

CANADA / JUDGMENT

Lacroix v. Loewen

2009 BCSC 239

COURT

Supreme Court of British Columbia

DECIDED

26 February 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2009 BCSC 239 Lacroix v. Loewen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lacroix v. Loewen,

2009 BCSC 239

Date: 20090226

Docket: M95062

Registry: New Westminster

Between:

Tracie Lacroix

Plaintiff

And

Lorne Bruce Loewen and D&S Bulldozing Ltd.

Defendants

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff:

R. Doran

Counsel for the Defendants:

J.D. James

Date and Place of Trial/Hearing:

February 13, 2009

New Westminster, B.C.

- [1] There are two applications before the Court. Both applications concern the question of whether an alleged settlement arrived at between counsel for the plaintiff and counsel for the defendant on March 11, 2004 is a binding agreement. The defendants say that there was an agreement and seek an order that the underlying action be dismissed.
- [2] The plaintiff says that there was no agreement and therefore seeks an order that paragraph 3 of the Statement of Defence, which pleads that the plaintiff has no cause of action against the defendants because of the agreement made on March 11, 2004, be struck and that the matter proceed to trial.

Background

- [3] On November 21, 2003, the plaintiff was injured in a motor vehicle accident. She was taken by ambulance to a hospital. She received medical treatment and alleges she suffered certain personal injuries. Subsequently, the plaintiff retained a lawyer, John Mickelson, to represent her in a claim for damages.
- [4] In March 2004, she contacted Mr. Mickelson and asked him to request that the Insurance Corporation of British Columbia reimburse her for chiropractic user fees and prescriptions. The plaintiff says these were costs which she had incurred as a result of the motor vehicle accident.
- [5] The plaintiff deposes that at the time she did not instruct her lawyer to enter into settlement negotiations. She also deposed that as of March 2004, she was suffering from neck, upper, mid and lower back pain as well as depression. She was being treated by her family physician, a massage therapist, a chiropractor, and a psychologist.
- [6] The affidavit material discloses that on March 11, 2004, counsel for the plaintiff contacted the ICBC adjuster concerning these claims. The adjuster made notes of his conversations and actions on March 11 and 12, 2004. Those notes are in evidence.
- [7] In those notes, the adjuster says:

In an attempt to settle early, I offered \$5,500. P/C countered after taking offer to client as follows with NP \$6,000 W/L \$500 specials \$200 and reimbursement of \$300 deductible. I agreed and settled the claim.

- [8] The material discloses that on that day, Mr. Mickelson called the plaintiff and told her that ICBC had offered to settle the claim for \$6,500. She deposes that she told him that amount was too low. She deposes that in response, her lawyer told her that the claim was worth "\$7,000 tops". The plaintiff then informed Mr. Mickelson that he should make an offer of

\$6,500, plus her deductible of \$300, plus all of her out of pocket expenses to date. She believed that the total amount would be \$7,900. The documents suggest that that amount would instead have been approximately \$7,692.

- [9] Mr. Mickelson telephoned the ICBC adjuster and discussed the matter. He then telephoned the plaintiff once again and said that ICBC had rejected her offer, but had countered with an offer of \$7,000. He advised her to accept that amount. As a result, she instructed him to accept ICBC's offer.
- [10] She deposes that she then had a conversation with some unidentified friends. Shortly afterwards, she telephoned Mr. Mickelson to tell him that she had decided not to accept ICBC's offer. He replied that it was too late. At that point, she had not received any money or any documentation.
- [11] After that conversation, Mr. Mickelson received a cheque for \$7,000 along with a release document. If the plaintiff had signed the release document, it would have released ICBC from liability for all tort claims as well as any claims under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83.
- [12] The plaintiff filed the Statement of Claim in this matter on January 3, 2007. As noted above, in the Statement of Defence, the defendant says that the plaintiff has no cause of action because all claims arising out of the relevant motor vehicle accident were settled by the agreement of March 11, 2004.
- [13] The question, then, is whether what occurred on March 11 and 12, 2004 resulted in a binding agreement.
- [14] In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62, 59 D.L.R. (4th) 114 (C.A.), McEachern C.J.B.C., speaking for the court, said at 70:

In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by

insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

- [15] In the case at bar, the question becomes whether the defendants, in sending over the cheque for the settlement sum along with the release documents, insisted upon terms or conditions which had not been agreed upon or were not reasonably implied in these circumstances.
- [16] There is no doubt upon the affidavit material filed by the plaintiff that when ICBC offered the plaintiff \$7,000 via her counsel Mr. Mickelson, she told Mr. Mickelson to accept that offer. He did.
- [17] It was after a conversation with friends that the plaintiff telephoned Mr. Mickelson again and told him that she would not accept the offer.
- [18] The plaintiff says that the documents, which she saw only after purporting to withdraw her acceptance, show that Mr. Mickelson did not follow her instructions. She had instructed him to make an offer at \$6,500, plus user fees, plus all of her expenses, an offer that would have amounted to \$7,692. However, she points out that according to the ICBC adjuster's notes, Mr. Mickelson did not make an offer of \$7,692. Instead, he countered ICBC's offer of \$5,500 with an offer of \$7,000. Thus, the offer that he made was \$692 less than the one authorized by the plaintiff.
- [19] Nevertheless, when Mr. Mickelson told the plaintiff that ICBC had made an offer of \$7,000, it is undisputed that she said she would accept ICBC's offer.
- [20] In these circumstances, I cannot see how the fact that the offer was \$692 less than what was originally authorized matters. The fact is that there was \$7,000 on the table. Her solicitor advised her to take this offer and she did.
- [21] However, the plaintiff raises a second issue. She says that the release forwarded to her lawyer along with the cheque was a release not only of the tort claim, but of any claim she might have had to the statutory benefits authorized by Part 7 of the Insurance (Vehicle) Regulation. She submits that while it is an implied term of an agreement that a release will be provided, a party may be discharged from an unexecuted agreement if the other party has insisted upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.
- [22] The plaintiff says that the \$7,000 offer was simply for the tort claim. She said that she was not told at any time that ICBC's purposed settlement was for \$6,000 non-pecuniary damages, \$500 in wage loss, \$200 in special damages, and a refund of a \$300 deductible. She simply understood that \$7,000 was the most she could receive.
- [23] Thus, counsel for the plaintiff says it should have been open to her to pursue a claim for Part 7 damages. As the release forwarded to plaintiff's counsel specifically discharged ICBC "under Part 7 of the regulations", a new term had been added to the agreement, one which the plaintiff had not agreed upon.

- [24] Counsel for the defendant says that, in fact, some Part 7 benefits were included in the offer because there could be payment for lost wages under Part 7. Additionally, special damages could have, in some circumstances, been paid under Part 7. Thus, counsel for the defendant submits that when ICBC and Mr. Mickelson discussed a wage loss component and a special damages component in arriving at the \$7,000 figure, they were impliedly including any and all Part 7 settlements.
- [25] The plaintiff says that her Part 7 benefits as of that date amounted to \$692, which was precisely the difference between the settlement she authorized Mr. Mickelson to make and the offer that he did in fact make.
- [26] The plaintiff relies upon, among other cases, *Witzke (Guardian ad litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (S.C.), a judgment in which the court declined to make a declaration that a binding settlement agreement had been entered into by the parties. In that case, the court found at paragraph 75 that it was "ambiguous whether the release required by the apparent agreement was to contain an indemnity". The court concluded that as there had been no discussion of an indemnity, the two parties were not *ad idem* and therefore, there was no contract.

Result

- [27] Here, an offer was put to the plaintiff. She instructed her solicitor to accept that offer. He did so. Her first complaint is that her counsel had failed to follow her instructions to make an offer of approximately \$7,692 to ICBC. Rather, ICBC made an offer, and her counsel counter-offered at a figure less than she had authorized. ICBC then rejected that counter-offer and offered the plaintiff \$7,000, which she accepted via her solicitor.
- [28] Because she accepted that offer, the failure of her counsel to follow her instructions is not fatal to the agreement. The plaintiff raises a second concern. She submits the situation is similar to the indemnity issue discussed above in *Witzke*. She says it was ambiguous as to whether the agreement contemplated a bar to further Part 7 benefits.
- [29] The plaintiff specified a figure for her tort claim, plus a figure for what could be expected under certain statutory benefits. The defendants' offer, as relayed to her, did not distinguish between the tort claim and the statutory claim. The proposed release would have released the defendants from both claims.
- [30] I am satisfied that while ICBC made an offer and the plaintiff at first accepted it. But before seeing the release, she purported to withdraw her acceptance. There was no mention of the fate of any subsequent Part 7 claims until the release was forwarded to counsel for the plaintiff. There is no mention of Part 7 in the adjuster's notes as referred to in his affidavit. Nor did Part 7 benefits come up in the plaintiff's conversation with her counsel except by implication in her pre-settlement request for payment of "out of pocket" expenses. Thus, as in *Witzke*, the release included a term which had not been considered by the plaintiff. While there was an implied term that a release would be executed, it was not clear that the release

would be for both the tort and Part 7 aspects of the claim.

- [31] When the plaintiff accepted the amount of \$7,000, in the words of McEachern C.J.B.C., she "removed her hand from the piece". But when the documents were tendered, they were not accepted. I conclude that the defendants were, at that point, insisting upon a term which had not been agreed upon and in these circumstances, was not reasonably implied.
- [32] In the result, the application of the plaintiff is allowed. Paragraph 3 of the Statement of Defence is struck. The application of the defendants is dismissed.
- [33] The plaintiff will have costs.

"Mr. Justice Williamson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/09/02/2009BCSC0239.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/lacroix-v-loewen-2009>

Prepared on 27 October 2026 · Esheria