

CANADA / JUDGMENT

Kostanski v. Batist

2020 BCSC 674

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 674 Kostanski v. Batist

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kostanski v. Batist,

2020 BCSC 674

Date: 20200430

Docket: S190557

Registry: New Westminster

Between:

Jerzy Kostanski

Plaintiff

And

David G. Batist

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D. W. Donohoe

Counsel for the Defendant:

T. D. C. Dalziel

Place and Date of Hearing:

New Westminster, B.C.

January 13, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 30, 2020

Introduction

- [1] In this action, the plaintiff, Mr. Kostanski, seeks damages for professional negligence, breach of contract and breach of fiduciary duty against his former solicitor, Mr. Batist. The plaintiff has filed both a Notice of Civil Claim and an Amended Notice of Civil Claim. The issues dealt with on this application arise from the differences, and time lapsed, between the two claims.
- [2] In the plaintiff's Notice of Civil Claim, filed May 3, 2017 ("2017 NCC"), the alleged negligence was respecting advice given to the plaintiff during the defendant's retainer in a family law dispute between the plaintiff and his former common law spouse.
- [3] In an Amended Notice of Civil claim filed September 6, 2019 ("2019 ANCC"), the plaintiff has added claims for negligence regarding the conduct of a trial of the family law dispute, which allegations were not included in the 2017 NCC.
- [4] There are two applications before the court, the first of which was filed by the defendant on December 11, 2019, to strike several paragraphs of the 2019 ANCC, specifically, to strike those portions of the amended claim referencing alleged negligence in the conduct of the trial before Baker J.
- [5] The defendant submits the new, or further allegations of negligence, constitute an allegation of a new cause of action and, if so, are allegations of negligence made outside the two year limitation contained in the Limitation Act, S.B.C. 2012, c. 13, and should be struck.
- [6] On December 23, 2019, the plaintiff filed a Notice of Application seeking: (i) a declaration that the amendments in the 2019 ANCC "are not different and separate causes of action from the original claims filed in May 2017"; or (ii) in the alternative, a declaration the amended claims were filed within the two year limitation period; or (iii) in the further alternative, that, if the court rules the amendments required leave of the court, leave be granted on a retroactive basis.
- [7] By agreement of the parties, the application of the plaintiff proceeded first.

Chronology

- [8] In January 2013, the plaintiff, Mr. Kostanski, retained Mr. Batist to represent him in a family law dispute with his former common law spouse. Mr. Kostanski and his common law spouse, Gosia, had been residing in a home on Kildonan Road in West Vancouver, B.C.
- [9] In March of 2013 the new Family Law Act, S.B.C. 2011, c. 25 [FLA], came into force in B.C., and in May 2013, Gosia commenced a family law proceeding including claims for property division under the FLA, which included the Kildonan Road property and against a condominium development in North Vancouver being developed by Mr. Kostanski with others.
- [10] Later in May 2013, the plaintiff began demolition of the Kildonan Road home. Subsequently, the plaintiff began and completed construction of a new home on the Kildonan Road property.
- [11] On June 1, 2013, the new Limitation Act came into force in B.C.
- [12] The family law case between Mr. Kostanski and Gosia went to trial in May and June of 2014, reasons for judgment were released in May 2015 and an application that Baker J. reconsider her reasons was dismissed in October 2015. Mr. Kostanski appealed the decisions of Baker J., which resulted in a decision of the Court of Appeal in June 2016.
- [13] Mr. Kostanski retained new counsel to pursue an appeal of the trial decision and the reconsideration application before Baker J.
- [14] The Court of Appeal dismissed Mr. Kostanski's appeal, as well as a cross-appeal, which had been filed by Gosia. The lone exception was that the Court of Appeal allowed an appeal relating to a tax issue, but the net reapportionment of family property was not varied in the Court of Appeal. Gosia was found to be entitled to a portion of the value of the Kildonan Road property, and a compensation order was made regarding the condominium project in favour of Gosia.
- [15] A significant issue in the family litigation was the appropriate date for assessing the value of the Kildonan Road property under the FLA, considering Mr. Kostanski having built a new home on the property, which increased the value.
- [16] On May 3, 2017, as stated above, the 2017 NCC was issued in this action claiming the defendant, Mr. Batist, provided negligent advice to Mr. Kostanski in the family litigation regarding the date of valuation of the Kildonan Road property. Specifically, Mr. Kostanski alleges Mr. Batist failed to inform Mr. Kostanski of the date for valuation of the Kildonan property and failed to inform Mr. Kostanski that new construction on that property would be treated by the court as family property subject to division under the FLA.
- [17] In November 2017, Mr. Batist was served with the 2017 NCC and a Response to Civil Claim was filed in December 2017 after delays in service.

- [18] In late summer of 2018, Mr. Kostanski obtained a transcript of the trial which had been held before Baker J. in May and June of 2014.
- [19] On September 6, 2019, Mr. Kostanski filed the 2019 ANCC on the defendant, which added claims of negligence in the conduct of the trial before Baker J. The allegations include Mr. Batist having failed to submit sufficient evidence at trial, made inadequate submissions and allegedly failed to seek or obtain instructions from Mr. Kostanski on various occasions during the trial. There is no reference in the 2019 ANCC to allegations arising from the valuation of the family property and division of the Kildonan property.
- [20] Mr. Kostanski has deposed to the reasons for delay in issuing the 2019 ANCC, which include a delay in obtaining a transcript of the trial and that his new counsel, Mr. Donohoe, encountered health problems and was not available for a considerable time, which delayed the issuance of the Amended Notice of Civil Claim to September 2019.

Discussion

- [21] The application of the defendant has been brought under several of the Supreme Court Civil Rules, B.C. Reg. 18/2019 [Rules], namely, Rules 1-3, 3-1, 3-7, 6-1, 8-1, 9-5, 9-6, 14-1, and the inherent jurisdiction of the court. For the purposes of brevity, I will not reproduce those Rules, which are readily available.
- [22] Donegan J. clearly summarized the function of pleadings in *Simon v. Canada (Attorney General)*, 2015 BCSC 924:
- [17] The function of pleadings is to clearly define the issues of fact and law to be determined by a court. A plaintiff must state, for each cause of action, the material facts. Material facts are those necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the allegations. By referring to the pleadings, the court will understand what issues of fact and law it will be called upon to decide: *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.) at para. 5.
- [23] Many more cases since the above have affirmed that, based upon the pleadings, it is key that the defendant knows the case he or she has to meet and the clear issues are placed before the court.
- [24] The allegations in the original 2017 NCC only included allegations regarding advice given by Mr. Batist regarding the reapportionment of family property under the FLA. Those issues went to trial before Baker J. and subsequently to the Court of Appeal. The damages that flowed from a finding of negligence in giving that advice would be a reapportionment of the increase in value in the contested family property between the date of separation and the date of trial.
- [25] Mr. Batist submits that the allegations now alleged in the 2019 ANCC plead new material facts and seek new damages arising from events that were not at issue in the 2017 NCC.

[26] Mr. Kostanski submits the amendments do not amount to a new cause of action citing *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, and *Taylor v. Blenz The Canadian Coffee Company Ltd.*, 2019 BCSC 906. In *Taylor*, Warren J. summarized the approach to applications to amend where a new cause of action has been alleged:

32 The general approach to applications to amend pleadings is generous and non-technical so as to permit amendments that are necessary to determine the real questions between the parties, considering always the interests of justice. *Century Services Inc. v. Leroy*, 2015 BCCA 120 at para. 10. In *Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.* 2015 BCCA 16 at para. 47, the Court of Appeal emphasised the need for flexibility in dealing with applications to amend pleadings given the evolutionary quality of litigation and the resulting requirement to ensure that pleadings adapt to changing circumstances. These foundational principles were recently reiterated in *Swiss Reinsurance Co. v. Camarin Ltd.*, 2018 BCCA 122 at paras. 22 and 23.

33 Granting leave to amend pleadings is a highly discretionary decision. Ultimately, the question is whether it is just and convenient to allow the amendments. *Swiss* at para. 21; *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996) 19 B.C.L.R. (3D) 283 (C.A.) at paras. 36-38.

34 The objective is to balance the interests of justice and convenience in relation to all the parties. Delay, the reasons for delay, the expiry of a limitation period, the presence or absence of prejudice, and the extent of the connection between the proposed amendments and the existing claims are all factors to be considered and none, on their own, are decisive: *Teal Cedar Products* at paras. 41 and 47.

35 Where the proposed amendments do not raise a new cause of action, there will be no issue as to the potential expiry of a limitation period. Thus, it makes sense to first determine whether the proposed amendments raise a new cause of action because the determination of that question, due to the potential expiry of the associated limitation period, is a component in the ultimate assessment of whether it is just and convenient to allow the proposed amendments: *Swiss* at para. 21.

. . . .

37 Where proposed amendments do raise a new cause of action and it is possible that the limitation period applicable to the new cause of action has expired, the court should first determine whether it is just and convenient to allow the amendments assuming that the limitation period has expired: *KPMG Inc. v. IMO Industries (Canada) Inc.* 2008 BCCA 317 at paras. 47-49. If so, the proposed amendments should be allowed unconditionally. If not, (i.e., if the loss of a limitation defence would cause such prejudice as would not permit the exercise of the court's discretion in favour of the amendments), then the amendments should be allowed without prejudice to the defendant raising the limitation defence at trial.

[27] Regarding whether the proposed amendment raised a new cause of action, Warren J. continued at para. 42 and 44:

42 The plaintiffs submit that the factual substance of the Blenz Opposed Amendments is already specifically pleaded in the Current Pleading or falls within the ambit of the factual scope of the Current Pleading. They say the only change is the legal characterization of the wrong that resulted from the pre-contractual dealings between the parties, with the reformulated legal theory being breach of a duty to disclose.

....

44 I have concluded that the Blenz Opposed Amendments do not raise a new cause of action. They do not go beyond the scope of the set of facts engaged by the Current Pleading. In other words, they do not change the substance of the factual issues raised in the action. The Current Pleading does not expressly assert a breach of a pre-contractual duty to disclose. However, as discussed later, breach of a pre-contractual duty to disclose is merely a recasting of the legal characterization of the wrong that is alleged to arise out of the pre-contractual course of dealing between Mr. Taylor and Mr. Kormi on the one hand, and the Blenz Defendants, on the other, which is the same course of dealing that is asserted in the Current Pleading as the foundation for the express misrepresentation claim. The legal characterization of the wrong has shifted from express misrepresentation inducing the formation of the franchisee/franchisor relationships to breach of a duty to disclose but for which the franchisee/franchisor relationships would not have been formed.

[Emphasis added.]

- [28] Of course, references in the above quotes refer to proposed amendments, whereas in the application before me, Mr. Kostanski had amended the Notice of Civil Claim without leave of the court, as he was permitted to do on first application to amend: R. 6-1(1)(a). However, the same principles would apply.
- [29] As such, as articulated in *Taylor and Swiss Reinsurance Company*, I am required to answer two questions: (1) whether the amendments raise a new cause of action; and (2) whether it is just and convenient to permit the amendments.
- [30] Based upon the principles referred to above, I am satisfied the pleadings included in the 2019 ANCC amount to a new cause of action. The amendments do "go beyond the scope of the set of facts engaged by" the previous pleading and do "change the substance of the factual issues raised in the action", to quote from para. 44 of *Taylor*. The amended pleadings in this case are not a matter of having re-casted the facts originally pleaded to add a new cause of action. The 2019 ANCC presents a totally different set of facts compared to the 2018 NCC, albeit included within the retainer of Mr. Batist by Mr. Kostanski. When reviewing the 2017 NCC, Mr. Batist and his solicitor could not have assumed that Mr. Batist was being sued as a result of negligence in the conduct of the trial. It is not a question of adding a new cause of action based upon the same or a similar set of facts.

[31] Having found the amended pleadings constitute a new cause of action, the question is whether it is "just and convenient" to allow the amendments, or, in this case, to refuse to strike the amendments included in the 2019 ANCC. In making a determination as to whether the amendment would be just and convenient, a significant component of that assessment is the potential expiry of the associated limitation period.

[32] Mr. Batist submits the limitation period for the amendments in the 2019 ANCC had expired by the date it was filed, which was more than "two years after the day on which the claim is discovered" (Limitation Act, s. 6). Mr. Kostanski submits that the limitation period was not discovered until 2018, after he had received transcripts of the trial and reviewed the same with counsel. Mr. Batist submits that the discovery period commenced upon issuance of the reasons for judgment in May of 2015.

[33] In *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021, G.C. Weatherill, J. stated:

24 The threshold on applications for leave to amend pleadings is a low one: *Wiggins v. HMTQ*, 2007 BCSC 1644 at para. 17. If the proposed pleading discloses a reasonable cause of action, application should be granted unless the amendment discloses a new cause of action beyond the expiration of the limitation period (and not necessarily even then); the proposed amendment is clearly invalid at law; or prejudice will be caused to the other party: 287993 B.C. Ltd. et al v. Chartwell Projects, 2006 BCSC 1231 at para. 12.

[34] In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (CA), at para. 67, the court listed five factors for consideration on an application for leave to amend, which included the extent of the delay, the reasons for the delay, any explanation put forward to account for the delay, the degree of prejudice caused by delay; and the extent of connection, if any, between the existing claims and the proposed new cause of action.

[35] Also in *Teal*, at para. 37, the court indicated that what is just and convenient must be balanced in relation to both parties, assuming the limitation period has expired.

[36] Applying the factors in the present case:

- The extent of delay: Assuming Mr. Batist is correct in his interpretation of expiry of the limitation period, the delay was approximately two years and four months, assuming the limitation period lapsed in May 2017.

- The reasons for the delay/the explanation of the delay: Mr. Kostanski says the reason for the delay is that he did not receive a transcript of the trial until 2018; as neither Mr. Batist nor his counsel on the appeal had suggested to him there was any error or omission in Mr. Batist's work. He says both his children and new counsel suffered health issues. Mr. Kostanski's explanation is not necessarily convincing, but is reasonable in the circumstances.

- The degree of prejudice caused by the delay: This is unknown, although there is presumed prejudice caused by delay, especially when a serious allegation such as a solicitor's negligence is extended out over several years.
- The connection between the original claims and the amended claims: Both causes of action arose in the same retainer, albeit there do not appear to be direct connections between the nature of the allegations of negligence.

Conclusion

[37] Considering all factors, it is just and convenient to allow the new allegations in the Amended Notice of Civil Claim to be permitted without prejudice to any limitation defence that can be raised by Mr. Batist at trial.

Costs

[38] Costs will be in the cause.

"Jenkins J."

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