

CANADA / JUDGMENT

Xia v. Chen

2025 BCSC 874

COURT

Supreme Court of British Columbia

DECIDED

14 March 2025

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2025 BCSC 874 Xia v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xia v. Chen,

2025 BCSC 874

Date: 20250314

Docket: M2011152

Registry: Vancouver

Between:

Haixi Xia

Plaintiff

And

Guo Chen, Xuyi Zhou, and Kelly Rand Hefelfinger

Defendants

Before: Associate Judge Vos

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E. Orr-Ewing

Counsel for the Defendants, Guo Chen and Xuyi Zhou:

E. Tolfo

Place and Date of Hearing:

Vancouver, B.C.

March 14, 2025

Place and Date of Ruling:

Vancouver, B.C.

March 14, 2025

- [1] THE COURT: The defendants apply for an order that would extend the time for them to serve a notice requiring trial by jury for this action. The plaintiff opposes the application. There is some urgency to the matter as the parties need to know if the fast approaching trial would be with a jury and, if so, jury fees would have to be paid early next week.
- [2] This decision is being provided as oral reasons. If the oral reasons are transcribed, I will likely edit them to clarify the judgment in written form and may include additional information from case authorities or the evidence on matters mentioned in an abbreviated manner when the oral reasons were delivered in court. However, the result and the core analysis will not change

Background

- [3] The plaintiff claims damages for personal injuries and losses she sustained as a result of a motor vehicle accident that occurred on February 25, 2019.
- [4] The notice of civil claim was filed on November 30, 2020. On April 27, 2021 the plaintiff filed a notice of discontinuance of her action against the defendant, Kelly Rand Hefelfinger. The other defendants, Guo Chen and Xuyi Zhou (hereinafter referred to as "the defendants"), filed their response to civil claim on May 21, 2021.
- [5] On February 14, 2022 the plaintiff filed a notice of trial, scheduling the trial of this action for a seven-day hearing starting on July 10, 2023. That notice of trial was served on counsel for the defendants on March 16, 2022.
- [6] On March 29, 2022 the defendants filed a notice requiring a trial by jury.
- [7] The defendants' lawyers did not receive a filed copy of their March 29, 2022 notice requiring trial by jury back from the registry until April 26, 2022. On May 6, 2022 counsel for the defendants served a copy of the notice requiring trial by jury on counsel for the plaintiff and explained in correspondence that the notice requiring trial by jury had been returned to them late, on April 26, 2022.

- [8] The plaintiff did not, at that time, indicate any objection to the timing of the delivery of the notice requiring trial by jury. Indeed, the plaintiff did not raise an issue with respect to the late service of this jury notice until about 2.5 years later.
- [9] On June 7, 2022 counsel for the plaintiff advised counsel for the defendants that he had mistakenly agreed to the July 10, 2023 trial date as he had another commitment scheduled at that time. He asked for the defendants' consent to reschedule the trial. The defendants accommodated that request.
- [10] On November 8, 2023 the plaintiff filed a second notice of trial, rescheduling the trial for a seven-day hearing starting on May 5, 2025. That notice of trial was served on defence counsel on November 24, 2023.
- [11] On December 5, 2023 counsel for the defendants filed a second notice requiring trial by jury. On December 5, 2023 counsel for the defendants received a filed copy of the notice requiring trial by jury filed that day and instructed a legal assistant at their office to serve that notice on the plaintiff's counsel. Due to an internal miscommunication between counsel for the defendants and his legal assistant, the December 5, 2023 notice requiring trial by jury was not sent to plaintiff's counsel promptly thereafter.
- [12] Counsel for the defendants has indicated that on May 2, 2024 he checked his file to ensure that enough time had been reserved for the trial to proceed with a jury.
- [13] On May 6, 2024 counsel for the defendants wrote to plaintiff's counsel to ask that the time reserved for the trial be increased from seven to ten days.
- [14] On May 14, 2024 counsel for the defendants wrote to plaintiff's counsel confirming that they had instructions to proceed with a jury trial and indicated that additional time should be reserved for the trial. At that time, counsel for the defendants was not aware that their office had not yet sent their second notice requiring trial by jury to the plaintiff's counsel.
- [15] Plaintiff's counsel did not respond to defence counsel's May 14, 2024 letter.
- [16] On October 15, 2024 counsel for the defendants was reviewing the file and discovered that a letter had not been sent to serve the second notice requiring trial by jury. He then determined that the second notice requiring trial by jury had not yet been served on plaintiff's counsel. The next day defence counsel sent a letter to plaintiff's counsel enclosing the notice requiring trial by jury they filed on December 5, 2023 and advised that they had inadvertently failed to serve the notice earlier.
- [17] On October 16, 2024 counsel for the plaintiff sent a letter to counsel for the defendants indicating that the plaintiff took the position that the notice requiring trial by jury was served out of time and was a nullity. Counsel for the plaintiff also indicated that if the defendants intended to apply to extend the time to serve their notice requiring trial by jury, they were to contact plaintiff's counsel to obtain mutually agreeable dates. Counsel for the defendants states that correspondence was sent to plaintiff's counsel on October 18, 22, 29

and November 5, 2024 requesting possible hearing dates, but plaintiff's counsel did not respond to those requests.

- [18] The deadline for payment of the initial jury fees required in order to maintain the jury trial is next Wednesday, March 19, 2025.

Analysis

- [19] In British Columbia, the default mode of trial for civil actions is a judge alone trial: Rule 12-6(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). However, in actions where damages are claimed for personal injuries and losses sustained in a motor vehicle accident, a party to the action can elect to have the trial proceed with a jury. The election is carried out pursuant to Rule 12-6(3). It provides that if a party requires the trial to be heard with a jury, they must file and serve a notice requiring trial by jury within 21 days after being served with the notice of trial. This early deadline for parties to declare whether they require the trial to proceed with a jury gives all parties time for adjustments they may wish make to their strategy or preparation because of the involvement of a jury.
- [20] If a party does not file and serve a notice requiring trial by jury within the 21-day period, but nevertheless still wants to have the trial proceed with a jury, that party can apply under Rule 22-4(2) for an order that would extend the time for them to file or serve the jury notice. Rule 22-4(2) allows the court to extend or shorten any period of time stipulated in the Rules.
- [21] The principles the court applies on such an application are set out at para. 45(3) of *Gill v. Majatovic*, 2016 BCSC 239. The considerations relevant to this application are:
- 1) Whether the defendants can establish that they had a clear intention to file and serve a notice requiring trial by jury within the 21 day period, but failed to do so because of inadvertence or neglect, either on the part of the defendants or their lawyer;
 - 2) Whether the plaintiff can establish that she would be prejudiced if the defendant would be allowed to serve a notice requiring trial by jury at this point in the proceedings; and
 - 3) Whether this application was brought in a timely manner.
- [22] Counsel for the defendants has indicated that at all material times they had instructions to preserve the defendants' right to proceed to trial with a jury. This is confirmed in an affidavit from the client, a claims adjuster with the Insurance Corporation of BC, and in an affidavit from the lawyer for the defendants who had conduct of the case. It is also confirmed by tasks counsel for the defendants indicates he did at various times to make sure enough trial time would be reserved for the trial to proceed with a jury.
- [23] During the hearing, the defendants' submissions mainly focused on the December 5, 2023 notice requiring trial by jury. This is not surprising, as the plaintiff's objection only arose after the second notice requiring trial by jury was served.

- [24] As can be seen from the chronology regarding the jury notices and the communications concerning a jury trial, the defendants consistently indicated that they wanted to maintain their right to proceed to trial with a jury. The defendants filed two notices requiring trial by jury; each filed within the 21 day period set out in Rule 12-6(3)(a). The defendants have shown that their first notice requiring trial by jury was served late because of its late return from the registry, and the second notice requiring trial by jury was served late because of an inadvertent miscommunication between defence counsel and an administrative assistant.
- [25] The defendants have satisfied the first part of the test. They had a clear intention to maintain their right to have the trial proceed with a jury. The two notices requiring trial by jury were served late only because of inadvertent mistakes by their lawyer.
- [26] The plaintiff's submissions at this hearing focussed on the late service of the first notice requiring trial by jury. The plaintiff argues that late service of that notice should disentitle the defendants from being able to have the trial proceed with a jury. This position was not conveyed until, at the earliest, October 16, 2024. The plaintiff argues that case authorities can be interpreted as suggesting that the filing of a notice requiring trial by jury, service of that notice, and payment of the initial jury fees amount to a three step process that must each be "perfected" for the filing party to be entitled to proceed with a jury. The plaintiff takes the position that there must be strict compliance with each of the three steps and that she could lay in the weeds and raise the late service argument at any time. This argument cannot succeed. That type of ambush tactic is strongly discouraged in the Rules and case authorities relating to the practice of civil litigation in BC. The modern approach to civil procedure requires parties to provide timely notice to other litigants about matters that may affect the litigation. The case authorities emphasize that the issue of whether the trial may proceed with a jury should be resolved early in the litigation process. It would be fundamentally unfair to allow a party opposing a jury trial to unduly delay resolution of a "gotcha" technical argument on whether the case would proceed with a jury. That unfairness is demonstrated here, as the opposition to the jury trial was not communicated until shortly before the trial date, about 2.5 years after the mistake the plaintiff relies on, in circumstances where the defendants conducted the case on the assumption that there could be a jury trial.
- [27] The plaintiff knew that the defendants consistently indicated their intention to preserve their right to proceed with a jury trial. Two notices requiring trial by jury were filed on time by the defendants and both were served on the plaintiff, albeit slightly late. If the plaintiff wished to eliminate the defendants' right to have the case proceed with a jury she should have indicated so at the earliest opportunity, so the matter would have been dealt with, and all parties would then know whether there could be a jury trial, and be able to conduct the case on that basis.
- [28] The plaintiff submits that it should be inferred that she would be prejudiced if the time to file the notice was extended to March 17, 2025. While prejudice can often be inferred when something is not done within the time set out in the rules, application of the test in Gill

requires the plaintiff to show that prejudice would arise if the extension to file or serve the jury notice is allowed. This means the plaintiff should establish that her conduct of the case will have to be adjusted because of the involvement of a jury; for example, that her lawyer would have to make changes in her expert evidence or preparation which cannot be carried out in the time remaining before the trial. The plaintiff has not shown that her preparation for trial would be significantly affected if the case would proceed with a jury. Indeed, it would be surprising if the plaintiff would be prejudiced, as she must have realized that the trial could be with a jury, given that counsel for the defendants had consistently indicated their intention to maintain their right to have the trial proceed with a jury, and no objection to the jury trial was voiced by plaintiff's counsel until recently.

[29] In all the circumstances, the plaintiff cannot say that this application was not brought in a timely manner. Defence counsel's office took steps since March 2022 to preserve the defendants' right to have the trial proceed with a jury, and filed two notices requiring trial by jury to support that position. Plaintiff's counsel did not voice any objection until October 16, 2024, when he learned that the second notice requiring trial by jury had not been provided earlier because of inadvertence. Only then did the plaintiff object. Plaintiff's counsel asked that this application be set on a mutually agreeable date, but then did not respond to requests for dates. The application was brought in a timely manner after attempts to arrange a mutually available date did not work out.

Result

[30] The application of the defendants seeking an order that the time to serve their notice requiring trial by jury be extended to March 17, 2025 is granted.

[31] Do counsel wish to make submissions with respect to costs?

[SUBMISSIONS REGARDING COSTS]

[32] Costs of this application are to be determined as costs in the cause.

"Associate Judge Vos"

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