

CANADA / JUDGMENT

Moquin v. Fitt

2017 BCSC 1204

COURT

Supreme Court of British Columbia

DECIDED

28 June 2017

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2017 BCSC 1204 Moquin v. Fitt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moquin v. Fitt,

2017 BCSC 1204

Date: 20170628

Docket: M76900

Registry: Nanaimo

Between:

Pierre Moquin

Plaintiff

And

Gisela Fitt

Defendant

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

K. Klear

Counsel for the Defendant:

M. Wilhelmson

Place and Date of Hearing:

Nanaimo, B.C.

June 26, 2017

Place and Date of Judgment:

Nanaimo, B.C.

June 28, 2017

[1] THE COURT: The defendant applies pursuant to R. 7-6(1) of the Supreme Court Civil Rules for an order that the plaintiff attend two medical examinations. The only issue on this application revolves around a proposed condition prohibiting the defendant or her insurer from conducting surveillance of the plaintiff during his travels to and from these medical examinations. All other terms and conditions in relation to the medical examinations have been agreed-upon. For the reasons that follow, I am persuaded that imposing the proposed condition enjoining the use of surveillance in connection with these court-ordered medical examinations is an appropriate exercise of the Court's discretion.

I

[2] The plaintiff alleges injuries arising out of a December 2013 motor vehicle collision. The defendant, who was traveling in the opposite direction on the Island Highway near Duncan, turned left in front of the plaintiff's vehicle. The defendant admits liability, and the damages assessment is scheduled for a ten-day jury trial in March 2018.

[3] The plaintiff's notice of civil claim sets out the following injury particulars:

- (a) Soft-tissue injuries;
- (b) Musculoskeletal and/or musculoligamentous injuries;
- (c) Shock, pain and suffering;
- (d) Blurred vision, dizziness, loss of balance and vertigo;
- (e) Loss of sense of taste, itching sensation in ears, visual light sensitivity;
- (f) Concussion, memory impairment and headaches;
- (g) Injury to arms, neck, back, chest, shoulder(s), leg and ankle;
- (h) Injury to upper and lower extremities;
- (i) Numbness, tingling and paresthesia in right arm and hand/fingers;
- (j) Thoracic outlet syndrome;

- (k) Injury to the brachial plexus region, nerve injury and radicular symptoms;
- (l) Such further injuries as may be determined.

II

- [4] The plaintiff lives in Nanaimo. The defendant has organized an examination of the plaintiff by (1) a vascular surgeon, Dr. Karim, on 1 August 2017 in New Westminster, and (2) an otolaryngologist, Dr. David, on 8 September 2017 in Vancouver. There is no evidence one way or the other whether the defendant or her insurers have engaged or plan to engage investigators to conduct surveillance of the plaintiff.
- [5] The plaintiff deposed that he is prepared to cooperate and attend these examinations, but that he is always nervous about seeing doctors. He says that he will try and relax and answer the questions put to him, but knows that he will be nervous because he does not know these doctors and he is concerned about whether the doctors nominated by the defendant's insurers will be fair.
- [6] The plaintiff goes on to depose that he has been told by his counsel that he may be followed by an investigator during his trips to and from these medical appointments. He says this:

The prospect of being followed and even videotaped on those days makes me more nervous and anxious. Truthfully, the thought of it causes me to feel added stress. When I am stressed, I have noticed that my symptoms are more elevated and my demeanor is off. I am concerned that I will be more tense and stressed when I attend these appointments as I will be looking over my shoulder while I make my way to the appointments -- I have been feeling that now and wondering if I am now being followed. Unfortunately, I am concerned that this nervousness and anxiety may affect how I come across to the doctors at the appointments.

III

- [7] Rule 7-6(1) provides that if the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person. Rule 13-1(19) provides that when making an order under the Rules, the court may impose terms and conditions and give directions it considers will further the object of the Rules. The object of the Rules is set out in R. 1-3(1): to secure the just, speedy and inexpensive determination of every proceeding on its merits.
- [8] There is authority for the no-surveillance term the plaintiff submits ought to be attached to the medical examinations order. In *Carta v. Browne*, 2012 BCSC 2219 at para. 15, Master Muir acceded to the plaintiff's argument for a condition that there be no surveillance of him during the medical examination or during his arrival or departure therefrom. The master concluded that "this is in the nature of being required to attend at court, and it is my view that any such surveillance would be unseemly, and I therefore grant the order."

- [9] The Carta case was cited to Master MacNaughton, as she then was, in *Ng v. Eng*, unreported, Vancouver Registry M115201, 14 October 2014. The master imposed a no-surveillance condition, saying: "I think it is inappropriate for a party who is compelled by court order to attend an examination to be under the potential of surveillance."
- [10] Mr. Justice N. Smith had the same issue before him in *Orr v. Pringle*, 2015 BCSC 2644. Mr. Klear appeared as counsel for the plaintiff in that case, and appears for the plaintiff in the case at bar. He tells me that Smith J. was referred to the Carta and Ng cases. At para. 3, the judge said:

As for surveillance, I agree that [it] is not simply a matter of the plaintiff being potentially subject to surveillance while he is in a public place at a time chosen by the defendant or whenever they can find him. This is a matter where he is at a place at a time that has been ordered by the Court. It is a bit analogous to a plaintiff being under surveillance in the courthouse and that is not appropriate. So I will grant that condition.

- [11] The defendant refers to two cases that she says constitute a competing line of authority. The first in time is a decision of Master Donaldson, *Kelly v. Sanmugathas*, 2009 BCSC 958 at para. 8. In the course of his reasons granting an order for a medical examination of the plaintiff, the master said:

So far as [the proposed condition] that no surveillance be conducted of the plaintiff arriving or leaving the examination, there is no basis whatsoever in the argument or materials suggesting that there should or should not be surveillance and no order will be made in that regard.

I infer that the issue of a no-surveillance condition was raised in the plaintiff's application materials but was not pursued at the hearing. The case does not assist me because the master did not express an opinion on the merits of such a condition.

- [12] However, the issue was squarely dealt with in *Marques v. Stefanov*, 2016 BCSC 2589, wherein Madam Justice Dorgan considered the Carta and Ng cases. In the course of her reasons for refusing to impose a no-surveillance term and declining to follow the masters' decisions in Carta and Ng, the judge said, at para. 17: "I was given no case authorities where these two decisions were followed." Thus, it is clear that the judge was not referred to Smith J.'s reasons in the Orr case.
- [13] The judge in *Marques* held that the exercise of discretion in relation to the imposition of conditions on a medical examination must be exercised judicially, and the conditions imposed must be reasonable and fair to all parties -- and what is reasonable must be analyzed in the context of what is necessary in order to achieve parity or equality of footing (para. 9).
- [14] She found, *inter alia*, that there was no evidence that the defendant intends or does not intend to conduct surveillance of the plaintiff as he travels to and from the medical appointment, and there is no suggestion raised that to-and-from surveillance would impair the medical examiner's ability to undertake and complete the examination (para. 10). She

held that "surveillance in these cases, subject to reasonable limits prohibiting such things as harassment or trespass, is a legal tool of discovery, one which could be used from the moment the notice of civil claim is filed" (para. 10).

[15] The judge observed that the master in *Carta* did not refer to the evidence and did not differentiate between the issue of surveillance during the medical examination and surveillance while travelling to and from the examination (paras. 12-14). With reference to the *Ng* case, the judge again noted the absence of analysis of the evidentiary record (para. 16).

[16] At paras. 18-21 in *Marques*, the judge explains why she did not impose the no-surveillance condition:

Without more, and with all due respect, I do not consider myself bound by these statements in respect of surveillance. To impose the general conditions sought by the plaintiff would, in my view, unduly restrict the defendants' right of discovery without compelling evidence of why it would be reasonable to do so and why it would be required and necessary to do so in order to achieve parity between the parties.

Such a general "rule", if imposed, would, in a motor vehicle case, limit a defendant's ability to surveil a plaintiff where, for example, the plaintiff is compelled by a subpoena to attend court. It could be in an unrelated case, but compelled nonetheless to attend court in order to provide evidence.

That, in my view, is a restriction which ought to be avoided unless the evidence and the arguments convince a court in the exercise of its discretion that such a restriction is necessary to achieve parity between the parties. I know that Mr. Collins, during argument, suggested that a plaintiff could be surveilled at the courthouse and indeed Mr. Collins points out that within the courthouse itself there are signs to indicate that surveillance is in place. That, in my view, is different than having a defendant in a case like this conduct surveillance. A defendant would not be able to surveil a party inside the courthouse. The surveillance signs Mr. Collins refers to are signs to indicate security surveillance is in place.

In my view, the imposition of a broad, all-encompassing restriction, as is sought here, of an otherwise legal discovery tool should be avoided. Such restriction, if any, should be imposed by a court exercising discretion judicially, on evidence, which would lead the court to conclude that the restriction was necessary in order to achieve parity between the parties, and is therefore a reasonable restriction of an otherwise legal discovery tool.

IV

[17] Returning to the case at bar, the defendant submits that I should follow the *Marques* case. Referring to *Hansard Spruce Mills Ltd. (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.), she submits that the *Orr* reasons ought to be considered as a *nisi prius* judgment. I am not sure that this is a proper characterization of the *Orr* judgment which, although given orally at the close of

argument, was delivered by an experienced judge after consideration of the applicable authorities. That said, I do not think it necessary to resolve this issue. Regardless of how it has occurred, there are now two divergent approaches to the question of whether the Court should exercise its discretion to bar surveillance while a plaintiff is travelling to and from a court-ordered medical examination. I consider myself at liberty to follow either line, or -- to put it another way -- I am obliged to choose between them.

- [18] With respect, I prefer the reasoning in the Carta line of cases. As I said early on during argument on this motion, I share the sense of unease expressed in Carta, Ng, and Orr about the prospect of surveillance of a party travelling to or from a court-ordered medical examination.
- [19] I do agree that it is important not to unduly hinder the ability of defendants or their insurers to conduct surveillance of claimants. Surveillance is not a "discovery" device in the narrow sense of being a litigation process such as oral examination of a party or a witness, or obtaining production of documents, or obtaining an order for a medical examination. However, it must be acknowledged that surveillance is a legitimate and, in some cases, useful tool -- and very occasionally it produces evidence that is critically important to a settlement or trial outcome.
- [20] The defendant concedes that surveillance in the courthouse precinct would be impermissible -- although I notice that in Marques the defendant argued (but failed to persuade) that surveillance in the courthouse would not be improper. The masters and judges that have considered the prospect of courthouse surveillance have unanimously expressed an aversion; I think part of the reason surveillance in the courthouse is "beyond the pale" is it involves a party engaging in partisan activity (other than advocacy) on the Court's neutral turf. But is it proper to extend this logic to surveillance of a plaintiff on the way to or from a court-ordered medical examination?
- [21] The defendant nominates a R. 7-6 medical examiner, but it is the Court that appoints the examiner and orders the plaintiff to attend for the examination at a particular time and place. On the dates of the medical examinations, the plaintiff will not be in public on journeys of his own choosing. If the defendant or the defendant's insurer takes advantage of the opportunity created by court order to engage in surveillance then the defendant might be seen by a reasonable observer to be acting in close concert with the Court. Partisan conduct aligned with the court order may be seen as lessening or compromising the Court's neutrality, and the Court must, of course, zealously protect its reputation for impartiality.
- [22] Barring surveillance on the trip to or from the medical examinations is hardly a significant barrier to the defendant's ability to gather information, and in my view the imposition of a surveillance bar and the consequent chance that the trier of fact might be deprived of some relevant information is a small price to pay to guard the Court's reputation. Returning to R. 13-1(9), I think the non-surveillance condition promotes the just determination of this proceeding -- a stated object of the Rules -- because it prevents the possibility of conduct

which might degrade the perception of the Court's impartiality.

- [23] I agree with the defendant's submission that an examination of the evidentiary record is important when deciding whether conditions on a medical examination ought to be imposed -- but only to the extent that the condition on the R. 7-6 order is for the purpose, as most ancillary conditions are, of putting the parties on an equal footing. However, the concern identified by the presiders in the Carta line of cases about surveillance in the courthouse or on the way to or from court-ordered appointments has nothing to do with levelling the playing field, and in my view the imposition of a condition on the basis of protecting the Court's integrity does not necessarily turn on the evidentiary record (as is the case for conditions designed to achieve reasonable equality between the parties in the preparation of a case for trial). The presiders in Carta, Ng, and Orr did not root their decisions in the evidentiary record, but rather in what I perceive to be a more general concern for the reputation of the Court and its processes. I do not agree with the defendant's submission that the absence of references to the evidentiary record in those cases is a proper basis for discounting those presiders' opinions on the impropriety of this type of surveillance.
- [24] As an aside, I am inclined to attach significant weight to masters' opinions on applications like this. I have in mind, in this respect, the reality that masters have advantages arising out of their greater experience in matters of this kind. They hear many more R. 7-6 applications than judges and likely have a more developed sense of the appropriateness of ancillary terms or conditions sought by the parties. In the different but perhaps analogous context of approval of sales in foreclosure proceedings, see the dicta of Esson J.A., as he then was, in *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 at paras. 44-45.
- [25] If I am wrong in preferring the Carta line of cases to Marques, I would in any event distinguish Marques on its facts. There is evidence in the case at bar, which was absent in Marques: i.e., that the ability of the medical examiner to conduct a proper examination -- and, in particular, the critically important examination process of taking a reliable history from the plaintiff -- may be put at risk by the prospect of surveillance. The plaintiff in the case at bar deposes to the negative effect that he expects the prospect of surveillance will have on his presentation at the examinations.

V

- [26] The defendant makes a backup argument. She submits that the defendant and her insurer and her counsel could undertake to the Court not to advise their investigator, if there is one, of the dates of the scheduled medical examinations. The defendant argues that if this condition is imposed then any surveillance that occurs would be coincidental and this would mitigate the concern expressed in the Carta line of cases.

[27] This alternative argument is superficially attractive but I cannot accede to it. The danger of an undertaking such as this is the risk that coincidental surveillance would occur or that the investigator learns of the particulars of a medical examination through other channels -- perhaps, say, by interviewing acquaintances of the plaintiff. The lasting consequences of surveillance notwithstanding undertakings, by way of suspicion and distrust between the parties, insurers, and counsel, is predictable and would be most unfortunate. On balance, it is not worth taking this admittedly slight risk in order to avoid a very slight restriction on the defendant's ability to conduct surveillance of the plaintiff.

VI

[28] The order for the medical examinations will go on the agreed-upon conditions and on the further condition barring surveillance of the plaintiff on his way to the examinations, during the examinations, or on his return from the examinations.

[COSTS SPOKEN TO]

[29] Costs to the plaintiff.

"Thompson J."

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