
CANADA / JUDGMENT

Lee v. Narang

2018 BCSC 1645

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1645 Lee v. Narang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lee v. Narang,

2018 BCSC 1645

Date: 20180924

Docket: E47377

Registry: New Westminster

Between:

Hui Ling Lee

Claimant

And

Shamsher Singh Narang

Respondent

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Claimant:

B. Ingram

Counsel for the Respondent:

E. G. Wong

Place and Date of Hearing:

New Westminster, B.C.

September 10, 2018

Place and Date of Judgment:

New Westminster, B.C.

September 24, 2018

- [1] The Respondent, Mr. Narang, appeals the various orders that were made by a Master on July 16, 2018. This appeal turns, at least in part, on a proper understanding of the procedural history of this matter as well as on various Rules within the Supreme Court Family Rules (the "Family Rules").
- [2] The Claimant, Ms. Lee, is 38 years old. She graduated from law school in 2007, though she did not begin her articles until 2017. The Respondent is a businessman and he is 41 years old. The parties have one child who was born on December 24, 2013.
- [3] On September 23, 2014, the Claimant commenced this family proceeding, bearing file number E47377, in the New Westminster Supreme Court Registry (the "New Westminster Proceeding"). In her Notice of Family Claim, the Claimant asserted, inter alia, that she and the Respondent began to live together "in a marriage-like relationship" on September 1, 2009 and that they separated on March 15, 2014.
- [4] On August 12, 2015 the Claimant, who had counsel, amended her claim. That amended pleading again asserted that the parties entered into a "marriage-like relationship on September 1, 2009". Thereafter, the Claimant, through counsel, filed an affidavit in support of a further amendment to her claim, but she did not propose any change to the September 1, 2009 date.
- [5] On February 23, 2016, the Respondent filed a Response to Family Claim in the New Westminster Proceeding. The parties thereafter attended a Judicial Case Conference in which they addressed various issues.
- [6] In March 2017, the parties reconciled. On March 10, 2018, the parties again separated.
- [7] On April 1, 2018, the Claimant sent the Respondent a text message stating that she would be "making out date of marriage to 2001 see how much I can f__k you s__t up" (the "Text").
- [8] On April 24, 2018, the Claimant filed a new Notice of Family Claim, under file number E181123, in the Vancouver Supreme Court Registry (the "Vancouver Proceeding"). When filing this new claim, the Claimant, under the heading "Prior Court Proceedings and Agreements" ticked the box which stated "There is no prior agreement, court order or court proceeding relating to any of the claims made in this notice of family claim". In the Vancouver Proceeding, the Claimant now asserted that the parties "began to live together in

a marriage-like relationship in 2002".

- [9] On May 4, 2018, the Respondent filed a Counterclaim in the New Westminster Proceeding. On May 15, 2018, newly appointed counsel for the Respondent wrote to counsel for the Claimant saying, in part:

"with respect to the procedural issues, I note that you have filed a Notice of Family Claim in Vancouver Supreme Court. It is unclear why you have done so. As you are aware, a Notice of Family Claim involving the same parties was filed in New Westminster Supreme Court in September 2014. To my knowledge, the New Westminster action has not been withdrawn nor concluded. I suggest that you withdraw Ms. Lee's Vancouver claim to avoid an unnecessary duplicity of proceedings. I will consent to an order transferring the New Westminster action to Vancouver".

- [10] On May 24, 2018, counsel for the Claimant filed a Notice of Intention to Proceed in the New Westminster Proceeding advising that the Claimant "intends to proceed with this family law case for the purpose of filing a Notice of Discontinuance." This Notice of Intention to Proceed was served on counsel for the Respondent on May 31, 2018.
- [11] On June 1, 2018, the parties attended at a Judicial Case Conference before Milman J., in the Vancouver Proceeding. One of the "Orders/Directions" made by Milman J. was that the "parties must deliver any application they wish to bring to determine which of the two existing proceedings will proceed so that the matter is heard on June 19, 2018."
- [12] On June 6, 2018, the Respondent filed an application seeking an order to stay the Vancouver Proceeding as an abuse of process and to have the New Westminster Proceeding transferred to Vancouver for all purposes pursuant to Rule 22-2(13).
- [13] On June 11, 2018, the Claimant filed a Notice of Discontinuance in the New Westminster Proceeding (the "Discontinuance"). This was filed prior to the expiry of the 28 day period that was provided or contemplated in the Notice of Intention to Proceed that the Claimant had filed.
- [14] On June 19, 2018, the Respondent brought his stay application before the Master.

The Reasons of the Master

- [15] The oral reasons for judgment of the Master are indexed at 2018 BCSC 1197. The Master considered the central question to be whether "the notice of discontinuance was filed in breach of R. 21-2(4) of the Supreme Court Family Rules"; para. 15.
- [16] The Master referred to each of Rule 21-2(4) and Rule 11-4(1) which respectively provide:
- Rule 21-2
- Notice of intention to proceed after delay of one year

- (4) In a family law case in which judgment has not been pronounced and no step has been taken for one year, a party must not proceed until
 - (a) the expiration of 28 days after service of notice of that party's intention to proceed in Form F48 on all parties, and
 - (b) a copy of the notice of intention to proceed and proof of its service has been filed.

..

Rule 11-4

Discontinuance before family law case set for trial

- (1) At any time before a notice of trial is filed in a family law case, a claimant may discontinue it in whole or in part against a respondent by filing a notice of discontinuance in Form F39 and serving a filed copy of the notice of discontinuance on all parties.

[17] The Master then said:

- 20. It is an agreed fact in this case that no trial date has been set. Accordingly, it would appear, reading the two rules together, the words, "at any time" in R. 11-4 mean just that. Thus, it seems to me that a notice of intention to proceed is unnecessary given the facts of this case, and therefore no contravention of R. 21-2(4) occurred.
- 21. As the notice of discontinue filed in New Westminster registry number E47377 was within the rule and the right of the claimant to file, it is proper and acted to discontinue that action. Thus, the claimant's action cannot be transferred to the Vancouver registry for all purposes as it has been discontinued.
- 22. Given that the claimant's New Westminster action has been discontinued, it is, in my view, moot as to whether or not the pleadings in the current Vancouver action were or are inconsistent with the discontinued action in New Westminster.
- 23. As to whether or not such alleged inconsistent pleadings are scandalous, I make no judgment as to same, as again, I view this matter as moot.
- 24. However, the parties are now left with a Notice of Family Claim in the Vancouver registry, and with an order by Master Muir dated June 6, 2018. And, while the Claimant's New Westminster action has been discontinued, the respondent's counterclaim is still extant.
- 25. In the event that the Respondent wishes his counterclaim filed in the New Westminster action to be transferred to the Vancouver registry for all purposes, I know of nothing to prevent such a transfer and will gladly order its transfer for all purposes. In order to assist the parties, I will also order that the counterclaim, when transferred to the Vancouver registry, be joined with Vancouver file number E181123.
- 26. The Claimant's New Westminster family claim, file number E47377, has been discontinued.

27. All family matters between the parties are now taking place within Vancouver registry file number E181123.
28. The Respondent's application for a stay is dismissed.
29. The Respondent's application for transfer of the New Westminster action to Vancouver, insofar as it can now only seek a transfer of the Respondent's counterclaim from the New Westminster registry to the Vancouver registry, is allowed and joined with the Vancouver action.

The Relevant Legal Framework

i) The Proper Test

- [18] The proper standard of review to be applied to an appeal from a Master's decision was established in *Abermin Corp. v. Granges Exploration Ltd.*, [1990] B.C.J. No. 1060 (S.C.), where Macdonald J. wrote, at 193:
- [19] . An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the Master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the Master.
- [19] The foregoing standard has been consistently applied in this jurisdiction since *Abermin* was decided; see for example *Sorila v. Chan*, 2016 BCCA 108 at para. 10; *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at paras. 35-37; and *Fat Mel's Restaurant Ltd. v. Canada Northern Shield Insurance Co.*, [1993], 76 B.C.L.R. (2d) 231 at para. 13 (C.A.).
- [20] If the question answered by a Master is a question of law alone, the appeal is a conventional or true appeal and the standard of review is correctness; *Northland Properties Ltd. v. Equitable Trust Co.*, [1992], 71 B.C.L.R. (2d) 124 at 127; *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2012 BCSC 597 at para. 11.

Analysis

- [21] I consider that the Master's reasoning, and the various orders that ensued from that reasoning, were both clearly wrong and incorrect. This is for two principal reasons.

- [22] First, I consider the Master, in focusing on the narrow question of whether it was open to the Claimant to file the Discontinuance as and when she chose to, ignored the background to the application and the real concern that arose from the Claimant's conduct. Specifically, the Claimant appears to have engaged in three forms of questionable or actually improper conduct. It was this conduct that, in part, underlay the Respondent's assertion that the Claimant's filing of the Vancouver Proceeding was abusive and/or scandalous.
- [23] First, the Claimant, in the Vancouver Proceeding, amended the date on which she and the Respondent began to live in a marriage-like relationship from September 1, 2009 to 2002.
- [24] Before me, counsel for the Respondent argued that it was not open to the Claimant to withdraw "an admission" in the manner that she did. Counsel for the Claimant, in turn, argued that the assertions made in pleadings are not generally considered "admissions"; see for example *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCSC 489 at paras. 28-31; rev'd on other grounds in 2016 BCCA 432 and 2017 BCCA 176; and *Ledinski v. Chestnut*, 2015 BCSC 373 at paras. 17-29.
- [25] I do not consider that it is either necessary or appropriate, in light of the conclusions that I have arrived at, to address this issue.
- [26] Instead, regardless of whether the September 1, 2009 date in the Claimant's Notice of Family Claim or her Amended Notice of Family Claim, in the New Westminster Proceeding, was an admission, any amendment of that latter pleading would have required either the consent of the Respondent or leave of the court pursuant to Rule 8-1(1) of the Family Rules. There is no explanation in the record of this appeal that addresses why the Claimant chose to commence the Vancouver Proceeding when there was already an existing family law action in place concerning the same issues and the same parties. Commencing the Vancouver Proceeding to circumvent the need to apply to amend the Amended Notice of Family Claim in the New Westminster Proceeding would, however, be wrong. The existence of the Text, without drawing any conclusions in relation to its contents, does elevate concerns about the Claimant's strategic decisions.
- [27] Second, the Claimant acted improperly when, in commencing the Vancouver Proceeding, she asserted in the documents that she completed that there was no other extant action in relation to the same issues. Once again, there is nothing in the record before me which suggests that this representation was inadvertent or the product of an oversight. But for the Claimant's misrepresentation, she likely would have been unable to commence the Vancouver Proceeding.
- [28] Third, the Order or Direction of Milman J. contemplated that the parties would bring an application "to determine which of the two existing proceedings will proceed". That application was to be heard on June 19, 2018. This date was prior to the expiry of the 28 days after which the Claimant had said, in her filed Notice of Intention to Proceed, she would be filing a discontinuance. Having received the Respondent's application materials, the Claimant then filed the Discontinuance within this 28 day period and prior to the June 19,

2018 hearing date that had been set.

[29] In doing so, she sought to and, based on the reasons of the Master, did fundamentally alter the basis upon which the Respondent's stay application was argued. For present purposes, it does not matter whether it is necessary to file a Notice of Intention to Proceed in a dormant action before a party is able to file a discontinuance. For present purposes, what matters is that the Claimant, in the Notice of Intention to Proceed that she filed, signalled that she would not be filing a discontinuance prior to the 28 day period that is contemplated by the Family Rules. This also appears to have been the understanding of Milman J., an understanding which informed his Order or Direction on the timeline for the subsequent hearing to determine which of the New Westminster or Vancouver Proceeding would proceed.

[30] In *Kamei Sushi Japanese Restaurant Ltd. v. Epstein*, [1996] B.C.J. No. 1223, the Court said:

20 Next it is argued that the plaintiffs are estopped from arguing the pleadings are not admissions because they filed a motion for leave to withdraw admissions contained in paragraphs 16 and 19 of the statement of claim. A great deal of time and expense has been expended on getting at the reason for the state of the pleadings including production of many documents and cross-examination of many of the participants in the preparation of the pleadings. This has occupied much of the time from March 16, 1994 to the present. Is it wrong to allow the plaintiffs having changed counsel to now argue that all this was in fact unnecessary because the pleading did not contain admissions requiring leave to withdraw? I hold it would be. The defendants have gone to a great deal of time and expense to defend the plaintiffs' application for leave to amend its pleadings. In essence the plaintiffs represented by their conduct that they would seek leave of the court to amend the pleadings and it is too late considering the extent of the defendants' reliance upon that representation for the plaintiffs to take the position that leave is not necessary. Any civil case is in essence an agreement between the parties within legal parameters to resolve the dispute upon the decision of the matters they chose to put in issue between them and there comes a point at which it is unfair to alter the matters upon which the case is to be resolved. So far as whether leave is necessary for the plaintiffs to amend its pleadings that point has been passed.

[Underlining added]

[31] Similar considerations are apposite in this case.

[32] With this history in hand, the issue that the Master addressed should not have been the technical question of whether the Claimant's filing of the Discontinuance in the New Westminster Proceeding rendered the existence of the issues before him moot. Rather that application should have been determined on the basis of the Claimant having filed two existing family law proceedings in circumstances where (i) at least arguably, she was attempting to avoid making an application to amend her pleadings in the New Westminster Proceeding; (ii) she filed the Vancouver Proceeding and appeared to have misrepresented that there was no other existing family law claim; and (iii) she filed a discontinuance of the

New Westminster Proceeding contrary to when she had represented to the Respondent that she would do so and contrary to the apparent intention of the schedule that had been imposed by Milman J.

- [33] Simply put, the issues that were raised by the Respondent before the Master were only "moot" because the Claimant had engaged in a series of questionable behaviours that caused those issues to become "moot". The focus of the Master's analysis and conclusion, respectfully, wrongfully sanitized the Claimant's conduct and insulated those various forms of conduct from either scrutiny or comment or sanction.
- [34] The second basis on which I consider that the Master erred is in his conclusion that a party can, in a dormant action, file a Notice of Discontinuance without first filing a Notice of Intention to Proceed. In addressing this issue, I do not consider it relevant, for interpretive purposes, that counsel for the Claimant initially appeared to consider that he was required to file a Notice of Intention to Proceed before he discontinued the New Westminster Proceeding.
- [35] The Master, at para. 20 of his reasons for judgment, concluded that reading Rule 21-2(4) and Rule 11-4 of the Family Rules together meant that the words "at any time" meant just that. While there is an intuitive appeal to allowing a party to file a discontinuance in a dormant action without first filing a Notice of Intention to Proceed, that intuitive position is not consistent with the Family Rules. The words "at any time", in Rule 11-4(1), are also found, in several instances, in circumstances where it is quite clear that Rule 21-2(4), and the need to file a Notice of Intention to Proceed, would pertain. For example:
- i) Family Rule 7-1(1): "A party may request a judicial case conference at any time ".
 - ii) Family Rule 8-1(1): "a party may amend the whole or any part of a pleading (a) once without leave of the court, at any time before service of the notice of trial ".
 - iii) Family Rule 5-1(23): "A corporation, partnership or proprietorship or either of the parties may apply to the court at any time for directions respecting any request for production of documents ".
- [36] Counsel for the Claimant also argued before me that the filing of a discontinuance did not constitute a party "proceeding" with a matter. Specifically Rule 21-2(4) of the Family Rules states:
- "a party must not proceed until
- (a) the expiration of 28 days ".
- [37] I do not consider that this submission is correct. Rule 11-4(2) deals with a discontinuance that is filed after a family law case is set for trial and states:

Rule 11-4

Discontinuance after family law case set for trial

(2) After a notice of trial is filed in a family law case, a claimant may discontinue the family law case in whole or in part against a respondent with the consent of all parties or by leave of the court.

[38] Here, too, it seems clear that a claimant would have to file a Notice of Intention to Proceed before being able to go to court to seek a discontinuance "by leave of the court". The nature and legal effect of a discontinuance under either Rule 11-4(1) or Rule 11-4(2) would be the same. It is not possible to say that a discontinuance under Rule 11-4(1) does not evince an intention "to proceed" while a discontinuance filed under Rule 11-4(2) does reflect such an intention.

Conclusions

[39] I consider that the central conclusions arrived at by the Master are either clearly wrong or are not correct for the reasons that I have described. I therefore conclude:

- i) that there was no proper basis for the Claimant to discontinue the New Westminster Proceeding prior to the expiry of the 28 days after he Claimant's Notice of Intention to Proceed was served on counsel for the Respondent;
- ii) that the Vancouver Proceeding was improperly filed. This is so both because it largely duplicated the then existing New Westminster Proceeding and because it was initially filed based on a misrepresentation to the Vancouver Registry.

[40] Accordingly, I order:

- i) that the Vancouver Proceeding be stayed;
- ii) that the New Westminster Proceeding be moved for all purposes to the Vancouver Registry. This appears to accord with the wishes of both parties; and

that the Claimant pay the costs of both the hearing before the Master and of this appeal.

"Voith J."

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