

CANADA / JUDGMENT

Leibenzeder Estate v. MacIntyre

2024 BCSC 378

COURT

Supreme Court of British Columbia

DECIDED

5 March 2024

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2024 BCSC 378 Leibenzeder Estate v. MacIntyre IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Leibenzeder Estate v. MacIntyre, 2024 BCSC 378 Date: 20240305 Docket: S223350 Registry: Vancouver Between: Estate of Georg Johann Louis Leibenzeder Plaintiff And Glenda Ann MacIntyre, Derrick Piett, Adios Services, Tara Lea Rose Cowie and Tyler Charles Cowie Defendants

- and - Docket: S2010645 Registry: Vancouver Between: Alison Robyn Bailey Plaintiff And Glenda Ann MacIntyre as the Administrator of the Estate of Georg Johann Louis Leibenzeder, Deceased, and Glenda Ann MacIntyre, in her personal capacity Defendants Before: The Honourable Justice MacNaughton Reasons for Judgment on Costs Counsel for the Estate of Georg Johann Louis Leibenzeder: S. Batkin Counsel for Alison Robyn Bailey: A. Jaffer-Jeraj Estate's Written Submission: November 17, 2023 Ms. Bailey's Written Submissions: December 7, 2023 No one appearing for Glenda Ann MacIntyre and no submissions filed Place and Date of Judgment: Vancouver, B.C. March 5, 2024 Table of Contents Overview.. 4 Special Costs. 5 Overview

- [1] In my August 16, 2023 reasons for judgment, indexed at Leibenzeder Estate v. MacIntyre, 2023 BCSC 1422 (the "Reasons"), I indicated that the Estate and Ms. Bailey were seeking special costs payable by Ms. MacIntyre but that, at the parties' request, I had not dealt with costs: at para. 8. I directed that if the parties were unable to agree on a costs order, they could make written submissions not exceeding ten pages each.
- [2] I received two sets of written submissions, one on behalf of the Estate and the other on behalf of Ms. Bailey. Ms. MacIntyre did not respond to either.
- [3] I do not intend to repeat the factual findings from the Reasons except as necessary to deal with costs. The chronology of the litigation was set out in detail in my Reasons. I use the defined terms from the Reasons in these costs reasons.
- [4] The January 7, 2022 Removal Order, pursuant to which Ms. MacIntyre was removed as the Administrator of the Estate, was made by Justice Horsman, when a member of this Court. The application to have Ms. MacIntyre removed was brought in action S2010645 filed by Ms. Bailey and defined in the Reasons as the Beneficiary Action.

- [5] Justice Horsman found that Ms. MacIntyre's conduct was reprehensible, warranting special costs. She wrote:
- [23] In my view [a special cost order] is appropriate. This application was only necessitated by Ms. MacIntyre's persistent and deliberate failure to engage in the issues raised by the application, including her ongoing failure to provide the estate information requested by the plaintiff and, at least in relation to [Associate Judge] Dick's order, ordered by the court. The defendant put the plaintiff to the cost of two court appearances and failed to appear at all on the date that was peremptorily set by the court.
- [6] Ms. MacIntyre did not take any steps to comply with the Removal Order and later abandoned her appeal of it. She waited until December 15, 2022 to apply to set the Removal Order aside.
- [7] That application was heard by me on May 4 and 5, 2023 together with Ms. MacIntyre's application to set aside a Default Judgment granted by now Associate Judge Robertson on June 16, 2022 in an action commenced by the Estate and defined in the Reasons as the Estate Action.
- [8] I dismissed both of Ms. MacIntyre's applications finding that, with respect to the Removal Order, she could not establish that she was not guilty of willful default, did not bring her application as soon as possible, and did not have a meritorious defence or one worthy of investigation. Finally, I found that it would not be in the interests of justice to set aside the Removal Order, especially considering the events following it: Reasons at paras. 152-153, 158, 163, 166-167.
- [9] With respect to Ms. MacIntyre's application to set aside the Default Judgment, I made findings that: Ms. MacIntyre had not provided any explanation for her failure to file a response; her failure was willful and deliberate; she had unreasonably delayed her application to set it aside; and her proposed response to the claim contained "bald denials" unsupported by affidavit evidence. Further, I found that Ms. MacIntyre had demonstrated a history of not complying with her obligations in the litigation and otherwise, of failing to engage with the issues raised against her, and the interests of justice did not favour setting aside the Default Judgment: Reasons, at paras. 177-178, 182, 185, 195-196.
- [10] On September 15, 2023, Ms. MacIntyre appealed my decisions. I am advised that she did not file her appeal record by November 14, 2023, the date on which it was due, and has not sought an extension of time to do so. Special Costs
- [11] Special costs are awarded in response to reprehensible conduct, which encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke. Special costs are "intended to express the court's disapproval of a party's conduct": *Hu v. Dickson*, 2015 BCSC 218 at para. 47 [Hu]. The Court must, however, "exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order": *Hu* at para. 48,

citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

- [12] The purpose underlying special costs is punitive not compensatory: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 [Le Soleil], leave to appeal ref'd, 39145 (1 October 2020). Nevertheless, special costs also allow a court to substantially indemnify a successful party which is particularly important where one party has to incur excessive costs as a result of the other parties misconduct: *D'Atri v. Gonzalez*, 2017 BCSC 1244 at para. 55.
- [13] The conduct that gives rise to an order for special costs has been set out in a number of cases; all dependent on their own facts.
- [14] In *McIntosh v. Alves*, 2018 BCSC 566, a case that bears a striking similarity to this case, the parties appeared before Justice Branch to resolve the defendant executor's breach of a settlement agreement, pursuant to which the proceeds of sale of an estate property were to be paid into trust. Justice Branch made certain orders and concluded that the defendant's breach merited a special costs order against her. The defendant then refused to sign the draft orders and delayed providing family photos to the plaintiff in breach of Branch J.'s order. At a reappearance to determine the quantum of damages, special costs were ordered against her.
- [15] Justice Horsman clearly set out the conduct that gave rise to a special cost order against Ms. MacIntyre in the Beneficiary Action, but Ms. MacIntyre's behaviour continued. She did not take steps to comply with the Removal Order, resulting in the Estate Action against her that gave rise to the Default Judgment and subsequent applications with respect to garnished funds, attendance at a case management conference, and preparation for and attendance of the two-day hearing before me to set aside the Removal Order and the Default Judgment.
- [16] The Estate Action was filed after several years of unfulfilled promises by Ms. MacIntyre to provide information to Ms. Bailey and Ms. MacIntyre's failure to finalize the Estate.
- [17] From January 4, 2021 - when Justice Kent ordered Ms. MacIntyre to file a response to the Beneficiary Action at a case planning conference - to the date of the Removal Order, counsel for Ms. Bailey and for the Estate attended six different court appearances: Reasons at para. 11
- [18] I am satisfied that in the circumstances of this litigation, Ms. MacIntyre has demonstrated a pattern of delay, broken promises, and inaction that resulted in two actions against her and numerous court appearances. All of those appearances, in both actions, are set out in the following table to demonstrate the litigation steps made necessary by Ms. MacIntyre's conduct. I recognize that some of the appearances were already been considered by Horsman J. as a basis for her special cost order. I have referred to the former Masters as Associate Judges in the table: Date Presiding Justice or Associate Judge Determination / Decision Ms. MacIntyre's Response/Conduct January 4, 2021 Justice Kent Case Planning Conference: order to provide a response to Notice of Civil Claim Response filed on the last

day. June 22, 2021 Associate Judge Dick Application for Passing of Accounts and Removal of MacIntyre as administrator (Resolved by a Consent Order) Did not provide family albums and other items agreed to; financial disclosure and document production; an interim distribution. September 10, 2021 Associate Judge Neilson Pre-Hearing Conference Did not provide documents and information requested by Counsel to move matters along as suggested by the Court. October 8, 2021 Associate Judge Vos Registrar's Hearing The passing of accounts could not proceed because she did not file her Affidavit materials. December 17, 2021 Justice Baker Application for Removal of MacIntyre as administrator and ancillary orders Did not file any response or materials and sought to have Mr. Piett speak on her behalf, which the Court refused; adjournment request was denied; claimed to have issues with phone line, but did not call back as directed by the Court. Adjourned to January 2022. January 7, 2022 Justice Horsman Application for Removal Failed to attend peremptory hearing. May 4, 2022 Justice Riley Mareva Injunction granted Failed to comply with Order. June 16, 2022 Associate Judge Robertson Default Judgment granted against Ms. MacIntyre Failed to comply with Order. July 5, 2022 Associate Judge Harper Correction of Order of Associate Judge Robertson confirming Ms. MacIntyre is not entitled to executor's fees or other fees. December 1, 2022 Associate Judge Muir Application for Payment Out of Court of Garnished Funds Application adjourned and peremptory on Ms. MacIntyre. December 2, 2022 Associate Judge Vos Default Judgment granted against the Defendant Derrick Piett. January 12, 2023 Justice Hori Application to set Aside Removal Order and Default Judgment. Application adjourned to Case Planning Conference. February 21, 2023 Justice Forth Case Planning Conference: Application rescheduled to May 4-5, 2023. Ms. MacIntyre's counsel to provide reply materials by March 15, 2023; failed to provide materials until May 2, 2023. May 4-5, 2023 Justice MacNaughton Application to set aside Removal Order and Default Judgment; Applications denied in Reasons delivered on August 16, 2023. Appeal filed on Sept. 15, 2023; appeal record not filed by November 14, 2023 due date and no extension sought.

- [19] As set out earlier in these reasons, Ms. MacIntyre has not filed submissions in response to the Estate's and Ms. Bailey's submissions on these special costs applications.
- [20] In this case, Ms. MacIntyre's conduct is reprehensible and should give rise to an order for special costs. She has shown disregard for interim orders in both the Estate and Beneficiary Actions justifying rebuke. Her non-disclosure with respect to estate matters is egregious. Special costs are appropriate because the notice of civil claim was properly served on Ms. MacIntyre, she was given many opportunities and reminders to respond to it, and chose not to do so, resulting in the Default Judgment to move matters forward. She was then unsuccessful in having the Default Judgment set aside.
- [21] Ms. Bailey is also entitled to a special cost order in the Beneficiary Action. Ms. MacIntyre reprehensibly failed to comply with orders for disclosure requiring multiple court appearances. She breached agreements that she made. As a result, the litigation was difficult, lengthy, and costly. Ms. MacIntyre's failure to abide by the Rules and court orders

has been deliberate and represents a flagrant disregard for the administration of justice and this Court's authority. Ms. MacIntyre was given many opportunities to address matters relating to the Estate, and failed to do so. Ms. Bailey had no choice but to commence her action to seek Ms. MacIntyre's removal as the Estate's administrator.

- [22] I agree with counsel's submissions that an order for special costs of the proceeding refers to all steps in it from its commencement through to the assessment of special costs: *Le Soleil* at paras. 139, 141.
- [23] The quantum of special costs is to be determined at a hearing before the Registrar. "MacNaughton J."

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