
CANADA / JUDGMENT

Kim v. Choi

2020 BCSC 1790

COURT

Supreme Court of British Columbia

DECIDED

20 November 2020

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2020 BCSC 1790 Kim v. Choi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Choi,

2020 BCSC 1790

Date: 20201120

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, appearing via teleconference:

N. Shirazian

Counsel for the Defendant, appearing via teleconference:

W. Mosley

Articled Student

Place and Date of Hearing:

Nanaimo, B.C.

October 28, 2020

Place and Date of Judgment:

Nanaimo, B.C.

November 20, 2020

- [1] Ms. Kim was awarded a monetary judgment on March 26, 2019: *Kim v. Choi*, 2019 BCSC 437. Ms. Kim appealed and Ms. Choi cross-appealed. The appeals were dismissed on March 24, 2020: *Kim v. Choi*, 2020 BCCA 98.
- [2] Ms. Kim now seeks to vary the trial judgment to include an award for pre-judgment interest and for a declaration that she is entitled to post-judgment interest.
- [3] For the reasons that follow, Ms. Kim's application for pre-judgment interest is granted and she is entitled to post-judgment interest. Ms. Kim is not entitled to the costs of this application.

Background Facts

- [4] Ms. Kim filed a Notice of Civil Claim on May 6, 2015 and sought a number of remedies arising out of payments to Ms. Choi. Ms. Kim claimed restitution for unjust enrichment with the damages to be converted into Canadian funds in accordance with the provisions of the Foreign Money Claims Act, R.S.B.C. 1996, c. 155 [FMCA]. Ms. Kim also claimed interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 [Act].
- [5] After a 14-day trial, Ms. Kim was awarded the following:
 - a) The amount of Canadian currency that was necessary to purchase 300,000,000 Korean Won at a chartered bank located in British Columbia at the close of business on the conversion date (which was the last day before the judgment was paid);
 - b) A 56% constructive claim impressed upon 2380 Idiens Way, Courtenay, B.C., up to the monetary sum of the judgment; and
 - c) Costs unless either party applied for a further hearing on the matter.
- [6] Both parties appealed. In May 2019, they agreed on a stay of execution of the judgment pending the appeal and upon Ms. Choi's counsel's undertaking to hold \$350,000 in his trust account.

- [7] At a subsequent hearing on September 10, 2019, Ms. Kim was granted costs at Scale B. Ms. Kim also sought a declaration as to the date upon when currency conversion was to be made as contemplated by the FMCA. Ms. Choi took the position that the court was functus on that issue. The issue of the currency conversion was left for further argument.
- [8] The parties' appeals were heard on December 19, 2019 and dismissed on March 24, 2020.
- [9] The question of pre-judgment interest was not raised or adjudicated either at trial or on appeal.
- [10] On March 31, 2020, the judgment amount of \$346,940.13 CAD was paid.
- [11] On June 2, 2020, Ms. Kim raised the issues of pre and post-judgment interest. She calculated the pre-judgment interest from August 14, 2014 to March 26, 2019 in the sum of \$15,532.94. The post-judgment amount was calculated from March 26, 2019 to April 1, 2020 in the sum of \$14,004.50.

Discussion

- [12] There is no question pre-judgment interest formed a part of the claim and in the ordinary course should have been calculated and added to the judgment. Pre-judgment interest is mandated by the Act--it is not discretionary: *Gould v. Royal Trust Corp. of Canada*, 2010 BCSC 16 at para. 36. The Act states:

Court order interest

Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

- [13] Ms. Kim argues that the entered trial Order of March 26, 2019 should be amended to include an interest award. She relies on Rule 13-1(17) of the Supreme Court Civil Rules, which sets out the court's jurisdiction to rule on a matter that should have been adjudicated at trial, but was not. She relies further on *Harrison v. Harrison*, 2007 BCCA 120 at para. 29:
- [29] 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.

- [14] Counsel for Ms. Kim deposed that he understood pre-judgment interest would automatically accrue on the pecuniary award. He further deposed that if the exclusion of interest from the entered Order amounts to an error, then the error is as a result of his "slip" or "omission."
- [15] This is not a question of a slip in drawing up the order. Rather, pre-judgment interest should have been raised at trial, but was not. As such, my authority to amend the order is found in the latter half of Rule 13-1(17).

Pre-judgment Interest

- [16] Although it is not normally an issue, pre-judgment interest is troublesome in this case because of the timing of this application. Counsel had multiple opportunities to raise the issue of pre-judgment interest after trial, but did not avail of them. Counsel could have addressed it in either of the two post-trial applications or when money was placed into trust staying execution pending the appeal, but did not do so.
- [17] Litigating in a manner where applications are brought long after the issues have been decided is not in the best interests of the parties or in the interests of justice. In other circumstances, this might be described as litigating in slices; such conduct is unacceptable. It may also be described as careless or sloppy; that too is unacceptable.
- [18] Litigation between parties must end at some point. A trial decision or an appellate dismissal signals the end in virtually all cases. There must be finality for the litigants. Once litigation has been concluded by a final decision it will only be in the rarest case that further relief may be sought.
- [19] As part of her award, Ms. Kim was clearly entitled to interest. There may have been issues with respect to the date when interest was to accrue from, but entitlement was not in question.
- [20] If Ms. Kim is denied pre-judgment interest, she will not receive the full benefit of the award. Pre-judgment interest is neither a windfall to the recipient nor a penalty to the payor. Pre-judgment interest simply recognizes that the judgment debtor has had the use of money that otherwise would have been used by the successful litigant.
- [21] It is in the interests of justice to ensure that a party is not deprived of the fruits of litigation success. This principle is set out in *Chand v. Insurance Corporation of British Columbia*, 2009 BCCA 559 at para. 46:
- [46] In addition to Rule 41(24), the court has, through inherent jurisdiction, "the power to amend the entered order on the basis that it contained an error in expressing the manifest intention of the Court" (*Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, 237 D.L.R. (4th) 260 at para. 26, leave to appeal ref'd [2004] S.C.C.A. No. 221). In the absence of evidence of irrevocable steps in reliance or undue prejudice, the court should correct the order (para. 27). It is not in the interests of justice for an order to stand that does not reflect the parties' true entitlements (para. 27).

- [22] The entered Order should have included an award for pre-judgment interest and a failure to correct the Order would deny Ms. Kim her true entitlement. There is no evidence that Ms. Choi has been or will be prejudiced by the correction. If there was such evidence, then that would be a factor to consider.
- [23] Ms. Choi argues that a Consent Order (dated February 7, 2019) precludes this application because the parties had agreed that no further applications could be made to re-open the trial. The Consent Order was the result of Ms. Choi's application to re-open argument to have her daughter removed as a defendant. The application was made after full submissions had been completed at the conclusion of the parties' respective cases. I do not consider that Order to prevent a party from receiving what is mandated by statute.
- [24] I conclude that because pre-judgment interest is mandated by the Act, it must be included in the judgment against Ms. Choi.

Post-judgment Interest

- [25] The issue of post-judgment interest does not arise until the judgment is paid because it is only then that the calculation can be made. Entitlement to post-judgment interest is deemed to be included in a judgment: the Act, s. 9(1). As such, it is not necessary to include it in an order: *Hockin v. Bank of British Columbia*, (1996), 73 B.C.A.C. 234 at paras. 8-12.
- [26] Ms. Choi argues that an award of post-judgment interest would be prejudicial because she:
- a) was unaware that interest would be sought when she entered into the terms of the stay of execution agreement;
 - b) did not have the benefit of the value of the funds placed into her lawyer's trust account under the stay of execution agreement; and
 - c) promptly paid the judgment following the dismissal of her appeal.
- [27] The stay of execution agreement was a convenient vehicle for Ms. Choi to protect her assets from Ms. Kim who was entitled to the fruits of her judgment. Ms. Kim also received the benefit of the agreement because she was assured of having access to funds in the event Ms. Choi's appeal was dismissed. It may have been prudent to have placed the funds in an interest-bearing account for the credit of the parties pending the appeal.
- [28] I do not consider any of the factors urged by Ms. Choi to be prejudicial. If she had not entered into the stay of execution agreement, it was open to Ms. Kim to realize on her judgment. Promptly paying the judgment after an unsuccessful appeal is not a reason to ignore the provisions of the Act. Therefore, I have no hesitation in concluding that post-judgment interest must be paid.

[29] Ms. Choi has not disputed the interest calculations at this hearing. However, now that she is aware that there is an obligation to pay, Ms. Choi should have the opportunity of challenging the calculations. If Ms. Choi takes issue with the calculations, she must file an application within 14 days. If Ms. Choi does not file an application within that time, then Ms. Kim shall be entitled to \$15,532.94 in pre-judgment interest and \$14,004.50 in post-judgment interest.

Costs

[30] In the ordinary course of events, a successful party is entitled to costs.

[31] However, the pre-judgment interest issue should have been dealt with during closing arguments or on applications following the trial decision. At the very least, it should have been dealt with prior to the matter coming before the Court of Appeal. If there was an error with respect to the question of pre-judgment interest, the appellate review would have corrected the matter.

[32] This is an application that was unnecessary if the matter had been dealt with diligently. Such a manner of conducting litigation is not to be encouraged. As a result, I decline to award costs.

"S.D. Dley J."

DLEY J.

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