

CANADA / JUDGMENT

Pandya v. Currie

2024 BCSC 2344

COURT

Supreme Court of British Columbia

DECIDED

23 December 2024

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2024 BCSC 2344 Pandya v. Currie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pandya v. Currie,

2024 BCSC 2344

Date: 20241223

Docket: M213938

Registry: Vancouver

Between:

Jay Gaurang Pandya

Plaintiff

And

Bridget Marie Currie, Sandip Kaur Dhillon, and Jasleen Kaur Dhillon

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice W.A. Baker

On appeal from: An order of the Supreme Court, dated October 29, 2024 (Pandya v. Currie, M213938)

Reasons for Judgment

Counsel for Plaintiff:

E.C. Moore

Counsel for Third Party:

D.W. Framingham

Place and Date of Hearing:

Vancouver, B.C.

December 13, 2024

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2024

- [1] This is an appeal from the order of Associate Judge Robinson, made October 29, 2024, in which the plaintiff's application to renew his notice of civil claim was dismissed.
- [2] The notice of civil claim in this matter was filed July 12, 2021. It is a claim for damages arising out of an accident on July 29, 2019. There are three defendants: Ms. Currie, Ms. Sandip Dhillon and Ms. Jasleen Dhillon. The Dhillons were served in accordance with the rules. The only issue before Robinson A.J. was whether the claim against Ms. Currie ought to be renewed.
- [3] The standard of review on this appeal is governed by *Kondori v New Country Appliances*, 2017 BCCA 164 at para. 16:
- [16] An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order is clearly wrong. Where the ruling of the master raises questions that are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, *Abermin* established that a rehearing in Supreme Court is the appropriate form of appeal.
- [4] The effect of the Associate Judge's decision in this case is to finally determine the plaintiff's claim against Ms. Currie. Therefore, I find that on this appeal I will proceed by way of a rehearing.
- [5] On this appeal, the third party ICBC takes no position. Similarly, the Dhillon defendants did not appear on this appeal.

Background

- [6] On July 21, 2021, plaintiff's counsel, Diamond & Diamond, served ICBC pursuant to s. 22 of the Insurance (Vehicle) Act, RSBC 1996, c. 231. On August 5, 2021, ICBC advised plaintiff's counsel that it would require personal service on the defendants, and ICBC provided counsel with the addresses it had on file for the defendants.
- [7] On June 28, 2023 ICBC filed a third party claim denying liability to indemnify Ms. Currie. It also filed a substantive response to civil claim.
- [8] The Dhillon defendants were served on August 15, 2021. They have appointed counsel, but have not filed a response to civil claim.
- [9] The plaintiff was not able to serve Ms. Currie at the address provided by ICBC, and sought more information from ICBC. On August 23, 2021, ICBC provided a PO Box for Ms. Currie and advised that Ms. Currie had been sent an email requesting her street address.
- [10] Another service attempt was made on August 30, 2021, which was not successful. Counsel followed up with ICBC on October 28, 2021 about Ms. Currie's address. ICBC did not respond.
- [11] Diamond & Diamond made no further service attempts, and the claim expired on July 12, 2022.
- [12] On October 16, 2023, ICBC served on Diamond & Diamond a demand for the plaintiff's documents, including the police file, the clinical records of the plaintiff, MSP documents, employment records, tax returns, etc. In short, ICBC's demands were the typical demands of an insurer that is defending a plaintiff's personal injury claim.
- [13] The plaintiff retained new counsel, Brij Mohan & Associates, on October 2, 2023. There were delays in transferring the file to the new counsel. Brij Mohan only received the file in February 2024.
- [14] Brij Mohan could not locate evidence of service on Ms. Currie, and made enquiries with Diamond & Diamond. Diamond & Diamond finally responded to Brij Mohan on June 21, 2024, advising that they had let service lapse, and made a report to the Lawyers Indemnity Fund ("LIF").
- [15] Brij Mohan incorrectly assumed that LIF needed to become involved and provide instructions before steps could be taken to renew the claim. In September 2024, Brij Mohan followed up with LIF and discovered that LIF took the position it was Brij Mohan's responsibility to serve Ms. Currie.
- [16] On October 11, 2024 Brij Mohan filed the application to renew the notice of civil claim. The application was heard on October 29, 2024.

- [17] Before the Associate Judge on October 29, 2024, counsel for the plaintiff did not put any evidence before the court in relation to the lapsed service deadline, the actions of Diamond & Diamond, or the actions of Brij Mohan explaining the delay between when they learned of the lapse in service and when they brought the application.

Related action

- [18] On October 30, 2020, the Dhillons filed an action (Chilliwack M38284) against Ms. Currie arising out of the same accident as in the claim by the plaintiff Pandya. Alternate service on Ms. Currie was ordered in that action.
- [19] On August 27, 2021, ICBC filed a third party action and substantive response to civil claim on the same basis as in the within action.

Issues on appeal

- [20] The following issues are raised in this appeal:

- a) Should fresh evidence be admitted?
- b) Did the Associate Judge err in refusing to allow the notice of civil claim to be renewed?

Should fresh evidence be admitted?

- [21] The details of the actions taken by Diamond & Diamond are set out in the affidavit of Mr. Chang, filed in this appeal. The details of the actions taken by Brij Mohan are set out in the affidavit of Mr. Kang, filed in this appeal. These affidavits were not before the Associate Judge hearing the application.
- [22] The usual test for the admission of new evidence arises from *Palmer v The Queen*, [1980] 1 S.C.R. 759 at p. 775, where the court sets out the following principles:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [23] Following these general principles, the test for the admission of new evidence in an appeal from a master, as the associate judges were then known, was set out in *L.J.B. v R.W.B.*, 2002 BCSC 1552 at para. 13-14:

- [13] The ordinary rule is that fresh evidence cannot be introduced on an appeal of a master's order unless the applicant demonstrates that the evidence was not available at the time of hearing despite due diligence. It must also be evidence that might have affected the ruling had it been put before the court of first instance. The rule can be more relaxed on an interlocutory appeal. (See *MacMillan Bloedel v. Mullin* (1985), 1985 CanLII 592 (BC CA), 66 B.C.L.R. 258 (C.A.)).
- [14] The ultimate question is whether it is in the interests of justice to introduce the fresh evidence. If so, this court is entitled to rehear the matter. (See *Culbert v. Agusti*, [1993] B.C.J. No. 2238 (S.C.), *Leggatt, J. and Abermin Corp. v. Granges Exploration Ltd.* (1990), 1990 CanLII 1352 (BC SC), 45 B.C.L.R. (2d) 188 (S.C.)).
- [24] L.J.B. has been accepted by in many decisions as the correct statement of the law.
- [25] In his affidavit, Mr. Kang explained why he did not secure affidavit evidence regarding the conduct of the law firms in attempting to serve the claim on Ms. Currie:
- I did not secure an affidavit from the plaintiff's former counsel explaining his error in failing to personally serve Currie prior to the expiration of the NOCC in support of the Renewal Application. I did not do so because I did not appreciate at the time that such an affidavit is typically included in an application where a party is arguing that the failure to effect service is attributable to his or her solicitor.
- [26] Mr. Kang confirms that the plaintiff has at all times wanted to proceed expeditiously with the litigation, and the delay in bringing the renewal application, and his failure to bring the evidence of the lawyers before the court on the renewal application, is attributable solely to him, and not to the plaintiff.
- [27] There is no dispute that the evidence of the lawyers is not new, and could have been adduced at trial. This matter will be resolved in relation to the second, third and fourth principles outlined in *Palmer*, and the interests of justice generally.
- [28] I am satisfied that the evidence of the lawyers as to the history of the attempts to serve Ms. Currie, the steps taken once the lapse in service was recognized, and the existence of the related proceedings, is relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- [29] I am satisfied that the evidence of the lawyers is credible.
- [30] I am satisfied that the evidence of the lawyers, when taken with the other evidence adduced on the application, could be expected to have affected the result before the Associate Judge
- [31] ICBC takes no position on this application. ICBC has filed a response to the plaintiff's claim, and has been proceeding with the normal steps in defending the claim since 2023.
- [32] The failure to serve Ms. Currie, and the failure to renew the notice of civil claim in relation to Ms. Currie are faults attributable to counsel, and not to the plaintiff himself.

[33] I find the interests of justice require the admission of the lawyers' affidavits to ensure that the plaintiff's application is determined on all of the relevant evidence, and the plaintiff is not prejudiced further by the faults of his counsel.

[34] I will consider the new evidence in this hearing to determine whether the decision below is correct.

Did the Associate Judge err in refusing to allow the notice of civil claim to be renewed?

[35] In making his decision, the Associate Judge noted that no explanation was given for delay between Brij Mohan taking the file in October 2023, and the discovery by the new law firm that there was no evidence in the file that service had been effected, and no explanation was given for the lapse of seven months between March 2024 and October 2024. The Associate Judge commented that there was no evidence that Ms. Currie had notice of the claim before it expired. The Associate Judge noted that Ms. Currie was not given notice of the application and therefore was not able to express any concerns which would allow him to determine prejudice. The Associate Judge concluded that four out of the five factors to be considered on an application to renew a claim weighed against granting the renewal.

[36] The plaintiff submits that in balancing the five factors, the Associate Judge failed to assess the application in light of the ultimate question, namely whether the interests of justice require the renewal of the claim.

[37] I have the benefit of materials that were not before the Associate Judge. I find that many of the explanations lacking before the Associate Judge have been answered in the affidavit material.

[38] In addition, I agree with the plaintiff that the overarching consideration on an application for a renewal of a notice of civil claim is to see that justice is done: *Sutherland v. McLeod*, 2004 BCCA 653 at para. 29; *Lowe v. Christensen* (1984), 54 B.C.L.R. 88 (CA) at pages 91-92.

[39] In *Sutherland*, the court of appeal addressed a case with facts closely aligned with the facts before me. In that case, due to the fault of counsel, the plaintiff's writ was allowed to expire. The court accepted the five factor test set out in *Bearhead v. Moorhouse* (1977), 3 B.C.L.R. 81 (S.C.) [*Bearhead*], and which was referred to by the Associate Judge below:

[18] Although several cases were cited to the chambers judge during submissions, the parties relied particularly on remarks in *Bearhead v. Moorhouse* (1977), 1977 CanLII 346 (BC SC), 3 B.C.L.R. 81 (S.C.), appeal dismissed (1978), 1978 CanLII 360 (BC CA), 5 B.C.L.R. 380 (C.A.), in which the judge in that case said that he relied on five factors, namely:

- a) Was the application brought promptly?
- b) Did the Defendant have notice of the claim?
- c) Has the Defendant suffered prejudice?

- d) Is the failure to serve the writ attributable in any respect to the actions of the defendant?
 - e) Was the failure to serve the writ attributable to the plaintiff?
- [40] On the question of whether the claim was promptly brought, the court in Sutherland, at para 27, held that the relevant time is the period between when the plaintiff learned the claim had not been renewed, and when the application was brought. In the case before me, while the plaintiff's new counsel could not find evidence of service in the file when they reviewed it in March 2024, it was not until LIF became involved in June 2024 that plaintiff had notice that Diamond & Diamond failed to renew the notice of civil claim.
- [41] As a result, I find that on June 21, 2024 the plaintiff learned the notice of civil claim had not been renewed. There was a further delay, again attributable to the misunderstanding of counsel, until September 2024 when new counsel learned that LIF expected him to bring the application. The application to renew was brought promptly thereafter, on October 11, 2024. I find that, in the circumstances, the application was brought promptly.
- [42] While the defendant Ms. Currie has not had notice of this claim, her insurer has had notice of the claim, and has responded to it. Ms. Currie had notice of the parallel action brought by the Dhillons, although I note that service on her was made by substitutional service. There is no evidence that Ms. Currie can be located, and service on her will likely have to be made by a substitutional order in this case also. As in the case of Sutherland, the real contest is between the plaintiff and ICBC, with Ms. Currie being the nominal party only.
- [43] Further, ICBC has contested liability in this action pursuant to s. 77 of the Insurance (Vehicle) Act, which effectively allows ICBC to step into the shoes of an insured in the conduct of its defence.
- [44] There is no evidence of any prejudice suffered by ICBC, given that it was served, has responded, and has taken steps in defending the action. ICBC takes no position on this application, and has produced no evidence to the effect that its ability to mount an effective defence has been prejudiced.
- [45] While I cannot say that the failure to serve the notice of civil claim is attributable to the defendant Ms. Currie, I do note that ICBC failed to respond to a request for contact information by counsel for the plaintiff. I do not say that ICBC has a positive obligation to assist in serving its insureds. At the end of the day it is the responsibility of plaintiff's counsel to ensure service is made. However, the failure of ICBC to respond to a request from counsel may have contributed to this matter falling off the radar of Diamond & Diamond.
- [46] The failure to renew the notice of civil claim cannot be attributed to the plaintiff himself. The failure lies at the feet of his counsel. In Sutherland, the court held:
- [43] Should the writ not be renewed, the plaintiff will lose a valuable cause of action for what might be a substantial claim through no fault of her own. She neither contributed to nor condoned the errors of her solicitors or the resulting delays. On the other hand, if the writ

should be renewed, ICBC will not suffer any material prejudice. The balance of justice is far from even and I need say nothing about the submission that the plaintiff's right of action against her legal representatives is therefore a relevant factor. In my view, the interests of justice require that the writ be renewed.

[47] In Sutherland, the court relied on the court of appeal decision in *Lowe v Christensen*. That decision speaks to the considerations of the court in assessing whether justice would be done if a renewal was not granted:

[28] I refer particularly to *Lowe v. Christensen* at 91-92, where this was said:

Two of the observations are particularly relevant here [p. 750]:

In an application to renew a writ of summons, I think the basic fact which the court must keep in mind is that it is primarily concerned with the rights of litigants and not with the conduct of solicitors. Non-compliance with the Rule requiring service of a writ of summons within 12 months of its issue is an irregularity. Under R. 11 the court is given a wide and unfettered power to relieve against that irregularity by renewal of the writ. . .

In an application to renew a writ of summons the basic question which faces the court is, what is necessary to see that justice is done? That question must be answered after a careful study and review of all the circumstances. If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant's defence, then the writ should be renewed. This should be done even if the only reason for non-service is the negligence, inattention or inaction of the plaintiff's solicitors and notwithstanding that a limitation defence may have accrued if a new writ was to be issued. If the non-service of the writ was due to the personal actions of the plaintiff, that, of course, would be a fact to be considered by the court. Each case should be considered in the light of its own peculiar circumstances and the court, in the exercise of its judicial discretion, should be determined to see that justice is done.

[48] I find that if the claim is not renewed, the plaintiff would suffer an obvious and substantial injustice through the loss of his claim against Ms. Currie. I find that the defence, represented by ICBC, will not suffer any prejudice or injustice.

[49] For these reasons, including my consideration of the five Bearhead factors, I find that it is in the interests of justice that the notice of civil claim is renewed in this case.

[50] The appeal is allowed, and the notice of civil claim filed July 12, 2021 is renewed for six months.

[51] I also grant the plaintiff leave to serve Ms. Currie in accordance with the terms set out in para. 2 of the notice of application, and set the time for Ms. Currie to respond in accordance with para. 3 of the notice of application.

[52] I make no order for costs in favour of the plaintiff, given that the application was not opposed, and the application was made necessary by the conduct of the plaintiff's solicitors and not the defendants in this action.

"W.A. Baker J."

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