

CANADA / JUDGMENT

Mayer v. Merchant Law Group LLP

2023 BCSC 927

COURT

Supreme Court of British Columbia

DECIDED

9 May 2023

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2023 BCSC 927 Mayer v. Merchant Law Group LLP IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Mayer v. Merchant Law Group LLP, 2023 BCSC 927 Date: 20230509 Docket: S229449 Registry: Vancouver Between: James Mayer Plaintiff And Merchant Law Group LLP Defendant Before: The Honourable Justice Branch Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: N.J. Kovak C.R. Mogerman M. Waddell Counsel for the Defendant: R.W. Thompson, K.C. B. Frenken Place and Date of Hearing: Vancouver, B.C. May 2, 2023 Place and Date of Judgment: Vancouver, B.C. May 9, 2023

- [1] THE COURT: In this proposed class action, the defendant seeks an order deferring the filing of its Response until after the resolution of its jurisdiction motion.
- [2] The defendant accepts that the burden is on it to show that there is a basis for such a deferral.
- [3] I find that they have not met that burden.
- [4] The Supreme Court Civil Rules specifically provide that the filing of a Response will not be treated as attornment. The defendant accepts that the Rules permit it to file a Response alleging that the court does not have jurisdiction over it in respect of the claim made against it, after filing an initial jurisdictional response, and that merely by doing so, it does not submit to the jurisdiction of this court.
- [5] However, the defendant raises the spectre that an attornment problem may still rear its head if and when the jurisdiction motion is decided. Specifically, if it loses the motion but launches an appeal, the defendant is concerned that it will be treated as having attorned to the jurisdiction in the interim period before the appeal is heard as a result of having filed a Response. That said, the defendant agrees that any such concern is limited to the territorial competence aspect of their jurisdiction application, given that no attornment difficulty arises in relation to that aspect of their application based on the principles of forum non conveniens: Nordmark v. Frykman, 2019 BCCA 433, at paras. 50, 59-60.
- [6] I find that the defendant's concern is overstated, and manageable if it is not.

- [7] In terms of whether it is a problem, I find that it could not be that an earlier filing of a Response would raise a concern after the result of the jurisdictional hearing is known, but rather it would only be any steps to defend beyond that. Otherwise, the protection afforded to the filing of a Response by R. 21-8(5)(a) would be completely undermined. The protection is not qualified in any way.
- [8] There is a problem embedded in the defendant's position. Specifically, if the defendant is correct, the legislature would have provided a protection that disappears the moment a jurisdictional motion is lost, with no power or ability to undo this effect. Such an outcome would be so grossly unfair to the party relying on the rule to file a Response that I find there is no possible way that the legislature could have intended such an interpretation. Such an interpretation would create the classic situation of sending someone out onto a branch and then sawing them off. There is no indication that the rule provisions are intended to apply retroactively to punish a defendant for steps taken before a jurisdiction application is lost.
- [9] In terms of managing any theoretical jeopardy that may exist during the appeal period, the plaintiff is prepared to agree to the following undertaking in order to protect against any prejudice to the defendant: The plaintiff will not assert that any steps taken by the defendants in the action, including delivery of the response to civil claim, pending the final determination of all appeals, are attornment to the BC court's jurisdiction and they will not raise the fact of any such steps to the defendant's prejudice in connection with the defendant's challenges, including any appeals.
- [10] Further, I note that the court itself has an array of powers under R. 21-8(4) to "give directions for the conduct of the proceeding before determining a jurisdictional application". I would exercise my powers under this rule to issue a direction that any steps taken in the action or the appeals pending the final determination of the appeals do not constitute attornment to the jurisdiction.
- [11] The plaintiff notes that a similar undertaking and direction was issued as a means of managing similar concerns raised by the defendants in *Cheung v. NHK Spring Co., Ltd.* (November 30, 2022), Vancouver S1910612 (B.C.S.C.) by Justice Coval. I find that these are reasonable steps to mitigate any risk that may exist should the court's legal analysis be incorrect.
- [12] The defendant also raises a more practical concern that there is no benefit to be served by filing a Response, as it will not assist in determining the issues raised by the jurisdiction motion. The defendant relies on the court's general discretion to extend the time for a pleading pursuant to R. 22-4(2); *Liang v. Barnard*, 2022 BCSC 491 at paras. 10-12. However, this argument overlooks that their jurisdictional motion also raises a *forum non conveniens* issue. In relation to *forum non conveniens*, there are a number of issues that could be addressed in the Response that would be germane to the assessment. For example, the Response could avert to:

- a) the location of any discussions that took place before execution of the retainer agreement at issue;
 - b) the location from which the retainer agreement was sent;
 - c) the location where the retainer agreement was received; and
 - d) the location of other witnesses and documents.
- [13] Indeed, some of these points, if pled in the Response, could also be relevant to territorial competence in terms of determining whether there is a real and substantial connection with British Columbia: *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [CJPTA], s.10; *Giustra v. Twitter, Inc.*, 2021 BCSC 54 at para. 36 (referring to the potential for "disputed pleadings"), *aff'd* 2021 BCCA 466; *Newman v. Beta Maritime Ltd.*, 2016 BCSC 2257 at paras. 60-61 (referring to "pleadings" in the plural form rather than the singular "pleading").
- [14] While there is a presumption in favour of the facts alleged in the Notice of Civil Claim on a jurisdictional application, that presumption is rebuttable: *Bell v. James*, 2020 BCSC 443, at paras. 22-25, 50. At a minimum then, the Response may serve as the vehicle to contest jurisdictional facts raised by the plaintiff, thereby providing notice that a more detailed review will be required: *Solecki v. Stroud Resources Ltd.*, 2017 BCSC 1130, at para. 37. I note that in *Solecki*, the defendant had filed a full Response, and there was no suggestion that this pleading acted as attornment at the moment the jurisdictional challenge was defeated therein. (para. 5).
- [15] The defendant also raises a concern that the preparation of the Response may take a good deal of time to prepare for potentially no purpose if the jurisdictional motion is successful, however, I have already detailed how the Response could be useful for the jurisdictional motion itself. Furthermore, it does not appear that the work will be particularly onerous. Indeed, the affidavit already provided by the defendant's principal, Mr. Merchant, already contains a good amount of detail that should be very useful in the preparation of a Response.
- [16] At the end of the day, I agree with the obiter comments of Justice Myers in *Giustra*:
- [31] Although nothing hinges on the point, I pause here to question this practice. While deferring a response may be permissible, where the determination of a jurisdictional challenge may depend on what is to be alleged in a response it appears to me to be preferable that the defendant file its response so that the issues are better crystallized. Rule 21-8 permits this to be done without attorning to the jurisdiction. As it stands, I am left considering the application on the basis of what I am told Twitter intends to plead which is not completely satisfactory.

- [17] I note that the Justice Myers decision was affirmed on appeal. Although the Court of Appeal did not specifically reference this issue, the court did acknowledge that "often" the defendant will not have filed a Response in advance of the jurisdictional motion. But the court did not state that this was the invariable or preferred practice: Court of Appeal Reasons at para. 8.
- [18] I find that, on the facts of this case, the filing of a Response is justified. "The Honourable Mr. Justice Branch"
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