
CANADA / JUDGMENT

Murray v. Murray

2019 BCSC 149

COURT

Supreme Court of British Columbia

DECIDED

6 February 2019

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2019 BCSC 149 Murray v. Murray

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Murray v. Murray,

2019 BCSC 149

Date: 20190206

Docket: D102270

Registry: Vancouver

Between:

Sybil Mae Murray aka Sybil Mae Christian Murray

aka Sybil Edwards

Claimant

And

William Frederic Murray

Respondent

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Addressing Special Costs

Counsel for the Claimant:

Mark R. Slay

Counsel for the Respondent:

Shawna L. Specht

Written Submissions of the Respondent:

January 8 and 10, 2019

Written Submissions of the Claimant:

January 28, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2019

- [1] In oral reasons on December 17, 2018, I granted William Murray's application to have this family proceeding dismissed for want of prosecution. I ordered ordinary costs to Mr. Murray but gave him leave to present written submissions in support of receiving special costs. (Mr. Murray raised the request for special costs in the course of his submissions in support of the dismissal order, but special costs were not addressed substantively at that stage.) I have now received and considered the written submissions from both parties addressing the special costs issue.
- [2] In my view, this is not a case calling for an award of special costs.
- [3] A well-known expression of the special costs test in this province is that of Lambert J.A. in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, 84 B.C.L.R. (2d) 1, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, 74 B.C.L.R. (2d) 311, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung*, 77 B.C.L.R. (2d) 314, in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs. [Emphasis added.]

- [4] Mr. Murray, in this costs application, emphasizes Ms. Edwards' delays in advancing the litigation being motivated in part by her disincentive to move the case along because Mr. Murray's funds were "tied up in trust pursuant to an undertaking." It was delay by Ms. Edwards in advancing her case which allowed Mr. Murray to succeed on his application to dismiss, for which he has already obtained an order for ordinary costs. Delay in itself will not ordinarily result in an order for special costs. It may be correct that Ms. Edwards delayed in part because funds in dispute were secured in trust, but Mr. Murray, a lawyer, could have moved the case along at earlier stages if he had thought the delay was prejudicing him then.
- [5] Passages from two decisions by this Court are instructive for resolving the special costs issue in this case.
- [6] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Madam Justice Gropper derived the following principles for testing whether conduct is reprehensible, at para. 73 of her reasons:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [7] In an earlier decision, *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284, Mr. Justice Williams examined what is meant by reprehensible, in the context of a special costs application, by reviewing numerous earlier cases, as follows at para. 25 of *Schwabe*:

In determining whether the conduct of the defendant in this case can be categorized as reprehensible and thus warranting an award of special costs, I considered a number of reasonably similar cases and note the following:

- a. *Chu v. Chu*, [2001] B.C.J. No. 2593 (S.C.) - An order of special costs was made against a plaintiff in a family law proceeding who was found to have deliberately lied to the Court on multiple occasions.

- b. S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd., [2000] B.C.J. No. 1042 (S.C.) - The Court awarded special costs on the basis that the conduct of the personal defendant in giving untruthful testimony and concocting evidence in an attempt to mislead the Court was reprehensible.
- c. Chan Estate v. Hwang, [1999] B.C.J. No. 875 (S.C.) - The Court ordered special costs on the basis that, in addition to disbelieving the defendant's testimony, it found that the defendant had presented forged documents to support his defence and had failed to call witnesses who purportedly supported his evidence.
- d. Unternaher v. Wheat Sheaf Inn Ltd. [1998] B.C.J. No. 2568 (C.A.) - The Court of Appeal held that an order of special costs was justified on the basis that the defendants' employees had lied and had attempted to mislead the Court on the issue of liability. Esson J.A. noted in concurring reasons that the decision of whether to award special costs was very much at the discretion of the trial judge and that that particular case should not be taken as authority for the proposition that special costs should be awarded simply because the Court finds that the witnesses on one side were untruthful. That case had been a special situation where the trial judge had expressly found that there had been a deliberate concoction of evidence intended to avoid liability.
- e. Lee v. Kuo, [1996] B.C.J. No. 1858 (S.C.) - Special costs were awarded against two of the personal defendants on the basis that their actions in fabricating a self-serving story, being argumentative, evasive and equivocal, and in constructing evidence to suit their purposes constituted reprehensible conduct.
- f. Fullerton v. Matsqui (District), [1992] B.C.J. No. 2969 (C.A.) - The Court of Appeal ordered special costs in circumstances where a police officer who testified for the defence gave evidence at trial that "was calculated to mislead the trial judge and the jury". In the Court's view, that evidence and the deliberate non-disclosure in the face of repeated public inquiries made the award of special costs appropriate to signal its disapproval of the defendants' conduct.
- g. EFP Holdings Ltd. v. British Columbia, [2003] B.C.J. No. 1360 (S.C.) - The Court held that special costs were not appropriate since the defendant's employee's testimony, although mistaken and misleading, was not a deliberate lie or an attempt to mislead the Court, and thus was not reprehensible conduct that required rebuke or reproof. Moreover, the defendant's failure to attend the mediation and the examination for discovery were also not sufficient to justify an award of special costs.
- h. Perez v. Vancouver (City), [2003] B.C.J. No. 850 (S.C.) - The Court declined to order special costs on the basis that the documents produced by the defendant, although suspicious in nature, were not proven to be forgeries and the defendant had not relied on them when suspicions about their authenticity were raised.

- i. O'Cadlaigh v. Madiuk, [1994] B.C.J. No. 2521 (S.C.) - The Court declined to order special costs in circumstances where the trial judge found the defendant's testimony to be an "unbelievable fabrication".
- [8] It can be seen from the reasoning in Westsea, and from the case review in Schwabe, that Ms. Edwards' conduct does not warrant an award of special costs against her. How the party defending against special costs conducted herself or himself in the course of the litigation is what must be scrutinized. Ms. Edwards' delays have cost her the right to advance her claim further; it is now dismissed. But I do not see reprehensible conduct on her part, despite those delays.
- [9] The application for special costs is dismissed. Ms. Edwards is entitled to her ordinary costs on the costs application.

"MACINTOSH J."

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