

CANADA / JUDGMENT

Qiao v. Owners, Strata Plan LMS 3863

2020 BCSC 1500

COURT

Supreme Court of British Columbia

DECIDED

8 October 2020

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2020 BCSC 1500 Qiao v. Owners, Strata Plan LMS 3863

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Qiao v. Owners, Strata Plan LMS 3863,

2020 BCSC 1500

Date: 20201008

Docket: S125576

Registry: Vancouver

Between:

Man Qiao, a.k.a. Caren Qiao

Plaintiff

And

Owners, Strata Plan LMS 3863, Alltek Patrol Corp.,

Satvir Gill, Jacky Cheng

Defendants

Before: The Honourable Madam Justice Donegan

Reasons for Judgment on Costs

Defendants' Written Submissions on Costs Received:

July 24, 2020

No other appearances

Place and Date of Trial:

Vancouver, B.C.

April 8-12 and 15-18,

July 29-30, September 9-13, 2019 and January 6-8, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 8, 2020

INTRODUCTION

- [1] In reasons indexed as *Qiao v. Owners, Strata Plan LMS 3863*, 2020 BCSC 818 (the "Trial Reasons"), I determined that the plaintiff had succeeded in establishing her claims for assault, battery, false arrest and imprisonment against the defendants, Satvir Gill and Alltek Patrol Corp., and awarded her \$36,000.00 in non-pecuniary damages and \$1,450.00 for special damages. I indicated the plaintiff would be entitled to her costs on the ordinary scale unless there were factors the parties believed ought to affect entitlement to costs, in which case I gave the parties the opportunity to make written submissions within 60 days of the date of judgment.
- [2] The defendants provided written submissions within the timeframe I directed and brought to my attention that they had made two formal, identical offers to settle, one in 2017 and the other in 2019. While they accept the plaintiff's entitlement to costs up to the date of the expiry of their first formal offer, they submit, as their primary position, that they ought to be awarded costs for all steps taken in the proceeding thereafter.
- [3] The plaintiff was provided with the defendants' written submissions, but chose not to provide submissions of her own.
- [4] For the reasons that follow, I award costs to the plaintiff at Scale B, plus reasonable disbursements up to the date of the expiry of the first formal offer to settle, December 4, 2017. I award costs to the defendants at Scale B and reasonable disbursements for all steps taken in the proceeding thereafter.

BACKGROUND

- [5] The background to the plaintiff's claims and my findings are set out in the Trial Reasons. I need not repeat them in detail, but will simply summarize by saying that on March 30, 2012, the plaintiff and a security guard at a shopping mall were involved in a physical altercation that caused the plaintiff to bring claims against both the security guard and his employer for assault and battery, false arrest and imprisonment, intentional infliction of mental suffering, as well as defamation. She claimed general damages, damages for the cost of future care, special damages, punitive, exemplary and aggravated damages for a total in

excess of \$11 million. The defendants denied liability, but took the position that even if liability on some of the causes of action was established, that the plaintiff failed to prove causation and failed to prove most, if not all, of the damages she sought.

- [6] The plaintiff commenced this action on August 10, 2012. The defendants filed their Response to Civil Claim on October 13, 2012. By 2016, lists of documents had been exchanged, some discoveries had been conducted and the plaintiff had gone through three different lawyers. On March 14, 2017, the first Notice of Trial was filed, scheduling a ten-day trial commencing January 22, 2018. On June 7, 2017, the defendants served expert reports from Dr. Daniel DeForge, a psychiatrist, and Dr. Mark Riley, a forensic psychiatrist. The parties attended an unsuccessful mediation on August 30, 2017.
- [7] On November 11, 2017, the defendants delivered a formal offer to settle pursuant to Rule 9-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules] to the plaintiff's lawyer at that time. The offer was for payment for all damages and interest in the amount of \$43,000.00, plus \$22,000.00 for costs, taxes and disbursements, for a sum total of \$65,000.00. The offer was open for acceptance until 4:00 p.m. on December 4, 2017.
- [8] The plaintiff's counsel withdrew on November 22, 2017. The defendants' offer expired without any comment or communication from the plaintiff. On December 14, 2017, at a Trial Management Conference, the plaintiff successfully applied to adjourn the upcoming trial.
- [9] On December 15, 2017, a second Notice of Trial was filed, rescheduling a ten-day trial to commence on January 7, 2019.
- [10] In mid-August 2018, the plaintiff retained a new lawyer.
- [11] On October 16, 2018, the plaintiff served the expert report of Dr. Lacrosha Hall, a forensic psychiatrist.
- [12] On December 13, 2018, the plaintiff filed an Amended Notice of Civil Claim.
- [13] On January 7, 2019, the parties attended for trial, but no judge was available. The trial was rescheduled to commence on April 8, 2019.
- [14] On March 21, 2019, the defendants delivered another formal offer to settle to the plaintiff's lawyer. This offer was on the same terms as the first, but set to expire on April 5, 2019 at 12:00 p.m.
- [15] The plaintiff did not accept that offer. Nor did she present a counter-offer or, at any time, deliver any formal offer of her own.
- [16] The trial commenced on April 8, 2019. After nine days, the trial was not completed, so we scheduled a further five days for July 29-August 2, 2019.
- [17] On May 7, 2019, the plaintiff filed a Notice of Intention to Act in Person.

- [18] Now self-represented, the plaintiff used what had been scheduled for the first two days of the trial continuation for bringing applications to adjourn the trial, to call two additional witnesses, Lan Zhang, a member of the College of Traditional Chinese Medicine Practitioners and Acupuncturists in British Columbia, and Raymond Fung, a "muscle balancing therapy" practitioner, and for permission to adduce updated expense and loss calculations. The plaintiff's applications were successful and the trial adjourned to September 9, 2019.
- [19] On September 9, 2019, the trial continued for five days and again did not complete. We scheduled a further three days for January 6-8, 2020. The trial completed on January 8, 2020.
- [20] The plaintiff was self-represented for the second half of her trial. She required an interpreter for all of the trial. The defendants paid the lion's share of disbursements for the trial, including the hearing fees to court for 16 of the 19 trial days in the amount of \$10,700.00, which included hearing fees for the two days that were taken for the plaintiff's applications in July.
- [21] Although I did not find the plaintiff had established all of the facts pertaining to liability that she sought to prove, I ultimately determined that she had succeeded in establishing her claims for assault, battery, false arrest and imprisonment against Mr. Gill, and that his employer was vicariously liable, the latter of which was admitted. I dismissed the plaintiff's claims in defamation and intentional infliction of mental suffering. In terms of damages, I found that the plaintiff failed to prove causation in many respects and that the vast majority of her claims for damages were unreasonable and unsupported in the evidence. I awarded her damages in the total amount of \$37,450.00 (the "Order After Trial"), a far cry from the \$11 million that she sought.
- [22] The defendants submit that the parties achieved somewhat equivalent success in the matters in issue and that such an outcome ought to factor into the costs award made, particularly in light of their offer to settle in excess of the amount awarded at trial made prior to the first trial date, and offered again one and a half years later. The defendants say the offer was reasonable and ought to have been accepted, particularly when it was offered a second time following receipt of the plaintiff's own expert medical opinion of Dr. Hall, which did not support her claim. Moreover, they argue that the plaintiff's claims for more than \$11 million were unreasonable in that there was no evidence to support most of the damages she sought. The plaintiff made deliberate choices not to produce or lead supportive evidence in support of her claims for ongoing injury, worsening health or financial claims, all of which ought to weigh in favour of the costs orders they seek.

ANALYSIS

- [23] Under Rule 14-1(9), costs in a proceeding are to be awarded to the successful party unless the court otherwise orders. At its most basic level, the successful party is a plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who

obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46, leave to appeal refused [2014] SCCA No. 211. Different considerations arise where litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at para. 91.

- [24] The "substantial success" standard was described by Justice Bouck in the oft-cited decision of *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal refused 2002 BCCA 454. He wrote:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [25] Justice Bouck went on to set out a four-part test, which has been frequently applied, to determine where "substantial success" lies at para. 46:
- a) First, by focussing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings;
 - b) Second, by assessing the weight or importance of those "matters" to the parties;
 - c) Third, by doing a global determination with respect to all the matters in dispute in determining which party "substantially succeeded" overall and, therefore, won the event; and
 - d) Fourth, where one party "substantially succeeded", a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [26] Although the plaintiff in the case at bar was not successful on all of her claims and received a substantially lower award than she sought at trial, it cannot be said that her action was not successful. The fact that the successful party obtained a judgment in an amount less than the amount sought is not, but itself, a proper reason for depriving them of costs: 3464920 *Canada Inc. v. Strother*, 2010 BCCA 328 at para. 43.
- [27] The plaintiff established liability under multiple causes of action and obtained a remedy. I consider her to have "won the event" and to be the substantially successful party in this case.

[28] However, the fact that a party has been successful at trial does not necessarily mean that costs are to be awarded in that party's favour. Rule 14-1(9) allows the court to "otherwise order". The court may make a contrary order for many reasons, two of which are argued by the defendants here:

1. A failure to accept an offer to settle under Rule 9-1; and
2. When the court rules against the successful party on one or more issues that took a discrete amount of time at trial under Rule 14-1(15).

[29] The defendants point to the formal offers they made and say they ought to reasonably have been accepted by the plaintiff. They also point to some issues that took discrete and large amounts of time at trial for which the plaintiff had no evidentiary support. When considered as a whole, the defendants say the court should exercise its discretion to award costs to the plaintiff only up to December 4, 2017, the date of expiry of their first offer. They submit that thereafter, costs should be awarded in their favour at Scale B, plus all reasonable disbursements. They offer four alternatives to the costs award in their favour:

1. Disbursements only from the date of expiry of the first formal offer;
2. That each party bear their own costs and disbursements from that date;
3. That the plaintiff be awarded reasonable disbursements only from that date; or
4. That the plaintiff be awarded 50% of costs at Scale B, including 50% of reasonable disbursements from that date.

[30] I have determined that costs in this case are to be decided upon application of Rule 9-1(5)(d); therefore, it is unnecessary for me to consider apportionment under Rule 14-1(15).

[31] The court may consider an offer to settle when exercising its discretion regarding costs: Rule 9-1(4) of the Civil Rules. Where a formal offer has been made, the court's discretion regarding costs is set out in Rule 9-1(5):

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.

[32] The court's discretion in this area is guided by the factors set out in Rule 9-1(6):

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.

[33] In *A.E. v. D.W.J.*, 2009 BCSC 505, Justice Goepel held, in respect of Rule 37B of the previous Civil Rules:

[61] I appreciate and accept that notwithstanding the differences between Rule 37B and its predecessors, the underlying legislative policy behind Rule 37B is to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *MacKenzie v. Brooks* (1999) BCCA 623, 130 B.C.A.C. 95; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, 55 B.C.A.C. 191 (C.A.); *Radke v. Parry*, 2008 BCSC 1397, 64 C.P.C. (6th) 176. Parties should not however be unduly deterred from bringing a meritorious, albeit uncertain claim, because of the fear that a punishing cost order could potentially wipe out their award of damage award. In that regard I note the comments of McLachlin J.A., as she then was, in *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25, 49 D.L.R. (4th) 205 (C.A.):

Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.

- [62] Regardless of the merits of the plaintiff's case the defendant's offer to settle cannot be ignored, because to do so would undermine the purpose of the Rule. Having decided to proceed in face of a not insignificant and ultimately successful offer to settle, the plaintiff cannot avoid some consequences.
- [34] With these principles in mind, I turn now to consider the factors set out in Rule 9-1(6).
- (a) Should the Formal Offer Have Been Accepted?
- [35] Whether an offer to settle is one that ought reasonably to have been accepted is considered not by reference to the award that was ultimately made, but under the circumstances that existed when the offer was open for acceptance: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 29.
- [36] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court explained that the reasonableness of the plaintiff's decision not to accept the offer must be assessed without reference to the court's decision. Rather,:
- [27] the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.
- [37] The Court in *Cottrill* held that the issue is not whether the offer was reasonable, but whether it was unreasonable to refuse it:
- [30] As recently noted by Justice Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24-25, the wording of the subrule is important. The issue is not whether the offer was reasonable but whether it was unreasonable to refuse it. He explained the distinction as follows:
- [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
- [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
- [38] I am of the view that the plaintiff ought reasonably to have accepted the defendants' formal offer the first time it was made. It was unreasonable for her not to have accepted it.

- [39] The offer was first presented to the plaintiff's lawyer on November 11, 2017, more than two months before the first trial date. It was open for acceptance until December 4, 2017. I find this was a reasonable amount of time to consider the offer because the deadline for the exchange of expert reports had passed, a mediation had concluded on August 30, 2017, and the parties were aware of all matters in issue and the evidence each party had for trial.
- [40] The plaintiff's lawyer withdrew on November 22, 2017, and the plaintiff successfully applied to adjourn the trial. She retained new counsel in August 2018, four months before the new trial date. The only significant new evidence from the plaintiff thereafter was an expert report from Dr. Hall, served on the defendants on October 16, 2018. That report largely aligned with the expert opinion evidence tendered by the defendants and served on the plaintiff over a year earlier.
- [41] The January 2019 trial date was adjourned by the court to April 8, 2019. Nearly three weeks before the trial was scheduled to commence, the defendants made the same offer it had made in November 2017 to the plaintiff's new counsel. The defendants left this offer open for acceptance until April 8, 2019, a few days before the trial would commence. Again, this was a reasonable amount of time for the plaintiff to have considered the offer again, particularly because it was identical to the previous offer and the parties were completely ready for trial.
- [42] The defendants' offer to settle, on both occasions, was clearly worded and unambiguous. Both offers were made at times when the plaintiff had counsel. The offers were identical. The offer was easily capable of being evaluated. It was not merely a nuisance offer. Liability was very much in issue in this trial, on every claim. I am satisfied that the defendants' first formal offer represented a real concession on the defendants' part and had a real relationship to the claims. The offer ought to have reasonably been accepted by the plaintiff before it expired on December 4, 2017. I find the plaintiff acted unreasonably in refusing to accept the offer. Had she accepted this first offer, the plaintiff could have avoided years of wasted time and financial resources.
- [43] This factor clearly favours the defendants' position.
- (b) The Relationship Between the Offer and the Judgment
- [44] The amount of the offer was more than what the plaintiff was awarded at trial. This factor favours the defendants' position.
- (c) The Financial Circumstances of the Parties
- [45] I have very little information on this topic. The plaintiff chose not to present any evidence concerning her financial situation or in support of her income loss claims at trial. I consider this a neutral factor.
- (d) Other Factors

[46] In *Frame v. Rai*, 2013 BCSC 686, the court considered the defendants' failure to participate in meaningful negotiation and the defendants' submission of considerable evidence that bore no relationship to the core issue at trial, among other things, as factors in awarding double costs pursuant to this subrule: para. 27. Of course, it is not open for me to consider a double costs award here (see *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30), but I do take into consideration as factors in my analysis that the plaintiff failed to engage in meaningful negotiations after she received the first settlement offer. She did not respond to either the first or second offers and did not make any counter-offers. Having spent weeks in trial with the parties, I am convinced that the plaintiff's failure to negotiate stems from her failure to make any realistic assessment of her claims. A great deal of the 19 days of trial time was spent with the plaintiff pursuing what she ought to have known were unrealistic and unreasonable claims, such as the \$4.5 million she claimed for "cost of living", the \$6 million she claimed for stem cell therapy costs in the future and nearly all of the \$600,000.00 she claimed for treatment and other related expenses, to name a few. It was clear to me from the evidence the plaintiff adduced at trial that she did not make any realistic assessment of her damages claims, which caused her failure to participate in any settlement negotiations. These factors favour the defendants' position here.

[47] When I consider all of the factors in the circumstances of this case, I conclude that this is an appropriate case in which to make an order under Rule 9-1(5)(d). Accordingly, I order that the plaintiff is entitled to her costs at Scale B, including reasonable disbursements, for all steps taken in the proceedings up to December 4, 2017. I further order that the defendants are entitled to their costs at Scale B, including all reasonable disbursements, for all of the steps taken in the proceedings after December 4, 2017. I further order that the parties may set-off amounts owing to each other to conclude final payment under the Order After Trial.

"S.A. Donegan J."

DONEGAN J.

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