

CANADA / JUDGMENT

Sloan v. Davis

2024 BCSC 2434

COURT

Supreme Court of British Columbia

DECIDED

17 December 2024

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2024 BCSC 2434 Sloan v. Davis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sloan v. Davis,

2024 BCSC 2434

Date: 20241217

Docket: E-213217

Registry: Victoria

Between:

Jacqueline Elizabeth Sloan

Claimant

And:

Edgar Bradley Davis

Respondent

Before: The Honourable Justice K. Wolfe

Oral Reasons for Judgment on Costs

In Chambers

Counsel for the Claimant:

M.G. Norton

Appearing on his own behalf:

E. Davis

Place and Date of Hearing:

Victoria, B.C.

December 17, 2024

Place and Date of Judgment:

Victoria, B.C.

December 17, 2024

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[1] These reasons have been edited for publication.

Introduction

- [2] THE COURT: These are my oral reasons for judgment. Should either party order a transcript or should I decide to publish them, I reserve the right to edit for grammar, clarity, style and to add case citations or references, but the substance of my decision will not change.
- [3] The application before me concerns costs for a summary trial. In early September 2024, I heard an application for summary trial brought by the claimant, Jacqueline Sloan. She sought a final order determining and granting judgment with respect to her interest in a condominium property that she previously shared with the respondent, Edgar Bradley Davis. In essence, the parties disagreed on the amount of Ms. Sloan's interest based on whether or not there was an oral agreement between them.
- [4] On September 20, 2024, I released oral reasons for judgment in this matter, which are indexed as 2024 BCSC 1780. I found the matter suitable for summary trial, held the evidence did not support the existence of an oral agreement on the terms Mr. Davis had advanced, and ultimately determined the family property should be equally divided. As I determined that Ms. Sloan was substantially successful in obtaining the order she sought, I exercised my discretion and ordered Mr. Davis to pay Ms. Sloan's ordinary costs of the summary trial application. However, I made the costs order subject to a request from either party to make further submissions on costs. I was advised that the parties wished to make further submissions and a hearing was set for today.

- [5] Before me, Ms. Sloan seeks double costs in respect of certain steps taken after she provided a second offer to settle on June 3, 2024. She has provided a written outline, as well as a supporting affidavit attaching the settlement offers and outlining the differences between the bills of costs if calculated as ordinary costs throughout, versus if calculated with double costs after the date of the second settlement offer.
- [6] After the summary trial, Mr. Davis filed a notice of intention to act in person. He appeared on his own behalf today. He did not provide written material but indicated that he wished to provide a statement to the Court. As noted below, I heard some of Mr. Davis's statement, but as Mr. Davis did not appeal from my initial order, I did not permit him to continue with those portions of his prepared statement that addressed what he considered to be errors in my previous decision or systemic failings with the family law system as a whole. I asked Mr. Davis to attempt to focus his submissions on the matter that is properly before me and the test I must apply, namely, why was it not unreasonable for him to have refused the settlement offer made by Ms. Sloan.
- [7] Given my previous determination that Ms. Sloan was substantially successful and therefore entitled to ordinary costs, in my view the primary issue before me today is whether Ms. Sloan is entitled to double costs for the steps taken after her second settlement offer was made. However, in light of Mr. Davis's submissions, I will also consider whether I should disturb my initial finding that Ms. Sloan was substantially successful.

Analysis

The applicable legal principles

- [8] The legal principles respecting costs are well-settled. Costs are addressed under Rule 16-1 of the Supreme Court Family Rules, while Rule 11-1 governs offers to settle. Rule 16-1(7) establishes the default rule that costs must be awarded to the successful party, unless the Court otherwise orders. The Court's discretion to order otherwise must be exercised judicially; it is the party who seeks an order otherwise that bears the onus to persuade the Court that a different costs order should be made: *S.A.M. v. J.A.M.*, 2017 BCSC 2348, at para. 7.
- [9] One of the situations that may warrant the Court ordering otherwise is where a party has made an offer to settle that should, in all the circumstances, have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29.
- [10] With respect to settlement offers, the Court may only consider offers that comply with the technical requirements of Rule 11-1(1):
- a) the offer must be made in writing by a party to a family law case;
 - b) the offer must be served on all parties; and

- c) the offer must contain an express reservation of the right to bring the offer to the attention of the Court for consideration regarding costs (what Mr. Norton referred to as the "magic language": see Rule 11-1(1)(c)(iii)).
- [11] Compliance with the requirements of the Rules is essential: *M.S.G. v. S.K.R.*, 2015 BCSC 913, at para. 13.
- [12] If an offer complies with the technical requirements of the Rule, Rule 11-1(5) provides the Court discretion to make one or more orders with specific cost consequences. Where, as here, a party has been found substantially successfully, Rule 11-1(5)(b) provides that a court may award double costs for all or some of the steps taken after delivery or service of the settlement offer.
- [13] In *Hartshorne*, the British Columbia Court of Appeal held that, as a general rule, double costs should be awarded against a party who did not accept a settlement offer that ought reasonably to have been accepted.
- [14] Rule 11-1(6) sets out a number of factors that a court may consider when assessing an offer to settle and determining whether to make an order under Rule 11-1(5). Those factors include: whether the offer was one that ought reasonably to have been accepted, either on the date the offer was delivered or on any later date; the relationship between the terms of the offer and the final judgment of the court; the relative financial circumstances of the parties; and any other factor the court considers appropriate.
- [15] When considering whether an offer ought reasonably to have been accepted, the question is "whether it was unreasonable to refuse the offer" based on the circumstances in existence at the time the offer was made, rather than with the benefit of hindsight after judgment has been rendered: *Crossley v. Vorell*, 2022 BCSC 913, at para. 26; *Findlay v. George*, 2021 BCCA 12, at para. 95.
- [16] When determining the reasonableness of an offer, the Court may consider factors such as the timing of the offer, whether it bore some relationship to the claim, whether it could be easily evaluated, and whether a rationale for the offer was provided: *Hartshorne*, at para. 27.
- [17] The Court has the discretion to award costs from the date of an offer to settle or from some other date thereafter, allowing for reasonable time for the other party to consider: *L.E.M. v. D.M.I.*, 2014 BCSC 831 at para. 27.

The parties' positions

- [18] Ms. Sloan has provided a copy of her June 3, 2024 settlement offer, which was sent by way of written correspondence from her counsel to Mr. Davis's former counsel. It offered to settle the claim for the sum of \$100,000, with each party to bear their own costs. This was despite Ms. Sloan seeking a sum of \$111,608.70 in the summary trial. I have no difficulty finding the June 3, 2024 offer complied with the technical requirements of Rule 11-1. It was in writing, it was served on Mr. Davis through counsel, and contained the express reservation that it

could be brought to the Court's attention for consideration in relation to costs.

- [19] Ms. Sloan says her offer ought reasonably to have been accepted. With respect to timing, she says the offer was made after filing and service of her summary trial materials so Mr. Davis knew her position and the evidence she would be advancing. In this way, Ms. Sloan says the situation was different from the usual circumstance where a party is facing a trial and does not know exactly what positions and evidence will be advanced. In a summary trial situation, after service and delivery of the materials, all of the "playbook", so to speak, is on the table.
- [20] As well, Ms. Sloan says the offer was made after a new appraisal for the condo had been completed, which resulted in a lower value for the condo. The offer took into account and accepted that lower value. Further, Mr. Davis had legal counsel at the time the offer was made. The offer was also made two-and-a-half years after the start of litigation, after a judicial case conference and after the exchange of disclosure. Finally, Ms. Sloan says the offer was made before her examination for discovery but with the express purpose of saving the parties those discovery costs. Ms. Sloan also says that nothing from the examination for discovery altered the outcome of the proceeding.
- [21] With respect to the relationship to the claim, Ms. Sloan says the June 3, 2024 offer improved on her previous offer from April 12, 2023, where she had offered to settle for about \$108,000. In addition, as the June 3, 2024 offer accepted the reduced value of the condo based on the most recent appraisal, it remained current to the facts at play in the litigation. Further, the offer provided rationales for why it was being made: first, to save the parties the time and expense of both the outstanding examination for discovery and the costs of proceeding to the summary trial; and, second, to allow the parties to put this matter behind them sooner than proceeding to trial, summary or otherwise. Ms. Sloan says the offer bore a realistic relationship to the claim, could easily be evaluated and was in the end more favourable to Mr. Davis than the Court's final judgment.
- [22] Ms. Sloan says there are two categories of steps that occurred after the June 3, 2024 settlement offer: first, her examination for discovery on June 25, 2024; and second, the summary trial application on September 5 and 6, 2024, with a half-day attendance for delivery of oral reasons on September 20, 2024.
- [23] Ms. Sloan's draft bill of costs calculated as ordinary costs totals \$17,901.84 for costs and disbursements, including taxes. If double costs are awarded for the above two categories of steps after June 3, 2024, Ms. Sloan's draft bill of costs totals \$24,621.84, a difference of \$6,720. The bulk of the difference is the five half-days of attendance for the summary trial and reasons, which results in an increase of \$5,000; the increase from the examination for discovery held June 25, 2024 accounts only for an additional \$1,000.

- [24] For his part, in his prepared statement Mr. Davis made it very clear that he disagrees with my judgment. He disagrees with my procedural decision to permit the matter to proceed by way of summary trial, which he described as a denial of his trial rights. He also disagrees with the substance of my decision, including my determination that there was no oral agreement between the parties. Mr. Davis acknowledges that he did not file an appeal.
- [25] Mr. Davis also made a number of broad statements about the unfairness he considers the family law system to work in respect of individuals who have chosen not to enter into a marriage contract. I took from his statements that he disagrees with the very premise of the family law system in imposing obligations on individuals who have chosen not to get married, yet who live in a marriage-like relationship for the requisite period of time, or who otherwise meet the criteria to be brought within the ambit of the Family Law Act. As expressed to Mr. Davis during the hearing, those are not concerns that I am at liberty to entertain on this application.
- [26] With respect to costs themselves, Mr. Davis invited me to find that this case falls outside the usual purview of family law cases and invited me to "break the cycle" of automatically awarding costs against the unsuccessful party. He urged me to consider that he advanced his case in good faith, in the honest belief in his positions that there was an oral agreement between the parties and that Ms. Sloan's denial of that oral agreement was not credible. He submitted that while a reasonable or good faith case like his is not always successful, that should not attract an automatic award of costs.
- [27] As I understood his submissions, Mr. Davis says that costs should not be awarded against him because the principles for awarding costs do not apply here. Specifically, he says costs are awarded where a party advances a frivolous case or in order to punish a party for bringing a dishonest case, the implication being that neither circumstance applies to him. He also submitted that he made settlement offers and offered to resolve the matter through mediation but those offers were rejected. In his view, it would be unfair to punish or penalize him alone for having rejected offers that were, from his perspective, unreasonable in the moment, when the other side also rejected offers based on their perspective of what was reasonable at the time.

Discussion

- [28] I have considered the materials and the submissions made before me today, as well as the cases I was referred to. I appreciate that this litigation has been taxing for both parties.
- [29] While Mr. Davis invited me to disturb my finding that Ms. Sloan was entitled to her costs because she was substantially successful at trial, he did not advance any basis on which I could do so. There is no question that Ms. Sloan was successful on the summary trial application, both in having persuaded me (against Mr. Davis's objections) that the matter was suitable for summary trial and in having achieved a judgment respecting her interest in the condo that was substantially in line with the position she had advanced. There can be no

doubt that she was substantially successful.

- [30] While Mr. Davis is right that the Court has discretion to "order otherwise" with respect to costs, the party which asks the Court to do so bears the burden of demonstrating why. Mr. Davis has not done so. While costs can be awarded to punish a party for bringing a dishonest case or where a party advances frivolous positions, an order for ordinary costs is designed to recognize the expense and the time that the successful party had to expend in order to realize their rights through a litigation process.
- [31] In these circumstances, there is no basis on which to deprive Ms. Sloan of the costs that she incurred to successfully advance her position at the summary trial. This leaves the question of whether Ms. Sloan should be entitled to more than ordinary costs on the basis of her June 3, 2024 settlement offer.
- [32] Double costs are the rule rather than the exception: *I.J.G.P.G. v. K.M.*, 2017 BCSC 261, at para. 87. If the Court is going to award double costs, the Court must explain why it was unreasonable for the party to have rejected the offer.
- [33] I have set out above the elements respecting the timing of Ms. Sloan's offer and the relationship to the claim, as well as the rationales that were provided for the offer. I accept each of those elements. The offer was provided when there was plenty of time to consider it. The summary trial had been scheduled for September 2024, and the offer was made June 3, 2024. At that point, there was a period of two-and-a-half weeks before the examination for discovery was set to be held. The offer was a comprehensive one that, if accepted, would have resolved the need for (at that point) a two-day summary trial application, or if the application for summary trial had been unsuccessful, a scheduled five-day trial. The offer provided sufficient information to permit Mr. Davis to understand the content of the offer being made. It was based on the full summary trial materials that had been served by that point, which provided Mr. Davis a complete picture of the evidence Ms. Sloan intended to rely on at the summary trial. In addition, by then, the litigation had been ongoing for some two-and-a-half years, with both parties suffering from the ongoing lack of resolution between them.
- [34] In the circumstances, I am satisfied that the June 3, 2024 offer was an offer that ought reasonably to have been accepted, with one potential exception, which I will discuss below.
- [35] Mr. Davis has not advanced any evidence respecting the parties' financial positions post-judgment that would cause me to believe there are financial reasons that should preclude an award of double costs. As in some of the case law I was referred to, this is also not a situation where the award of double costs in respect of the summary trial application or the examination for discovery would "upset the balance that was achieved through the actual judgment". The judgment was for a sum of approximately \$125,000 once everything is taken into account, and the double costs addition (if accepted at the level Ms. Sloan has advanced) is approximately \$6,700.

- [36] The one piece that gives me pause is the question about whether there should be double costs for the examination for discovery. I asked Ms. Sloan's counsel some questions about that in the course of submissions today. I did so as I was mindful of the centrality of Mr. Davis's argument that Ms. Sloan lacked credibility. It was a critical focus of his position at the summary trial. The answer I was provided today was that Mr. Davis had the benefit of the affidavit on which Ms. Sloan intended to rely at trial, effectively making the discovery unnecessary. However, I accept Mr. Davis's position that, following the examination for discovery, he and his then counsel believed there was more headway to be made in cross-examination of Ms. Sloan and accordingly, believed they had a basis for opposing the summary trial so that they could pursue that cross-examination in a full trial.
- [37] As well, as indicated to Ms. Sloan's counsel during the hearing today, the assertion that nothing came out of the examination for discovery that altered the course of the trial is a position that can only be taken with the benefit of hindsight after the examination for discovery had occurred. That is not a position Mr. Davis had an ability to assess at the time the settlement offer was made on June 3, 2024. As I indicated, any kind of offer must be evaluated based on the circumstances that were known at the time that the settlement offer was delivered. Mr. Davis could not have known until after the examination for discovery occurred whether something might come of it that could alter the course of the trial.
- [38] In my view, it was not unreasonable for Mr. Davis to refuse the offer before the examination for discovery given that the major difference between the parties was Mr. Davis's assertion that the parties had an oral agreement about how the house was to be divided in the event of separation. The examination for discovery at least allowed further information to be gathered about Ms. Sloan's evidence and position and allowed some testing of the information provided in her affidavit which had not been available to Mr. Davis until that point.
- [39] As a result, in my view the appropriate costs award in this case is an award of double costs for the steps taken after the examination for discovery, but not including the examination for discovery. In my view, the examination for discovery was scheduled to occur only a few weeks after the offer was made. I am conscious that the offer was set to expire before the examination for discovery but I am also aware that counsel often continue to correspond on offers to settle despite a stated expiry date. As a result, I think Mr. Davis ought reasonably to have given some serious consideration to accepting the offer after the examination for discovery confirmed Ms. Sloan's strong belief that the oral agreement was only with respect to the down payment for the condo and not with respect to any return on the investment for the condo.

- [40] As a result, I will grant an order of double costs for the steps taken after June 25, 2024, in respect of this matter. That means the draft bill of costs that has been provided by Ms. Sloan will need to be adjusted to remove the \$1,000 additional double costs for the examination for discovery and to address the tax consequences for that. I trust that the parties will be able to agree on those terms. Mr. Norton, Mr. Davis, do you need something more concrete in terms of the terms of the order, or is that clear enough?
- [41] CNSL M. NORTON: No, that is clear enough from my perspective, Justice.
- [42] THE COURT: Okay. And with respect to the order arising from this particular application, are you prepared to draft that order, Mr. Norton?
- [43] CNSL M. NORTON: I will draft the order, Justice, yes.
- [44] THE COURT: Okay. And would you like Mr. Davis to sign that order, Mr. Norton?
- [45] CNSL M. NORTON: Perhaps what I can do is provide Mr. Davis a copy of that order and if he has any input or suggestions on it, he can advise me and we can work together, but if I do not hear from him within seven business days of it being provided, or of today's date, because I can get it drafted today, that his signature be dispensed with.
- [46] THE COURT: Why don't we do it this way, because I am concerned that is a bit uncertain. Mr. Davis, right now, particularly with Canada Post and couriers being what they are, there are challenges because where an order is made, usually both of the parties who appear at the hearing have to sign the order physically in order for it to be entered. I am going to make an order dispensing with the need for your signature just so that the order does not get held up trying to obtain a physical signature. But I am going to order Mr. Norton to provide you a draft copy of the order, and I am going to order him to provide you seven business days in which to provide comments on the draft order, and failing any comments from you within that seven business day period, he is at liberty to enter the order without your signature.
- [47] CNSL M. NORTON: All right. And to be clear, the comments I would expect are related to the form of the order and its relation to your judgment as opposed to other comments about the fairness of the justice system in general, I will simply note.
- [48] THE COURT: Yes. The comments would have to be specific to whether or not Mr. Norton has accurately captured the substance of my judgment today, which is just that Ms. Sloan is entitled to double costs for the summary trial application and receipt of the reasons. Does that make sense, Mr. Davis?
- [49] EDGAR DAVIS: So the order that you just read to us in its entirety, is that going to be available to me?
- [50] THE COURT: So what will be available after today would be the court summary sheet. Mr. Norton, are you able to obtain the court summary sheet?

- [51] CNSL M. NORTON: Yes, I am agreeable to obtaining the court summary sheet and providing that along with the order.
- [52] THE COURT: So what can be prepared right away is the court summary sheet that records the order that I have actually made. Madam Registrar has been typing that. So it is just the ultimate order at the end of it, as opposed to all of the reasons. The availability of the full reasons will depend on whether I choose to publish them or whether either party orders a transcript.
- [53] EDGAR DAVIS: Okay. But it --
- [54] CNSL M. NORTON: Oh, I believe Mr. Davis can access DARS, as well. I am not sure how quickly the recording gets onto the system but I understand it to be very quick.
- [55] THE COURT: Yes.
- [56] EDGAR DAVIS: As long as what -- what she does provide is -- is clear and I can cross-reference it to the order that Mr. Norton prepares.
- [57] THE COURT: Certainly, and I can also include a direction that the order be referred back to me for a review before it is endorsed, so that I am satisfied that the order Mr. Norton has prepared accurately reflects my judgment today. So I will add that.
- [58] EDGAR DAVIS: Thank you.
- [59] CNSL M. NORTON: Thank you.
- [60] THE COURT: I am going to hang onto your binder, Mr. Norton, because I have a feeling the cases are going to come up again.
- [61] CNSL M. NORTON: Yes.
- [62] THE COURT: I thank both parties for your submissions today, and I hope that this does allow the final resolution of this matter between the parties. Thank you.
- [63] CNSL M. NORTON: Yes, thank you, Justice.

"K. Wolfe J."

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