

CANADA / JUDGMENT

Raniga v. Poirier

2020 BCSC 780

COURT

Supreme Court of British Columbia

DECIDED

26 May 2020

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2020 BCSC 780 Raniga v. Poirier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Raniga v. Poirier,

2020 BCSC 780

Date: 20200526

Docket: M175549

Registry: Vancouver

Between:

Maajayshree Bharti Raniga

Plaintiff

And

Jeremy Arthur Poirier

Defendant

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for Plaintiff:

Anastase Maragos

Janet De Vita

Counsel for Defendant:

David Giroday

Place and Date of Application:

Vancouver, B.C.

May 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 26, 2020

I. introduction

- [1] The plaintiff applies to adjourn the trial of this personal injury action currently set for five days commencing June 8, 2020. The request arises from a comedy of errors on the part of plaintiff's counsel and the failure to produce any expert medical opinion evidence for the purposes of trial.
- [2] The defendant, who has admitted liability for the motor vehicle accident underlying the claim, opposes any adjournment of the trial. Instead, seeking perceived tactical advantages arising from plaintiff's counsel's mishandling of the file, the defendant's liability insurer insists that the trial proceed as scheduled with the only expert medical evidence being a report prepared by an orthopedic surgeon on behalf of the defence which is unfavourable to the plaintiff.
- [3] For the reasons that follow, the trial is adjourned.

II. background

- [4] This application proceeded pursuant to the COVID-19 Notice #14 issued by the Court on April 27, 2020. That notice provides for applications which can be made by way of written submissions instead of a hearing while the regular operations of the Court are suspended because of the COVID-19 pandemic. The parties are each limited to one sworn affidavit, not exceeding 10 pages inclusive of exhibits, setting out the key facts underlying the issue to be decided. Their written submissions are limited to a maximum of 20 pages. The Court then reviews the filed material and makes a decision on the merits if it is appropriate to do so.
- [5] The motor vehicle accident in which the plaintiff was injured occurred on November 6, 2015 in Vancouver. Plaintiff's counsel was retained approximately one month later, although the action was not started until a Notice of Civil Claim was filed on June 30, 2017.
- [6] Examinations for discovery of the parties occurred on August 28, 2018. An amended Response to Civil Claim was filed by the defendant on October 4, 2018 in which liability for the accident was admitted, thereby limiting the dispute to the nature and extent of the plaintiff's injuries and the appropriate quantum of damages.

- [7] A Notice of Trial was filed by the plaintiff on December 4, 2018 setting the matter down for trial for a period of one week commencing June 8, 2020.
- [8] Defence counsel commissioned an independent medical examination of the plaintiff by an orthopedic surgeon. The necessary arrangements were made between the parties. Defence counsel then issued a letter dated November 24, 2019 confirming the location of the examination and the date (February 14, 2020). The examination occurred on that date. An expert report by the orthopedic surgeon was then prepared and was served on plaintiff's counsel on March 12, 2020.
- [9] The affidavit filed in support of the adjournment application is sworn by a partner of the law firm which has represented the plaintiff since December 2015. That affidavit provides no information regarding the manner in which the plaintiff's file was handled in the first four years of that retainer. It is apparent, however, that at least one paralegal, one associate lawyer and the partner was involved in the prosecution of the action.
- [10] The limited information provided in the partner's affidavit is not exactly a testament to diligence or professionalism. Among other things, he testifies:
- "In the course of preparing for the trial of this matter, in the first week of May 2020, my co-counsel alerted me to the fact that we had not commissioned an expert medical report with respect to this file", and as a result, his client "does not have expert medical evidence to lead at trial";
 - He had been asked by his paralegal in "approximately February 2020", whether he wished for an independent medical examination to be scheduled "in this matter" and, "confusing this file with another" which was very near settlement, he instructed that an IME was not required;
 - He was aware his client attended a defence IME in February 2020 and an expert report was prepared on behalf of the defence on March 11, 2020;
 - The offices of his law firm closed in mid-March due to the COVID-19 pandemic and the firm "transitioned to a remote work system", although he had access to the office and attended there "on occasion for specific matters";
 - A trial management conference scheduled for April 7, 2020 was adjourned because of the suspension of Court operations related to COVID-19 and "as a result, there have been no arrangements for exchange of witness schedules, will-says, documents agreements, agreed statements of fact, or other provisions for trial organization and procedure".
- [11] Not surprisingly, since the "error" on the part of plaintiff's counsel was not "learned of" until the first week of May 2020, plaintiff's counsel has been unable to schedule any independent medical examination which would allow for the preparation of an expert report before trial. Hence the request for an adjournment.

- [12] The affidavit tendered on behalf of the defendant is sworn by a legal administrative assistant at the law firm representing the defendant. That assistant has no personal knowledge of the matters set out in her affidavit but she sets out a (limited) chronology of events based on her being "informed by my review of the file". The affidavit provides no evidence whatsoever regarding any prejudice that might be sustained by the defendant if an adjournment were to be granted.

III. the governing legal principles

- [13] Both parties referred to the comprehensive review of the legal principles governing an application for adjournment of a trial under Supreme Court Civil Rule 12-1(9)(a) set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 where the Court stated:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made. The discretion must, of course, be exercised judicially in accordance with appropriate principles. The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant. This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties. The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion.
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action. Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits. The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case.
- [20] Other factors or considerations include (in no particular order of priority):
- the expeditious and speedy resolution of matters on their merits ;
 - the reasonableness of the request ;
 - the grounds or explanation for the adjournment ;
 - the timeliness of the request ;
 - the potential prejudice to each party ;
 - the right to a fair trial ;
 - the proper administration of justice ;

- the history of the matter, including deliberate delay or misuse of the court process); and
- the fact of a self-represented litigant

- [21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim. If the claim is novel, then the prospect for success is one factor to consider. However, the prospect for substantive success should not be the sole basis for refusal of an adjournment.
- [22] The expeditious and speedy resolution of a matter raises the question of whether there has been a previous adjournment and, if so, the reasons for that prior adjournment. If the circumstances have not changed, a subsequent application will likely not be successful.
- [23] Timeliness of the request is a factor. An application made at the opening of trial on the grounds that a party cannot be present will be carefully scrutinized as to the effect upon other parties, whether the party's evidence is crucial, and what other recourse was available. If the trial is already underway and an adjournment may be indefinite, the court will want to consider whether it is certain that granting an adjournment would resolve the issue that was the cause of the adjournment request.
- [24] The explanation for the need of an adjournment is an important consideration. It has been said that simple neglect to get properly ready for a hearing, while irksome for the other party, will still usually lead to an adjournment on the theory that the prejudice to the person denied the adjournment will be greater than prejudice to the person who is forced to accept an adjournment. It would be unjust to decide, without more, that a party who has been less than diligent will be forced to go to trial unprepared... Failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client under the "often applied principle that the sins of the lawyer should not be visited upon the client" provided that relief can be given on terms that protect the innocent adversary as to costs thrown away and as to the security of the legal position he has gained. However, counsel's simple statement that he is not ready for trial may not be sufficient. The fact of a medical condition that may impair a party's ability to conduct his case as well as he might does not, in itself, mandate an adjournment, but it is a serious consideration.
- [25] Prejudice to the parties if an adjournment is granted or is not granted must be considered. Any prejudice to be suffered by either side must be weighed and balanced. However, it is non-compensable prejudice that is pivotal. If the problems raised by an explanation of prejudice can be met by conditions of an adjournment, then, upon consideration of all of the circumstances, an adjournment may be granted.
- [26] Overall delay in the history of proceedings may be a factor. Prolonged delay due to tactical considerations may be inexcusable and result in injustice to the other side because a fair trial is no longer possible. However, a delay forced on a party by negligent solicitors, impecuniosity, or illness is distinguished from tactical delay. The issue is whether the delay is excusable in light of the reason for it and other circumstances.

- [27] The fact that a litigant is self-represented is relevant, but does not entitle him to a "pass" The object is to facilitate as far as reasonable the ability of a self-represented litigant to fairly present his case on the relevant issues. If counsel is appointed and assumes conduct of a case after the matter has been set for trial, he may be required to clear his calendar to facilitate the trial date
- [28] The court may impose terms and conditions to an adjournment order However, the terms must be just in all of the circumstances... A party seeking certain terms and conditions should generally prove that he will be prejudiced in some way by the order.

(citations omitted, emphasis added)

IV. analysis

- [14] The Court is not impressed by the contents of the lawyer's affidavit filed in support of the adjournment application. It does not disclose the nature of the plaintiff's injuries or the nature and extent of medical treatment received by the plaintiff since the accident. It does not disclose what sort of clinical records or other documents are available or have been obtained in relation to the plaintiff's injuries and treatment. It does not explain why an "independent" medical examination of the plaintiff is necessary. It does not disclose the law firm's usual practice and procedures for preparing cases for trial and why, knowing full well that the trial was scheduled for June 8, 2020, the plaintiff's file was not reviewed by co-counsel (or others) before the first week of May 2020.
- [15] Having said the above, however, I accept the judgment of plaintiff's counsel that an independent medical examination of the plaintiff is necessary in this case so that expert medical evidence can be tendered at trial to advance and substantiate the plaintiff's personal injury claim before the Court. Counsel accepts responsibility for inadequate trial preparation and there is no suggestion (nor could they be) that the plaintiff in any way caused or contributed to the problem.
- [16] As noted above, the affidavit tendered on the behalf of the defendant in opposition to the adjournment application does not testify to any prejudice any adjournment would cause the defence. In his Application Response and his written submissions, defence counsel suggests an adjournment of the trial "will result in further time and expense for the preparation of trial" at a later date. He does not articulate what expenses have been incurred that will be "thrown away" nor, indeed, does he describe what has actually been done to prepare for trial.
- [17] Defence counsel also speculates that a trial adjournment will result in "increased expert witness costs" inasmuch as a further independent medical examination and report from the expert will have to be obtained closer to the subsequent trial date. I accept that this may be a possibility but at this point in time it is simply speculation.

[18] In my view, the overall interests of justice strongly militate in favour of an adjournment of the trial in this case. The paramount consideration is to ensure there is a fair trial of the plaintiff's claim on the merits. The plaintiff is not responsible for the failure of his lawyer to diligently prepare for trial in a timely way. Liability has been admitted and there is no irreparable evidentiary prejudice that the delay in the trial will cause the defendant.

[19] In the result, I make the following order:

1. The trial of this action currently set for June 8, 2020 is adjourned;
2. The parties will immediately attend upon Supreme Court scheduling to secure the next available convenient date for the trial of this action;
3. A trial management conference will be held in this case no later than 90 days before the new trial date and all medical evidence, including any expert opinion evidence, intended to be relied upon by the plaintiff at trial will be notified to and, where necessary, served upon the defendant before the date of the trial management conference; and
4. The defendant is granted leave to conduct one further examination for discovery of the plaintiff if necessary before the date of the trial management conference or thereafter if permitted and as directed by the Judge or Master presiding at the trial management conference.

[20] The plaintiff has succeeded in securing an adjournment and ordinarily would be entitled to the costs of this opposed application. However, the Court cannot condone the conduct of counsel which was the cause of the adjournment and will exercise its discretion by refusing to award costs. It is also the expectation of the Court that plaintiff's counsel and his firm will absorb all fees and expenses incurred in relation to this adjournment application and will not bill the same to his client.

[21] The defendant requests that if an adjournment is granted, he should be paid "costs of this application thrown away". It is not clear to the Court what is meant by the phrase "thrown away" but if the intention is to seek costs of the application regardless of success, the request is declined. This is a situation where the defendant was seeking to visit the sins of the lawyer upon a blameless plaintiff client to whom liability has been admitted and in the absence of any meaningful evidentiary prejudice. It should have been obvious from the outset that an adjournment would be granted.

"Kent J."

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