

CANADA / JUDGMENT

Ostro v. Kotyk

2020 BCSC 1011

COURT

Supreme Court of British Columbia

DECIDED

7 July 2020

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2020 BCSC 1011 Ostro v. Kotyk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ostro v. Kotyk, 2020 BCSC 1011 Date: 20200707 Docket: E063193 Registry: Vancouver Between: Anastasia Joan Ostro aka Anastasia Joan Kotyk Claimant And Melvin Samuel Kotyk Respondent Corrected Judgment: The text of the judgment was corrected at paragraphs 2 and 3 on July 22, 2020. Before: The Honourable Madam Justice Horsman Reasons for Judgment Counsel for the Claimant: I. Pietrow Counsel for the Respondent: L. Cruickshank Written Submissions Received: Vancouver, B.C. July 3, 2020 Place and Date of Judgment: Vancouver, B.C. July 7, 2020

INTRODUCTION

- [1] The claimant brings an application by written submissions seeking an order for further document production from the respondent in advance of the presently scheduled trial date of August 10, 2020. The application is brought pursuant to COVID-19 Notice #14 ("Notice #14"), which sets out the procedure for the hearing of applications by written submissions during the period of suspension of the Court's regular operations. Among other requirements, an applicant is limited to filing one sworn affidavit in support of the application not to exceed 10 pages including exhibits.
- [2] The respondent filed an earlier application for document production pursuant to Notice #14 seeking production of 18 categories of documents. Master Taylor ruled that the application was not within the guidelines set out in Notice #14. In a memorandum to counsel of June 3, 2020, Master Taylor issued the following direction: Accordingly, it is my ruling that this matter be set for oral hearing at a time and date convenient to both parties. I also observe that matters of this nature with as many documents being sought usually take longer than two hours, so I would suggest that you govern yourselves accordingly, unless many of the subparagraphs have been discontinued or have gone by consent.
- [3] It does not appear that any oral hearing was subsequently set down. The claimant subsequently served this second application for document production, limiting the relief sought to documents in the possession of the respondent's former legal counsel. It is not clear to me from the record whether the documents sought on this application overlap with those sought in the prior application before Master Taylor.

- [4] The claimant has filed an affidavit in support of the application that is superficially compliant with the 10-page limit on affidavit material in Notice #14. I say it is superficially compliant because the claimant has only managed to keep to the 10-page limit by selectively quoting from six previously filed affidavits that are not before me on this application.
- [5] The respondent opposes the relief sought. The respondent says, first, that this application is not properly brought by way of written submissions in light of the June 3, 2020 ruling of Master Taylor. Alternatively, the respondent says that the material sought by the claimant is subject to solicitor-client privilege.
- [6] In my view, for the reasons that follow, this application is not suitable for resolution on written submissions.

BACKGROUND

- [7] As I am declining to adjudicate this application by way of a written submission process, I will only briefly review the factual background by way of explaining my conclusion that an oral hearing is required.
- [8] The parties separated in February 2005 following a lengthy marriage. They were divorced by order of the Court on December 12, 2008. The claimant filed a writ of summons and statement of claim in September 2006. The claim has been amended over time. The current version of the claimant's pleading is the amended notice of family claim filed June 3, 2019.
- [9] There is a significant issue in the proceeding as to whether the parties entered into a final and binding settlement in May 2006. In her amended notice of family claim, the claimant pleads the existence of a written agreement dated May 30, 2006. In his amended counterclaim, filed April 30, 2020, the respondent seeks a declaration that there is no settlement agreement and that any communication between the parties during settlement discussions is covered by settlement privilege.
- [10] On the present application, the claimant seeks production of the files of lawyers who represented the respondent in 2006 and in 2018-19. The relief sought includes production of all communications between these lawyers and the respondent from the time of the retainer until its conclusion.
- [11] The claimant's position is that the respondent has waived privilege by disclosing the existence of legal advice in various affidavits he has sworn over time. The affidavits are not in evidence before me on this application, presumably because the claimant recognizes that this would contravene the requirements of Notice #14. Instead, the claimant has sworn a 10-page affidavit which purports to summarize relevant aspects of the following previously-filed affidavits: · The respondent's 5th affidavit of March 30, 2009; · The respondent's 6th affidavit of May 20, 2009; · The claimant's 4th affidavit of May 28, 2009; · The respondent's 10th affidavit of January 22, 2019; · The respondent's 11th affidavit of July 22, 2019; and · The respondent's 13th Affidavit of July 31, 2019.

- [12] Approximately half of the claimant's affidavit filed in support of the present application consists of a series of selective extracts from these affidavits under the heading "Key Positions Taken by the Respondent in Proceedings".
- [13] The respondent disputes the claimant's version of the litigation history. He has filed an affidavit that provides additional context, including additional selective quotes from the affidavit material.

ANALYSIS

- [14] There are factual disputes as to whether the respondent's affidavit evidence over time amounts to a waiver of solicitor-client privilege over his communications with his counsel. It would be difficult at the best of times to resolve such conflicts on an interlocutory application. It is impossible to do so fairly in this case when the affidavits on which the argument of waiver is founded are not even before the Court.
- [15] Notice #14 directs that only one affidavit be filed in support of an application by written submission, and that the affidavit not exceed 10 pages in length. Faced with this requirement, parties should consider whether the issue on which they seek a court ruling is truly amenable to adjudication by written submissions. An application by written submissions may be suitable to resolve a discrete issue which is not factually or legally complex: *C.G.R. v. J.L.R.*, 2020 BCSC 790 at para. 17.
- [16] The present application is factually and legally complex, and it raises issues of central importance to the parties to this litigation. The questions of the enforceability of the settlement agreement, the admissibility of evidence of settlement negotiations, and the alleged waiver of privilege by the respondent are interrelated. The resolution of these issues will require consideration of a litigation history that dates back over a decade. The importance of solicitor-client privilege as a substantive rule of law cannot be overstated. The parties cite close to 30 cases on the subject in their written submissions, including numerous judgments of our Court of Appeal and the Supreme Court of Canada.
- [17] In my view, the application record does not permit a fair adjudication of these issues through the written submissions procedure.
- [18] I return, finally, to the ruling of Master Taylor that I quoted at the outset of these reasons. I recognize that the application before me is a new one, which appears narrower and which may not overlap with the relief sought before Master Taylor. However, both applications are concerned with disputed issues of document production arising in the same case. In my view, Master Taylor's ruling, even if it was not directly applicable to the second application, provided relevant guidance as to the appropriate method for resolving the issues.
- [19] I therefore direct that this matter be set down for an oral hearing at a time and date convenient to both parties.

[20] Costs are in the cause. "Horsman J."

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