

CANADA / JUDGMENT

LeRoy v. Timberwest Forest Corp.

2018 BCSC 69

COURT

Supreme Court of British Columbia

DECIDED

18 January 2018

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2018 BCSC 69 LeRoy v. Timberwest Forest Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: LeRoy v. Timberwest Forest Corp., 2018 BCSC 69 Date: 20180118 Docket: S14836 Registry: Duncan Between: Rebecca LeRoy and Ted LeRoy Plaintiffs And Timberwest Forest Corp., Timberwest Holdings Ltd., Timberwest Forest Company, David Whiteley, Paul McElligott and Beverlee Park Defendants Corrected Reasons for Judgment: The text of the Reasons for Judgment was corrected at paragraph 11 c) on January 23, 2018. Before: Master Harper Reasons for Judgment Counsel for the Plaintiffs: D.C. Harbottle Counsel for the Defendants: J.S. Yates Places and Dates of Hearing: Duncan, B.C. December 11, 2017 and Vancouver, B.C. January 9, 2018 Place and Date of Judgment: Duncan, B.C. January 18, 2018 Overview

- [1] The plaintiffs filed a notice of trial on October 12, 2017, setting a 30-day trial in Duncan commencing September 24, 2018.
- [2] The defendants object to the trial being held in Duncan and say that it should be held in Vancouver on a date convenient to counsel and to the parties.
- [3] The issues that arise on this application involve the validity of the notice of trial and the appropriate venue for the trial.

Background

- [4] The plaintiffs operate a log sorting business located in Crofton on Vancouver Island, B.C.
- [5] The action is a claim in conspiracy, fraud and deceit. The plaintiffs allege the defendants have harmed their business.
- [6] The action was commenced in December, 2013, but no steps were taken to set the matter for trial until 2017. The original notice of civil claim named Duncan as the place of trial.

- [7] The plaintiffs retained new counsel who filed an amended notice of civil claim on June 14, 2017, inadvertently changing the place of trial from Duncan to Vancouver. This error occurred because the precedent document used by plaintiff's counsel's firm defaulted to place of trial being Vancouver. Plaintiff's counsel did not catch the error before the amended notice of civil claim was filed, nor when a further amended notice of civil claim was filed containing the same error.
- [8] The initial position of the plaintiffs, as expressed in their counsel's draft letter dated June 20, 2017 to the Supreme Court Scheduling manager and sent to counsel for the defendants, was that the proceeding should be transferred to Vancouver for all purposes. He further states in that letter that "counsel practice [sic] in Vancouver and it is expected that most of the witnesses will be from the Lower Mainland".
- [9] The position of the plaintiffs then appears to have changed. Protracted discussions between counsel ensued commencing in June 2017 via letter and email about the place of trial. Both parties, as communicated through their respective counsel's correspondence, seemed to be open to the trial being in Vancouver or Duncan, depending on when a trial date could be secured.
- [10] Eventually, plaintiffs' counsel unilaterally set Duncan as the place for trial by filing the notice of trial that is at issue on this application.

Issues

- [11] The issues for determination on this application are:
- is the notice of trial valid, given that the amended notice of civil claim and further amended notice of civil claim named Vancouver as the place of trial and no order has been made changing the venue to Duncan?
 - if the notice of trial is valid, does the preponderance of convenience justify changing the venue for trial to Vancouver?
 - if the venue for trial is Duncan, should the pre-trial applications be heard in Vancouver?

Analysis

Is the notice of trial valid?

- [12] The defendants' position is that the place of trial must be the place named in the amended notice of civil claim unless the place of trial is changed by court order: Rule 12-1(5) of the Supreme Court Civil Rules. In my view, the inadvertent mistake made by plaintiffs' counsel in naming Vancouver as the place of trial on the amended notice of civil claim should not bind the plaintiffs. The defendants were not misled by the error as evidenced by the continued discussion on venue throughout the latter half of 2017 as being a live issue. The notice of trial is valid.

- [13] The essential issue on this application is the venue for trial. Given that the plaintiffs named Duncan as place of trial in their original notice of civil claim, this application should be considered an application by the defendants for a change of venue. Does the preponderance of convenience justify changing the venue for trial to Vancouver?
- [14] The court may order a proceeding be transferred to another registry for any or all purposes in the interests of justice or if the balance of convenience and expense justifies it: Rule 23-1(13) of the Rules and *Cooper v. Lynch*, 2009 BCSC 1317 at paras. 10-11.
- [15] In the case before me, the "interests of justice" test does not apply. The focus is, therefore, on the balance of convenience described as "a great or considerable preponderance of convenience and expense": *Armstrong v. Revelstoke (City)*, [1927] 2 D.L.R. 223 (B.C.C.A.) at 224.
- [16] The defendants say that the balance of convenience justifies transferring the proceeding to Vancouver for all purposes for the following reasons:
- a) both counsel are based in Vancouver;
 - b) most of the witnesses are based in Vancouver;
 - c) while the plaintiffs are based on Vancouver Island, the corporate defendants are headquartered in Vancouver;
 - d) two of the individual defendants are based in Vancouver;
 - e) the defendants' expert witnesses will be from Vancouver;
 - f) the trial was unilaterally booked by counsel for the plaintiffs for a date when one of the defendants, David Whiteley, will be out of the country on a trip that has been booked for the first four weeks of the trial; and
 - g) according to counsel for the defendants, a trial can be secured in Vancouver on dates starting January 2019 so there is no significant benefit in terms of the "early trial date" factor to the trial being held in Duncan commencing September 24, 2018.
- [17] The defendants argue that the travel to Duncan will not only be inconvenient, but expensive. Holding the trial in Vancouver would be less expensive to all the parties.
- [18] The plaintiffs say, however, that they wish to be in Duncan for the trial because they must attend to their business on a daily basis and cannot do so if the trial is in Vancouver. The plaintiffs also say they plan to call ten to twelve witnesses who live on Vancouver Island.

- [19] All factors on this application justify a change of venue except for the plaintiffs' legitimate interest in being able to carry on their business during trial. Counsel for the plaintiffs submits that, when he filed the notice of trial on October 12, 2017 setting Duncan as the place of trial, it was not because of the plaintiffs' known wishes to remain in Duncan during trial to attend to their business, but because he thought Duncan may have availability for an earlier trial date than Vancouver.
- [20] Unfortunately, counsel for the plaintiffs was not aware of his clients' desire to remain in Duncan for the trial until very shortly before this application came on for hearing on December 11, 2017. It was not until plaintiff's counsel delivered an affidavit of his legal assistant sworn November 30, 2017 on information and belief that "Mr. LeRoy will suffer personal and financial hardship" if the trial were to be held in Vancouver that defence counsel was aware that the plaintiffs would oppose a trial in Vancouver. Further, it was not until December 11, 2017, just before the hearing of this application commenced, that counsel for the plaintiffs provided Mr. LeRoy's affidavit sworn that same day stating not only that his business requires his daily attendance, but also that he intends to be involved in the trial on a daily basis. Mr. LeRoy says he intends to operate his business before and after trial each day and, thus, he cannot realistically operate the business from Vancouver.
- [21] Trials should not be set unilaterally when counsel are actively involved, as in this case, in exploring trial dates and venue. It is most unfortunate that counsel for the plaintiffs set the trial date unilaterally.
- [22] On the other hand, if a party will be out of the country during the timeframe that trial dates are likely to be set, it is expected that any restrictions on trial dates be made known to the other side so that that timeframe can be taken out of consideration for potential trial dates.
- [23] In this case, Ms. Yates, counsel for the defendants, at first objected to the September 24, 2018 trial date not because Mr. Whiteley was not available but because she was not available. Ms. Yates's schedule has now cleared so her unavailability is no longer an impediment to the current trial date.
- [24] There is a presumptive right on the part of the plaintiffs as the dominant litigants to choose the place of trial. In my view, the defendants have not discharged the heavy burden of the demonstrating that the place of trial should be other than that chosen by the plaintiffs: *Armstrong* at 224. The additional expense inherent in the trial being held in Duncan can be dealt with by the trial judge when costs are determined.
- [25] The trial should be held in Duncan, and I so order.
- [26] Whether the trial should be adjourned due to Mr. Whiteley's being in China for part of the trial is a different issue and will need to be the subject of an adjournment application. Nothing in these reasons should be construed by either party as an assessment of the merits of such an application. If there is such an application, I am not seized of it. Should the pre-trial applications be heard in Vancouver?

[27] The overriding factor in favour of the trial being held in Duncan is the plaintiffs' stated need to run the business during trial. That factor does not mean the pre-trial applications should be heard in Duncan. Both counsel work in Vancouver. In my view, all pre-trial applications should be heard in Vancouver. It is not practical or efficient to leave it to counsel to negotiate venue on an application-by-application basis as suggested by counsel for the plaintiffs. Further protracted negotiations on venue should be avoided. Therefore, I order that all pre-trial applications be heard in Vancouver. Summary of orders

[28] I summarize my orders as follows:

- a) the application for a declaration that the notice of trial dated October 12, 2017 is invalid is dismissed;
- b) the application that the trial be scheduled in Vancouver on the next available date for which counsel and all parties are available is dismissed;
- c) the application for an order transferring the proceeding from the Duncan registry to the Vancouver registry for all purposes or, alternatively, for trial, is dismissed; and
- d) all pre-trial applications will be heard in Vancouver. Costs

[29] The plaintiffs should have made it known from the outset that they opposed the trial being held in Vancouver, if that was, in fact, their position. A great deal of time and energy spent on fruitless discussions could have been saved if the defendants had known that changing venue for trial would require them to seek a court order.

[30] Further, I have granted the defendants' application that all pre-trial applications be heard in Vancouver. Accordingly, although I have dismissed the defendants' application for change of venue of the trial, it is appropriate that the plaintiffs pay the defendants their costs of this application in any event of the cause, but not payable forthwith, and I so order. "Master Harper"

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