

CANADA / JUDGMENT

Niloufari v. Sheena

2022 BCCA 329

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 329 Niloufari v. Sheena COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Niloufari v. Sheena, 2022 BCCA 329 Date: 20220928 Docket: CA48425 Between: Ebrahim Niloufari Appellant (Plaintiff) And Anthony Randeep Sheena and Mandeep Sheena Respondents (Defendants) Before: The Honourable Madam Justice Newbury (In Chambers) On appeal from: An order of the Supreme Court of British Columbia , dated June 27, 2022 (Niloufari v. Sheena, Vancouver Docket M171917). The Appellant, appearing in person: E. Niloufari Counsel for the Respondent: M.R.S. Hufton Place and Date of Hearing: Vancouver, British Columbia September 2, 2022 Place and Date of Judgment: Vancouver, British Columbia September 28, 2022 Summary: Application for leave to appeal dismissed. Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This is an application for leave to appeal an order of a Supreme Court justice dismissing Mr. Niloufari's action for damages arising out of a motor vehicle accident that occurred in March 2015. The plaintiff claimed that the defendants' car rear-ended his car, resulting in injuries to his head, spinal cord, shoulder, neck, back and leg, and emotional distress.
- [2] Mr. Niloufari filed his notice of civil claim in March 2017, acting on his own behalf at the time. The defendants responded through counsel; the plaintiff was examined for discovery in December 2017; the plaintiff retained a lawyer in March 2018; and the defendant Mr. Sheena was examined for discovery in January 2019. A trial was scheduled for October 19, 2020. On June 30, 2020, Mr. Niloufari's counsel filed a notice of intention to withdraw. Shortly thereafter, the plaintiff filed a notice of intention to act in person.
- [3] A trial management conference was held on September 14, 2020, where it was agreed that seven rather than five days should have been allotted for the trial. Accordingly, it was adjourned from October 19, 2020 to June 27, 2022 -- i.e., almost two years.
- [4] A few weeks before the scheduled trial date, another trial management conference was held in May 2022 before Mr. Justice Coval, at which the plaintiff said he was seeking legal counsel and was having difficulty with respect to the availability of his expert witnesses. He raised the possibility of another adjournment application; counsel for the defendants suggested that the liability portion of the trial be separated from the quantum of damages.

- [5] At the trial management conference on May 19, 2022, Coval J. ordered that an application be brought on June 8, 2022 to consider the proposed severance. With respect to adjournment, his order of May 19 stated: The Plaintiff shall file and serve an Application Response to the Defendant's Notice of Application for a liability only trial by June 3, 2022 and may set out his basis for an adjournment of the current trial date in his Application Response materials; The order also specified various dates to be met in the event the trial was not adjourned.
- [6] The plaintiff's response stated in part: The application respondent request (sic) that due to difficulty managing his witnesses, emotional distress, no counsel and unfamiliarity with Rules and procedures of court the trial of this case be adjourned for 8 to 10 months so it could be managed better.
- [7] For their part, the defendants made it clear their position was that the plaintiff was solely at fault for the accident because he had made an "unsafe u-turn directly in front of the Defendant". The defendant Mr. Sheena had testified to this effect in discovery; and according to the notice of application filed by the defendants, the plaintiff had been given a violation ticket after the accident for making an unsafe u-turn. According to the defendants, the police file also indicated that the plaintiff had said at the scene that he had made such a turn with the intention of travelling in the opposite direction. The defendants pointed out that there was a potential savings of time and expense if liability were determined in their favour, since the quantum portion of the trial would be then unnecessary. No expert evidence was expected in the liability portion of the trial.
- [8] The parties came before a master on June 8, 2022. The Master ordered that the trial proceed on the issue of liability only, and dismissed the plaintiff's request to adjourn the trial. I am told that no transcript of the proceedings is available. No appeal was filed in respect of the Master's order.
- [9] On the date set for trial, June 27, 2022, the defendants attended in court. The plaintiff attended by conference phone, and eventually was able to appear by video as well. He told the Court he had muscle pain, a headache, fatigue, anxiety and was depressed and needed an adjournment for six months. (I note that he provided this court with a report from his family doctor dated January 17, 2022 that detailed various soft-tissue type injuries and "post-concussion syndrome and depression" that in the doctor's opinion were likely to have resulted from the accident. The report stated that Mr. Niloufari was "capable of doing everything that he did before the accident"; but that his residual symptoms had plateaued and there was little prospect for "further significant improvement".)
- [10] Returning to June 27, 2002, counsel for the defendants opposed the requested adjournment. The Court stood down briefly to permit counsel to locate his notes so that he could clarify past applications for adjournments, and to allow better audio and video reproduction from Mr. Niloufari's end.

- [11] When the hearing resumed, Coval J. asked Mr. Niloufari if he would be able to conduct his trial virtually. Mr. Niloufari said he could not. Counsel for the defendants recounted the adjournments that had been sought unsuccessfully on June 8 and June 15, 2022. The trial judge asked Mr. Niloufari what he had to say in response to the fact that he had tried unsuccessfully to have the trial adjourned three times in the past. Mr. Niloufari said he had sought an adjournment back in October 2020 because he did not have a lawyer at that time and was looking for one and could not represent himself. He recalled applying for an adjournment only once thereafter, rather than three times in total.
- [12] The judge told Mr. Niloufari that he seemed "very able to represent yourself right now, you are doing a good job, so what is the problem?" The judge inquired whether, if the trial were to go ahead, Mr. Niloufari would prefer to start from home or would rather come to court physically. Again, Mr. Niloufari said he could not come to court and could not conduct his part of the trial "at this time". He requested a six-month adjournment.
- [13] After hearing from counsel, the court stood down until the afternoon. The judge then gave oral reasons for judgment. He noted that the medical evidence did not suggest that Mr. Niloufari was unable to conduct his case; that no expert witnesses were necessary for the liability portion; and that it would not be in the interests of justice to delay the trial further. In the result, he said the case would be dismissed if Mr. Niloufari did not appear in person the next day ready to proceed. When Mr. Niloufari did not appear the next day, the case was dismissed as abandoned.
- [14] The criteria for granting leave are well known: I must consider whether the issue(s) on the appeal has some merit; whether it is of significance to the practice; whether it is of significance to the action; and whether it would hinder the progress of the action itself. Obviously, the viability of the action is in jeopardy in this instance. The issue of adjournment is a fact-intensive question that is unlikely to be of interest to the practice generally. More importantly, the merits of the proposed appeal are in my opinion very low, given the fact that Mr. Niloufari had already delayed the trial of his own claim by years. In all the time that has passed, he has not retained new counsel. If more time were given now to Mr. Niloufari, I consider that he still would not have counsel; nor would his condition have improved significantly. The accident occurred more than seven years ago and memories fade.
- [15] In all the circumstances, I am not persuaded this court should, or would, second-guess the ruling of the trial judge in the exercise of a discretion that engages the ability of the Supreme Court to control its own process. The judge concluded that it would not be in the interests of justice to adjourn yet again. I would dismiss the application for leave. "The Honourable Madam Justice Newbury"

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