

CANADA / JUDGMENT

Randhawa v. Sharma

2024 BCSC 2021

COURT

Supreme Court of British Columbia

DECIDED

11 September 2024

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2024 BCSC 2021 Randhawa v. Sharma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Randhawa v. Sharma,

2024 BCSC 2021

Date: 20240911

Docket: S242849

Registry: New Westminster

Between:

Gurvinder Singh Randhawa, Sarbjit Kaur Randhawa, and

Inderjit Kaur Gill aka Inderjit Kaur Randhawa

Plaintiffs

And:

Brij Mohan Sharma, 0736547 BC Ltd., Nikola Komadina aka Nick Komadina, and N.S.K.
Contracting Ltd.

Defendants

And:

Nikola Komadina aka Nick Komadina, N.S.K. Contracting Ltd., City of Prince Rupert, Westrek
Geotechnical Services Ltd., Brij Mohan Sharma

and 0736547 BC Ltd.

Third Parties

- and -

Docket: S243172

Registry: New Westminster

Between:

Inderjit Kaur Gill aka Inderjit Kaur Randhawa

Plaintiff

And:

Definity Insurance Company doing business as Economical Mutual Insurance Company and Economical Insurance

Defendant

And:

Brij Mohan Sharma, 0736547 BC Ltd., Nikola Komadina aka Nick Komadina, and N.S.K. Contracting Ltd., The City of Prince Rupert, and Westrek Geotechnical Services Ltd.

Third Parties

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for Inderjit Gill:

J. Un

Counsel for Nikola Komadina and N.S.K. Contracting Ltd.:

J. Foster

Place and Date of Hearing:

New Westminster, B.C.

September 11, 2024

Place and Date of Judgment:

New Westminster, B.C.

September 11, 2024

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] By way of background, both of the underlying actions relate to damages alleged to have been caused to real property, that being a duplex building owned by the plaintiffs in the BC Supreme Court Action No. S242849, Randhawa et al v. Sharma et al. (the "Damages Action"), as a result of excavation work undertaken by the applicant, N.S.K. Contracting Ltd. ("NSK") at the request of owners of an adjoining property. In the Damages Action, various third parties have been named including the owners of the adjoining property, and NSK and its principal, Nikola Komadina (collectively, the NSK Defendants).
- [3] In the notice of civil claim filed in the Damages Action the damages alleged to have been suffered are plead as follows:
24. The cost to repair the foundation of each the Damaged Properties, which does not include the cost to repair or replace damaged fixtures, is in the amount of approximately \$15,352.00 plus tax, so in the total amount of approximately \$230,704.00 plus tax for both of the Damaged Properties.
25. As a result of the Defendants' Negligence, the Plaintiffs have suffered and continue to suffer direct loss, damage and expense, particulars of which include, but are not limited to:
- (a) costs to investigate the cause of the damage;
 - (b) costs to monitor the movement of the Damaged Properties;
 - (c) costs of inspection and professional advice concerning the damage and repairs;
 - (d) costs to effect emergency and permanent repairs to the Damaged Properties;
 - (e) costs to repair and replace damaged contents and fixtures;
 - (f) costs of alternative living arrangements;
 - (g) loss of rental income;
 - (h) interference with the Plaintiffs' use, and enjoyment of the Damaged Properties;
 - (i) diminution in in value of the Damaged Properties; and
 - (j) such further and other particulars as they become known to the Plaintiffs.

- [4] As to the second action, BC Supreme Court Action No. S243172, *Gill v. Definity Insurance Company* (the "Insurance Action"), it was filed by one of the plaintiffs in the Damages Action as owner of one of the units in the duplex building in respect of the alleged refusal of her insurer to provide insurance coverage for the damages alleged to have been caused by the excavation.
- [5] Today's application is for the trial of the two actions to be heard together.
- [6] The individual plaintiffs do not take any position on the application.
- [7] After considering the factors as set out by the Court of Appeal in *Sohal Estate v. Argitos*, 2010 BCSC 916, at paras. 12, 13 and 22, *Hashimi v. Miki*, 2019 BCSC 2287 at paras. 7 to 8 and *Liu v. Tsai*, 2017 BCSC 221 at para. 4, I am satisfied that it is appropriate that the matters be heard together for the purposes of trial, along with the ancillary and usual orders as set out in the NSK Defendants' notice of application in that respect relating to discoveries and cross use of evidence.
- [8] The issue for determination beyond that issue, which was the subject of the majority of the parties' submissions, was in respect of an application brought in the Insurance Action to compel the plaintiff in that action to attend at an examination for discovery, that being separate and apart from the relief being sought in the Damages Action related to having the trials heard together.
- [9] The distinction there may be one without a difference given the order that I have just made to have the matters heard together, which includes the usual relief as to the waiver of implied undertaking of confidentiality and the ability to use documents, including discovery transcripts as evidence in each action.
- [10] Notwithstanding that my order may render the application moot, it is appropriate to address the arguments advanced by the parties on this issue given the submission made.
- [11] Specifically, the question that was raised during submissions was whether NSK, in its position as a third party in one action and a defendant in the other, would be entitled to conduct an examination for discovery of more than one of the plaintiffs.
- [12] The concern arises because of the plaintiffs' individual roles in the litigation. In particular, as noted there are two separate sets of owners of the two separate halves of the duplex, which was stratified. One strata lot, or unit, is owned by the plaintiffs, Gurvinder Singh Randhawa and Sarbjit Kaur Randhawa (the "Randhawa Lot"), and the other strata lot, or unit, is owned by Inderjit Kaur Gill (the "Gill Lot"). While all of the owners are plaintiffs in the Damages Action, as noted, only Ms. Gill is the plaintiff in the Insurance Action.
- [13] The position of the plaintiffs, who are represented by the same counsel, is that given the commonality of interest between the plaintiffs, there is no entitlement to an examination for discovery of more than one plaintiff by the NSK Defendants.

- [14] A secondary issue in that respect is whether or not the NSK Defendants, in their capacity as third parties in the Insurance Action, are adverse to Ms. Gill such that there would be any entitlement to discover her at all. Notwithstanding the orders made there is, in that respect, a practical difference between the Insurance Action and Damage Action in terms of how the parties are and are not aligned on issues.
- [15] While the issue as to whether the NSK Defendants can conduct an examination for discovery of more than one of the plaintiffs is nuanced, R. 7-2 is clear on its face that "each party to an action" must be available for an examination for discovery by the parties of record who are "adverse in interest".
- [16] In taking the position that the NSK Defendants will only be entitled to discover one of the plaintiffs, they cited various decisions in which the use of discovery evidence was considered, given that under R. 12-5(46) such evidence can only be tendered at trial by a party "adverse in interest" unless the court otherwise orders.
- [17] One of those decisions was *Liversidge v. Wang*, 2012 BCSC 1974 at para. 9 where Justice Burnyeat considered whether a third party is adverse in interest to a plaintiff, confirming that while there were limited circumstances in which that would occur, prior decisions did not represent "authority for the general proposition that the interest of a Plaintiff and a Third Party are adverse".
- [18] In *National Bank Financial Ltd. v. LePoidevin*, 2018 BCSC 1175 ("National Bank") the court considered the question of whether a party is adverse in interest in the context of a dispute as to the right of the plaintiff to discover some 13 or 14 different defendants who were individually named.
- [19] The court reviewed various decisions such as *Kovacevic Consult Inc. v. Coastal Contacts Inc.*, 2015 BCSC 569, a decision of Master MacNaughton as she then was, where she found that a defendant was not limited to discovering only one plaintiff despite the plaintiffs argument that they shared a "commonality of interest", relying on, among other decisions, *Soprema Inc. v. Wolrige Mahon LLP*, 2014 BCSC 1013, and the appeal decision in that same matter, 2014 BCCA 366.
- [20] In *National Bank*, the court concluded:
- [15] I agree with the conclusions that are expressed in *Kovacevic*, in *Henni* and in the foregoing texts. Specifically, I do not consider that the language of Rule 7-2(1) confers any jurisdiction on the Court to limit the right of a party of record to conduct an examination for discovery of an individual or of individuals who are parties to the action and who are adverse in interest.
- [21] Here, the plaintiffs are adverse in interest to the NSK Defendants, in their capacities as defendant. In my view they also are in the Insurance Action. While both the plaintiff and the NSK Defendants have a common interest in establishing the claim as an insurable event, even if it is, the insurers will be seeking contribution if it is found that the NSK Defendants

are liable. In other words, the plaintiffs in both the Damages Action and the Insurance Action are adverse to the NSK Defendants on the issue as to whether or not the NSK Defendants are liable for any damages found to have been suffered.

- [22] Nonetheless, the plaintiffs argue that because of the commonality of interest between them, that despite that there may be issues in which they are adverse to the NSK Defendants, it is not appropriate to order the discovery of each of them, or more particularly, to compel Ms. Gill to attend a discovery over and above that being conducted in respect of the collective Randhawa plaintiffs (the NSK Defendants confirm they will be discovering only one owner of the Rhandawa Unit) relying on *Soprema*.
- [23] Specifically, at para. 12 of the lower court's decision, after considering *Nesbitt v. Midland Walwyn Capital Inc.*, 1994 CanLII 2111 (BCSC), paras. 15, 19 and 20, the court found as follows:
- [11] The defendant argues that this case has been mistakenly interpreted to stand for the proposition that where there are multiple parties with a commonality of interest, only one representative of those parties may be examined: see, for instance, *Executive Inn Inc v Pfeffer*, 2005 BCSC 1677 at para. 3. Instead, the defendant submits, this case specifically reserves an individual right of examination to each plaintiff, but requires them to exercise it with the same representative of the single defendant. This individual right, the defendant says, supports the proposition, that multiple plaintiffs are treated differently from multiple defendants.
- [12] I am unable to agree with this argument. It is true that *Hutchinson J.* refers to the ability of each plaintiff to exercise a right of examination, so long as it is of the same representative. But in arriving at that conclusion, the judge rejected the interpretation of the rule urged by the defendant here, of an automatic right for each party to examine each other party that is adverse and interest. That is the key point. Moreover, given that the plaintiffs were represented by the same counsel, as is commonly the case, their individual opportunity to examine had to be exercised through their one counsel on the same appointment. In short, there was to be one examination of one representative.
- [13] In my opinion, the reasoning in cases that limit a plaintiff's ability to examine multiple representatives of defendants who have a commonality of interest applies with equal force to the circumstances here. Those cases include *Procon Mining & Tunnelling Ltd v McNeil*, 2009 BCSC 1401, *NMH Holdings Ltd v The Crestmark Developments Limited Partnership* (29 June 2012), Vancouver Registry No. S105672 (SC), *Dann v Dhaliwal*, 2012 BCSC 1817, 41 BCLR (4th) 387, and *Blue Line Hockey Acquisition Co v Orca Bay Hockey Limited Partnership*: 2007 BCSC 443, 71 BCLR (4th) 104 ("Blue Line #1").

- [24] There is a significant distinction in Soprema. There were three corporate plaintiffs that were related companies with a common CEO. The defendant wished to examine two separate representatives of the plaintiffs, the common CEO and a separate local general manager they argued was the "man on the ground".
- [25] Notably, R. 7-2(5) expressly contains the words that "unless the court otherwise orders", only one representative of a corporate party is to be examined with, in Soprema, there being a common representative. In contrast, given that the plaintiffs in this matter are not corporate parties, the starting point is R. 7-2(1) which, as noted, specifically states that every party is obligated to be examined, or to make themselves available for examination.
- [26] In addition, there is a significant difference between the case before the court today and Soprema, in that the evidence of the CEO, given that he was a CEO of all companies, would be binding evidence in respect of each of the named corporate plaintiffs.
- [27] That distinction was also made in Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP, 2020 BCSC 1344, where the defendants were the partnership and an individual partner within the partnership. The evidence of one can bind the evidence of the other.
- [28] That is not the case as between these plaintiffs. While there may be some common interest in that the damages being sought include damages to the foundation of the property or what would be common property, the other damages being sought, such as rental income, alternative living arrangements, repair to contents and fixtures, is obviously damages that will be specific to each of them, and the evidence of one would not bind the other.
- [29] Thus, while I accept that there may be some circumstances where it may not be appropriate to examine each of the plaintiffs, or perhaps it would otherwise be appropriate to delay the discovery of some co-plaintiffs until others are conducted so that there is not a piling up of evidence, in this case there is no reason why Ms. Gill should not be individually examined.
- [30] As noted, technically, the only relief being sought in the Insurance Action is an order for discovery of Ms. Gill. I can make that order, and I will, but the concern I have is that it may lead to a bit of a "gotcha" moment in that the counsel for the plaintiff, as stated, are not taking a position on the orders being sought today, but have clearly stated that they will be taking the position that no further examination can be conducted by the NSK Defendants if they examine Ms. Gill.
- [31] In their notice of application, the NSK Defendants include a "catchall" provision that the court "may make such further and other orders as they deem just".

- [32] In the course of their submissions, and in their response materials, the plaintiffs squarely put the issue before the court as to whether multiple discoveries could be conducted of the plaintiffs, and for that reason I am prepared to make a direction in that regard in addition to the order that is squarely before the court in the relief being sought as set out in the notice of application.
- [33] Specifically, I will make the order that the NSK Defendants are entitled to conduct an examination for discovery of each of the plaintiffs. While I probably do not need to make the order that broad as opposed to ordering a discovery of a plaintiff from each of the units in the duplex, I will make the order on those terms, but expect, based on their submissions today, that counsel for the NSK Defendants will exercise some prudence in determining whether and how far that should extend, and only discover one of the Randhawas.

[DISCUSSION AS TO ORDER DRAFTING]

- [34] THE COURT: Thank you, to clarify, I make the order in the Damages Action that the NSK Defendants are at liberty to conduct an examination for discovery of each of the plaintiffs.
- [35] As to costs. This is one of those applications that had to come to court. An order must be sought in order to have the trials heard together, either by desk order or application. The issue of this examination for discovery became a side issue to that application.
- [36] As such, I order that the costs be in the cause.

"Associate Judge Robertson"

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