
CANADA / JUDGMENT

Riley v. Riley

2010 BCSC 822

COURT

Supreme Court of British Columbia

DECIDED

10 June 2010

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2010 BCSC 822 Riley v. Riley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Riley v. Riley,

2010 BCSC 822

Date: 20100610

Docket: S082785

Registry: Vancouver

Between:

Robert Christopher Riley

Plaintiff

And

Susan Doreen Riley

Defendant

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Kasting

Counsel for the Defendant:

A.A. Mortimore

Written submissions:

April 7, 14 and 19, 2010

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2010

- [1] This is an application by the defendant for double costs arising from a trial in which reasons for judgment were issued on February 5, 2010 dismissing the plaintiff's action (see *Riley v. Riley*, 2010 BCSC 161).
- [2] The plaintiff brought the action seeking to:
- [1] ... set aside the conveyance on the grounds his sister, Susan, had a "special relationship" with her father and unduly influenced him to make the transfer. The plaintiff also seeks a declaration the property is held in trust for and should be transferred to the estate of Mr. Riley, and an order the defendant be disqualified from acting as Executrix of the estate because of her breach of trust.
- [3] The action was dismissed with costs awarded to the plaintiff:
- [79] Unless there are matters of which I am unaware, the defendant will be entitled to costs. If there are such matters the parties may make submissions to me within 21 days of the date of this judgment.

The parties have since filed submissions on the issue of double costs.

BACKGROUND

- [4] On September 29, 2009 the defendant delivered an Offer to Settle pursuant to Rule 37B of the Rules of Court to the plaintiff. The offer read:

The Defendant, Susan Doreen Riley, offers to settle the within proceeding by a waiver of costs by the Defendant and a Consent Dismissal Order on a no costs basis, as though the proceeding had been determined on its merits.

The Defendant, Susan Doreen Riley, reserves the right to bring this offer to the attention of the Court for consideration in relation to costs after the Court has rendered judgment on all other issues in this proceeding.

- [5] At the time the offer was made, examinations for discovery of both parties had been completed and the plaintiff's counsel was in possession of the plaintiff's list of witnesses who would be called at trial and the documents upon which the defendant would rely at trial.

- [6] The trial was originally scheduled to be heard for five days commencing October 19 through 23, 2009. The parties attended the courthouse but were advised no judge was available to hear the matter.
- [7] The trial commenced November 30, 2009 and continued for four days.

Discussion of the applicable principles governing an award of double costs

- [8] Recently in *Pham-Fraser v. Smith*, 2010 BCSC 694, I reviewed the applicable principles governing an award of double costs under Rule 37B. At paras. 7-11, I concluded:
- [7] Rule 37B was introduced in 2008 and was designed to encourage parties to settle disputes rather than to litigate. The purpose of the rule is intended to cause both parties to pause and consider their respective positions realistically in light of all the information available and to assess the likely outcome of the trial. The rule is intended to both encourage that re-assessment and to deter parties who fail to do so realistically by penalizing them with an extra burden of costs.
- [8] In *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 86 B.C.L.R. (4th) 17, Mr. Justice Hall, in the context of addressing Rule 57(9) stated:
- [15] In the recent case of *Bedwell v. McGill*, 2008 BCCA 526, a case dealing with a particular aspect of costs not relevant to this appeal, Newbury J.A., for the court, at para. 33, noted the purpose of former R. 37(24) as being "aimed at encouraging litigants to settle wherever possible, thus freeing up judicial resources for other cases."
- [16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

The above passage was recently quoted by Mr. Justice Voith in *Lakhani v. Ellioy*, 2010 BCSC 281.

- [9] In *Hutson v. Michaels of Canada, ULC*, 2009 BCSC 1587, I observed:
- [7] Rule 37B came into effect July 1, 2008. It was intended to supplement gaps in the former Rule 37A, to reinforce the principle of judicial discretion in the awarding of costs and to provide for a mechanism to better promote the settlement of disputes between litigants. One of the main purposes behind the Rule, as behind Rule 37A, is to endeavour to make the expense of litigation less onerous to parties who act reasonably in prosecuting or defending their claims while at the same time providing a sanction to those who do not.
- [10] Rule 37B provides:

Offer may be considered in relation to costs

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

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, in whole or in part, 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 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 of the offer to settle. ...

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 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.

Application of Legal Principles to the Present Case

- [11] I will review each of the factors referred to in Rule 37B(a) to (d) as each may be relevant to the facts in this case.
- [9] As stated, an award of double costs is discretionary. Rule 37B gives the court a broad discretion to consider a number of factors. The court is not bound by a consideration of the first three factors listed in s. 37B(6) and may consider any other factor it deems appropriate given the circumstances of the case. Having said that, it would be most unusual for the court not to consider the first three factors listed.

Application of principles to the present case

- [10] Having considered the submissions of the parties, I am of the view the defendant should be entitled to double costs in this matter.

- [11] As stated, the plaintiff was in possession of all the materials the defendant intended to rely on at trial as well as the defendant's list of witnesses. One of the critical witnesses for the defendant was Mr. Bondoreff, the lawyer who prepared the conveyance and who, in doing so, interviewed Mr. Riley, Senior. His evidence and the notes he made of his interview with Mr. Riley quite clearly dispelled any notion Mr. Riley was unduly influenced by the defendant.
- [12] I am also of the view Mr. Riley was motivated in pursuing his lawsuit by a false belief he was entitled to share in his father's estate. He failed to appreciate his father would be influenced in how he governed his affairs by the fact the two had been estranged for many years and that the plaintiff had done very little to support him or his wife in her declining years. He also failed to appreciate the significant role played by the defendant in assisting Mr. Riley, Senior and his wife. I have set these facts out in the judgment and there is no need to repeat them.
- [13] In my view the plaintiff should have reasonably anticipated his claim would be dismissed at trial.
- [14] The plaintiff argues the defendant's offer to settle was not a true offer to settle as it was simply "an invitation to the Plaintiff to abandon the litigation". The plaintiff says it would be "untenable both logically and philosophically" if a defendant who succeeds in defeating a plaintiff's claim can expect to receive double costs.
- [15] While acknowledging the facts in this case to be different, the plaintiff cites *Wilson v. Leung*, 2008 BCSC 1828, where Sinclair Prowse J. stated, at para. 11:
- [11] It was not obvious as to the outcome of this action nor is it obvious as to the finding of the Jury. As has just been touched upon, the Jury could well have based their dismissal on the finding that the recollection of the Plaintiff was equally plausible to the recollection of the Defendants. Given this situation, it would be inappropriate, in my view, to conclude that the Plaintiff ought reasonably to have accepted the offer (namely, withdrawn her action). For these reasons, I am dismissing the Defendants' application for double costs.
- [16] An offer by a party to waive or forgo costs if the other party abandons pursuit of its claim is an appropriate offer to settle pursuant to Rule 37B. There are many claims commenced in this Court which are ultimately dismissed or which are subject to dismissal. To accept the plaintiff's argument would take away a valuable settlement tool from the parties and be contrary to the intent of Rule 37B.
- [17] In *Ludwig v. Bos*, 2010 BCSC 695, Truscott J. considered whether an offer to settle issued by the defendant whereby the plaintiff would discontinue the action and pay certain taxable costs and disbursements to the defendant constituted a proper offer pursuant to Rule 37. He found it did, concluding at para. 8:

I reject both submissions of the plaintiffs. Dealing with their first submission an offer to settle under Rule 37B in my view can be an offer to accept a discontinuance of a claim, and not just an offer of a compromise of the claim.

- [18] In my view the decision in *Wilson* is distinguishable on its facts from the present case. In *Wilson* the plaintiff's claim arose from injuries suffered in a motor vehicle accident. The plaintiff had commenced her action in Provincial Court but by consent the action was moved to the Supreme Court where it was joined with another action which had been commenced in that court by a party who was also claiming they were injured in the accident. The plaintiff and the defendant were named in the second action as defendants. The action was transferred to the Supreme Court and joined with the second action to avoid inconsistent results. The action was tried with a judge and jury. The jury dismissed the plaintiff's claim. The defendant had made an offer to settle of \$1.00 on terms that if accepted on the date it was made each party was to bear its own costs but if not accepted until after the date it was made the plaintiff was to pay the costs of the defendant. Sinclair Prowse J. considered the offer was not one which should have been reasonably accepted because, as she stated at paras. 9-10:
- [9] From the outset, the parties in the present action had different recollections of the cause of this collision. There were no independent witnesses. Objectively, each recollection was equally plausible. The question that the Jury had to determine was whether they found that the Plaintiff's recollection was probably the way that the accident happened. If they accepted the Defendants' recollection or if they found that the Plaintiff's and the Defendants' recollections were equally plausible, they would have to dismiss the Plaintiff's claim.
- [10] The offer of the Defendants was essentially that the Plaintiff withdraw her claim entirely. In the circumstances of this case, that was not an offer that ought reasonably to have been accepted.
- [19] It is clear from the above the judge considered the merits of the plaintiff's claim in concluding as she did. It is also clear that had she reached a different conclusion she would have awarded double costs.
- [20] In *MacKinlay v. MacKinlay Estate*, 2008 BCSC 1570, Savage J. also considered the effect of Rule 37B when a nominal offer was made. The issue was whether double costs should be awarded where the successful defendant had made a nominal offer to settle. He held, at paras. 34-35:
- [34] While a nominal offer might be described as strategic, it was a strategy aimed at persuading the Plaintiffs to discontinue the proceeding, an outcome that is favourable as compared to the outcome the Plaintiffs obtained at trial. Such an offer is one of the few tools in the arsenal of a defendant of relatively modest means which might exert pressure on a plaintiff pursuing an unmeritorious claim.

[35] In this regard, albeit in the context of the former Rule, the Court of Appeal in *Kurylo v. Rai* 2006 BCCA 176, 53 B.C.L.R. (4th) 214, at ¶ 7 said:

. When a defendant assesses his position in litigation of any kind he may consider that the plaintiff has no case and if the case goes to trial, will fail. But the defendant may also be willing to make some minor offer which would carry with it the costs in the hope that the action will go away and that he will not, thereafter, incur large legal bills to establish his legal position that the plaintiff has no case.

[21] I see no logical distinction between a nominal offer and an offer such as that made by the defendant in this case. The principle is the same. One party is provided with an offer to settle and if not successful at trial in advancing its position relative to the offer it may be held accountable for costs of pursuing the matter to trial.

[22] The second factor referred to in Rule 37B(6) clearly favours the defendant. The judgment upheld the position she outlined in the offer to settle. Had the plaintiff accepted it he would have saved not only his legal costs but also the legal costs he must pay to the defendant as the successful party.

[23] There are no other relevant circumstances which bear on my determination of double costs. The caution expressed by Hall J.A. in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 86 B.C.L.R. (4th) 17, is applicable in this case. Based on the considerations in the above paragraphs, I conclude the plaintiff shall pay double costs to the defendant. Those double costs shall commence seven days from the date the offer was made.

"GREYELL J."

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