

CANADA / JUDGMENT

Katz v. Chisholm

2025 BCSC 1998

COURT

Supreme Court of British Columbia

DECIDED

17 June 2025

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2025 BCSC 1998 Katz v. Chisholm

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Katz v. Chisholm,

2025 BCSC 1998

Date: 20250617

Docket: S234520

Registry: Vancouver

Between:

Karen Marie Katz

Plaintiff

And

Catrina M. Chisholm and Kahn Zack Ehrlich Lithwick

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

The Plaintiff appearing in person:

K.M. Katz

Counsel for the Defendants:

D. Rondeau

Place and Date of Hearing:

Vancouver, B.C.

June 17, 2025

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2025

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered given that some matters were abbreviated in the interests of time. I have made such edits without affecting the substance or final disposition.
- [2] The defendants bring this application for leave to bring a third-party notice against Terrance Joseph Kosikar ("Mr. Kosikar"). The plaintiff opposes the application.

Background

- [3] The underlying action is one for damages arising from a claim of professional negligence concerning a conveyance of real property in Seton Portage, BC (the "Property").
- [4] In general terms, the plaintiff alleges that she advanced funds for the purchase of the Property to the proposed third party, Mr. Kosikar, who took title from his ex-wife, who is not a party to this action. Title was registered solely in Mr. Kosikar's name, however the plaintiff alleges that she advanced the funds for the purchase and that the intent was that she would be the owner. In separate proceedings commenced by the plaintiff against Mr. Kosikar under action No. S228836, she alleges that she is the beneficial owner of the Property and seeks, among other things, a declaration that Mr. Kosikar holds the Property in a resulting trust for her (the "Resulting Trust Action"). The Resulting Trust Action was commenced on November 3, 2022.
- [5] In terms of this action, which was commenced June 22, 2023, the plaintiff alleges that she had a retainer with the defendant counsel and law firm who provided services in respect of the conveyance of title to Mr. Kosikar, and that they were negligent in providing advice and carrying out her instructions to ensure that the Property was, in fact, registered in her name, as she alleges was the intention. She seeks damages for the loss of funds advanced by her and loss of title, and return of legal fees she alleges were paid by her on Mr. Kosikar's behalf.

- [6] In addition to the within action and the action brought against Mr. Kosikar directly, I am advised that the plaintiff has commenced a further action against an entity with which Mr. Kosikar is affiliated whereby the plaintiff seeks the return of funds that she alleges were advanced as loans.
- [7] The nub of the defence of Mr. Kosikar in those other actions is that all advances made by the plaintiff were gifts.
- [8] With respect to this action, the defendants dispute that the plaintiff was their client such that they owed her any duty of care whatsoever. Rather, Mr. Kosikar was their client. Alternatively, they plead that even if she was a client then the defences raised by Mr. Kosikar as to the nature of the advance of funds and arrangement between him and the plaintiff apply to defeat any negligence claims, alleging that the plaintiff advised them specifically that all advances by her were a gift.
- [9] There have been several procedural applications that have been brought to date, including in respect of discovery matters, but also with respect to case management including in respect of the other actions. The plaintiff submits that the applications brought on her behalf were not necessarily brought at her instruction, with her counsel going on what was loosely described by her as a folly of his own.
- [10] In any event, in the course of those applications an order was made on January 9, 2025, to stay these proceedings until such time as the Resulting Trust Action was determined, with the reasons for judgment acknowledging that to the extent the negligence action against these defendants were to proceed, the determination as to what the nature of the advance of the funds by the plaintiff was, a gift or a loan, would be a threshold issue. Specifically, in the reasons for judgment indexed at 2025 BCSC 34, the following was noted:
- [130] There are significant potential benefits of granting the stay of the Lawyer Action pending the trial of the Kosikar Action. These relate to time savings and costs savings. If the Purchase Funds were not a gift, then Ms. Katz will be able to obtain the Property. If they were a gift, she will lose in her bid to have the Property transferred to her. Either way, resolution of the Kosikar Action will likely do away with much of the Lawyer Action, which will largely be reduced to a dispute over legal costs.
- [131] This narrowing of the issues mitigates the concern that a stay of the Lawyer Action could result in a delay of that proceeding coming to full resolution. Once the Kosikar Action is concluded, that determination will help to significantly narrow the remaining issues in the Lawyer Action. Narrowing the issues remaining in the Lawyer Action will have a direct impact downstream - it will reduce the number of days required for trial of the remaining issues in the Lawyer Action, which in turn will result in earlier trial dates.

- [11] After that stay order was pronounced, the plaintiff unilaterally filed a notice of discontinuance in the Resulting Trust Action on May 12, 2025. As a result, the Resulting Trust Action was determined and, by the terms of the January 9, 2025 stay order, this action was no longer stayed.
- [12] The plaintiff then began to bring further procedural applications forward in this action. This application was filed May 26, 2025.
- [13] I am advised that a case planning conference has been set for August 1, 2025, which may assist the parties to put some procedures in place to ensure that this matter moves forward in a timely way, with some sense of order to the applications being brought.
- [14] No trial date has yet been set.

The Parties' Positions

- [15] The basis on which the defendants seek to file the third party notice is that the defendants' position is that if (a) they are found to owe a duty to the plaintiff and (b) the funds are found to not be a gift, then Mr. Kosikar ought to indemnify them for any damages as he failed to accurately convey to them the relationship and nature of the advances such that any loss was not due to negligence on their part.
- [16] The primary basis for the plaintiff's opposition, as she describes it, is that the defendants are improperly "jumping on" her own litigation against Mr. Kosikar in the Resulting Trust Action, without providing any indemnification to her for the legal costs that she says she has incurred to date in advancing the claims against Mr. Kosikar, whether that be the Resulting Trust Action, or in this litigation. It is, in fact, acknowledged by the defendants that in drafting their third party notice, they are largely mirroring the pleadings that the plaintiff filed herself.
- [17] The plaintiff's further position is that it is inappropriate to unduly complicate this matter, whether it be by adding to the complexity by requiring this threshold issue as to the nature of the advances to be resolved, which will require additional trial time to be added, and add further pretrial procedures involving Mr. Kosikar's disclosure of documents and discovery, although the plaintiff does say that she has no intention of discovering Mr. Kosikar herself or of discovering the defendants.
- [18] The plaintiff's arguments are, in essence, that it is not just and convenient, particularly without there being any indemnification to her for the costs, incurred to date in moving the litigation against Mr. Kosikar forward, to have Mr. Kosikar brought into this action as a third party, on the sole issue of the nature of the advances made.

Legal Analysis

- [19] The object of permitting third party proceedings has been noted in *McNaughton v. Baker*, 1988 CanLII 3036 (CA), at para. 14, of being to avoid a multiplicity of proceedings and the potential for inconsistent findings by allowing resolution of related questions, issues, or remedies within the same action, with the fundamental question being, as noted in *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192, at para. 90, whether a greater injustice and inconvenience would arise from allowing the third party proceedings or from striking them, if filed, or not granting leave depending on the context in which the application is brought.
- [20] The applicable principles for an application such as this were summarized at para. 19 of *Stevenson Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072 as follows:
- (a) The test on this application is the same as under Rule 9 - 5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue: *Drummond v. Moore*, 2012 BCSC 496 at para. 25.
 - (b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application: *Clayton Systems 2001 Ltd. v. Quizno's Canada Corporation*, 2003 BCSC 1573 at para. 9.
 - (c) The court is required to assume that all pleaded facts are true: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at 980; *Dhillon v. Coape and Hockaday*, 2004 BCSC 1208 at paras. 17-18.
 - (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice: *Symes v. Knooihuizen*, 1998 CanLII 2231 (BC SC), 1998 B.C.J. No. 611 at paras. 38-39; *Clayton Systems 2001 Ltd.* at para. 9.
 - (e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defense: *Adams v. Thompson et al.* (1987), 1987 CanLII 2590 (BC CA), 15 B.C.L.R. (2d) 51 at para. 20; *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 at para. 1.
- [21] With respect to those factors:
- a) I have reviewed the proposed third party claim and assuming the facts plead to true, the claim is not one that is bound to fail.
 - b) Given the chronology and litigation history in this matter, including the stay order and recent discontinuance of the Resulting Trust Action there has been no delay.

- c) The issue as to prejudice is one that is of some concern certainly from Ms. Katz's perspective. As noted, she argues that such prejudice arises from the potential increase in costs and potential delay if the trial takes longer to secure and conduct, as well as what she perceives as the defendants being able to realize on her own efforts in pursuing the claims against Mr. Kosikar to date, without them having contributed to her legal costs in doing so. However, it is generally the prejudice of the third party that is the focus when considering prejudice. In most cases it is the proposed third party who opposes the filing of the third party notice, rather than another party. Generally, if there are multiple parties who are potentially liable for the losses suffered or claimed to be suffered, it is often in the claiming party's interest to have all of the potential tortfeasors, or parties responsible for the breach, as the case may be, to be in the action so that all of the issues can be resolved. In short, a claiming party is generally not well served if at the end of a lengthy trial it is determined that a non party is responsible such that further proceedings must then be pursued for a remedy to be realized. Regardless, to the extent there is prejudice to the plaintiff, it can be addressed through costs orders. After this matter is determined on the merits, the trial judge will be in the position to determine what steps taken were and were not reasonably taken and what effect any of those steps has on a costs award, including if Ms. Katz should be compensated for her costs. It is premature at this time to make any decision in that respect and I decline to do so.
- d) Mr. Kosikar has been served with his application and takes no position, and, in fact, has indicated, that he will fully participate in this action.
- [22] As noted ultimately in exercising the court's discretion, the court must be satisfied that it is just and convenient in the circumstances to grant leave. The risk of inconsistent findings is one of the factors that is considered in this analysis.
- [23] Evidence as to the instructions given by Mr. Kosikar to the defendants, including in respect of the nature of the advances by the plaintiff, will necessarily be led in this action as those instructions will be relevant to the question of whether the defendants were negligent, assuming the plaintiff was a client to whom they owed a duty.
- [24] If Mr. Kosikar were not a party, the issue as to whether the defendants were entitled to contribution or indemnity from Mr. Kosikar would need to be resolved in a separate action, given that the Resulting Trust Action has been discontinued.
- [25] As such, there is a risk of inconsistent findings and embarrassment to this court.

Orders Made

- [26] In my view it is in the interests of justice that the third-party notice be filed and leave be granted as sought and I make that order.
- [27] The lawyers also sought an application for special costs, or uplift costs, payable forthwith by the plaintiff if she opposes this application.

[SUBMISSIONS ON COSTS]

- [28] THE COURT: The defendants are outside the time for a third-party notice to be filed, meaning that they had to bring this application to proceed. That does not lay at the feet of Ms. Katz. While she did oppose, meaning the application was perhaps more complex and lengthier than it otherwise would have been, for some of the same reasons I expressed previously, it is premature to set the scale of costs on an increased basis.
- [29] The defendants will have the costs of this application at the scale to be determined by the trial judge, in any event of the cause.
- [30] THE COURT: Turning then to some other relief that was not sought in the Notice of Application. The defendants also sought procedural orders with respect to two things:
- a) The continued inclusion by the plaintiff of materials that are inadmissible and not to be produced subject to provisions of s. 87 of the Legal Profession Act, R.S.B.C., c. 255 namely the complaint documents and the record of the complaint proceedings that the plaintiff brought against the defendants which are confidential. As this was not in the notice of application, I am not prepared to make an order now, but this is certainly something that I would expect the court to make an order on at the case planning conference, which Ms. Katz ought to consider.
 - b) A request for an order to compel the plaintiff to provide an email address for delivery. Again, this was not in the application so I will not make that order at this time, but it is something that can be addressed at the case planning conference and I would encourage Ms. Katz to consider providing it.
- [31] THE PLAINTIFF: I don't have one.
- [32] THE COURT: An application can be brought, if necessary, after the case planning conference if those matters cannot be addressed.
- [33] In summary, the orders are as sought in the notice of application, with costs to the defendants in any event of the cause at the scale to be determined by the trial judge.
- [34] I also dispense with approval as to form of order by the plaintiff.
- [35] Thank you.
- [36] CNSL D. RONDEAU: Thank you.
- [37] THE PLAINTIFF: Your Honour, just so you know, the defendants are going to have to seek an order for me to comply with anything in regards to the third party because I will not comply. I just put that on the record.

[38] THE COURT: Thank you. I will note, if these Reasons are ordered, two things: One, that Ms. Katz has stated on the record that she has no intention to comply with any orders made in respect of the third party, and, two, that she has put on the record that she has no intention of discovering the third party or discovering the defendants. Thank you.

[1] CNSL D. RONDEAU: Thank you.

"Associate Judge Robertson"

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