[27] In *Nybo v. Kralj*, 2010 BCSC 674, Madam Justice Dillon considered this section of the Evidence Act in a jury trial where the plaintiff's counsel applied in the middle of a trial to have three witnesses give evidence by way of video conference. Her Ladyship said this at paragraph 11:

British Columbia's legislation is different [from the Ontario legislation]. It establishes that the court may allow videoconference evidence if another party does not consent unless the non-consenting party satisfies the court that receiving the testimony in that manner would be contrary to the principles of fundamental justice. In my view, this expresses a narrower view of the exclusion of videoconferencing and puts the onus on the party who would deny use of the technology.

[19] That solution was also addressed in *Campbell v. McDougall*, 2011 BCSC 1242, a decision of Master Bouck, at paras. 24 and 25:

[24] Plaintiff's counsel proposes that Dr. Maloon attend trial via videoconferencing from [South] Africa. The plaintiff is willing to accommodate the defence in any manner during trial to allow for this procedure.

[25] Dr. Maloon has provided some details of his expected whereabouts during the 25-day trial period. He is unable to provide a precise itinerary given that the travel period is still five months away. Dr. Maloon expects to be working in Cape Town, South Africa, during the last month of his sabbatical. Nonetheless, the doctor deposes that "it is not possible" to participate in a videoconferencing given that "my schedule is too uncertain to be able to make a commitment and I will not have access to any charts or records".

And then the court points out that:

[26] There is a nine-hour time difference between Victoria and Cape Town.

[20] Here, I have no evidence, as I have said repeatedly, from Dr. Rickards. There is no evidence he is unavailable for a video conference. The time difference between here and Colombia, I am advised, is three hours.

[21] The dangers of video depositions have been referred to in many cases, one of such is *Byer v. Mills*, 2011 BCSC 158. The court commented on the use of video deposition at trial and those comments have been reiterated in various other cases including in *Campbell* at paras. 53 to 55 where the court says:

[53] The comments, while obiter, were further adopted by the court in *Seguin v. Stack*, (11 March, 2011) Vancouver No. M095847 (B.C.S.C.) in which Master Baker dismissed an application to permit a medical doctor to provide evidence by way of deposition as the doctor was already committed to surgical and clinical activities (along with other trials) during the particular week of trial. As Master Baker observed, the doctor was advised of the trial dates so any conflict in that regard must have been the fault of his office

[54] Most recently, Master Young decided that the use of videoconferencing is to be preferred over deposition evidence so long as the object of fundamental justice is achieved

[55] In this case, Dr. Maloon is an important witness for the defence. From this observer's perspective, there are several aspects of the report that invite careful and thorough cross-examination by plaintiff's counsel.

Master Bouck went on to dismiss the application to have Dr. Maloon's evidence taken by video deposition.

[22] The defendant relied on a decision of Mr. Justice Willcock in *Gill v. A & P Growers Ltd.*, 2011 BCSC 1421. The plaintiff points out that that decision must be carefully read and construed as it was with respect to an application by the plaintiff for a video deposition of an expert in advance of trial. It was submitted that the difficulties that arise from taking a video deposition of a defendant's expert do not arise in those circumstances.

[23] Counsel for the plaintiff pressed upon me that there are disadvantages in that if there are eventualities that arise at the trial that are not contemplated or not considered in advance of the video deposition of the proposed defence expert, that there will be no opportunity to put those matters to Dr. Rickards, and the plaintiff potentially will be at a disadvantage in that regard.

[24] The defendants argue that any such disadvantage can be taken into consideration by arguments as to the weight of the expert's evidence at the trial. I am not persuaded that that overcomes, first of all, the onus to convince me that a video conference would not be the appropriate avenue here and, secondly, the potential detriment to the plaintiff if something arose that was not contemplated.

[25] Thus, in all of the circumstances, I am not convinced that the application should go and the application is dismissed with costs to the plaintiff in the cause.

[26] MS. SIDHU: Your Honour, just with respect to costs, it is a fast track, so can we get costs for the day at \$1,100 plus tax? It was a short leave application, kind of brought at the last minute.

[27] THE COURT: Right. Do you wish to say anything about that, Ms. Carey?

[28] MS. CAREY: Well, I hadn't -- I think that's -- the amount suggested by my friend is excessive, given that the total fast track cost would be \$6,500 for the entire preparation of the matter from start to finish. Perhaps we can leave that for a taxation hearing, unless you are inclined to order a dollar figure, but I think the amount proposed by my friend is excessive.

[29] MS. SIDHU: Your Honour, there is precedent for fast track matters that have contested chambers application where an order for costs are made because it would not be fair to the plaintiff to restrict them to \$6,500. Then that opens the door for defence counsel to make as many applications and not --

[30] THE COURT: Yes, I understand. In my view, it is appropriate regardless of the fact that it is a fast track action, to order lump sum costs.

[31] I will order \$1,000 inclusive of disbursements and taxes given that counsel have been here virtually the entire day.

[32] THE CLERK: And, Your Honour, so costs to the plaintiff --

[33] THE COURT: Yes.

[34] THE CLERK: -- lump sum costs \$1,000 inclusive of disbursements and taxes; is it forthwith?

[35] THE COURT: No, not forthwith. Thank you.

"Master Muir"

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