
CANADA / JUDGMENT

Wannan v. Hutchison

2020 BCSC 1233

COURT

Supreme Court of British Columbia

DECIDED

19 August 2020

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2020 BCSC 1233 Wannan v. Hutchison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wannan v. Hutchison,

2020 BCSC 1233

Date: 20200819

Docket: S173949

Registry: Victoria

Between:

Joanne Wannan

Plaintiff

And

Pamela Hutchison

Defendant

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment

Counsel for the Plaintiff:

M.H. Martin

Counsel for the Defendant:

J.J. Weisman

Place and Date of Hearing:

Victoria, B.C.

August 14, 2020

Place and Date of Judgment:

Victoria, B.C.

August 19, 2020

Introduction

- [1] The defendant seeks to enforce a settlement agreement that she says was reached between the parties on April 7, 2020.
- [2] By way of brief background, on October 23, 2017, the plaintiff filed a Notice of Civil Claim seeking damages for injury and loss she alleges to have suffered as a result of naturopathic treatments performed on her by the defendant.
- [3] On April 1, 2020, counsel for the defendant issued a formal offer to settle, the thrust of which is as follows:

The defendant, Pamela Hutchison, offers to settle the within proceeding for payment to the plaintiff of the sum of \$5,000 all-inclusive. In exchange, our client requires that the plaintiff sign a Release and have a Consent Dismissal Order executed on a no costs basis, as though the proceeding had been determined on its merits. We enclose copies of the Release and Consent Dismissal Order for your consideration.

Kindly advise if you have any questions regarding the proposed terms of settlement.

- [4] After the word Release is a footnote which reads:

The Release includes a confidentiality and non-disparagement clause.

[Emphasis added].

- [5] The release that was attached includes, inter alia, the following clause which is of significance to this application:

The Releasor further agrees that she will in no way disparage, criticize, or otherwise negatively comment in any public matter on the Releasee, the Treatment, the Action or handling of same, or the Release between the parties. If it is proven that the Releasor has in any way breached the terms of this paragraph, then the Releasee will have the right to recover the consideration paid to the Releasor pursuant to this Release.

- [6] On April 8, 2020, counsel for the plaintiff sent counsel for the respondent an email accepting the offer. It read:

I have instructions to accept your offer of \$5,000 and am in the process of getting the release signed. Please confirm if you would like the original release returned to you or if you are satisfied with an electronic copy.

[7] Almost exactly 24 hours later, on April 8, 2020, counsel for the plaintiff sent counsel for the defendant another email indicating a problem with the release:

There is one issue with the release. Ms. Wannan had a very negative experience with the Hinz protocol and does not want to be prevented from telling others about her experience, the side effects she experienced and that it did not work for her. This goes to the effectiveness of amino acids as a treatment in her case. Please confirm that you will amend the release to exclude this.

[8] The defendant refused to amend the release, stating that they had a binding settlement.

The Issue

[9] The issues to be decided are:

- a) did the parties enter into a binding settlement agreement; and if so
- b) should the court exercise its discretion to refuse to enforce it.

The Law

[10] The ordinary rules of contractual interpretation apply in determining whether there was a binding settlement agreement. In *Fieguth v. Acklands Ltd.*, 1989 CanLII 2744 (BC CA), Chief Justice McEachern, writing for the Court, stated that:

[35] In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

[11] The terms of an offer must be clear and unambiguous: *The Owners, Strata Plan NW 3079 v. Chan*, 2010 BCSC 527 at para. 81. The acceptance must be absolute and unqualified: *Urban Communications Inc. v. BCNET Networking Society*, 2014 BCSC 485 at para. 74.

[12] It is not for the court to formulate a contract between parties. The court must view the transaction on an objective basis to determine whether there was a meeting of the minds between the parties. It is only if there has been an agreement on all of the essential terms that the transaction can be declared an effective contract: *All Out Contracting Ltd. v. Gourlay*, 2020 BCSC 481 at para. 31.

Analysis

- [13] The plaintiff argues that the terms of the offer were ambiguous. She submits that while the fact that there was a release to be signed was clear, the specific terms of the release were not.
- [14] Alternatively, the plaintiff argues that it would be unfair to enforce the settlement as her instructions to counsel were based on a misunderstanding of the terms of the offer. Because of the pandemic, plaintiff's counsel was not meeting with her clients in person. When she forwarded the offer to her client, plaintiff's counsel inadvertently did not attach the release. All the client had was the letter extending the offer and stating that a release was required to be signed which contained a confidentiality and non-disparagement clause. The plaintiff did not realize that the non-disparagement clause extended beyond the defendant to include the treatment as well, until she was sent the release to sign. By then her counsel had sent the email accepting the offer.
- [15] The defendant maintains that the parties had a binding contract. She argues that there was no ambiguity or uncertainty in the offer or acceptance. The defendant argues that there was no mistake. A change of mind based on further consideration is not sufficient to set aside an agreement. The plaintiff's counsel acted within the scope of her apparent authority to enter into the contract on behalf of her client. If there was any error it was that plaintiff's counsel may have exceeded her authority, which is not a basis upon which to refuse to enforce an agreement. The plaintiff is therefore bound by the terms of the contract.
- [16] There is no question that there was a binding settlement agreement. The terms of the offer were clear. The real issue is whether in the circumstances of this case the court should exercise its discretion to refuse to enforce it.
- [17] In *Carlton v. Carlton*, 2017 BCSC 603, Justice Warren discussed the court's discretion to permit a party to withdraw from a settlement agreement:
- [36] As held by Sewell J. in *Roumanis*, I do not have a broad discretion to allow Ms. Carlton to withdraw from or undo the Settlement Agreement on the basis that the agreement was unfair or that it is in the interests of justice to do so.
- [37] Where the settlement has yet to be perfected or, in other words, fully implemented, the court retains a limited discretion to deny an application to enforce the agreement and refuse to stay the proceeding. In such a case, the parties would be left to pursue the remedies sought in the underlying action or to commence a new action on the settlement. Four grounds for the exercise of this discretion were set out and discussed in *Hawitt v. Campbell*, [1983] CanLII 307 (BC CA). There, Macfarlane J.A. said at para. 19:

The judge may refuse the stay if:

1. There was a limitation on the instructions of the solicitor known to the opposite party;

2. There was a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;
3. There was fraud or collusion;
4. There was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.

[38] It is clear from these four grounds that the discretion is exercised in circumstances where settlements have been agreed to by counsel without instructions or under a misapprehension as to what the actual instructions were, or where there has been fraud or collusion. I agree with Justice Sewell's conclusion in Roumanis, that absent these very limited grounds, the dispositive issue is whether the settlement is binding pursuant to contractual principles.

[18] In *Milios v. Zagas*, [1998] O.J. No. 812, the Ontario Court of Appeal considered a scenario similar to the one before this court.

[19] In *Milios*, the client's wife advised counsel that her husband was away but had told her "to go ahead with the settlement". Acting on these instructions, counsel accepted an offer made by the opposing side. When the client returned three weeks later he learned of the mistake and clarified that he had told his wife to go ahead with his (the client's) previous settlement offer, not the offer from the other side. The chamber's judge enforced the accepted settlement offer. In setting aside that decision, the Ontario Court of Appeal held that the chamber's judge should have considered a number of factors in addition to merely whether there was clear offer and acceptance, as follows:

In addition to over-emphasizing the fact that the plaintiff's acceptance was clear and under-emphasizing the evidence of mistake, I think that the motions judge erred by not taking into account manifestly important factors, including:

- * since no order giving effect to the settlement had been taken out, the parties' pre-settlement positions remained intact;
- * apart from losing the benefit of the impugned settlement, the defendant will not be prejudiced if the settlement is not enforced;
- * the degree to which the plaintiff would be prejudiced if judgment is granted in relation to the prejudice that the defendant would suffer if the settlement is not enforced;
- * the fact that no third parties were, or would be, affected if the settlement is not enforced.

[20] I am satisfied that plaintiff's counsel entered into the settlement under a misapprehension - both on her part and the part of her client. In these unusual times counsel are doing business differently. Instead of meeting face to face with clients, they are now forced to communicate electronically. It is a new way of doing business. That counsel inadvertently

failed to attach the release to the offer to settle is not out of the realm of possibilities. I accept that counsel did not realize that she had failed to provide the release to her client until after she sent the acceptance email, and that her client did not understand the scope of the release when she instructed counsel to accept the offer.

- [21] I further accept that the non-disparagement clause in this case is unusually broad and that it is reasonable that the plaintiff failed to appreciate from simply reading the offer to settle, that the non-disparagement clause would include the treatment.
- [22] Plaintiff's counsel reported the misapprehension to defendant's counsel within 24 hours of the acceptance. The settlement had not been perfected. No further steps had been taken.
- [23] There is no evidence before me that there would be any prejudice to the defendant if the settlement is not enforced other than losing the settlement. Nor is there any evidence before me that there would be an impact on any third parties if the settlement is not enforced.
- [24] I am however satisfied that there would be prejudice to the plaintiff if the settlement is enforced. She would be silenced from publicly warning others about the treatment she received; something she feels strongly about.
- [25] In all of the circumstances, I am satisfied that this is one of those rare cases in which it would be unjust to enforce the agreement. Accordingly, I refuse to enforce the plaintiff's acceptance of the settlement offer.
- [26] Costs are in the cause.

"The Honourable Madam Justice Murray"

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