

CANADA / JUDGMENT

Stallan v. Palleson

2015 BCCA 462

COURT

British Columbia Court of Appeal

DECIDED

9 November 2015

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2015 BCCA 462 Stallan v. Palleson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Stallan v. Palleson,

2015 BCCA 462

Date: 20151109

Docket: CA43086

Between:

Andrew Stallan

Appellant

(Plaintiff)

And

Josephine Palleson and 0979690 B.C. Ltd.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 19, 2015 (Stallan v. Palleson, 2015 BCSC 1463, Vancouver Docket S146049).

The Appellant:

In Person**Counsel for the Respondents:**

J. MacDonnell

Place and Date of Hearing:

Vancouver, British Columbia

October 28, 2015

Place and Date of Judgment:

Vancouver, British Columbia

November 9, 2015

Summary:

The applicant (respondent) seeks security for costs of the appeal and that the appeal be stayed until security is posted. It argues that the appeal has no merit and its chance of recovery, should costs be won, is low. Held: Application denied. The appeal has some merit, the prospects of recovery are not overwhelming, and the appellant will likely have insufficient means to pursue it if costs are ordered.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] The respondents, Josephine Palleson and 0979690 B.C. Ltd. seek security for costs of the appeal in the amount of \$10,000 and the appeal be stayed until security is posted. A draft bill of costs was not provided by the applicants.

Background

- [2] The appellant, Mr. Stallan, seeks to appeal the order of Mr. Justice Kent dismissing his action on the grounds of res judicata. Kent J.'s reasons for dismissal are indexed at 2015 BCSC 1463.

Facts Relevant to the Application

- [3] The respondent, Josephine Palleson, owns 0979690 B.C. Ltd. doing business as Lotus Activia ("Lotus").
- [4] The appellant, Andrew Stallan, is Ms. Palleson's former son-in-law. Mr. Stallan and Ms. Palleson's daughter, Lisa Palleson-Stallan, were divorced on June 21, 2015. They had jointly owned and operated a clothing apparel business.
- [5] Mr. Stallan alleges that Ms. Palleson-Stallan improperly transferred some of the apparel business's assets, just prior to its bankruptcy, to her mother, Ms. Palleson, for the purposes of incorporating and operating Lotus. He does so in three separate actions:

1. the first action, he included in his counterclaim in a family law proceedings against Ms. Palleson-Stallan in Provincial Court on September 20, 2013: Action No. E132373, Vancouver Registry (the "Family Action");
 2. the second action, he commenced against Lotus and Ms. Palleson in Provincial Court on July 3, 2014: Action No. 1424300, North Vancouver Registry (the "Small Claims Action"); and
 3. the third action, which is the subject of this appeal, he brought against Lotus and Ms. Palleson in the Supreme Court on August 6, 2014: Action No. A146049, Vancouver Registry (the "Civil Action").
- [6] Mr. Justice Dyer addressed the Small Claims action on August 26, 2014 in a case conference. He ordered that the action not proceed until judgment in the Family Action was first obtained, and only then with leave.
- [7] Justice Kent pronounced judgment in the Family Action on May 20, 2015 (2015 BCSC 834). The claims regarding wrongful transfer of property which formed the subject matter of the Civil Claim were dismissed with costs (paras. 116-117).
- [8] Justice Kent pronounced judgment in the Civil Action on August 20, 2015 (2015 BCSC 1463). Mr. Stallan's claims with respect to wrongful transfer of property were dismissed with costs based on the doctrine of *res judicata* and abuse of process (paras. 35-36):
- [35] In the family law trial, this Court ruled that Mr. Stallan had failed to prove that any such transfer of assets occurred and dismissed his claim for compensation on that account. In the present action Mr. Stallan seeks to relitigate the same facts and determination upon which rested the dismissal of his compensation claim in that family law trial.
- [36] Neither this action nor the action issued in the Provincial Court should be allowed to proceed any further. I do not have the jurisdiction to dismiss the Provincial Court proceeding; however the present action is dismissed with costs to the defendants

The Law

Security for costs of the appeal

- [9] Section 24(1) of the Court of Appeal Act provides that a justice may order that an appellant pay or deposit costs in an amount and in a form determined by the justice.
- [10] The ultimate question is whether the order would be in the interests of justice (*Lu v. Mao*, 2006 BCCA 560 at para. 6). In this regard, Madam Justice Rowles in *Ferguson v. Ferstay*, 2000 BCCA 592 at para. 7, identified the following as relevant considerations:
- (1) appellant's financial means;
 - (2) the merits of the appeal;
 - (3) the timeliness of the application; and

- (4) whether the costs will be readily recoverable.
- [11] The appellant against whom an order is sought bears the onus of showing why security should not be required (*Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9).
- [12] The appellant's circumstances are the paramount consideration in determining whether some, all, or none of the security are ordered (*AB & A Matthews v. Dixon*, 1999 BCCA 333 at para. 13). Security for costs will generally not be ordered if it will prevent an appellant from bringing a meritorious appeal (*Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125-126 (B.C.C.A.)).
- [13] The usual form of security for costs includes "a provision that the appeal is stayed pending the deposit of the security " (*Austin v. Goerz*, 2007 BCCA 151 at para. 6 (*Chiasson J.A. in Chambers*)). Authority for this order is found in s. 10(2)(b) of the Court of Appeal Act, which permits a justice to make any order to prevent prejudice to any person.

Discussion

(1) Appellant's financial means

- [14] Mr. Stallan brought a notice of motion before this Court for an order that no fees be payable on the basis of his unemployment. Saunders J.A. denied the motion on September 21, 2015, finding that Mr. Stallan's financial statements were inaccurate. He had recorded his employment income as zero. Namely, she found that he did have employment income: (1) imputed income of \$50,000-\$55,000 and (2) monthly employment insurance benefits (CA43086 at paras. 4-5 (*Oral Reasons, in Chambers*)). However, Mr. Stallan successfully applied for indigent status in the trial for his Family Action (order of Master MacNaughton, June 15, 2015).
- [15] Mr. Stallan hopes to find a job soon and submits evidence of recent job applications as proof of his attempts to find employment. Mr. Stallan is currently receiving unemployment insurance, and has three children.
- [16] Ms. Palleson contends that Mr. Stallan is regularly provided with funds by his parents, which they deposit into UK accounts. Mr. Stallan refutes this claim by providing bank statements going back to December 2014 for a UK bank account under his name. They show a balance of £329.74, which has apparently not changed from December 2014 to October 2015.
- [17] In my view, Mr. Stallan does not have adequate financial means to post security in the amount requested by the respondents.

(2) Merits of the appeal

- [18] Mr. Stallan argues that the trial judge's ruling was based on a "simple misunderstanding". In support of this, he submitted excerpts of trial transcripts in the Family Action. In them, he appears to make it clear that he was not pursuing his claim for the assets allegedly held by the defendants in the Civil Action, in the Family Action, despite his pleadings to the contrary.
- [19] In my view, this is an arguable ground of appeal. These transcripts were not before Saunders J.A. on the application to dispense with filing fees.
- (3) Timeliness of the application
- [20] Ms. Palleson timely brought this motion 14 days after Mr. Stallan initiated his appeal in this Court and only four days after Justice Saunders delivered her oral reasons for judgment on the no fees payable motion.
- (4) Whether the costs will be readily recoverable
- [21] Ms. Palleson contends that Mr. Stallan's financial means are limited and the likelihood of recovering costs is "very low if nonexistent". She believes that he will expend any resources he has bringing the appeal, which will leave him unable to satisfy any future cost award.
- [22] Ms. Palleson-Stallan was awarded costs in the Family Action, which amount to approximately \$31,000. Up to September 24, 2015, she had not received payment. She also claims that Mr. Stallan has not paid \$15,000 of costs owed to her in relation to other legal proceedings.

Disposition

- [23] In summary, Mr. Stallan has limited financial means, the application was timely brought, and the prospects of the respondent recovering costs are not overwhelming. However, it appears that Mr. Stallan's appeal has some merit, and if he is required to post security for costs he will not be able to proceed with his appeal.
- [24] In these circumstances, I would dismiss the application for security for costs.

"The Honourable Madam Justice Bennett"

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Prepared on 25 October 2026 · Esheria