

CANADA / JUDGMENT

Lee v. Merrill Lynch Canada Inc. et al

2003 BCSC 80

COURT

Supreme Court of British Columbia

DECIDED

16 January 2003

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2003 BCSC 80 Lee v. Merrill Lynch Canada Inc. et al

Citation:	Lee v. Merrill Lynch Canada Inc. et al
Date:	20030116 2003 BCSC 80
Docket:	S014183 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	NELLIE LEE PLAINTIFF
AND:	MERRILL LYNCH CANADA INC., DIANA YOUNG, MARJORIE WONG AND EDMUND LEE DEFENDANTS
AND:	DIANA YOUNG AND MARJORIE WONG PLAINTIFFS BY COUNTERCLAIM
AND:	LORNA FAN AND DAN FORSYTHE DEFENDANTS BY COUNTERCLAIM

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WARREN

Counsel for Diana Young, Marjorie Wong and Edmund Lee:

H. Shapray, Q.C.

Counsel for Lorna Fan and Dan Forsythe:

A. Wade

Counsel for Nellie Lee:

J.D. Shields

Date and Place of Trial:

Vancouver, B.C.

January 10 & 18

and April 2 & 3, 2002

Introduction

- [1] The plaintiff Nellie Lee is a 91 year old woman whose capacity is the subject of proceedings under the Patients Property Act. She had been under the care of her daughter Diana Young and in 1996 had entered into a Representation Agreement and signed a power of attorney to the three children who are the named defendants. In June 2001, Lorna Fan took what I will term custody of Mrs. Lee from her sister Diana Young and against the wishes of Ms. Young. Later that month the three children who are defendants in this action commenced the proceedings under the Patients Property Act, asking for a declaration that Nellie Lee is by reason of mental infirmity arising from disease, age, or otherwise, incapable of managing herself and her own affairs and that they be appointed Committee of her estate or, alternatively, for the appointment of the Public Trustee. That proceeding came on for hearing before K. Smith J., then of this court, but was adjourned to obtain the opinion of other doctors after an independent medical examination. That examination was held on January 10, 2002. The issue of the competency of Nellie Lee was heard by Hood J. on May 13 to 17 and May 21 and 22, 2002. He delivered his reasons for judgment on June 7, 2002 and found that Nellie Lee was not capable and appointed Diana Young Committee of her Estate without the need to post security and Marjorie Wong Committee of her person.
- [2] As a result of the allegations made against the three defendant children in this action, the battle has been joined. They have defended the action and counter-claimed against Fan and Forsythe. No relief is claimed against the plaintiff Nellie Lee in the counter-claim. Fan and Forsythe have defended the counter-claim. Both sides claimed costs against the other and, in the case of Young and Wong, they claimed damages against Fan and Forsythe for abuse of process and punitive damages as well as special costs.
- [3] After the pleadings had closed, counsel for Young and Wong attempted to arrange an examination for discovery of Mrs. Nellie Lee. These attempts were not successful, in part because Nellie Lee's counsel, Mr. Shields, took the position that as counsel for the plaintiff he was entitled to examine the defendants first, although he had not taken out an appointment to do so. Later, because Mr. Shapray had scheduled the appointment at a time when Mr. Shields was not available, he did not appear with Nellie Lee and when Mr. Shapray attended at the appointed time the appointment was duly endorsed with the non-appearance.

- [4] Mr. Shapray now applies for an order to compel Mrs. Nellie Lee to attend and be examined and the first issue before me is whether to order that she attend for the Examination for Discovery. He asks, as well, for special costs payable forthwith by her counsel or, alternatively, by Mrs. Lee herself.
- [5] The action against Merrill Lynch was discontinued shortly after it was commenced and the action against Young, Wong and Lee was discontinued but only after the appointment to examine the plaintiff Nellie Lee was taken out.

Positions of the Parties

- [6] Counsel for Nellie Lee takes the position that when the action was discontinued the defendants' right to examine the plaintiff ended. Mr. Shapray says that he is entitled to examine the plaintiff whether the claims by her have been discontinued or not.
- [7] Counsel for Fan and Forsythe, the defendants in the counterclaim, submits that Young and Wong can only claim against the plaintiff Nellie Lee or against her and third parties. A counterclaim cannot stand, he argues, if it is against only the third party and if it is advanced, it is faulty and must be struck: Bullen and Leake, 12th Ed. Sweet and Maxwell: 1975 and *Furness v. Booth* (1886), 4 Ch. D. 586. In the pleadings, the only claim advanced by the counterclaim is against Fan and Forsythe. Further, Nellie Lee has discontinued her action and there clearly is no counterclaim made against her. Counsel for Fan and Forsythe submits that, accordingly, there is no legal basis for maintaining the counterclaim against them.
- [8] Fan and Forsythe also say the claims in the counterclaim against them are an abuse of process because there is already before the Court the petition to determine the competency of the plaintiff and once that question is answered it will be unnecessary to launch a further proceeding to have the same question answered. They submit that it is not the object of the Rules and practice of the court to promote multiplicity of actions to address the same issue. Any claim Young and Wong feel should be made against Fan and Forsythe should be the subject of a separate and independent action.
- [9] Mr. Wade submits that all of the relief against his clients Fan and Forsythe, and the facts upon which it is based, are identical with the relief and the facts set out in the petition under the Patients Property Act and these claims were formally abandoned in that proceeding, a month and a half after this action was commenced. He argues that where identical claims based upon identical facts are abandoned the plaintiffs by counterclaim are estopped from making the same pleas: *Brady v. A.E. LePage (B.C.) Ltd.*, [1989] B.C.J. No. 801 and *Oostendorp v. Sarai et al*, [1973] 42 D.L.R. (3rd) 158.
- [10] Mr. Shapray argues in reply that the counterclaim was served before Mrs. Lee discontinued her action and she remains a party to the action for the purpose of determining the liability for costs in her action and the counterclaim. She need not be named in the style of cause under the provisions of Rules 21 and she remains a defendant by counterclaim even though

unidentified. Further, although the defendants do not seek damages against Nellie Lee, she remains a party adverse in interest pursuant to R. 27 and most certainly on the issue of costs of the action ostensibly commenced with her consent.

- [11] Mr. Shapray says the question whether Nellie Lee gave informed consent to start the action and whether she did give instructions to her counsel of her own free will is at the heart of the matter and her testimony may assist the court and her answers may help to establish the conspiracy and undue influence which the defendants allege. The issue is whether she was manipulated into suing the defendants and she is liable to answer questions, inter alia, about the revocation of her will and power of attorney.
- [12] Mr. Shapray also argues that there is no necessary conflict between asking for the appointment of a committee because a person is alleged to be incapable of managing her own affairs and yet still require a person who is incompetent to give evidence on discovery. Competency to give evidence is different from incapacity to commence an action: *Penn v. Secord* (1979), 16 B.C.L.R. 48 at 50 and R. 27(11) and 40(28). Mr. Shapray further argues that there is no evidence that giving evidence at an examination for discovery would be harmful to Mrs. Lee.
- [13] On the argument advanced by counsel for Fan and Forsythe that there is no valid claim advanced in the counterclaim which seeks only a declaration, Mr. Shapray submits that R. 5(22) provides that no proceeding shall be open to objection because only a declaration is sought. Further, in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1914-15] All E.R. Rep. 24 the Court of Appeal made it clear that the power of the court to grant declaratory relief was an important part of its jurisdiction and is not to be confined to cases where there is a cause of action. In *Solosky v. Her Majesty the Queen*, [1980] 1 S.C.R. 821 Dickson J. held at page 830 that declaratory relief is a remedy which was not constrained by form or bounded by substantive content and declarations can be granted where real, rather than "factitious or academic" issues are raised. The court in *Collvers v. McDermid & Company*, [1979] 6 W.W.R. 316 dismissed an application to strike a claim for declaratory relief where the statement of claim sets out allegations of fact which disclosed the claim for a declaratory judgment and which, if granted, would determine important issues between the parties. A similar effect is to be found in *Landreville v. The Queen*, [1973] 41 D.L.R. (3d) 574. In *Horton Bay Holdings Ltd. v. Wilks*, [1991] 3 C.P.C. (3d) 112, Cummings J.A. at p. 116 held that:

The granting of a declaration is a discretionary matter which cannot properly be pronounced upon without first hearing evidence and conducting a trial. The court's willingness to grant a discretionary declaration is distinct from its ability to do so based on the pleadings. The latter may provide a proper ground for striking an action pursuant to Rule 19(24), but the former does not.

- [14] In *B.C. Ferry Corp. v. T&N plc* (1995), 16 B.C.L.R. (3d) 115 the Court of Appeal held that it was an error in law for the trial judge to hold that the court's discretion to grant declaratory relief was restricted to those cases where there was a lis between the parties. The court has a broad and unfettered discretion to grant declaratory relief unfettered by any such limitation.
- [15] Mr. Shapray argues that there is practical utility in allowing the defendants to obtain the declaration which they seek. First, such a declaration will allow the defendants to obtain special costs. Second, the declaration may be a necessary element to prove in the conspiracy and other tort claims and in fact may be a necessary foundation in order to support the claim for punitive damages. Thirdly, such a declaration will assist in the restoration of the reputation of the defendants who have been accused of a serious breach of fiduciary responsibility and because the plaintiff Nellie Lee discontinued the action, the declarations sought by the defendants is the only chance for the defendants to set the record straight. Finally, the defendants want to preserve the evidence of the plaintiff for trial by way of a videotaped deposition under R. 38. They argue that given the age of the plaintiff such a step is necessary to preserve the evidence for the hearing.
- [16] To some extent, events have overtaken the positions of counsel. Mr. Justice Hood found in his lengthy reasons for judgment that the evidence overwhelmingly supported the conclusion that Mrs. Lee was incapable of managing her own affairs and he made the declaration under s. 3 of the Patients Property Act as sought by the defendants Wood and Young. He also found that the action of the plaintiff Nellie Lee in, inter alia, commencing this action against her children Diana Young, Marjorie Wong and Edmund Lee, was clearly not her own action but rather those of the Fan family and particularly Lorna Fan and Dan Forsythe and the product of their undue influence and pressure [par. 54].

Conclusions

- [17] I am of the view that the defendants Wood and Young do have the right to examine for discovery Nellie Lee who is adverse in interest and the discontinuance does not prevent the defendants from setting down an appointment. From the evidence, she likely meets the relatively low standard of competence required for that process and the weight to be given to her evidence is better left to the trial judge. Her age and the progressive dementia make it prudent to have her evidence videotaped and available for trial.
- [18] Further, I hold that there is no right of primacy of place for a plaintiff to examine for discovery first.
- [19] The counterclaim is not an abuse of process as the relief sought differs from that set out in the petition and the abandonment of the claims set out in the petition does not affect the claims set out in the counterclaim.

- [20] Finally, I conclude that the claim for special costs is best left to the trial judge who will be in a better position to determine that issue after hearing all of the evidence, particularly touching on the scope of the authority given to the plaintiff's solicitor. The defendants Young and Wong are entitled to their costs of this application on Scale 4 in any event if the matter does not proceed further.

Reasons for Conclusion

- [21] A counterclaim is a creature of the statute and Rules of Court but the objective is to prevent a multiplicity of proceedings. Courts have been liberal in permitting a wide scope of claims in counterclaims and the general principle is to be found in *Dominion Trust v. Brydges* (1920), 28 B.C.L.R. 451 (S.C.): so long as the counterclaim discloses a valid cause of action it need not be connected with the original matter set out in the plaintiff's claim unless there are claims made against third parties when the wide scope of the rule is narrowed. The reason for the limitation is to prevent the plaintiff's claims from becoming bogged down in the claims against the third party where the claims are unrelated. This protects the plaintiff from incurring additional expenses arising out of the unrelated claims and from unnecessarily lengthening the trial. The intention of R. 21(8) is to help focus the issues at trial and reduce the number of issues to be determined at the trial. There are a number of cases where this liberal scope is demonstrated and the courts have allowed third party claims. In *Grinnell Fire Protection Systems Co. v. Wall Bros. Construction Co.* (1981), 29 B.C.L.R.259 (C.A.) the Court of Appeal held that a third party added in a counterclaim need not be jointly liable with the plaintiff and that it is sufficient that the third party be severally liable under the counterclaim. In *Smith v. Buskell*, [1919] 2 K.B. 362 (C.A.) the English Court of Appeal held that it was valid for a counterclaim to add a third party who could be either alternatively liable or jointly liable depending on the determination of the proven facts. There, the plaintiff had claimed for a breach of contract and the defendant brought a counterclaim against the plaintiff as seller of the goods and also against the third party as the deliverer based on alternative theories of the facts: against the plaintiff for selling a bad product; against the third party for negligence in transporting the goods; and finally, against both the plaintiff and the third party in negligence.
- [22] In the case before me, the claim against the third parties is intricately connected to the subject matter of the head action which is a claim based on breach of fiduciary duty, breach of contract and other torts arising out of the alleged improprieties by the defendants in their care of Nellie Lee and her estate. The counterclaim, inter alia, is for a declaration that Nellie Lee did not have the capacity to instruct counsel which would have an effect upon both Nellie Lee and the third parties. Similarly, the claim for a declaration that her revocation of the will was not valid would be binding upon both Nellie Lee and the third parties. Further, there are allegations that the third parties committed a variety of torts in causing Nellie Lee to bring the action and in revoking her will and clearly the factual underpinnings of all of the claims are connected.

- [23] Although it is argued that counterclaim procedures were not intended to permit the defendants from advancing claims for damages against only the third parties, nevertheless the policy of reducing the multiplicity of proceedings and the desirability of having the litigants' rights determined in one process is particularly pertinent in this family based litigation where there is less concern of the plaintiff's claims getting bogged down in unconnected issues relating to the third parties.
- [24] I note in passing that a counterclaim may seek only a declaration and need not be for damages: *Adams v. Adams*, (1890) 45 Ch.D. 436 (affirmed on appeal [1892] 1 Ch. 369 (C.A.)).
- [25] With reference to the third parties' argument that the defendants had abandoned all of their claims during the petition hearing, the evidence is conflicting and there is no clear record of what precisely was abandoned at the preliminary hearing before Smith J. Rule 36 governs the process for discontinuance and withdrawal of claims whether advanced by a plaintiff or by counterclaim or third party proceedings and the Rule requires the filing of Form 26 which does not appear to have been done in this case. In any event Rule 36(8) provides that without order, a discontinuance of an action, whether in whole or in part, is not a defence to a subsequent proceeding for the same or substantially the same cause of action. Accordingly, abandonment of the claims at the petition hearing does not affect the ability of the defendants to advance those claims in a subsequent action.
- [26] As I understand the positions of the third parties, it is not based on the Rules of Court but that the defendants are estopped from advancing the claims and in support, their counsel relies upon a number of cases where claims were abandoned within a single action and where the plaintiffs sought to reintroduce them to the litigation. Neither *Oostendorp v. Sarai*, *supra*, nor *Brady v. A.E. LePage (B.C.) Ltd.*, *supra*, deals directly with the issue of estoppel and in both cases the abandonment was pursuant to the Rules and there was a clear record of which claims had been abandoned, one in a statement of defence and the other in an amended statement of claim. Here there is no clear record of what was abandoned. *Wilson v. Sears Canada Inc.*, [1990] N.S.J. No. 123 (N.S.C.A.) is a case where there was a finding of estoppel based upon a solicitor's undertaking to abandon a claim and a corresponding reliance upon the undertaking. With a change of counsel the plaintiff attempted to reintroduce the claim but the court held that there was a promissory estoppel based upon a promise, the intention to affect legal relations, a change in reliance upon the promise and that it would be inequitable to permit the representor to renege on the promise. *Wilson*, *supra*, arose out of an amendment to the statement of claim and analogous to a discontinuance under the Rules with a filed Form 26.
- [27] The Rules provide that the fact a claim is discontinued is not a defence when claims are brought again in a later action. In my view, Rule 36(8) is applicable and permits a party who has discontinued a claim in one action to bring substantially the same claim in another action and the discontinuance is not a defence.

- [28] Rule 27(11) deals with the examination of mentally incompetent persons and provides that no mentally incompetent person may be examined without leave of the court. In *Penn v. Secord* (1979), 16 B.C.L.R. 48 (S.C.), relied on by the defendants, the Court held that the onus is on the party seeking to examine the mentally incompetent person to establish a competency to be examined, the test being whether the person understands what is being said and understands the nature of an oath. Ruttan J. permitted the examination observing that it is only in the clearest of cases that an appointment for discovery should be struck on the grounds of the unsoundness of mind of a party. While the defendants have introduced evidence that Nellie Lee is easily led and there is the finding of Hood J. that she is not competent to manage her own affairs, nevertheless I am satisfied that the better course is to permit her examination for discovery and leave to the trial judge the question of the admissibility and reliability of the evidence. Because of her advancing years and her dementia, the discovery should be videotaped as provided under Rule 38(13).
- [29] While I leave the issue of the claim for special costs to the trial judge, I conclude that the defendants are entitled to their costs of this application which, if the case does not proceed further shall be on Scale 4.

"T.P. Warren, J."

The Honourable Mr. Justice T.P. Warren

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