

CANADA / JUDGMENT

Lambrecht v. Lambrecht Estate

2023 BCSC 1051

COURT

Supreme Court of British Columbia

DECIDED

20 June 2023

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2023 BCSC 1051 Lambrecht v. Lambrecht Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lambrecht v. Lambrecht Estate,

2023 BCSC 1051

Date: 20230620

Docket: S127328

Registry: Kelowna

Between:

Christopher Emil Lambrecht in his own name and on behalf of the Estate of Cynthia Mary Lambrecht, Deceased

Plaintiff

And

Julia Anne Wilhelmina Lambrecht, Executor of the Estate of Cynthia Mary Lambrecht, Julia Anne Wilhelmina Lambrecht and David Maurice Lambrecht

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment on Costs

Counsel for Plaintiff:

T.M. McCaffrey

Counsel for Defendants:

S.T. Rule

Written Submission of Plaintiff

March 13, 2023

Written Submission of Defendant, Julia Anne Wilhelmina:

March 16 and 21, 2023

Place and Date of Judgment:

Kelowna, B.C.

June 20, 2023

Introduction

- [1] The defendant Julia Lambrecht seeks her costs in this action. She seeks special costs or, in the alternative, ordinary costs to November 12, 2021 and double costs after November 12, 2021.
- [2] The plaintiff argues that the defendant is entitled to ordinary costs only.

Background

- [3] In this litigation the plaintiff sought orders and declarations relating to the shares of the three adult children in their mother's estate and in the family home owned by Julia Lambrecht as a result of a joint tenancy created by their mother.
- [4] The trial was held on June 29, 2022. I rendered my decision on January 25, 2023, dismissing the plaintiff's claims, in a judgment indexed as 2023 BCSC 114.
- [5] There is no dispute that the defendant Julia Lambrecht is entitled to costs. The only question is what scale of costs.

Special costs

- [6] Special costs are awarded only in exceptional circumstances, where the conduct of a party is deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.) at para. 17.
- [7] In the case before me, the defendant seeks special costs on the basis that the plaintiff made an unfounded allegation of undue influence against her. There is no other conduct which the defendant relies on in support of her claim for special costs.

- [8] In *McLean v. Gonzalez-Calvo*, 2007 BCSC 648, the court reviewed a long line authority where special costs were awarded in the face of unproven and unsubstantiated allegations of undue influence. The primary considerations of the court are that the allegations were pursued based on speculation, without foundation, and unduly prolonged the proceedings. In one case costs were awarded where the allegations were only abandoned three days before trial.
- [9] In the case before me, the defendant's counsel wrote to the plaintiff's counsel on November 10, 2020 asking the plaintiff to reconsider the litigation, given the evidence of independent witnesses which did not support the allegations of the plaintiff. Most, if not all, of these witnesses testified at trial. The summaries of the evidence of these witnesses in this letter is consistent with their testimony at trial. Defence counsel cautioned the plaintiff's counsel about the cost consequences of making and maintaining an unfounded allegation of undue influence, and referred to *McLean v. Gonzalez*. The defendant offered to waive costs if the plaintiff consented to a dismissal of his claims.
- [10] On November 12, 2021 defendant's counsel again wrote to the plaintiff's counsel. At this point in time, discoveries had been conducted. Defendant's counsel noted that the plaintiff had no evidence of any undue influence exerted by the defendant over their mother. He again sought a dismissal of the plaintiff's claim without costs to either party, on certain terms favourable to the plaintiff. If the offer was not accepted, the defendant intended to seek special costs against the plaintiff.
- [11] On November 23, 2021, the plaintiff's counsel advised that the plaintiff agreed to withdraw his claim of undue influence. The notice of civil claim was not amended to reflect this agreement, but the court was advised of the concession at trial.
- [12] The defendant submits that, notwithstanding the concession made by the plaintiff, the plaintiff continued to make assertions that suggested the defendant acted improperly. In an affidavit filed June 6, 2022 and the response to the application for summary trial, the plaintiff suggested the defendant was intimidating their mother, manipulating their mother, and dominating their mother, and that their mother did not enter into the joint tenancy as a result of her own full, free, and informed thought.
- [13] The defendant submits that, even though the arguments were advanced in relation to the resulting trust claim, they were in substance allegations of undue influence which the defendant was obliged to defend, and which the plaintiff knew had no chance of success.
- [14] The plaintiff submits that contrary to the cases relied on by the defendant, the plaintiff did not relentlessly pursue the allegation of undue influence up until the end of the litigation. The plaintiff submits that it was a reasonable allegation to pursue when the claim was filed, but once the defendant had been discovered, the plaintiff withdrew the allegation and did not pursue it at trial (even though the notice of civil claim was not amended to reflect the plaintiff's position).

- [15] In addition, the plaintiff chose the most cost efficient form of resolution, namely a summary trial. The plaintiff had a legitimate basis to advance a claim in resulting trust, even though not ultimately successful. None of the factors summarized in *Mayer v. Osborne Contracting Ltd.*, [2011] BCJ No 1302 at para. 11 were met in the case at bar, and there are no exceptional circumstances which would justify an order for special costs.
- [16] I agree with the plaintiff. Although the notice of civil claim was not amended, the plaintiff advised the defendant in 2021 that he would not pursue the claim of undue influence, and he maintained that position at trial. I am not satisfied that the materials filed in support of the summary trial were so egregious that an award of special costs is warranted. While the plaintiff was not successful in his claim of resulting trust, that alone is not sufficient to an order for special costs.

Double costs

- [17] The defendant relies on Rule 9-1(5) and (6) in seeking an order for double costs after November 12, 2021.
- [18] On November 12, 2021 the defendant offered to reduce her share of their mother's estate from 40% to 35%, and increase the plaintiff's share from 40% to 45%, in exchange for a dismissal of the action without costs.
- [19] In determining whether an award for double costs ought to be made, Rule 9-1(6) sets out the following factors which the court may consider:
- (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.
- [20] The defendant submits this offer ought to have been accepted by the plaintiff. She submits that there was little likelihood that the plaintiff would succeed at trial in obtaining a share of the family home. If the plaintiff was not successful at trial, the distributions under the will would remain unchanged. In the defendant's offer, the plaintiff would receive a greater share of the estate than that set out in their mother's will. As of the date the offer was made, the defendant and plaintiff had both been discovered, and the defendant had provided the plaintiff a year earlier with the names of the independent witnesses who supported the defendant and summaries of their evidence. As such, the defendant submits that the plaintiff had all the information he needed to assess his position and accept her offer.

- [21] The plaintiff submits that the defendant's offer was only open for 14 days, and that was insufficient time to properly assess the offer. The plaintiff submits that he did not have time to explore the evidence of the defendant's witnesses before the withdrawal date of the offer. The plaintiff relies on *Bergen v Gatez*, 2016 BCSC 896, where the court found that an offer to settle, which was withdrawn before its expiry just days before trial, was not open at the time of trial and should not be relied on in founding an award of double costs.
- [22] In the case before me, the plaintiff had ample time to interview the defendant's witnesses. He was told an entire year earlier who the witnesses were, and what their evidence would be. While their evidence was not in affidavit form in 2020, as it was in preparation for the summary trial, there is no evidence before me that the plaintiff tried to interview them or was not able to contact them to assess their evidence in the year that passed between the two letters from the defendant's counsel. To a large extent, the summaries of evidence provided by counsel in November 2020 reflect the findings made at trial in relation to these witnesses.
- [23] The plaintiff was given two weeks to assess his position. There is no evidence that he responded to the defendant that more time was needed as he wished to meet with the witnesses. Rather, the plaintiff simply let the offer expire.
- [24] Reasonable offers are encouraged to avoid unnecessary trial costs. I do not agree that the defendant must keep its offer open until trial in order for it to be considered by the court. The defendant made a reasonable offer that, if accepted, would have saved both parties the time and expenses of preparing all the affidavits and materials required for this summary trial. To require the offer to have remained open up until trial, in this case, defeats the purpose of encouraging reasonable pre-trial offers.
- [25] In the circumstances of this case, I find that the offer of the defendants made November 12, 2021 was reasonable, and was one that the plaintiff ought to have accepted.
- [26] I order double costs in favour of the defendant Julia Lambrecht for all steps in the litigation taken after November 26, 2021, the date the offer expired.

"W.A. Baker J."

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