

CANADA / JUDGMENT

Usmon v. Masi

2020 BCSC 958

COURT

Supreme Court of British Columbia

DECIDED

26 June 2020

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2020 BCSC 958 Usmon v. Masi IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Usmon v. Masi, 2020 BCSC 958 Date: 20200626 Docket: M190232 Registry: New Westminster Between: Shakeb Muhammad Usmon Plaintiff And Aura Masi, Veena Kumar and David Kumar Defendants Before: The Honourable Mr. Justice Riley Reasons for Judgment Counsel for the Plaintiff: S. Hashmi Counsel for Defendant Aura Masi: I. Aikenhead, Q.C. Written Submissions Received: June 24, 2020 Place and Date of Judgment: New Westminster, B.C. June 26, 2020

- [1] This is an application by the defendant Aura Masi for an order (i) requiring the plaintiff Shakeb Usmon to attend for an independent medical examination by a psychiatrist, and (ii) abridging the 84-day deadline for serving the resulting medical-legal report and the 42-day service deadline for any responding report.[1] The basis for the application is that defendant's counsel had previously arranged and secured agreement for the plaintiff to attend at independent medical examinations on two prior occasions, but each of those examinations was cancelled due to concerns about the COVID-19 public health emergency.
- [2] By way of background, this is an action for damages from personal injuries arising out of a motor vehicle collision. The trial is presently set for five days commencing on 24 August 2020, a mere two months hence.
- [3] Counsel for the plaintiff opposes the order sought, arguing that defendant's counsel could and should have done more or made alternate arrangements to secure an independent medical examination before now, for example by arranging for the examination to take place by video. Counsel says the 84-day time limit for the defendant to serve expert reports in advance of the trial has now passed, and at this point it would be unduly prejudicial to the plaintiff to grant the order sought.
- [4] The defendant's request for an order requiring the plaintiff to attend for an independent medical examination is governed by Rule 7-6 of the Supreme Court Civil Rules. The purpose of this Rule is to put the parties on an equal footing with respect to their ability to present expert medical evidence: *Tran v. Abbott*, 2018 BCCA 365 at para. 32. I am satisfied that the defendant has made out a basis for ordering the plaintiff to attend an independent medical examination by a psychiatrist identified by the defendant. The only reason that I would not make such an order would be if it was unnecessary or pointless because the request was

made too late, in circumstances where there is no good reason to believe the resulting report would be admissible at trial.

- [5] Plaintiff's counsel submits that the test for obtaining an order under Rule 7-6 is more stringent where the application is brought after the 84-day service requirement as provided for in Rule 11-6(3), citing *Timar v. Barson*, 2015 BCSC 340 [Timar] at para. 20. Timar is distinguishable because the defendant, having missed the 84-day service deadline, applied for an independent medical examination for the express purpose of preparing a responding report governed by Rule 11-6(4): Timar at para. 2. In that context, Mr. Justice Smith reasoned that if the parties have prepared their cases properly, "responsive reports under Rule 11-6(4) should rarely be necessary and IMEs for the purposes of preparing such reports should be rarer still": Timar at para. 19. By contrast, in the case at bar the defendant is seeking an independent medical examination for the purposes of an "initial report" or "fresh report" that would be governed by Rule 11-6(3), in a context where the 84-day service deadline was missed due to circumstances said to be largely if not entirely beyond the control of defendant's counsel.
- [6] That brings me to the defendant's request for an abridgment of the time limit for service of the resulting report. Rule 11-6(3) provides that such reports must be served at least 84 days before the scheduled trial date "[u]nless the court otherwise orders". Thus, the court clearly has a discretion to abridge the time limit. In exercising that discretion, the court should have regard to Rule 11-7(6), which allows the court at trial to admit an expert report despite non-compliance with the service requirements on various grounds: *Neyman v. Wouterse*, 2013 BCSC 95 at para. 5.
- [7] Of particular note is Rule 11-7(6)(c), which gives the court at trial the residual discretion to admit a report despite non-compliance with the service requirements where "the interests of justice require it". In *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109, Mr. Justice Abrioux, as he then was, explained that the "interests of justice" are not properly invoked "to simply excuse or ignore" the requirements in the Rules. Rather, there must be compelling reasons justifying the "extraordinary step" of abrogating the service requirements. In my view, the same analysis is appropriate in considering whether the court should exercise its discretion to abridge the 84-day service requirement in advance of the trial under Rule 11-6(3).
- [8] There are indeed compelling reasons to justify an abridgement of the 84-day time limit in this case. Defendant's counsel made repeated efforts to arrange for an independent medical examination of the plaintiff in sufficient time for a report to be completed within the 84-day time limit, but these efforts were frustrated by fallout from the COVID-19 pandemic. This situation was more or less entirely beyond the control of counsel. I do not accept the submission that defendant's counsel could or should have done more to arrange for the examinations. Appointments were scheduled and confirmed in writing by all concerned. The fact is that the two previous examinations were cancelled, at more or less the last minute, as a result of the COVID-19 pandemic. Nor do I accept that defendant's counsel

should have arranged for an independent medical examination by video. It may be that some medical practitioners, such as a psychiatrist, could adequately conduct an examination by video. I do not accept that to be the case in respect of an independent medical examination by a physiatrist, keeping in mind that the physical injuries allegedly suffered by the plaintiff include injury to the neck, shoulders, arms, back and chest.

- [9] I accept that service of the resulting report some 45 days before trial may have some effect on the plaintiff's ability to prepare, but in the circumstances I find that this general assertion of prejudice is not sufficient to overcome the objective of providing a level playing field with respect to expert medical evidence as contemplated in Rule 7-6. There is no evidence of any more specific form of prejudice to the plaintiff, either in terms of the inconvenience and impact of the examination itself, or in terms of counsel's ability to prepare for trial. Certainly, as the defendant concedes, the plaintiff will be entitled to a corresponding abridgement of the time limit for service of any responding report.
- [10] I would grant the order on the terms sought by the defendant. Specifically, (i) the plaintiff is directed to attend for an independent medical examination at 10:00 am on 30 June 2020, (ii) (a) the 84-day deadline for the defendant to serve the resulting report is abridged to 7 July 2020, and (ii)(b) the 42-day deadline for the plaintiff to serve any responding report is abridged to 18 August 2020.
- [11] The defendant is entitled to costs of this application in the cause. "Riley J."
- [1] The application is brought by written submissions pursuant to a Practice Directive entitled COVID-19: Expansion of Civil and Family Matters - Applications by Written Submission dated 27 April 2020 (COVID-19 Notice #14).

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