
CANADA / JUDGMENT

Kim v. Choi

2019 BCSC 1792

COURT

Supreme Court of British Columbia

DECIDED

18 October 2019

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2019 BCSC 1792 Kim v. Choi

1IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Choi,

2019 BCSC 1792

Date: 20191018

Docket: S77677

Registry: Nanaimo

Between:

Me Hee Kim

Plaintiff

And

Ae Sun Choi

Defendant

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for the Plaintiff:

A.N. Epstein

H. Han

Counsel for the Defendant:

L.M. Low

Place and Date of Trial:

Nanaimo, B.C.

September 26 & 27, 2019

Place and Date of Judgment:

Nanaimo, B.C.

October 18, 2019

Introduction

- [1] Ms. Kim was granted judgment against Ms. Choi (2019 BCSC 437).
- [2] Ms. Kim had sought to immigrate to Canada from Korea. Ms. Kim's application for permanent residency was enhanced on the basis that she was an entrepreneur. Ms. Choi owned a restaurant that she purported to sell to Ms. Kim as part of a strategy to secure residency for Ms. Kim.
- [3] Some money was paid to Ms. Choi through her daughter's Korean bank account.
- [4] Ms. Kim had been untruthful in her application for immigration status. Ms. Choi was found to be an untruthful witness at trial.
- [5] Ms. Kim had offered to settle the case by making an offer that was slightly less than the judgment award.
- [6] Ms. Kim seeks:
 - a) Special costs; or, in the alternative,
 - b) Double costs as of the date of her offer to settle.
- [7] Ms. Choi maintains that because of Ms. Kim's untruthfulness she should not be awarded special costs. Ms. Choi argues that it was not unreasonable for her to refuse the offer to settle and, therefore, double costs should not be awarded.
- [8] Ms. Choi's daughter seeks special costs as a consequence of the unsubstantiated allegations of conspiracy, fraud and deceit.
- [9] For the following reasons, I dismiss the claims for special and double costs and award Ms. Kim costs at Scale B.

Background Facts

- [10] Ms. Kim wished to immigrate to Canada. In order to enhance her application for residency, Ms. Kim made false declarations. She decided to hasten her residency application by entering into an agreement with Ms. Choi to purchase Ms. Choi's restaurant.
- [11] Over the course of 11 months, Ms. Kim paid about \$480,000 for the purchase price and operating expenses of the restaurant. Differences arose between the parties and Ms. Kim returned to Korea. She did not receive residency in Canada.
- [12] Some of the money paid by Ms. Kim was diverted through Ms. Choi's daughter's account in Korea. The diversion was to avoid Korean currency restrictions on money being taken out of the country.
- [13] Ms. Kim brought an action against Ms. Choi and her daughter.
- [14] Ms. Choi's daughter was a named defendant on the basis that her bank account in Korea was used as a conduit to transfer Ms. Kim's payments to Ms. Choi. It was alleged that the daughter conspired to commit fraud and deceit.
- [15] Prior to the commencement of the trial, Ms. Kim withdrew her allegations against the daughter and conceded that she was not part of her mother's scheme.
- [16] Ms. Kim had made a formal offer to settle in the sum of \$325,000. Ms. Choi was awarded judgment for 300,000,000 Korean Won. Depending on the date of the currency conversion, the amount of Canadian currency required to buy 300,000,000 Korean Won was in excess of the offer to settle.
- [17] Before trial, Ms. Choi had made false declarations in affidavits tendered in support of applications that would have given her an advantage in the litigation (e.g. applications for security for costs and removal of a Certificate of Pending Litigation lodged against her home).
- [18] At trial, Ms. Choi gave false testimony and was found to be an untruthful witness.

The Positions

- [19] Ms. Kim says that the magnitude of Ms. Choi's untruths constitute reprehensible conduct deserving of rebuke through an award of special costs. In the alternative, Ms. Kim argues that she should be entitled to double costs because the award was generally in accord with the formal offer and ought to have been accepted prior to trial.
- [20] Ms. Choi counters that Ms. Kim was also untruthful and, therefore, should not be entitled to special costs. Ms. Choi states that there were issues that needed to be tried and, therefore, it was reasonable not to have accepted the offer to settle.

- [21] Ms. Choi's daughter argues that she is entitled to special costs because there were allegations of conspiracy, fraud and deceit made against her without any evidence of such conduct and that the allegations have impacted her reputation and good name.

Special Costs

- [22] Special costs may be awarded where the conduct of a party is reprehensible. Reprehensible conduct includes conduct that is scandalous or outrageous, or milder forms of misconduct that are deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 747 (B.C.C.A.).
- [23] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Walker, J. set out those circumstances that warranted the attraction of special costs:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - (g) where a party brings a proceeding for an improper motive;
 - (h) where a party maintains unfounded allegations of fraud or dishonesty; and
 - (i) where a party pursues claims frivolously or without foundation.
- [24] Special costs are punitive and serve to chastise the offending party: *Ip v. Insurance Corp of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at para. 7.
- [25] Special costs are the exception. Special costs should not be awarded where the only issue is a party's credibility: *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284 at para. 26; *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal ref'd [2012] S.C.C.A. No. 120. However, a party who lies, falsifies evidence and attempts to deceive the court can be subjected to special costs: *Hoffman v. Percheson*, 2011 BCSC 1175 at paras. 19-23.
- [26] Special costs may also awarded where a litigant makes allegations of fraud without foundation. A prima facie case must exist before such a serious allegation is made: *Ip* at paras. 7-8.

[27] In *Ip*, at para. 8, the Court outlined the injuries inflicted by fraud allegations and the consequences that flow from baseless claims:

An allegation of fraud, willful misstatements, or other such claims made against a person casts a serious pall over his or her reputation in the community. Very careful consideration must be given by the defendant before making such serious allegations. At the very least, a *prima facie* case must exist and if it does not then special costs by way of "chastisement" is a reminder to the defendant to exercise better care in the future.

Special Costs Claim by Ms. Kim

[28] A party who embarks on a strategy of winning at all costs and, in order to achieve that goal, attempts to deceive the court, will face the sanction of special costs. Special costs serve as a deterrent to emphasize that misconduct will not be tolerated.

[29] Ms. Choi was not truthful, but there are more than just credibility concerns.

[30] Ms. Choi embarked on a strategy of reliance upon false affidavit material in an attempt to thwart Ms. Kim's access to trial. If the application for security for costs had been successful, it is conceivable that Ms. Kim would not have been able to proceed with the litigation. Her claim would not have been heard on the merits and her access to the court would have been denied. This was not a case of a party bringing applications to the court in what might be described as hard fought litigation. This was a case of a litigant relying on false evidence to prevent the opposing party from prosecuting her claim and continuing to give false evidence in an attempt to deceive the court.

[31] Ms. Choi's misconduct is deserving of rebuke.

Special Costs Claim Against Ms. Kim

[32] The original Notice of Civil Claim was filed on May 6, 2015. It included the following allegations against Ms. Choi, her daughter and Youn Hee Edmonds:

47. Kim says that for an unknown period of time, particulars of which are better known to the Defendants, and each of them, the Defendants wrongfully and maliciously conspired together to defraud and injure Kim by combining at different times for the purpose of assisting and encouraging each other to obtain monies from Kim without consideration.
48. Kim says that the Defendants, and each of them, fraudulently and deceitfully conspired and agreed together to cheat and defraud Kim and to hoodwink and deceive Kim to obtain monies from Kim without consideration.
49. Kim further says that the conspiracy was implemented and perpetuated, in whole or in part, by each of the Defendants, for the benefit of the Defendants, and to the detriment of Kim, and Kim has suffered damages as a result.

50. Further and alternatively, the Defendants, and each of them, intended or knew, or ought to have known, that their wrongful acts and omissions would cause injury to Kim and as a result of the Defendants' wrongful acts and omissions in furtherance of the conspiracy, Kim has suffered damages.
51. Kim says that the Defendants counseled and aided and abetted each other to implement and perpetuate the said fraud and conspiracy and, in so far as they did so, the said Defendants are each parties to each and every act or omission committed by each of them in furtherance of the fraud and conspiracy.
55. Further, Kim says that the Defendants' conduct was high-handed and arrogant, and was actuated by greed and malice and amounts to wrongful conduct, and Kim says that by reasons thereof, Kim is entitled to punitive and aggravated damages against the Defendants, and each of them.
75. Further, or in the alternative, beginning at a time unknown to Kim, the Defendants and each of them combined and conspired with each other by unlawful means to obtain payments from Kim. In furtherance of the conspiracy, the Defendants and each of them engaged in wrongful acts and omissions set forth herein. The Defendants and each of them intended and knew, or ought to have known, that their wrongful acts and omissions would cause injury to Kim. As a result Kim has suffered damages.
- [33] On February 29, 2016, a Consent Order was entered dismissing the action without costs against Ms. Edmonds.
- [34] In her application for security for costs, Ms. Choi deposed on April 29, 2016, that her daughter informed her that she (the daughter) had received money from Ms. Kim's mother and transferred those funds to Ms. Choi. This was an indication that the daughter was involved in Ms. Choi's scheme. At the very least, it could be argued that there was a prima facie case based on this information.
- [35] There were a number of amendments made to the Notice of Civil Claim, but the allegations of fraud against the daughter were only withdrawn at the outset of the trial. Ms. Kim conceded that the daughter had not been part of her mother's dealings and that the daughter had not done anything wrong.
- [36] Ms. Kim took no appreciable steps to pursue the claim against the daughter. There were no discoveries until the eve of the trial. The allegations remained in the pleadings for over three years. It is apparent that Ms. Kim did not litigate her claims in an expeditious way, but was content to leave the serious allegations against the daughter outstanding.

[37] The allegations were serious and likely to cast a pall over the daughter's reputation. If Ms. Kim had been diligent in prosecuting her claim, it is likely that she would have realized that the daughter was not a part of Ms. Choi's dealings. In these circumstances, leaving the allegations in place based only on a prima facie case without further investigation is deserving of rebuke.

Should Special Costs be Awarded?

- [38] The claims against the daughter were withdrawn by consent, but the question of her entitlement to costs was left to be determined after judgment was pronounced. Therefore, even though the daughter is no longer a named party to this action, her claim for costs must still be decided.
- [39] Ms. Choi and her daughter did not retain separate counsel. Even though the law firms may have changed, these defendants were represented throughout the litigation by the same counsel at any given time.
- [40] It should be noted that the mere fact a party does not pay legal fees is not a reason to deny an award of special costs: *Fullerton v. Matsqui* (District) (1992), 74 B.C.L.R. (2d) 311 at para. 29 (B.C.C.A.).
- [41] The daughter took no steps to demand particulars or to have the claims against her dismissed. While that does not excuse the allegations against her, it is a factor to consider when deciding if an award of special costs is warranted.
- [42] The purpose of special costs is to penalize misconduct. An award of special costs against Ms. Choi would serve to show this court's disapproval of her misconduct. Likewise, an award of special costs against Ms. Kim would emphasize this court's disapproval of failing to diligently investigate beyond what may have initially been a prima facie case.
- [43] An award of special costs, as sought against Ms. Choi and Ms. Kim, would result in what was described by Ms. Choi's counsel as "a wash". The benefactor of the result would be Ms. Choi who was unsuccessful in defending the claim against her, but would receive the benefit of special costs for a joint defence.
- [44] The daughter played no part in the litigation other than attending an examination of discovery. The litigation was conducted by Ms. Choi.
- [45] I am also mindful that Ms. Kim's counsel was adamant that the daughter had not been involved in her mother's scheme. Ms. Kim had been cooperative in allowing the daughter to testify at her convenience.

- [46] Ms. Kim says that if an award is to be made for special costs against her then she should get the benefit of a Sanderson Order, pursuant to Rule 14-1(18), so that the costs are to be paid by Ms. Choi. In some circumstances, a Sanderson Order would be appropriate. However, a Sanderson Order would effectively relieve Ms. Kim from her misconduct because the sanction against her would be paid by Ms. Choi. Ms. Choi would be paying special costs twice and that is not just.
- [47] I am satisfied that to do justice between all the parties, an appropriate award is to dismiss the respective applications for special costs and award Ms. Kim costs at Scale B. Ms. Kim was successful and, in considering all of the circumstances, ought not to be denied her costs.

Offer to Settle

- [48] Ms. Kim seeks double costs as contemplated by Rule 9-1 of the Supreme Court Civil Rules because she offered to settle her claims for an amount that was less than the judgment. The offer was dated October 23, 2018 and included the following:

The Plaintiff offers to settle this action in its entirety on terms that upon acceptance of this offer to settle:

- (i) The Plaintiff will be entitled to payment by the Defendants of \$325,000.00 (the "Settlement Payment");
- (ii) The Plaintiff will be entitled to taxable costs and disbursements in accordance with this offer to settle and Rule 14-1 of the Supreme Court Civil Rules, B.C. Reg 168/09.

[49] The offer was open for acceptance until November 13, 2018.

[50] Rule 9-1 gives the court discretion to award double costs after a formal offer to settle has been made. The relevant provisions of Rule 9-1 states:

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[51] Ms. Choi argues that it was not reasonable to accept the offer. The reasonableness of an offer is assessed based on the circumstances that existed when the offer was open for acceptance. In *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 29, the Court stated:

[29] Whether an offer to settle is one that ought reasonably to have been accepted is assessed not by reference to the award that was ultimately made, but under the circumstances existing when an offer was open for acceptance. In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, this Court explained:

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[52] The question at the time the offer was made is whether it was unreasonable to refuse it: *Cottrill* at para. 30.

[53] The offer was made to both defendants. The daughter had a strong defence as was evidenced by Ms. Kim's acknowledgment that she was simply an unwitting pawn in her mother's scheme. An acceptance of the offer would have resulted in the daughter being exposed to execution proceedings. It was entirely reasonable for her to reject the offer. That is a complete answer as to whether the offer should have been accepted.

[54] I, therefore, conclude that it was not unreasonable for the offer to be refused.

[55] As a consequence there is no reason to award double costs.

Summary

[56] The claims for special costs and for double costs after delivery of an offer to settle are dismissed.

[57] Ms. Kim was successful in her claim and is entitled to costs at Scale B.

"S.D. Dley J."

DLEY J.

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