

CANADA / JUDGMENT

Sidhu v. Narang

2023 BCSC 1317

COURT

Supreme Court of British Columbia

DECIDED

4 July 2023

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2023 BCSC 1317 Sidhu v. Narang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Narang,

2023 BCSC 1317

Date: 20230704

Docket: M207187

Registry: Vancouver

Between:

Amandeep Singh Sidhu

Plaintiff

And

Manisha Narang and Rajinderpal Singh Narang

Defendants

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Cope

Counsel for the Defendants

R. Monty

N. Chohan

Place and Date of Hearing:

Vancouver, B.C.

June 26, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 4, 2023

[1] THE COURT:

Introduction

[2] This action involves a claim for damages, loss and expense arising from a motor vehicle accident which occurred on January 26, 2019 in Abbotsford, BC.

[3] The defendants apply to extend time for service of a notice requiring trial by jury. The plaintiff opposes this.

Background

[4] On July 10, 2020, the plaintiff filed a notice of civil claim.

[5] On October 27, 2020, Mr. Monty of Harris & Brun was retained by Insurance Corporation of British Columbia ("ICBC") to act as counsel for the defendants. On January 7, 2021, counsel filed a response to civil claim denying liability and denying that the plaintiff had sustained injury, loss or expenses as a result of the accident. The defendants allege that the plaintiff was under the influence of alcohol when the accident occurred and failed to remain at the scene of the accident.

[6] On September 21, 2021, the parties agreed to tentatively set the matter for a ten-day trial commencing February 5 or February 12, 2024.

[7] On August 8, 2022, defendants' counsel emailed plaintiff's counsel inquiring whether they had been successful in scheduling trial dates. On August 9, 2022, plaintiff's counsel advised they had secured a trial date of February 5, 2024, but only for nine hearing days.

[8] On August 24, 2022, plaintiff's counsel filed a notice of trial. On August 26, 2022, they served it on defendants' counsel by fax. Defendants' counsel says that due to inadvertence or administrative error, the fax serving the notice of trial was "missed". The 21-day period for filing a notice requiring trial by jury lapsed.

- [9] On January 11, 2023, defendants' counsel sent an email to plaintiff's counsel asking when they would receive the notice of trial. They were advised that the notice of trial had been served by fax on August 26, 2022. A further copy of the covering letter and notice of trial were provided at that time.
- [10] This was not included in the affidavit materials, but during submissions defendants' counsel stated that on March 13, 2023, his office sent unfiled materials for this application to plaintiff's counsel and indicated that, if it was being opposed, they would schedule the hearing for a mutually convenient date. Plaintiff's counsel advised he intended to oppose. June 26, 2022 was the earliest mutually convenient hearing date.
- [11] On June 13, 2023, defendants' counsel filed this application.
- [12] As noted, trial is scheduled for February 5, 2024.

Applicable Law

- [13] Rule 12-6(3) of the Supreme Court Civil Rules is as follows:

Notice requiring trial by jury

- (3) Subject to Rule 15-1(10) and subrules (2) and (4) of this rule, a party may require that the trial of an action be heard by the court with a jury by doing the following:
- (a) within 21 days after service of the notice of trial but at least 45 days before trial,
 - (i) filing a notice in Form 47, and
 - (ii) serving a copy of the filed notice on all parties of record;
 - (b) at least 45 days before trial, paying to the sheriff a sum sufficient to pay for the jury and the jury process.
- [14] Rule 22-4(2) allows the court to extend or shorten any period of time provided for in the rules:

Extending or shortening time

- (2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.
- [15] In *Chapman-Fluker v. Gustavson*, 2019 BCSC 1022, at paras. 27-29, Master Elwood, as he then was, summarized the applicable law:

27 Prior to 1998, the Rules required litigants to pay the jury fees at the time of delivering the jury notice. In a leading authority decided under the previous Rule, *Hoare v. Firestone* (1989), 1989 CanLII 246 (BC CA), 42 B.C.L.R. (2d) 237 (C.A.), the Court of Appeal explained the importance of electing trial by jury at an early stage in the proceedings, at page 241:

The learned judge very properly emphasized the importance of the right to elect for jury trial. But on a broad consideration of the rules and authorities which has been possible in these appeal proceedings I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.

28 In *Gill v. Mijatovic*, 2016 BCSC 239, Mr. Justice Davies found that these considerations remain important to the court's determination whether to extend the time for filing a jury notice, recognizing, however, that a party who files a jury notice may now unilaterally "opt out" of a jury trial by not paying the jury fees.

29 Mr. Justice Davies extracted from the authorities before and after the rule change the following non-exhaustive list of the factors to be considered on an application to extend the time for filing a jury notice, at paragraph 45(3) of *Gill*:

- (a) Whether the party applying had a clear intention or desire to have the action tried by a jury during the time allowed for filing a Jury Notice and whether the failure to do so was due to inadvertence or neglect on the part of the applicant or their solicitor. In that regard:
 - (i) Evidence of intention, inadvertence or neglect must be established by the clearest and best evidence. See: *Litt v. Grewall*, 2011 BCSC 1071 (at para. 22);
 - (ii) Generally speaking, the evidence required will be that of the solicitor and the client, however, in some circumstances the evidence of the solicitor alone may be sufficient. See: *Narang v. Bhatthal*, 2006 BCSC 513 (at para. 28) and *Moll v. Parmar*, 2012 BCSC 1373 (at paras. 23-26 and 36); and
 - (iii) The affidavit of a paralegal alone or evidence comprised of double hearsay will not suffice. See: *Ngai v. Cho et al*, 2001 BCSC 333 (at paras. 23-25 and 31) [Ngai];
- (b) Whether the character of the action has so materially or fundamentally changed that it is now clearly appropriate for a jury trial when it was clearly not during the time allowed for the filing of a Jury Notice. See: *Hoare*; *Coulson v. Syra*, 2001 BCSC 914; *Penner v. Great-West Life Assurance Co.*, 2002 BCSC 1131; and *Robertson v. Canadian Imperial Bank of Commerce* (1994), 1994 CanLII 1752 (BC CA), 99 B.C.L.R. (2d) 246 (C.A.) [Robertson];
- (c) Whether the parties have consented to the late filing. See: *Coulson* and *Penner*;
- (d) Whether the party opposing the extension of time to file and serve a Jury Notice can point to any prejudice that would arise if an extension of time is allowed. See: *Moll*; *Penner*; and *On*; and

- (e) Whether the application to extend the time for the filing of a Jury Notice has been brought in a timely manner. See: Coulson; Penner; Ngai (at para. 25); Robertson (at paras. 33 to 35 and 50); and *Donovan v. Vat*, 1996 CanLII 8519 (B.C.S.C.) [*Donovan*] (at paras. 24 and 26).

[16] In *Litt v. Grewal*, 2011 BCSC 1071, at para. 22, Master Caldwell, as he then was, commented as follows:

22 While I am of the view that Rule 22-4(2) (the new version of Rule 3(2)) allows me to extend the time for the filing of a jury notice, I am also of the view that I should only do so on the basis of the clearest and best evidence. The extension of the time for filing a jury notice is a matter of considerable significance; the hurdle faced by the applicant is not cleared by the presentation of "some" evidence of the party's intention and when that intention was formed or, as here, when they received sufficient information to undertake that enquiry.

Analysis

[17] I now turn to consider the relevant factors identified in *Gill v. Mijatovic*, 2016 BCSC 239.

Did the defendant have intention to have case tried by a jury?

[18] The only evidence tendered by the defendants regarding intention is a very brief affidavit of Mr. Holisko, a claims specialist with ICBC. He says he has handled this file since September 25, 2020 and that "before August 24, 2022" he instructed Mr. Monty to issue a notice requiring trial by jury in this matter. There was no affidavit evidence addressing this point, but in submissions Mr. Monty confirmed he had received instructions to file a jury notice prior to August 24, 2022.

[19] Plaintiff's counsel argues that the evidence tendered on this point is inadequate. The adjuster's affidavit is vague and terse, and it fails to establish that there was an intention to issue a jury notice which continued up to and during the 21-day period after the notice of trial was served.

[20] The affidavit evidence seeking to establish intention in this case was minimal and vague. The majority of the information provided addressing this issue came through submissions of counsel. As such, this was only revealed to opposing counsel at the hearing, as opposed to appearing in the application materials and supporting affidavits.

[21] In *Weir-Jones v. Taylor*, 2013 BCSC 1633, at paras. 33-39, Justice Fitzpatrick reviewed numerous cases which consider adequacy of evidence tendered in various forms:

33 In *Ehmig v. Lee*, [1994] B.C.J. No. 364 (S.C.), a legal assistant swore an affidavit simply stating that the jury notice had "inadvertently not been filed" and that she was "informed by the Plaintiff and do verily believe that it has been his contention from the very beginning of this action that this trial be tried by Judge and jury". After noting that there was no affidavit from counsel or the plaintiff, Master Donaldson dismissed the application, stating, "[t]here is not sufficient evidence that it was the intention of the plaintiff that the matter be heard before a jury."

34 Similarly, in *Tsang v. Vermerris*, [1996] B.C.J. No. 314 (S.C.), the court found that an affidavit from a legal assistant as to her negligence was not sufficient evidence to establish the requisite intent: Paras. 17-19, 23-24.

35 In *Ngai*, again, the only evidence before the court was the affidavit of a legal assistant deposing that counsel had advised that the applicant had always intended to file a jury notice: Para. 9. The opposing party objected to this evidence regarding intention on the basis that it was double hearsay and that there was no satisfactory evidence as to why the notice was not filed in time. Neilson J. found that such evidence was insufficient to establish the requisite intention: Paras. 25-32.

36 In *On v. Venittelli*, 2006 BCSC 1987, at para. 28, the court relied on a legal assistant's affidavit on the issue of intention, although there appears to have been other evidence on the other issues.

37 There appears to have been a change in practice since those early cases, in that more recent cases now typically provide evidence directly from either counsel or the party, or both. In *Narang v. Bhatthal et al*, 2006 BCSC 513, the court found that an affidavit from ICBC's counsel was sufficient to show the requisite intention over the relevant time frame: Para. 29. Similarly, in *Moll*, the court found that an affidavit from the party's counsel was sufficient to not only establish the requisite intention but also the reasons why the notice was not filed: Paras. 23-26, 36.

38 The party in *Litt* had filed an affidavit that her lawyer had not advised her of the right to a jury trial, but the Master nevertheless found that the solicitor's failure to file an affidavit as to the alleged negligence was fatal: Para. 23.

39 In summary, there must be clear and convincing evidence of the intention to file a jury notice within the 21-day period. There must also be satisfactory evidence as to the reason for failure to file the notice, any prejudice to the parties, and any other relevant factor.

Has the plaintiff demonstrated prejudice?

[22] Prejudice asserted by the plaintiff includes the following:

- a) Adding a jury component to the trial will increase the amount of time required to roughly 15 days, which means that the current trial, which is only set for 9 days, would have to be adjourned. If the current trial date is lost, plaintiff counsel's calendar cannot accommodate a new trial date until sometime in 2026.
- b) Some of the treating and lay witnesses that he currently intends to call at trial may be "lost for evidentiary purposes." During argument, counsel elaborated that this refers to possible retirement of experts or degradation of witness memory.
- c) At seven years post-collision, the net value of any past income loss and two years of what would be future lost income will be diminished because the pre-judgment interest rate is not likely to match market-rate increases. Also, interest the plaintiff has to pay on disbursements is not recoverable.

- [23] The plaintiff did not tender detailed evidence regarding how counsel reached the conclusion that six additional days would be needed for a jury trial of this matter, what specific witnesses or evidence might be lost or offer estimates for anticipated interest-related losses if the trial is adjourned.
- [24] I asked defendants' counsel whether the addition of a jury would mean that the current trial date would have to be adjourned. Counsel indicated the 10-day estimate was agreed to back in September 2021. At that time, they did consider a jury and felt 10 days was sufficient. Since then, there have been discoveries and additional document production. He now thinks 9 days would be tight and concedes that an adjournment might be necessary. He argues, however, that this does not constitute prejudice to the plaintiff because they would still be in this position if the defendants had filed a jury notice on time.
- [25] With regard to this latter point, I note that if the defendants had filed a jury notice on time, it would have been filed in September 2022. The parties would have been in a position to discuss how many days were necessary for a jury trial and find a new trial date to accommodate that as early as September 2022, rather than having that delayed to July 2023.
- [26] I conclude that extending time to file a jury notice will most likely cause the plaintiff some prejudice in the form of significant trial delay.

Did defendants bring application in a timely manner?

- [27] No explanation was offered for counsels' failure to follow-up on the whereabouts of the notice of trial between August 8, 2022, and January 11, 2023.
- [28] Defendants' counsel stated during submissions that the delay between January 11, 2023, and March 13, 2023, which is when the unfiled application materials were delivered to plaintiff's counsel, was due to the logistics of getting a draft of Mr. Holisko's affidavit to ICBC so it could be vetted by him and his superiors to confirm he was willing to sign it, fully understanding the risks and consequences. Frankly, this explanation is difficult to accept considering the brevity of Mr. Holisko's affidavit. The substantive portion is essentially one sentence. Further, any explanation of delay should have been set out in an affidavit rather than being disclosed for the first time at the hearing as submissions of counsel.
- [29] The delay between March 13, 2023 and the hearing date of June 26, 2023 relates to counsel's schedules and has been adequately explained.

Conclusion

- [30] I conclude that the affidavit material the defendants tendered in support of this application is insufficient to meet "the clearest and best evidence" standard established as set out in the Litt and Were-Jones cases.
- [31] The defendants' affidavits do not provide an adequately detailed explanation necessary to establish:

- a) ICBC's intention to have the case tried by a jury; and
- b) the delay in bringing this application after discovering the notice of trial had not been forwarded to counsel's attention on August 26, 2022.

[32] Many of the most important factual issues raised by this application were only addressed in the submissions of defendants' counsel rather than the supporting affidavit material. It is understandable that counsel may occasionally seek to address unexpected or last-minute issues through submissions. In this case, however, the affidavit evidence tendered was minimal and vague or non-existent on several key issues which ought to have been anticipated and addressed by affidavit when the application was being prepared. This would ensure that the plaintiff receives reasonable notice of the factual basis for the application. This did not occur in this instance and, in my view, it is fatal to the application.

[33] I am also persuaded that extending time to file the jury notice would cause the plaintiff significant prejudice, namely, the likely loss of the current trial date and significant delay in securing a new trial date of sufficient length to accommodate the additional procedures inherent in a jury trial.

Order

[34] The defendants' application is dismissed, with costs to the plaintiff in any event of the cause, but not payable forthwith.

"Master Bilawich"

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