

CANADA / JUDGMENT

Noel v. Tatarov

2023 BCSC 62

COURT

Supreme Court of British Columbia

DECIDED

13 January 2023

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2023 BCSC 62 Noel v. Tatarov IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Noel v. Tatarov, 2023 BCSC 62 Date: 20230113 Docket: 93791 Registry: Nanaimo Between: Emily Noel Plaintiff And Valentyna Tatarov and Alex Tatarov Defendants Before: The Honourable Madam Justice D. MacDonald Reasons for Judgment Re: Costs Counsel for the Plaintiff: M.W. Buhler Counsel for the Defendants: N. Parhar Written Submissions of the Plaintiff Received: November 8, 2022 Written Submissions of the Defendants Received: November 21, 2022 Place and Date of Judgment: Nanaimo, B.C. January 13, 2023 Table of Contents Introduction.. 3 Parties' Positions.. 3 Facts.. 4 Legal Principles.. 6 Fast Track Litigation.. 6 Settlement offers. 6 Offers to Settle. 7 Analysis.. 10 Fast Track Litigation.. 10 Settlement Offers. 11 Disposition.. 12

Introduction

- [1] This is a fast track action subject to R. 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] regarding a real estate transaction gone wrong. I issued reasons for judgment on October 25, 2022, ruling in favour of the plaintiff. The reasons can be found at 2022 BCSC 1861.
- [2] These are my reasons for costs. Parties' Positions
- [3] The plaintiff seeks additional and double costs. She requests that I award her costs of this proceeding fixed in the amount of \$27,720, inclusive of taxes and disbursements which are to be assessed. The plaintiff requests that I exceed the fast track costs rule, R. 15-1(15)(c), which limits the amount of costs exclusive of disbursements to \$11,000 for trials that are more than two days. She argues that exceeding R. 15-1(15)(c) is justified in this case because the trial took a total of five days and the defendants did not accept her two settlement offers.
- [4] According to the plaintiff, a significant portion of the delay is attributed to the difficulty of cross-examining the defendants, particularly Valentyna Tatarov. The plaintiff submits that in my reasons for judgment, I concluded that Ms. Tatarov contradicted her evidence from examination for discovery and was untruthful during direct examination. Ms. Tatarov displayed selective memory and clung to her narrative. All of this required extensive cross-examination.

- [5] The plaintiff submits that, before any consideration of double costs, she should receive an increased cost award of \$1,500 for each of the fourth and fifth days of trial. This would result in a total initial cost award of \$14,000, plus a tax amount (discussed after the consideration of double costs), plus disbursements. She contends that an award of double costs is appropriate due to the defendants not accepting her settlement offers. The plaintiff submits that half of the pre-trial cost amounts and all the trial amounts should be doubled.
- [6] The defendants request that the quantum of costs be limited to \$11,000, plus taxes, as per R. 15-1(15)(c). The defendants argue that the rule relating to costs under fast track litigation ought to apply because collectively the trial only lasted four days. In addition, any extra time was due to the plaintiff's new argument of equitable fraud and the calling of an unnecessary witness. Further, the defendants argue they were open to meaningful negotiation since the outset of the action. On June 3, 2022, the defendants tendered an offer to settle which the plaintiff refused.

Facts

- [7] Although the action was brought under R. 15-1, Fast Track Litigation, the trial spanned five calendar days but only amounted to four trial days. How much time was spent at trial is as follows: June 27, 2022 (full day), June, 28, 2022 (full day), June 29, 2022 (full day), July 5, 2022 (45 minutes), and August 8, 2022 (three-quarters of a day).
- [8] The plaintiff made two offers to settle under R. 9-1 to the defendants. The first offer was on December 7, 2021. The second offer was on March 3, 2022. The terms of the offers were the same:
1. The parties shall not take any additional steps in this proceeding except in furtherance of this settlement agreement.
 2. The parties shall complete the Contract of Purchase and Sale of the Property, with a new closing date of February 1, 2022.
 3. The parties shall sign a consent dismissal order, dismissing this proceeding without costs to any party. The consent dismissal order shall be filed after the completion of the Contract.
 4. The plaintiff, on the one hand, and the defendants, on the other hand, shall execute a full and final mutual release of all claims between them, except in relation to this settlement agreement and the terms of the release. The executed mutual release shall be distributed to the parties after the completion of the Contract.
- [9] The defendants refused the offers to settle.
- [10] Examinations for discovery were not conducted on the defendants until April 1, 2022. The defendants did not conduct an examination for discovery of the plaintiff.

- [11] On June 3, 2022, the defendants tendered an offer to settle, via email, with the following terms:
1. The parties will enter into a new Contract of Purchase and Sale of the Property in the amount of \$240,000;
 2. The completion date for the proposed new Contract will be August 31, 2022 or earlier (our clients are willing to be reasonably flexible with your client as it relates to her timing in financing); and
 3. The parties will execute a consent dismissal order with no costs to either party, which order will be filed after the completion of the transaction.
- [12] The plaintiff helpfully set out a chronology of the key steps in this proceeding, together with the dates on which her offers to settle were made: Date Event 2021-05-14 Date that contract was supposed to complete 2021-06-17 Notice of Civil Claim filed 2021-08-13 Response to Civil Claim filed 2021-12-03 Amended Notice of Civil Claim filed 2021-12-06 Notice of Fast Track Action filed 2021-12-07 First offer to settle made 2022-02-14 Notice of Trial filed 2022-03-03 Second offer to settle made 2022-04-01 Examinations for discovery of the defendants conducted 2022-04-27 Trial Management Conference 2022-06-27 First day of trial - trial lasts 5 days
- [13] This chronology did not include the defendants' offer to settle dated June 2, 2022. Legal Principles Fast Track Litigation
- [14] This is a fast track action subject to R. 15-1 of the Rules. Rule 15-1 includes the following provisions concerning costs: Costs
- (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1(10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
- (a) if the time spent on the hearing of the trial is one day or less, \$8,000;
 - (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, \$9,500;
 - (c) if the time spent on the hearing of the trial is more than 2 days, \$11,000. Settlement offers
- (16) In exercising its discretion under subrule (15), the court may consider an offer to settle as defined in Rule 9-1. Taxes to be added to costs
- (17) If tax is payable by a party to a fast track action in respect of legal services, an additional amount to compensate for that tax must be added to the costs to which the party is entitled under subrule (15), which additional amount must be determined by multiplying the amount of costs to which the party is entitled under subrule (15) by the percentage rate of the tax.

- [15] Under R. 15-1(15)(c), the maximum costs available for a trial heard over more than two days is \$11,000. However, it is open to the court to "order otherwise" in cases where special circumstances exist: *Peacock v. Battel*, 2013 BCSC 1902 at paras. 17-18. In *Johal v. Radek*, 2016 BCSC 1170, Justice Voith (as he then was) summarized the applicable law relating to costs in fast track litigation when the trial exceeds three days:
- [10] Under R. 15-1(15)(c), the maximum costs available for a trial heard over more than two days is \$11,000. However, it is open to the court to "order otherwise" in cases where special circumstances exist; *Peacock v. Battel*, 2013 BCSC 1902 at paras. 17-18. Special circumstances have included trials that were longer than the maximum number of days outlined in the fast-track Rules (i.e. more than three days) and where a reasonable offer to settle was made but not accepted.
- [13] *Majewska* is often cited when applying R. 15-1(15), so that \$6,500 is attributed to all matters up to the commencement of trial and \$1,500 is attributed to each day of trial thereafter. These figures are logically reached since \$1,500 is the amount added for each day of trial in subrule (15); see *Duong v. Howarth*, 2005 BCSC 128 at paras. 17-19. In cases where no days of trial have been undertaken -- i.e. an offer to settle is accepted before trial -- the maximum costs award is \$6,500; see *Duong* at para. 19 and *Benz v. Coxe*, 2012 BCSC 1043 at paras. 5, 19.
- [14] A slightly different approach was taken in *Peacock*. In that case, the \$11,000 cap was applied to the first three days of trial and \$1,500 was added for each additional day of trial. *Lam v. Chiu*, 2013 BCSC 1281 and *Sheikh v. Struys*, 2013 BCSC 1148 are other examples of this approach.
- [15] Ultimately, this is a distinction without a difference. Both approaches yield the same figure with respect to additional days of trial; the Court in *Peacock* simply did not expressly allocate \$6,500 to pre-trial costs.
- [26] Generally speaking, the successful party in a fast-track matter is awarded \$6,500 in pre-trial costs and \$1,500 in costs for each day of trial. Offers to Settle
- [16] Rule 9-1 of the Rules governs offers to settle. The relevant portions of the Rule are as follows:
- Definition
- (1) In this rule, "offer to settle" means
- (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
- (i) is made in writing by a party to a proceeding, (ii) has been served on all parties of record, and (iii) contains the following sentence: "The .[party(ies)] , ..[name(s) of party(ies)] , reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding." Offer may be considered in relation to costs

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs. Cost options
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle. Considerations of court
- (6) In making an order under subrule (5), the court may consider the following:
 - (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.
- [17] An award of double costs doubles the "costs", not the disbursements: *Honeybourn v. Aghdasidehaji*, 2022 BCSC 1085 at paras. 51-56.
- [18] The underlying purpose of R. 9-1 was set out in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at paras. 25-35. In summary, the purpose of R. 9-1 is to encourage the early settlement of disputes by rewarding the party that makes a reasonable offer to settle and penalizing the party that did not accept the offer. It should discourage the continuance of doubtful cases or frivolous actions, as well as such defenses. Ultimately it is to reduce the time and expense of unnecessary litigation.

- [19] The court typically considers the factors listed in R. 9-1(6), but they are not mandatory. The court has the discretion to consider any factors it considers appropriate. Nevertheless, the discretion regarding whether to award double costs should be "exercised in a just, principled, and consistent way": *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282 at para. 88.
- [20] The issue of reasonableness in a party's rejection of an offer is not determined by reference to the award that was ultimately made. Rather, it is assessed by reference to the circumstances existing at the time the offer was open for acceptance: *Hartshorne* at para. 27; *Yip v. Saran*, 2014 BCSC 1593 at para. 17.
- [21] Nevertheless, a party who rejects a reasonable offer to settle typically faces some sanction in terms of costs to avoid undermining the importance of certainty and consequences in applying the Rule: *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. As the Court stated:
- [81] I do not quarrel with the general proposition that a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer. To do otherwise would undermine the importance of certainty and consequences in applying the Rule. The importance of those principles was emphasized by this court in *Evans v. Jensen*, 2011 BCCA 279:
- [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

Analysis

Fast Track Litigation

- [22] The starting point for the cost award to the plaintiff is that she is entitled to costs in the amount of \$11,000, plus the tax amount and disbursements: R. 15-1(15) and (17). The court has discretion to award a higher amount if the trial lasts longer than three days: R. 15-1(15)(c): *Johal* at para. 10. Special circumstances have included trials that were longer than the maximum number of days outlined in the fast-track Rules and where a reasonable offer to settle was made but not accepted.

- [23] I accept that the trial lasted four days, not five, but that it exceeded the three days allowed in the Rules. As outlined above, the trial consisted of four full trial days collectively which can be broken down as follows: June 27, 2022 - full day; June 28, 2022 - full day; June 29, 2022 - full day; July 5, 2022 - 45 minutes; and August 8, 2022 - three-quarters of a day.
- [24] The trial exceeded three days because it took some time to cross-examine Ms. Tatarov. However, the trial also exceeded three days because the issue of equitable fraud was raised by the plaintiff. This issue arose in response to the defendants' response. Nonetheless, the plaintiff took no steps to put the defendants on notice of this issue. As a result, the length of the trial was extended, at least in part, due to this issue. In addition, the plaintiff called a witness, Ms. Selzler, who did not add much to the substantive issues at trial.
- [25] The purpose of R. 15-1 is to decrease the cost of litigation where warranted. I accept the defendants' submissions that best efforts were made to minimize the length of the trial and avoid potential delays. There were no pre-trial applications and both parties conducted their case in an efficient manner.
- [26] There is no basis for the Court to exercise its discretion to levy additional costs against the defendants on this ground. I am not prepared to exercise my discretion to award additional costs based on the extra day of trial. Settlement Offers
- [27] The plaintiff submits that she should receive an award of double costs under R. 15--1(16) and R. 9-1 because she made two offers to settle that were rejected by the defendants. The plaintiff argues that if the defendants had accepted one of the offers to settle: · the defendants would not have had to reimburse the plaintiff for the rent payments made under protest, being \$16,888 plus interest; and · the defendants would not have had to pay costs to the plaintiff.
- [28] The court is not to approach the reasonableness of an offer with the benefit of hindsight: Hartshorne at para. 27. The question is whether they were reasonable based on the information known to the recipient at that time. However, a party who rejects a reasonable offer to settle typically faces some sanction in terms of costs to avoid undermining the importance of certainty and consequences in applying the Rule: Wafler at para. 81.
- [29] Here, both parties made settlement offers. The plaintiff's offers were made before any discoveries had been conducted. At this time, neither side had all of the information to which they were each entitled.
- [30] More importantly in this case, I would not characterize the offers tendered by both parties as offers with significant compromise. Although the plaintiff's offers ceded the rental payments of \$7,228 and \$10,126 at the dates of offer (\$16,888 plus interest at trial) and costs, she remained steadfast on the primary issue of the contract price.
- [31] Even less in the spirit of compromise, the defendants' settlement offer was for the plaintiff to agree to a purchase price of \$240,000. At trial, the defendants' evidence was that comparable properties in the area were selling for \$250,000. The defendants wanted to split the

difference between the selling price of \$150,000 and the \$250,000 they believed the Property was worth. As a result, they demanded that the plaintiff pay an additional \$50,000 through a second mortgage which would have amounted to an actual price of \$250,000. Given this background, I consider the defendants' offer of \$240,000 to be in the nuisance category.

[32] In my view, based on the circumstances existing at the time the offers were open for acceptance, it was not unreasonable for the defendants to reject them.

Disposition

[33] The application for double costs is dismissed.

[34] The plaintiff is entitled to \$11,000 in costs, taxes pursuant to R. 15-1(17), and disbursements to be assessed. "D. MacDonald J."

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