

CANADA / JUDGMENT

Vedan v. Stevens and Zabotel

2008 BCSC 934

COURT

Supreme Court of British Columbia

DECIDED

17 July 2008

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2008 BCSC 934 Vedan v. Stevens and Zabotel IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Vedan v. Stevens and Zabotel, 2008 BCSC 934 Date: 20080717 Docket: M39025 Registry: Vernon Between: Inqala Dan Vedan, by his Guardian Ad Litem, Joan Zabotel Plaintiff And Alfred Peter Stevens Defendant And Joan Zabotel, Derrick Zabotel and the Adams Lake Indian Band by its Legal Representative, Nelson Leon, and the said Adams Lake Indian Band Third Parties Before: Master Hyslop as Registrar Reasons for Judgment No one appeared on behalf of the Plaintiff Counsel for the Defendant B. Kielmann Counsel for the Third Party, Adams Lake Indian Band A. Wright Date and Place of Trial/Hearing: July 8, 2008 Vernon, B.C.

- [1] The Adams Lake Indian Band ("Third Party") took out an appointment to assess its costs pursuant to Appendix B, Party and Party Costs of the Rules of Court (the "Rules").
- [2] This assessment arises as a result of the defendant discontinuing his claim against the Third Party: for contribution or indemnity for any amount that may be found due and payable by him, [Third Party Notice]
- [3] The notice of discontinuance was filed by the defendant prior to this action being set down for trial.
- [4] The Third Party argues that it is entitled to assess its costs pursuant to Rule 36(4) of the Rules as follows: Costs and default procedure on discontinuance or withdrawal
- (4) Subject to subrule (2), a person wholly discontinuing an action or wholly withdrawing his defence against a party shall pay the costs of that party to the date of delivery of the notice of discontinuance or withdrawal and if a plaintiff, liable for costs under this rule, subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.
- [5] The defendant argues that this assessment is premature, and it should be dealt with by the court pursuant to Rule 36(5) of the Rules as follows: Idem

- [5] Where a plaintiff discontinues the whole or any part of an action in which a person has been joined as a third party, the third party, if the discontinuance disposes of the claim against the third party, is entitled to costs and may apply to the court for a direction as to who should pay them.
- [6] The defendant argues that as this is a third party assessing its costs, the costs cannot be assessed until the action is disposed of by the court, and the court determines who pays the costs. Counsel for the defendant suggested that the court may award costs by a Bullock or Sanderson order. I disagree with this position.
- [7] Rule 36(4) permits a party against whom there is a claim, which is discontinued, or a defence withdrawn, to assess their costs. It is not discretionary. (*Scuccato v. Almazan*, 2007 BCSC 1314).
- [8] Rule 36(5) contemplates a plaintiff discontinuing an action in whole or in part which finally disposes of the claim against a third party. There is no reference to a defendant in this sub-rule. This sub-rule relates only to a plaintiff and a third party.
- [9] Rule 36(4) makes no mention of a third party. This sub-rule describes a person wholly discontinuing his action, or withdrawing his defence against a party. The discontinuance or withdrawal is taken by a person against a party.
- [10] That part of Rule 36(4) that applies to third parties is as follows: a person wholly discontinuing an action against a party shall pay the costs of that party to the date of delivery of the notice of discontinuance
- [11] Rule 1 of the Rules does not define "party" or "person". Registrar Horn addresses this in *P.T.C. v. C.S.*, [1999] B.C.J. 1212, 33 C.P.C. (4th) 188.
- [12] Registrar Horn had before him, a defendant who had been served with a writ and statement of claim. The defendant, through counsel, made an appearance before the court. The plaintiff filed a notice of discontinuance before the defendant filed an appearance. The defendant took out an appointment before the registrar to assess her costs pursuant to Rule 36(4). Registrar Horn concluded the following: 9 The Rules of Court sometimes use the words "person," sometimes the word "party" and sometimes the words "party of record." 10 The word "person" is generally used where some right is given to or obligation imposed upon a person not made a party to a proceeding (see for example Rules 10(8), 38(1) and 57(29)). But the word "person" is sometimes used to include a party (see for example Rules 10(5) and 42(25)). 11 While the words "party of record" are defined in s. 1(8) the word "party" is not. The words "party of record" are generally used with precision (see for example Rules 36(1) and 40A(2)). 12 The word "party" is often used without precision. Sometimes it is clear that the word refers to a person who is named as a party to a proceeding and is not a party of record (see, for example, Rules 14(1) and 15(5)) and sometimes it refers to a party of record (see for example Rules 34(1) and 35(1)). 13 I conclude that in interpreting any Rule no great significance can be attached to the use of the word "party" as opposed to the word "person"

or to the words "party of record" and that the context dictates whether a Rule applies to someone named as a party but who has neither entered appearance nor taken formal steps in the proceeding. 15 In my opinion, Rule 36(4) is designed to allow costs to a party who has incurred fees or expenses in taking a step in a proceeding or preparing to do so, after being served with notice of the proceeding. Here Ms. C.S. did have notice and did participate, without objection, even though she did not enter appearance. She is a party and she has incurred costs which she is entitled to have assessed.

[13] I conclude that the Third Party is entitled to assess its costs pursuant to Rule 36(4) of the Rules, and take out a certificate of costs for the units and disbursements that I have assessed.

[14] I have signed the certificate of costs as assessed on July 8, 2008. "Master Hyslop" MASTER HYSLOP

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