

CANADA / JUDGMENT

Singh v. Young

2020 BCSC 791

COURT

Supreme Court of British Columbia

DECIDED

28 May 2020

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2020 BCSC 791 Singh v. Young IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Singh v. Young, 2020 BCSC 791 Date: 20200528 Docket: M215503 Registry: New Westminster Between: Partap Singh Plaintiff And Virginia Young, Robert Daniel Kemp, and Mary Ellen Kemp Defendants Before: The Honourable Mr. Justice Taylor Reasons for Judgment In Chambers Counsel for Plaintiff: K. Gill (Articled Student) Counsel for Defendants: No Appearance Place and Date of Hearing: New Westminster, B.C. May 20, 2020 Place and Date of Judgment: New Westminster, B.C. May 28, 2020

Introduction

- [1] This is an application by written submission under the process direction of the Chief Justice set out in Covid-19 Notice #14 (April 27, 2020). The applicant seeks to renew a Notice of Civil Claim for a period of not more than 12 months, pursuant to Rule 3-2(1) of the Supreme Court Civil Rules, on the basis that a defendant has not been served.

Background

- [2] The plaintiff, Partap Singh, filed a Notice of Civil Claim on May 31, 2019 (the "NOCC"), in which he claims damages for injuries and other losses allegedly sustained as a result of a motor vehicle accident that took place on June 4, 2017. The named defendants in the NOCC are Virginia Young ("Ms. Young"), and Robert Daniel Kemp and Mary Ellen Kemp (the "Kemp Defendants"). Subsequently, the Kemp Defendants were served with the NOCC and they filed a Response to Civil Claim on February 24, 2020. Ms. Young has not yet been served with the NOCC.
- [3] The plaintiff retained a process serving company for the purposes of personally serving Ms. Young. In a sworn affidavit filed on this application, a process server employed by the company deposed that he had attempted to personally serve Ms. Young on January 28, 2020 at an address that had been located through a vehicle licensing and registration search. The process server stated in the affidavit that he spoke to a woman at the residence, who advised that Ms. Young owned the property but did not live there. The process server stated that he left a sticky note with the woman containing contact information to pass onto Ms. Young and

requesting that Ms. Young call to arrange for personal service. He further stated that a co-worker at the process serving company subsequently received a call on January 31, 2020 from Ms. Young, who inquired "what this was regarding". The process server stated that the co-worker told him he informed Ms. Young that this was regarding a motor vehicle accident. The co-worker also stated that Ms. Young informed him of the name of her workplace, from where she was calling, but did not provide any other contact details.

- [4] The process server further deposed that, on February 11, 2020, he unsuccessfully attempted to serve Ms. Young again at the same residential address. He also stated that he contacted the telephone number for Ms. Young's workplace, but that number did not connect with any person specifically. The process server stated that he spoke with security at the workplace to inquire about Ms. Young's specific location within the workplace, but was unable to obtain that information.
- [5] The plaintiff filed this application on May 13, 2020, but did not serve the Kemp Defendants with the application materials. In response to a question from this Court about the reasons for not serving the Kemp Defendants, plaintiff's counsel took the position that there is "no prejudice to [the Kemp Defendants]" that would arise from a renewal of the NOCC.
- Discussion

- [6] Rule 3-2(1) of the Supreme Court Civil Rules provides as follows:

- (1) An original notice of civil claim does not remain in force for more than 12 months, but if a defendant named in a notice of civil claim has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original notice of civil claim be renewed for a period of not more than 12 months.
- [7] The NOCC was filed by the plaintiff on May 31, 2019. Under Rule 3-2(1), the 12-month period for service of the NOCC on Ms. Young expires on May 31, 2020. Accordingly, the plaintiff seeks an order renewing the NOCC for a period of 12 months for the purposes of continuing to attempt to effect personal service on Ms. Young.
- [8] In *Fast Fuel Services Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 at para. 9, the Court of Appeal set out the following five factors that are relevant to the exercise of a court's discretion on an application for a renewal of a writ:
- (a) whether the application to renew was made promptly;
 - (b) whether the defendant had notice of the claim before the writ expired;
 - (c) whether the defendant was prejudiced;
 - (d) whether the failure to effect service was attributable to the defendant; and
 - (e) whether the plaintiff, as opposed to its solicitors, was at fault.

- [9] The authorities make it clear that each case must be decided on its own facts, and that in all such cases "the overarching objective is to see that justice is done"; *Sutherland v. McLeod*, 2004 BCCA 653 at para. 29; *Kaufmann v. Aleksich*, 2015 BCSC 1598 at paras. 18-19. Further, with respect to weighing the interests of justice, the Court of Appeal, in *Sutherland* at para. 28, affirmed the following approach as previously set out in *Lowe v. Christensen* (1984), 54 B.C.L.R. 88 (C.A.): "If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant's defence, then the writ should be renewed..."
- [10] Taking into account the foregoing authorities, I will now proceed to consider each of the five factors:
- (a) Was the application to renew made promptly?
- [11] Many of the reported authorities concerning Rule 3-2(1) involve situations where the original 12-month period for service has already elapsed, either due to an oversight by counsel or to a decision made by the plaintiff. This case is different because the plaintiff's application has been brought inside the 12-month window for service, albeit at the outer limit of that time period. This fact supports the conclusion that the application by the plaintiff has been prompt. While I note that the last attempt by the plaintiff to effect service took place on February 11, 2020, and that several months have elapsed since that time without apparent further action on service by the plaintiff, I do not consider the inaction in this case to be unreasonable, particularly considering the recent challenges created for litigants arising from the Covid-19 pandemic.
- [12] Accordingly, I conclude that the application to renew has been made promptly in this case.
- (b) Did the defendant have notice of the claim before the writ expired?
- [13] As stated above, the period for service of the NOCC has not yet expired, although it will shortly. While there was no definitive evidence filed by the plaintiff as to whether Ms. Young has had specific notice of the NOCC or its contents, the affidavit from the process server filed on this application did adduce evidence that:
- i. the process server had advised the inhabitant of Ms. Young's residence that he was seeking to serve Ms. Young and left a sticky note containing contact information with her requesting that Ms. Young call to arrange for personal service; and ii. on information and belief, he was advised by a co-worker at the process serving company that the co-worker subsequently received a call on January 31, 2020 from Ms. Young, who had evidently received the sticky note, who inquired "what this was regarding" and was advised by the co-worker that this was regarding a motor vehicle accident.
- [14] While the foregoing is not proof that Ms. Young has had notice of the NOCC or its contents, it is evidence that Ms. Young has at least been made aware of an ongoing attempt by the plaintiff to serve her with legal documents in respect of the June 4, 2017 motor vehicle accident. In my view, the fact of this knowledge on her part, and the fact that she has not

cooperated with the plaintiff by providing an address for personal service, is a factor tending to offset any unfairness to her in respect of a renewal of the period for service of the NOCC.

(c) Was the defendant prejudiced?

[15] There is no evidence before me that a renewal in this case would create a "prejudice consequent upon delay" that would "directly and negatively impact the defendants' ability to defend the claim; Fast Fuel Services at para. 25; Stuart v. Patterson, 2010 BCSC 1236 at para. 24. Specifically, it is in my view unlikely, without evidence to the contrary, that a renewal of the NOCC for a few additional months beyond the original 12-month service window would, for example, substantially impact Ms. Young's ability to recall events, to compile evidence or otherwise to prepare her case for trial.

(d) Was the failure to effect service attributable to the defendant?

[16] As stated above, the plaintiff's process server has made two separate attempts to serve Ms. Young, and has also left forwarding contact information with Ms. Young. Ms. Young has been made aware that the process server requires her address for service, and yet has not provided this information. While it is certainly possible that Ms. Young does not understand the role of a process server, or that her lack of communication has been due to a misunderstanding or other life circumstances, I nonetheless conclude that the failure to effect service in this case is attributable at least in some measure to the defendant, and is therefore a factor in favour of renewal.

(e) Was the plaintiff, as opposed to his solicitors, at fault?

[17] The plaintiff and his solicitors have taken steps to serve Ms. Young within the time allotted under the Supreme Court Civil Rules and, indeed, have successfully served the Kemp Defendants in that same time frame. While the plaintiff's process server could perhaps have made additional attempts to effect service on Ms. Young after February, 2020 and prior to this application, the plaintiff's actions have been reasonable under the circumstances and it cannot be said that the plaintiff has been at fault in this case.

Conclusion

[18] The plaintiff has taken steps to bring this application promptly, and has not been at fault with respect to the difficulties in effecting service. While Ms. Young may not have complete details concerning the contents of the NOCC, she is at least aware that a process server wants to serve her with documents concerning the June 4, 2017 motor vehicle accident. Furthermore, the plaintiff has made two attempts to serve Ms. Young to date and the inability of the process server to locate Ms. Young is at least partly attributable to Ms. Young's unwillingness to provide an address for service.

- [19] A denial of a renewal in this context would clearly be prejudicial to the plaintiff, as the NOCC would cease to remain in force with respect to Ms. Young after May 31, 2020. By contrast, I do not believe that a short renewal would work any substantial injustice to the defendant or prejudice the defendant's defence. Accordingly, taking into account the five factors set out in *Fast Fuel Services*, I will exercise my discretion in this case to renew the NOCC. Although the plaintiff has asked for a renewal for an additional period of 12 months, I am prepared at this time to order a six-month renewal from June 1, 2020, up to and including November 30, 2020, with a view to encouraging the plaintiff to act promptly on service. Given that the plaintiff's process servers already have information concerning Ms. Young's residence and place of work, this in my view should be ample time to take the additional steps necessary to effect service.
- [20] Furthermore, given that the plaintiff did not serve the Kemp Defendants with the application materials, and that the Kemp Defendants were therefore unable to speak on this application to the issue of any potential prejudice to them, I order the plaintiff to serve the Kemp Defendants with the application materials and the order made after application forthwith, to permit them to consider their position.
- [21] Costs will be in the cause. "Taylor J."

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