

CANADA / JUDGMENT

Riddell v. L'Heureux

2008 BCSC 1598

COURT

Supreme Court of British Columbia

DECIDED

21 November 2008

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2008 BCSC 1598 Riddell v. L'Heureux

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Riddell v. L'Heureux,

2008 BCSC 1598

Date: 20081121

Docket: 04 2962

Registry: Victoria

Between:

Robert Allan Riddell

Plaintiff

And:

Dwayne L'Heureux and

John Doe I and John Doe II

Defendants

Before: Master McCallum

Reasons for Judgment

Counsel for Plaintiff

D. Williams

Counsel for Defendants

M. F. O'Meara

Date and Place of Hearing:

19 November 2008

Victoria, B.C.

INTRODUCTION

- [1] The plaintiff and defendant were involved in a motor vehicle collision on July 6, 2002. The plaintiff commenced this action claiming damages against the defendant on July 6, 2004. The Writ has never been served on the defendant but the defendant's insurer filed an Appearance on April 24, 2006, and a Statement of Defence on October 26, 2006. The defendant brought these motions asking to have the Writ set aside for failure to serve, or alternatively asking to have the action dismissed for want of prosecution.
- [2] For the reasons that follow, I have concluded that the defendant's motions must be dismissed.

BACKGROUND

- [3] The plaintiff says he was injured as a result of a collision caused by the defendant on July 6, 2002, near Chetwynd, British Columbia. He commenced this action on July 6, 2004, through counsel in Victoria, British Columbia.
- [4] In September 2004, the defendant's insurer was advised by Michael Mantyka, counsel in Saskatoon, Saskatchewan, that he had conduct of the matter. Thereafter, there was correspondence between the adjuster for the insurer and Mr. Mantyka dealing with the claim. The adjuster asked in December 2004 and June 2005 for "a copy of the Writ of Summons which has been filed and served".
- [5] On June 6, 2005, Mr. Mantyka advised that conduct of the matter had been transferred to Christopher Tahn, a lawyer practising in Calgary, Alberta. On July 12, 2005 the adjuster requested that Mr. Tahn provide a copy of the filed and served Writ. That request was followed up with a further request for "a copy of the Writ of Summons" on January 24, 2006. On March 28, 2006, Mr. Tahn sent the adjuster a copy of the filed Writ of Summons.
- [6] It is apparent from the evidence of Mr. Tahn that he had conduct of the matter originally and had retained Mr. Mantyka for advice and assistance only on issuing process in British Columbia. Mr. Mantyka had arranged for Victoria counsel to issue the process on July 6, 2004, at the close of the limitation period. Mr. Tahn was advised that Mr. Mantyka would attend to service of the Writ. Mr. Mantyka attempted to serve the Writ by registered mail addressed to the defendant in British Columbia on September 15, 2004.

- [7] On March 30, 2006, the adjuster was informed by staff of the insurer that the Writ had not been served upon the Insurance Corporation of British Columbia. On April 24, 2006, an Appearance was filed for the defendant by in-house counsel for the insurer. The insurer appointed Oliver Hui, counsel in Prince George, British Columbia, to act for the defendant in about May 2006.
- [8] Mr. Hui had some brief contact with Mr. Tahn in the spring of 2006 and delivered this motion to Mr. Tahn on July 25, 2006, although it was apparent that Mr. Tahn had never been formally on the record. Mr Hui filed a Statement of Defence on October 25, 2006.
- [9] This motion, originally filed July 24, 2006, was first set down for hearing for September 4, 2008, and finally heard on October 1, 2008. Mr. Hui attributes most of that delay to difficulties in determining who was acting for the plaintiff and in the plaintiff obtaining affidavit evidence in response to the motion from Mr. Tahn. The Tahn affidavit was delivered January 4, 2007.
- [10] On July 21, 2008, Darren Williams was appointed to act for the plaintiff. The evidence shows that following Mr. Williams' appointment, much effort was directed to advancing the plaintiff's claim in this action. Clinical records were obtained, hospital records were obtained and requests were made for copies of police records and the plaintiff's income tax returns. The plaintiff has demanded documents from the defendant and produced lists of his own documents.
- [11] The parties agree that the Writ was never formally served upon the defendant. The defendant contacted his insurer following the collision in 2002, but neither the insurer nor Mr. Hui has had any contact with him since 2002. Mr. Hui says he has not been able to contact the defendant although unspecified efforts to locate him have been made.

DISCUSSION

- [12] The defendant says that the Writ should be set aside pursuant to the provisions of Rule 14(6.2) that provides:

Disputed process or service

(6.2) If a party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, alleges that the originating process in the proceeding is invalid or has expired or that the purported service of the process was invalid, the party may, after entering an appearance, apply for one or both of the following:

- (a) an order setting aside the process;
- (b) an order setting aside service of the process.

- [13] It is obvious from the opening words of Rule 14(6.2) that the defendant is not "a party who has been served with an originating process". That said, the defendant did file an Appearance and therefore the Writ is deemed to have been served on him on the date the Appearance was filed by virtue of Rule 11(3). Since deemed service occurred after the Writ had expired, the originating process might be found to be invalid and open to being set aside. In these circumstances, the defendant's insurer knew the defendant had not been served and elected to file the Appearance in any event. It would be anomalous indeed if the defendant could now succeed in an application to set aside the originating process or service of it where he essentially agreed to accept service by filing the Appearance.
- [14] This case is distinguishable from *R & J Siever Holdings Ltd. v. Moldenhaue*, 2008 BCCA 59, where the court held that where an unauthorized Appearance and Defence had been filed, they should have been struck out as they were nullities. In the case at bar, the defendant's insurer authorized the filing of the Appearance and Defences as it was entitled to do. The Appearance and Defence are not nullities and there is no basis for striking out the originating process or deemed service of it.
- [15] The defendant also did not file this motion within the 30 days of filing his Appearance as required by Rule 14(6.2). That sub rule contemplates the filing of a Defence without submitting to the jurisdiction of the court only where the applicant has filed a motion under Rule 14(6.2) within 30 days of filing the Appearance. In this case, the motion was not filed within the 30 day limit and the defendant has submitted to the jurisdiction of the court.
- [16] The defendant also applied for an order that the action should be dismissed for want of prosecution under Rule 2(7). The test under Rule 2(7) is succinctly set out in *Thandi v. Ech Tech Recycling*, 2006 BCSC 85, where the court said at paragraph 3:

It is common ground that an action will be dismissed for want of prosecution if, first, there has been inordinate delay; second, the inordinate delay is inexcusable; third, the delay has caused or is likely to cause serious prejudice to the applicant; and fourth, the balance of justice demands that the action should be dismissed: *Tundra Helicopters Ltd. v. Allison Gas Turbine, A Division of General Motors Corp.* (2002), 98 B.C.L.R. (3d) 238, 2002 BCCA 145; *Irving v. Irving* (1982), 38 B.C.L.R. 318, 28 C.P.C. 296 (C.A.). The plaintiffs concede that there has been inordinate delay and that the inordinate delay is inexcusable. The issues then are whether the delay has caused, or is likely to cause, serious prejudice to the applicants and if so whether the interests of justice demand that the matter be dismissed.

- [17] The plaintiff here conceded there had been an inordinate delay in prosecuting the action but says the application should fail because the delay was excusable and that the defendant has not shown serious prejudice as a result of the delay. The delay is explained through the affidavit of the plaintiff's present counsel but he relies mainly upon the hearsay evidence of the plaintiff. There is no evidence from the plaintiff directly and given that this is, in effect, an application for a final order, the hearsay evidence on the issue of delay is not admissible.

- [18] Could it be said then, that there has been serious prejudice to the applicant and that the interests of justice demand that the action be dismissed? The only suggestion of prejudice arises from the inability of the insurer to locate the defendant. There is a paucity of evidence on the actual steps taken or the resources devoted by the insurer to the task of locating the defendant. Given that liability has been denied, it may be that the insurer will want to locate the defendant but this evidence does not demonstrate serious prejudice to the defendant. It is apparent that some investigation was done because the Defence was filed denying liability.
- [19] This is not a case where the interests of justice demand the action be struck out. The plaintiff has taken significant steps to prosecute his claim and there can be a fair trial on the merits of the claim.

CONCLUSION

- [20] The defendant's motions are dismissed. The defendant appeared and is deemed to have accepted service. There is no basis for striking out the originating service or dismissing the action for want of prosecution.
- [21] Given the long delay and the plaintiff's relatively recent efforts to move his claim forward, the parties will bear their own costs of this motion.

"W. McCallum"

Master William McCallum

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Prepared on 26 October 2026 · Esheria