

CANADA / JUDGMENT

Ouellette v. Nguyen

2020 BCSC 366

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 366 Ouellette v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ouellette v. Nguyen,

2020 BCSC 366

Date: 20200313

Docket: M142641

Registry: Vancouver

Between:

Lison Ouellette

Plaintiff

And:

Kim Dien Nguyen and Kim Luan Nguyen

Defendants

- and -

Docket: M176728

Registry: Vancouver

Between:

Lison Ouellette

Plaintiff

And:

Jasvinder Chander

Defendant

- and -

Docket: M176730

Registry: Vancouver

Between:

Lison Ouellette

Plaintiff

And:

Daniuska Loyola Diaz

Defendant

Before: Master Bouck (as Registrar)

Reasons for Decision

Counsel for the plaintiff:

K. Simon

Counsel for all defendants

J. Rusinek, as agent for J. Cahan

Place and Date of Hearing:

Vancouver, B.C.

February 3, 2020

Place and Date of Decision:

Vancouver, B.C.

March 13, 2020

The Appointment

- [1] These reasons address an assessment of the parties' party/party costs following the plaintiff's acceptance of the defendants' offer to settle. At all relevant times, one counsel represented all of the defendants in the actions. The actions were joined for the purposes of trial.

- [2] The parties present a bill of costs for each action together with affidavits of justification. The defendants' affidavits address claims for disbursements only.
- [3] The appointment for the costs assessment was filed on April 30, 2019. As will be further described below, the assessment was delayed due to the dilatoriness of the defendants in identifying issues in dispute and their near complete failure to comply with registrars' orders made at two pre-hearing conferences.
- [4] Counsel of record for the defendants is Mr. J. Cahan. Mr. Rusinek was given conduct of the assessment hearing at the eleventh hour as Mr. Cahan was in trial. Mr. Rusinek and Ms. Simon had constructive discussions just prior to the commencement of the hearing, resulting in a significant narrowing of the issues in dispute. Nevertheless, at the commencement of this hearing, the defendants requested an adjournment of the appointment at least with respect to their bills. The adjournment application was opposed by Ms. Simon who noted that the hearing date had been coordinated with Mr. Cahan's calendar, this was the second attempt at a hearing and, in any event, an adjournment was unnecessary given that the defence had filed affidavits of justification. I declined the adjournment request for several reasons, not the least of which is that no real prejudice to the defence was identified should the assessment proceed. Moreover, adopting the adage that the best indicator of future behaviour is past behaviour, I had no confidence that an adjournment would result in an improved evidentiary record. On the other hand, the plaintiff would suffer prejudice as the defendants may well have delayed payment of Ms. Ouellette's costs until that further assessment was concluded and any set-off determined. Despite receiving late in the day instructions, Mr. Rusinek ably represented his clients' interests.
- [5] The conduct of the defence in relation to the costs issue caused the plaintiff to seek special costs for the assessment hearing. That claim was addressed at the hearing but will need to be the subject matter of further written submissions because of the recently issued judgment in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69.

Background Facts

- [6] The plaintiff prepared written submissions and comprehensive affidavit material. Some of the information below is taken almost verbatim from that written material.
- [7] These actions arise out of three motor vehicle accidents. Ms. Ouellette was the operator of the motor vehicle involved in all three accidents and claims to have suffered various losses and damages due to the negligence of the defendants.
- [8] The first accident which is the subject matter of action no. M142641 occurred on July 13, 2012. Hammerberg Lawyers LLP was retained by the plaintiff in October of that year. A notice of civil claim with respect to that action was filed on April 28, 2014, naming solely Kim Luan Nguyen as the defendant owner/driver. Subsequently, Kim Dien Nguyen was identified as the actual driver and added as a defendant by order of the court. The action was

under Fast Track at an earlier period of time, but removed from that process before the actions were joined for trial.

- [9] The second action (M176728) relates to a motor vehicle accident that occurred on November 27, 2015. The plaintiff retained Hammerberg Lawyers LLP the following month, with a notice of civil claim being issued on August 10, 2017.
- [10] The third action (M176730) arises from a motor vehicle accident on May 9, 2016. Again, the plaintiff retained Hammerberg Lawyers LLP about one month post-accident. The notice of civil claim in this action was also issued on August 10, 2017.
- [11] The plaintiff's injuries as described in the three notices of civil claim were mostly soft tissue in nature with some psychological overlay. The plaintiff pled claims for all the typical heads of damages seen in personal injury litigation. Liability and quantum of damages were put in issue by the defence in all three actions.
- [12] The plaintiff is or was a self-employed interior designer so the income loss claim added some complexity to the proceeding.
- [13] During the course of these proceedings, the plaintiff obtained reports from six medical experts and an economist. Two of the medical legal reports were obtained prior to the second accident. Plaintiff's counsel also consulted an expert business loss evaluator although no report was forthcoming. In addition, plaintiff's counsel exchanged correspondence with several other treatment providers.
- [14] A mediation was held on August 23, 2017, in an effort to resolve all three actions. Obviously, that mediation was not successful.
- [15] On December 5, 2017, the defendants collectively delivered an offer to settle pursuant to the Supreme Court Civil Rules (the "SCCR"). The offer contains the following provisions with respect to costs:
 - 1. The Plaintiff is entitled to costs assessed in accordance with Rule 14-1 (1)(f) or Rule 15-1 (15) to (17) of the Supreme Court Civil Rules, B.C. Reg. 168/09 (the "Civil Rules") and the reason for judgment in *Bowen v. Martinec*, 2008 BCSC 104, and necessary and reasonable disbursements to the date of the delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules;
 - 2. The Defendants, Kim Dien Nguyen and Kim Luan Nguyen are entitled to their costs of Action #M142641 assessed in accordance with Rule 14-1 (1)(f) or Rule 15-1 (15) to (17) of the Civil Rules and the reasons for judgment in *Bowen v. Martinec*, 2008 BCSC 104, and necessary and reasonable disbursements from the date of the delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules;

3. The Defendant, Jasvinder Chander is entitled to her costs of Action #M176728 assessed in accordance with Rule 14-1 (1)(f) or Rule 15-1 (15) to (17) of the Civil Rules and the reasons for judgment in *Bowen v. Martinec*, 2008 BCSC 104, and necessary and reasonable disbursements from the date of the delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules; and
 4. The Defendant, Dariuska Loyola Diaz is entitled to her costs of Action #M176730 assessed in accordance with Rule 14-1 (1)(f) or Rule 15-1 (15) to (17) of the Civil Rules and the reasons for judgment in *Bowen v. Martinec*, 2008 BCSC 104, and necessary and reasonable disbursements from the date of the delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules.
- [16] The offer to settle appears to have been faxed to the offices of the plaintiff's counsel at about 3:00 p.m. that day.
- [17] Meanwhile, a trial date in the Nguyen action had been reserved for April 2018.
- [18] The three actions were joined for trial pursuant to an order made February 8, 2018 but filed in the Diaz action only. A notice requiring trial by jury was filed in each action on or about February 20, 2018.
- [19] On February 23, 2018, Mr. Cahan assumed conduct of the defence in all three actions. The April trial date was adjourned, with a new date reserved for February 25, 2019. A second jury notice was filed by the defence in the Nguyen action only. The trials in the three actions were expected to consume 15 days before a judge and jury.
- [20] Another attempt at resolving the actions by way of mediation took place on January 29, 2019. It is not disputed that the defendants' instructing insurance adjuster breached a confidentiality agreement following the mediation by relaying certain information to third parties.
- [21] The plaintiff accepted the defendants' offer to settle five days before the joined trials were set to begin. Neither party has applied to the court for an order with respect to costs.

Post-settlement events with respect to the assessment of costs

- [22] The plaintiff first provided the defendants with bills of costs at the second mediation. Two days later, the plaintiff delivered supporting invoices for various disbursements. No meaningful discussions took place, resulting in the plaintiff taking out this appointment. The defendants' bills were provided to the plaintiff on April 12.
- [23] A pre-hearing conference on the appointment was conducted by Registrar Nielson on April 30, 2019, resulting in the following orders or directions:
1. By May 21, 2019, both Parties will advise the other what they take issue with and why and if further particulars or documents are required they be requested by that date.

2. By June 4, 2019, the Parties are each to provide the other with whatever particulars and documents have been requested.
 3. June 18, 2019 both Parties are to exchange positions in writing both on the items and disbursements.
 4. By July 2, 2019 both Parties will provide their Affidavits of justification.
 5. By July 9, 2019 either Party can provide a reply Affidavit if required.
 6. Within 3 days of receipt of one another's Affidavits the Parties are to advise whether cross examination is required.
 7. Either Party may request a further Pre-Hearing Conference if required.
- [24] The plaintiff complied with the terms of this order, but the defendants, for the most part, did not. While the defendants responded to some of the plaintiff's requests for additional information or documentation, particulars of objections were never delivered nor was an affidavit of justification forthcoming as required under the order.
- [25] As a result of the defendants' failure to comply with Registrar Nielsen's order, the plaintiff set down a further pre-hearing conference. On September 11, 2019, the parties appeared before Master Elwood who issued these additional orders and directions:
1. By 4:00 pm on September 18, 2019, counsel for the Defendant is to provide further particulars requested by the Plaintiff in correspondence dated May 21, 2019 and July 26, 2019, and advise the Plaintiffs in writing of the units and disbursements in issue.
 2. By October 2, 2019, counsel for the Plaintiff will identify and advise the Defendants in writing of the units and disbursements in issue, and may provide an updated position on particulars.
 3. By 4:00 pm on October 10, 2019, counsel for both Parties shall file and exchange any Affidavits they intend to rely on at the Hearing on October 31, 2019.
 4. Counsel for both Parties may speak to his or her Affidavit of Justification at the Hearing on October 31, 2019.
 5. By October 17, 2019, either Party can provide a reply Affidavit if required.
 6. Any Affidavit exchanged later than the deadline outlined above, shall not be considered at the Hearing on October 31, 2019 without an explanation acceptable to the Registrar.
 7. Costs incurred by the Plaintiff for the Pre-Hearing Conference, in any event of the outcome, shall be paid forthwith by counsel for the Defendant.
- [26] Despite follow up reminders from plaintiff's counsel, the defendants did not comply with their obligations under Master Elwood's order. Defence counsel was non-responsive to written and telephone communications from plaintiff's counsel.

- [27] The result of the defendants' non-compliance is that the plaintiff prepared voluminous affidavit material justifying each and every tariff item and disbursement claimed in the bills. Ms. Simon's affidavit of justification sworn October 10, 2019 in the Nguyen action is 440 pages long.
- [28] On October 21, 2019, the defence filed affidavits of justification in each of the actions. The affidavits are sworn by a legal assistant and merely exhibit third party invoices or the law firm's internal records as justification for the disbursements incurred.
- [29] The assessment hearing set for October 31, 2019, did not proceed, as I understand, due to lack of judicial resources.
- [30] The plaintiff was not made fully aware of the specific objections to her bills of costs until the morning of February 3, 2020.
- [31] No reasonable excuse or explanation has been offered by the defendants for their non-compliance with the orders of Registrar Nielsen and Master Elwood. The excuse proffered on February 3 was that Mr. Cahan has a busy practice and was otherwise engaged when the deadlines specified in the orders arrived. That excuse, which reflects poorly on either the defendants' or their counsel's appreciation of the importance of court orders, does not explain why no attempt was made to fully address the outstanding questions or issues after the appointment was adjourned in the fall of 2019.

The Disputed tariff items and disbursements

- [32] The parties' bills and submissions reflect an understanding that the offer to settle governs entitlement to costs. That is, the plaintiff is entitled to costs and disbursements to the date of the delivery of the offer and the defendants are entitled to costs thereafter. The plaintiff's bills reflect costs and disbursements incurred up to and including December 5, 2017. The defendants' bills describe the costs and disbursements as those incurred from December 5, 2017 to February 20, 2019. Given that the plaintiff accepted the defendants' offer without qualifications and there is no contrary order of the court, I conclude that she is only entitled to costs up to December 5, 2017.
- [33] I will only address the items, units and disbursements that are in dispute between the parties.
- [34] A common complaint in the costs dispute is that the other party is attempting to receive double recovery given that the conduct of the two later actions was so interwoven with the processes necessitated by the first action. Section 9 of Appendix B governs the circumstances where no order has been made apportioning the costs between multiple actions joined for trial. In the present circumstances, the registrar is to apportion the costs between the three actions taking into consideration the [necessary and proper] work, and based on the evidence presented, that was done in relation to each of the actions: *Farrokhmanesh v. Sabib*, 2010 BCSC 497 at paras. 7 and 8.

A. The Plaintiff's Bills

- [35] While the onus is on the plaintiff to prove the necessity, propriety and/or reasonableness of her costs, Ms. Ouellette is somewhat disadvantaged in terms of marshalling all available evidence due to the defendants' failure to comply with previous orders. That being said, the plaintiff has provided sufficient evidence to allow the registrar to conduct an assessment of her bills. In any event, the defendants' objections to the plaintiffs' claimed costs turned out to be relatively modest.

The Nguyen bill

- [36] On this bill, the defence only contests the number of units claimed under item 2. The plaintiff claims 20 units while the defence says that 15 units is more appropriate. The necessary work conducted between August 28, 2014 and December 5, 2017 is described in Ms. Simon's affidavit of justification. I am satisfied that 20 units is a reasonable allowance for this work, particularly given the amount of work that pre-dated the commencement of the second action in August 2017. The plaintiff's claim of 20 units is allowed.
- [37] With respect to the photocopying and facsimile charges, the plaintiff revised the claims presented in the bill of costs and provided evidence of the same. Mindful of the law pronounced in *Sovani v. Jin et al.*, 2006 BCSC 855, I am satisfied that an allowance of \$1,197.25 for photocopies is reasonable in the circumstances of this case. I am also persuaded that the amount of \$131.10 for the facsimile charges is reasonable.
- [38] The plaintiff was examined by Dr. D. Cameron, a neurologist, on December 4, 2017, pursuant to a request made by counsel for a written medical-legal opinion. That report, dated December 16, 2017, was delivered to plaintiff's counsel but never served under the SCCR nor disclosed to the defence except as a privileged listed document. The affidavit material describes Ms. Simon's rationale for not serving the report, although the real issue here is whether obtaining the report itself was necessary or proper at the time that the disbursement was incurred. I find that a request for the medical legal opinion was at least proper if not necessary.
- [39] However, the defence denies that Dr. Cameron's charges are properly claimed as the date of the report falls after the delivery of the offer to settle. The plaintiff's justification for claiming the expense is that the date of the report is merely reflective as to when the expert's opinion was transcribed. Dr. Cameron's invoice breaks down his charges between the exam (\$1,300), a review of records (\$2,400) and preparation of the medical legal report (\$1,761) but no specific dates are attributed to each task. I allow only those charges that were, on the evidence, incurred before December 5, 2017. Accordingly, Dr. Cameron's charges are allowed at \$3,885, including GST.

- [40] Dr. Janke is a psychiatrist who prepared two medical legal opinions: the first dated September 29, 2016; and the second dated January 12, 2018. In each case, Dr. Janke has charged \$4,800 for reviewing materials, performing an assessment interview and preparing the corresponding medical legal report. The second assessment was originally scheduled for November 21, 2017 but rescheduled to December 5, 2017. Dr. Janke charged \$600 per hour for preparation and dictation of his report.
- [41] As with Dr. Cameron's charges, the defence says that no allowance should be made for charges incurred once the offer to settle was delivered. In addition, the defence submits that the second report of Dr. Janke is repetitive of the first report and the entire assessment was unnecessary given the prognosis in that first report.
- [42] I am satisfied on the evidence that a follow-up or reassessment of the plaintiff by Dr. Janke was at least proper if not necessary in this case. However, I also find that the expenses for obtaining the second medical-legal report were incurred after the date of the offer to settle and, as such, will not be allowed.

The Chander bill

- [43] The defence takes issue with the units claimed by the plaintiff for tariff items 1, 2, 10 and 11 as well as the amounts claimed for photocopies and facsimile.
- [44] With respect to tariff items 1 and 2, the defence contends that the plaintiff would have spent minimal time on these tasks given the parallel steps being taken in the first action. I disagree. The plaintiff has delineated the work performed for this particular action from that which was necessary and proper work in the two other actions. I allow the units claimed by the plaintiff.
- [45] Similarly, I am satisfied on the evidence that the units claimed for items 10 and 11 reflect the objective time required to conduct the document discovery exercise. Those units are allowed as presented.
- [46] The photocopying and facsimile charges are modest. Given the description in the evidence of the communications that flowed between the parties and between the plaintiff's counsel and her chosen experts, I am satisfied that the amounts claimed are reasonable and will be allowed.

The Diaz bill

- [47] The defence's objections to this bill mirror those made with respect to the Chander bill. The same allowances are made as with the Chander bill for the same reasons.

B. The Defendants' Bills

- [48] Not surprisingly, Mr. Rusinek was not in a position to speak to the tariff items except in a very general way.

- [49] The registrar may rely on experience in assessing the reasonableness of certain categories of disbursements. The registrar may also, at times, rely on the unsworn but uncontroverted statements of counsel in justifying a particular item or charge. However, where strict proof of entitlement to a particular charge or item is required, there is no alternative but to provide supporting evidence.
- [50] Ironically, some of the plaintiff's evidence can be relied upon to put the necessity and propriety of disputed tariff items and disbursements in context. However, that evidence does not provide the registrar with sufficient information to support most of the defendants' claims.
- [51] As with the plaintiff's bills, the defendants' bills mirror one another on the tariff items claimed.

The Nguyen bill

- [52] The defendant claims 10 units for item 2, being the correspondence, conferences and investigations that were conducted between December 5, 2017 and February 20, 2019. According to the plaintiff's evidence, the litigation steps taken during this period included the trial adjournment and preparation for the second mediation. The defendant is compensated for these steps by other tariff items. The registrar is then left to guess how much time was reasonably incurred in the steps covered by item 2. The plaintiff points to the communication challenges with the defendants and their counsel that have plagued this proceeding. In those circumstances, I accept the plaintiff's submissions that only 2 units ought to be allowed.
- [53] With respect to items 17 and 18, Mr. Rusinek identifies the number of the defence experts but had little to offer (again, through no fault of his own) on the extent of any instructions or conferences required. I allow 2 units for item 17 and no units for item 18. The only source of objective information with respect to the defence's process to contact and interview witnesses are the two Trial Briefs filed subsequent to the offer to settle. Those Trial Briefs are not helpful as the non-expert witnesses are identified only in generic terms and "TBD".
- [54] Similarly, with respect to items 31 and 32, I accept the plaintiff's submissions and allow 1 unit for item 31 and 2 units for item 32.
- [55] The plaintiff submits that the instructing adjuster's breach of the mediation confidentiality agreement disentitles the defendants to any units for items 45 and 46. I disagree. The task of the registrar is to determine whether a step was necessary or proper in the prosecution or defence of the proceeding. In my view, the registrar has no jurisdiction to disallow an item because of a party's particular conduct. It appears that this remedy can only be provided by the court and the registrar is not the court: 567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.

- [56] In correspondence with defence counsel, the plaintiff agreed that some allowance ought to be made for the charges of various defence experts. However, Ms. Simon requested (and indeed required) better information addressing the necessity, propriety or reasonableness of those charges. That information was not forthcoming. At the assessment hearing, the plaintiff was less willing to concede any allowance for the charges. That is a fair position for the plaintiff to take in protecting her interests.
- [57] While a detailed invoice can sometimes provide a basis for the registrar's assessment of reasonableness, the absence of supporting information or simply a very general invoice does not. It is not enough to make a bald statement that such expenses were either necessary or proper in the conduct of the proceeding: *Bereti v. Schuette*, [1980] B.C.J. No. 802. The result of this omission is the disallowance of a charge: *Ward v. Pasternak*, 2015 BCSC 1190. In the result, the absence of evidence or attestations from the responsible lawyer addressing the necessity and propriety of any charges leads me to allow only those disbursements and corresponding amounts that the plaintiff agrees to pay.
- [58] Accordingly, the following charges are disallowed in their entirety: mileage and car rental, agents' filing fee, facsimile charges, black and white photocopies/printing, Fast Track Investigations Ltd., Mark Szelekey, Dr. Mark Riley and Crowe McKay LLP, QL Systems Limited, court fees, postage, scanning and the filing of the second jury notice. On that last charge, I agree with the plaintiff that a second notice was not required.
- [59] The charges for Dr. W. Craig are allowed as agreed to by the plaintiff.

The Chander bill

- [60] As with the plaintiff's claims, some allowance will be made for the investigations required for each accident as well as steps that might have been unique to a particular action. I allow 2 units for item 2. Items 17, 18, 31, 32, 45 and 46 are assessed on the same basis as the Nguyen bill. While there would be some duplication of work with respect to the trial management conference (the briefs are identical in content) and the mediation, the three actions were not consolidated and each could be the subject of a separate trial or mediated settlement. There is no evidence supporting a claim for item 10 so no units are awarded.
- [61] The amounts claimed for agents' filing fees, black and white photocopies/printing, colour photocopies/printing and scanning are disallowed given the absence of any proper justification for these charges.

The Diaz bill

- [62] Items 17, 18, 31, 32, 45 and 46 are also assessed on the same basis as in the Nguyen bill. As with the Chander bill, there is no evidence to support a claim under item 10 and no units are awarded for that step. The facsimile charges, agents' filing fees, black and white photocopies/printing and scanning are similarly unsubstantiated and disallowed. The invoices or internal records of defence counsel's office are of no assistance to the registrar as those records do

not address the necessity or propriety of the disbursement in the conduct of the proceeding. The photocopying charge is allowed at \$40.00 as there is some evidence that photocopying was necessary at least in the preparation of trial briefs and other post-December 5, 2017 steps taken in the proceeding.

Cost of the Assessment

- [63] The only issue left to be determined is the respective parties' entitlement to costs relating to the assessment process. I note that Master Elwood has already made an order in that regard. This final issue will determine the net amount of costs owed to the plaintiff pursuant to the offer to settle.
- [64] Although I doubt that a registrar has jurisdiction to order special costs for the assessment process, further written submissions are necessary given the development of the law during my deliberations. Accordingly, the parties are directed to provide written submissions as to both their respective entitlements to costs of the assessment process, as well as the final amount owing to each party. A certificate of costs may be included with the submissions. The submissions shall be delivered to the Manager of Supreme Court Scheduling in the Victoria registry by no later than 4:00 p.m. on April 9, 2020. If submissions are not received by April 9, I will assume that these outstanding questions are resolved. If a party fails to deliver submissions by that date, I will assume that no issue is taken with the other party's submissions duly received.

"Master C.P. Bouck"

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