
CANADA / JUDGMENT

Loft v. Nat

2015 BCSC 198

COURT

Supreme Court of British Columbia

DECIDED

13 February 2015

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2015 BCSC 198 Loft v. Nat

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Loft v. Nat,

2015 BCSC 198

Date: 20150213

Docket: M110420

Registry: New Westminster

Between:

Glenn Loft

Plaintiff

And

Baljinder Singh Nat and Rajinder Sandhu

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment on Costs

Counsel for Plaintiff:

D. Shane

Counsel for Defendants:

L.J. Mackoff

Place and Date of Hearing:

New Westminster, B.C.

January 13, 2015

Place and Date of Judgment:

New Westminster, B.C.

February 13, 2015

- [1] This is an application for costs following a decision of mine (2013 BCSC 1568) dated August 28, 2013 granting damages to the plaintiff for injuries incurred in a motor vehicle accident which had occurred in 2007. The plaintiff had sought considerably more than I found to be owing, ie. he sought damages of over \$3 million. Due to pre-existing medical conditions, personality disorders and in particular the plaintiff's lack of credibility, I granted total damages of approximately \$63,000 for general damages, past wage loss and special damages.
- [2] An appeal of my decision resulted in a dismissal (2014 BCCA 108) save the Court of Appeal allowed an appeal of my decision on costs stating "the fact that [Mr. Loft] obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs" (at para. 47). The Court referred the issue of costs back to me for further determination.
- [3] The defendants now seek double costs from the date of offers to settle made by them on December 21, 2012 and January 8, 2013 on the basis that one of those offers ought reasonably to have been accepted by Mr. Loft. Mr. Loft submits he could not have accepted the offers due to one of the conditions attached to each of the offers and the circumstances in which the offers were made, i.e. shortly before the trial was scheduled to commence.
- [4] The plaintiff also seeks costs from the defendants on the basis that the plaintiff was successful at trial.

Offers to Settle

- [5] The two offers to settle included identical terms. The only difference is that the offer of December 21, 2012 was to pay the sum of \$125,000 in full settlement of the claims of the plaintiff whereas the offer of January 8, 2013 offered a settlement amount of \$150,000. Both offers included court ordered interest to the date of the offers but excluded costs. The offers were both clearly in excess of the fruits of judgment.

- [6] There was a unique clause in the offers to settle which related to the Insurance Corporation of British Columbia ("ICBC") having been served with a Notice of Attachment and/or Requirement to Pay from the settlement funds, assuming one of the offers was accepted, obligating ICBC to firstly pay the Family Maintenance Enforcement Program ("FMEP") the amount claimed in the Notice of Attachment and/or Requirement to Pay before paying out the balance of the settlement to Mr. Loft.
- [7] By way of background, while this litigation was proceeding, Mr. Loft was involved in family proceedings with his former spouse and with a previous common law partner. In those two proceedings there were arrears of support which at the time of service of the Notice of Attachment and/or Requirement to Pay were in the range of \$100,000. Apparently FMEP had gotten wind of the claim in this action and were hoping the arrears of support could be paid from the proceeds of settlement or a judgment in favour of Mr. Loft.
- [8] The wording of the applicable paragraph in the offers to settle is significant and stated:
- The defendants confirm that this offer is made with the acknowledgement that the Insurance Corporation of British Columbia ("ICBC") has been served with a Notice of Attachment and/or Requirement to Pay and is therefore obligated to first pay to Family Maintenance Enforcement Program ("FMEP") from the Settlement Payment in this matter. The defendants and /or ICBC are required to first meet any obligation to FMEP before paying monies to the plaintiff in relation to the Settlement Payment, pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 and amendments and regulations thereto.
- [9] The plaintiff did not respond to the offers to settle. This action proceeded to trial commencing January 29, 2013 and concluded with submissions in August 2013.
- [10] ICBC was not a party in this action.
- [11] After the offers to settle were delivered and following the trial of this action, Mr. Loft was successful in an application to Mr. Justice Groves of this court to reduce the arrears of support to an amount of approximately \$6,000.
- [12] The plaintiff submits that the condition contained in the settlement offers regarding FMEP made it impractical to accept either of the offers, in that if the offer had been accepted, ICBC would have been enabled to pay a sum of approximately \$100,000 to FMEP with the balance to be paid to the plaintiff. Considering that the amount claimed by FMEP was in dispute and the ultimate reduction of the amount of arrears to a sum of \$6,000, Mr. Loft's reluctance to accept the offers is understandable.
- [13] The plaintiff also submits that the Notice of Attachment and/or Requirement to Pay should not have been included in the offers to settle as those documents were issued to ICBC, not to the defendants, and ICBC was not and would not become obligated to pay the settlement amount or the amount of any judgment. The Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 provides for a notice of attachment in s. 15 (1) which states:

15 (1) If the debtor has at any time defaulted in a payment required under a maintenance order, the director may serve a notice of attachment in the prescribed form on a person who is indebted or likely to become indebted to the debtor.

A "debtor" under the Act is defined as:

"debtor" means a person required under a maintenance order to pay maintenance;

- [14] The plaintiff submits that service of the Notice of Attachment and/or Requirement to Pay on ICBC would not attach the settlement funds, if one of the offers had been accepted, as ICBC would not have been indebted to the plaintiff. According to the wording of the settlement offers, it was the defendants who had offered to pay the plaintiff the settlement funds. ICBC was obligated to indemnify the defendants and had no obligation to pay the plaintiff the settlement amount upon acceptance of an offer to settle.
- [15] A second reason put forward by the plaintiff as to why the offers of settlement ought not to have reasonably been accepted relates to the timing of the offer and the plaintiff's personal circumstances at the time.
- [16] The first offer was made on December 21, 2012 and the trial of this matter was scheduled to commence on January 29, 2013. The plaintiff submits there was no reason a reasonable offer could not have been made many months before the scheduled trial date in that discoveries had been completed long before and circumstances had not changed for many months. It is submitted that there was no new information available to the defendants that was not in their hands many months before.
- [17] Also, the plaintiff submits it was not reasonable for him to accept one of the offers as he had been hospitalized for psychiatric issues on December 26, 2012 and was not released from the hospital until January 25, 2013, which was a Thursday before the trial commenced on January 29, 2013. It is alleged the plaintiff was in an agitated state, suffering emotional and psychiatric issues and in the circumstances he would not have been in a position to reasonably consider and accept the offers. It is also noted that the offers were open for acceptance up to 4:00 p.m. on Friday, January 26, 2013.
- [18] The plaintiff submits that in these circumstances it was not unreasonable that the plaintiff proceeded to court on January 29, 2013.
- [19] It was submitted on behalf of the defence that ICBC was not aware of Mr. Loft's hospitalization until a "few days" prior to the expiry of the offers.

Relevant Law

- [20] The governing provisions concerning costs and offers to settle are set out in the Supreme Court Civil Rules, B.C. Reg. 168/2009. Rule 14-1 provides the authority to order costs generally and Rule 9-1 allows the court to consider offers to settle in the context of a costs order.

- [21] In a case involving multiple issues where there has been divided success, the court will engage in a "substantial success" analysis. In the decision of *Fotheringham v. Fotheringham*, 2001 BCSC 1321, the court dealt with what constitutes "substantial success". Mr. Justice Bouck found that substantial success is determined by comparing the position taken by a party at trial against the end result, and it is a global assessment of who substantially succeeded in the litigation as a whole (para. 17). He concluded his discussion of what may constitute "substantial success" with the following paragraph, in which he was making reference to *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various factors in dispute and weighing their relative importance. The words, "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [22] As Mr. Justice Goepel states in *Paul v. Pumple*, 2013 BCSC 1844 at para. 16, an offer to settle should not be included in the substantial success analysis; it will be considered afterwards because whether one party is substantially successful will impact the availability of a costs award made on the basis of an offer to settle.
- [23] It may be the case that the court will conduct its substantial success analysis and find that neither party had substantial success, and consequently order that neither party be entitled to a costs award. The court may still nonetheless proceed to make a costs award on the basis of an offer to settle alone.
- [24] Where parties are not entitled to costs under the substantial success analysis, subrules 11-1(5)(a)-(c) of the offer to settle analysis cannot apply. As per Goepel J. in paras. 26-28 of *Paul*:
- [26] Rule 11-1(5)(a) allows the court to deprive a party of costs to which it might otherwise be entitled. As I have concluded that neither party is entitled to costs, Rule 11-1(5)(a) does not apply.
- [27] Rule 11-1(5)(b) allows the court to award double costs. An award of costs simpliciter is an essential pre-requisite for an award of double costs. As I have concluded that neither party is entitled to costs, Rule 11-1 (5)(b) does not apply.
- [28] Rule 11-1(5)(c) concerns an award of costs to which a party is already entitled. As I have found that Ms. Paul is not entitled to costs, that subrule does not apply.
- [25] It is important to highlight from this passage for the purposes of the case at bar that a pre-requisite for a double costs award is an award of costs simpliciter.

[26] A court may apply Rule 11-1(5)(d), however, to award costs to a party even when there is no award for costs simpliciter under the substantial success analysis. In order to apply Rule 11-1(5)(d), the offer to settle must be better than the result the other party obtained at trial. Since the comparison is between the result and the offer, not between the result and the positions taken at trial, an award of costs under this provision is not dependent on a party being substantially successful at trial (Paul at para. 29).

[27] When considering an offer to settle, a court may take into account the factors articulated in Rule 9-1(6), namely:

- 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.

[28] I will thus engage in a substantial success analysis followed by a consideration of the two offers to settle in determining whether there should be a costs award in this proceeding.

Discussion

[29] Applying the findings of Mr. Justice Bouck in *Fotheringham*, to the issues and my findings in this action:

- a) The credibility of the plaintiff was a very significant factor throughout all issues. I found Mr. Loft was generally not credible and his evidence was even contradicted by his own witnesses on occasion;
- b) The plaintiff was awarded non-pecuniary damages of \$40,000 after seeking an award in the range of \$100,000 - \$150,000, which would amount to limited success;
- c) The claimant was awarded past loss of income but only for a limited portion of the time up to trial;
- d) The claim of the plaintiff for future loss of income was dismissed. Considerable court time was devoted to this claim. Again, Mr. Loft's evidence of his lost opportunities for work was not credible and was contradicted on occasion by his own witnesses;
- e) The claim for loss of future care was also dismissed; and
- f) The award for special damages was approximately \$1,900 out of a total claim of \$17,220, the difference being a claim for chiropractic sessions which were disallowed.

- [30] Keeping in mind the "rule of thumb" of Mr. Justice Bouck of 75% amounting to "substantial success", and looking at the matters in dispute globally, my conclusion is that neither party has achieved substantial success. It is true that the plaintiff was successful in the sense that he was awarded some damages for injuries he had suffered in the motor vehicle accident. However, the plaintiff had serious credibility issues, and the defendant successfully defended the bulk of the claims advanced by the plaintiff. The plaintiff also wasted considerable court time with the claim for future loss of income, which was ultimately dismissed. I also take into consideration the mental health and other personal issues of the plaintiff and conclude that there should be no award as to costs in this matter.
- [31] I am unable to make a costs award in favour of the defendants on the basis of the defendants' two offers to settle as I conclude they were not offers that ought reasonably to have been accepted on the dates the offers were made. I accept both submissions put forward by the plaintiff in this regard. Even if the plaintiff was inclined to accept one of the offers to settle, the condition included in the offers relating to the Notice of Attachment and/or Requirement to Pay from FMEP should not have been a term of the offer. ICBC was not and would not have been indebted to Mr. Loft. ICBC was not a party to the action and its obligation was only to indemnify the defendants for negligence if the court awarded damages to Mr. Loft. As well, the offers of settlement were made by the defendants, not ICBC, and the defendants had no obligation to ICBC if one of the offers was accepted.
- [32] I also find that the timing of the offers and the personal circumstances of the plaintiff in and around the time the offers were made resulted in it being unreasonable for the plaintiff to have accepted one of the offers.
- [33] I conclude that it was not reasonable in the circumstances for the plaintiff to accept either of the offers and the defendants are not entitled to costs on the basis of the offers to settle. In the result, as neither party was substantially successful, each party will be obliged to bear their own costs.

"Jenkins J."

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