
CANADA / JUDGMENT

Kumant v. Pommier

2012 BCSC 392

COURT

Supreme Court of British Columbia

DECIDED

19 March 2012

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2012 BCSC 392 Kumant v. Pommier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kumant v. Pommier,

2012 BCSC 392

Date: 20120319

Docket: 19501

Registry: Cranbrook

Between:

Rolf Reiner Kumant

Plaintiff

And

John Pommier, Anton Wolfgang

and Canadian Sun & Mountains Travel Corporation

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Appearing on his own behalf:

Rolf Reiner Kumant

Counsel for the Defendants:

Counsel for the Applicant, William E. McNally

K.D. Watts

J.C. Zimmer, Q.C.

Place and Date of Hearing:

Cranbrook, B.C.

February 15, 2012

Place and Date of Judgment:

Cranbrook, B.C.

March 19, 2012

- [1] A former lawyer for the plaintiff, Rolf Reiner Kumant ("Mr. Kumant"), seeks leave to intervene in an application brought by the defendants subsequent to the trial in this proceeding. Both Mr. Kumant and the defendants object to the participation of the lawyer, William E. McNally ("Mr. McNally").

I. BACKGROUND

- [2] On December 16, 2011, I awarded judgment in favour of Mr. Kumant in the amount of \$40,237 for injuries he suffered in a motor vehicle accident. The trial took place over four days in November 2011. Mr. Kumant acted for himself at the trial. Apparently, he had previously engaged Mr. McNally as counsel but, according to Mr. McNally, he ceased acting for Mr. Kumant as the latter had indicated a lack of confidence in him. Mr. McNally now claims a solicitor's lien on the amount Mr. Kumant recovers, including costs.
- [3] As part of the continuing trial proceeding, the defendants now seek two forms of relief; the first being to have certain sums deducted from the judgment on the basis of an argument to be advanced under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 with respect to certain benefits Mr. Kumant either received or could have received had he applied for them. The defendants will also argue that they are entitled to certain costs due to the amount recovered by Mr. Kumant compared with the amounts of certain offers to settle they made that were not accepted.
- [4] Mr. McNally says that his interest is very much at stake in being able to intervene at this stage to oppose the defendants' application. That is, to assist in maximizing to the extent possible the amount to be recovered by Mr. Kumant and to minimize Mr. Kumant's exposure to the defendants' claim for costs.

- [5] The defendants object to the participation of Mr. McNally. They say that their application is part of the proceeding brought by Mr. Kumant and that Mr. McNally is not a party nor should he be. They say that he is neither a person who ought to have been originally joined as a party, nor one whose participation is required so that all matters may be effectively adjudicated upon. In any event, say the defendants, the interest of Mr. McNally is purely commercial.
- [6] Further, the defendants argue Mr. McNally's application is premature until the amount Mr. Kumant is to recover is known, i.e. at the conclusion of the defendants' application.
- [7] None of this makes much sense to Mr. Kumant, who continues to act for himself. He has filed no material in response to either application and says, simply, that he does not owe Mr. McNally anything and Mr. McNally should not be joined as an intervener.

II. DISCUSSION

- [8] Section 79 of the Legal Profession Act, S.B.C. 1998, c. 9 states:

79 (1) A lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.

- (2) Subsection (1) applies whether or not the lawyer acted as counsel.
- (3) The court that heard the proceeding or in which the proceeding is pending may order the review and payment of the fees, charges and disbursements out of the property as that court considers appropriate.
- (4) Sections 70 to 73 apply to a review under subsection (3) of this section.
- (5) If the proceeding referred to in subsection (1) was before a tribunal, the lawyer may apply to the court for an order under subsection (3).
- (6) All acts done and conveyances made to defeat, or that operate or tend to defeat, the charge are void against the charge, unless made to a bona fide purchaser for value without notice.
- (7) A proceeding for the purpose of realizing or enforcing a charge arising under this section may not be taken until after application has been made to the appropriate court for directions.
- [9] The application brought by Mr. McNally is broad in its scope. He asks for the following relief:
1. Fixing the amount of and approving payment of the fees, charges and disbursements of the Plaintiff's former counsel, Mr. McNally, as presented to the Plaintiff out of the amounts payable to the Plaintiff by the Defendants;

2. A direction that any amount owed to the Plaintiff by the Defendants be paid into court in satisfaction of the solicitors' lien of the Plaintiff's former counsel, Mr. McNally;
3. Granting status to the Plaintiff's former counsel, Mr. McNally, as an intervener with respect to any costs application in the main action which would alter the normal incidence of costs being payable to the Plaintiff following the event;
4. Permission to the Plaintiff's former counsel to proceed to taxation against the Defendants to recover the disbursements, in the event that the Plaintiff is unwilling or unable to do so; and
5. Directing that the Plaintiff's former counsel, Mr. McNally, receive notice of any application by the Defendants or the Plaintiff that may adversely affect his solicitor's lien.

[10] However, upon hearing the application, I asked Mr. McNally's counsel to restrict his arguments to those directed at whether Mr. McNally is entitled to intervene at this stage or at all in the proceeding between Mr. Kumant and the defendants. Mr. McNally argues that, as he has the statutory right to his lien, his interest is not simply commercial but is, rather, statutory as well as part of the common law.

[11] Mr. McNally apparently offered his services to Mr. Kumant to oppose the defendants' application but, says Mr. McNally, Mr. Kumant declined the offer. At this point in time, Mr. McNally has the statutory right to a claim of lien. That lien has not, however, been perfected. That is, no court has yet made a declaration that Mr. McNally is entitled to a lien. There is a discretion in the court to allow or not allow a claim of lien. A useful discussion on this subject may be found in the reasons of Madam Justice Baker in *N.H. v. K.W.; Re Bankruptcy of N.H.*, 2004 BCSC 463.

[12] In *Gladue v. British Columbia (Attorney General)*, 2010 BCSC 788, Mr. Justice Cole, referring to the predecessor of Rule 6-2(7) of the new Rules of Court (Rule 15(5)(a) of the old Rules) stated at para. 11:

A party seeking to be added must demonstrate a direct interest in, or that they are directly affected by, the outcome of the proceedings or that their participation is necessary for effectual adjudication.

[13] Undoubtedly, there may well be an argument at some point, if Mr. McNally proves his entitlement to a lien, as to whether a claim of a right to set-off for costs, as advanced here by the defendants, would take priority over and possibly have the effect of extinguishing the solicitor's lien. That strikes me as an issue that would be most effectively dealt with at the hearing of the defendants' application. Thus, while it may be true that the extent, if any, of "the property recovered" by Mr. Kumant will not be known until the conclusion of the defendants' application, it would be just and convenient for the Court to have the assistance of any arguments Mr. McNally may put before me as to what Mr. Kumant may ultimately be entitled to recover. If Mr. McNally does prove his entitlement to a lien, then he will have a legal charge over the funds and not merely a commercial interest in the matter. But, as noted earlier, Mr. McNally must first have a declaration of the Court that he is entitled to a

lien.

Mr. McNally should first bring on an application before another judge of this Court for a declaration of lien and, if made, for the amount to which he is entitled. I direct that another judge deal with those aspects of Mr. McNally's application as Mr. Kumant is self-represented and justice would be thereby best seen to be done. As the material before me would suggest a prima facie case of entitlement to a lien (I do note, however, that Mr. Kumant has not yet filed any opposing material to suggest otherwise which he may well do on such an application), I find that it is appropriate to adjourn the application of the defendants for a period of two months to permit Mr. McNally to first bring on his applications. Liberty to apply to proceed to the parties in this proceeding if there is any delay beyond the two months by Mr. McNally in doing so. Notice of any continuance of the defendants' application shall be given to Mr. McNally unless this Court rules otherwise.

"Melnick J."

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