IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TCF Ventures Corp. v. The Cambie Malone's Corporation,* 2016 BCSC 2133

Date: 20161117
Docket: S128964
Registry: Vancouver

Between:

TCF Ventures Corp.

Plaintiff

And

The Cambie Malone's Corporation

Defendant

And

Tim Fernback

Defendant by Counterclaim

Corrected Judgment: The text of the judgment was corrected at para. 13 on November 22, 2016.

Before: The Honourable Mr. Justice Williams

Ruling on Costs

Counsel for the Plaintiff and Defendant by Counterclaim:	R. Mahil P. Kressock
Counsel for the Defendant:	T.D. Goepel
Place and Date of Trial:	Vancouver, B.C. October 19-23, 2015 December 15, 2015
Place and Date of Judgment:	Vancouver, B.C. November 17, 2016

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[1] This ruling pertains to the matter of costs following trial.

[2] In reasons for judgment released on August 18, 2016 (2016 BCSC 1521), the court awarded the plaintiff damages for wrongful dismissal in the amount of $107,893.33. The trial was conducted over six days.

[3] In my reasons, I indicated that the plaintiff would be awarded costs at Scale B. However, this ruling was made subject to any written submissions by counsel contrary to that disposition.

[4] Submissions on the issue of costs have now been received from both the plaintiff and the defendant.

[5] The plaintiff seeks an award of special costs pursuant to Rule 14-1(1)(b)(i) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Alternatively, he seeks an order for double costs pursuant to Rule 9-1(5)(b).

[6] The defendant submits that there is no proper basis to make an award of special costs, nor should the court award double costs as sought. Moreover, the defendant submits that, given the plaintiff's conduct during this litigation, the court should order each party to bear its own costs.

Submissions of the Parties

[7] The plaintiff, in arguing for an award of special costs, makes reference to what he says is the reprehensible conduct of the defendant. Specifically, he says that the defendant made improper allegations of sexual harassment, allegations which were withdrawn on the first day of trial. The plaintiff also points out that the defendant raised defences that were not pursued, listed witnesses who were not called, and introduced irrelevant evidence at trial. As a result of these actions, the plaintiff submits that trial time was wasted and he was unnecessarily inconvenienced.

[8] In response to the sexual harassment allegations, the defendant notes that, at the time the pleadings were prepared, there was an outstanding human rights

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complaint filed against the defendant by one of its former employees. Although this claim was filed against the defendant, it was based significantly on alleged conduct on the part of the plaintiff. The defendant says that, in those circumstances, it was logical and proper for it to have initiated its counterclaim, as it was, in essence, seeking indemnity against the plaintiff in the event that the human rights complaint was successful.

[9] In regards to the other grounds on which the plaintiff makes his claim for special costs, the defendant says that it was entitled to defend the case as it saw fit, which, in turn, was dependant on how the plaintiff laid out their claim. Consequently, in accordance with Rule 7-4(4), there was no obligation on it to call as a witness any individual named on its witness list. Moreover, the defendant denies that evidence was adduced which was irrelevant or wasted the court's time.

[10] As noted above, in the alternative, the plaintiff seeks an order awarding double costs. The basis for this application is that he made two formal offers to settle which he says were unreasonably rejected by the defendant. He points to an offer that was made on January 22, 2015 for $50,000 which remained open for a period of one week. There was, as well, a second offer to settle (for a lesser sum) made on February 10, 2015, which was open for one day. Both offers were ultimately rejected by the defendant.

[11] The defendant takes the position that the circumstances surrounding these offers should preclude any order of double costs. Specifically, the defendant says that, at the time the offers were made, the plaintiff had refused to produce relevant documentation, such as personal income tax returns. The lack of access to these materials precluded the defendant from knowing the plaintiff's earnings, a factor which could be considered in regards to mitigation. Thus, the defendant argues that it should not have been forced to accept these offers, as it had been denied access to relevant evidence.

[12] Finally, the defendant says that the court should make an order that each party bear its own costs, thus depriving the plaintiff of his costs, on the basis that the

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plaintiff's conduct in the course of the litigation is deserving of sanction. In support of this claim, the defendant refers to the following four instances of conduct allegedly deserving sanction:

a. In reasons for judgment, in expressing my observations of Mr. Fernback as a witness, I expressed my view that he had been less than perfectly forthcoming and noted that some of his testimony was "somewhat opaque";

b. In reasons for judgment, I noted that the plaintiff's counsel had provided the court with the decision of another judge of the Supreme Court involving Mr. Yehia. I noted that the court in the prior case made observations of Mr. Yehia that were "less than positive," and that any such observation by another judge is of no relevance in this trial. I concluded that, in general, this decision was irrelevant to the case at bar;

c. In pretrial examinations, the defendant says that Mr. Fernback was untruthful in reporting income made after his tenure with the defendant; and

d. The plaintiff is alleged to have repeatedly made late production of relevant documents in the course of the litigation. Evidently, one previously scheduled trial date had to be adjourned for that reason. Moreover, the defendant claims that the late production of documents continued until the eve of the second trial.

Discussion

[13] There is a substantial body of authority on the issue of special costs.

[14] In terms of the *Supreme Court Rules*, Rule 14-1 addresses costs of a proceeding, with Rule 14-1(1)(b) relating to special costs. Special costs are only to be awarded "exceptionally": Fraser, Horn & Griffin, *Conduct of Civil Litigation in British Columbia*, loose-leaf, 2d ed. (Toronto, Ont.: LexisNexis Canada, 2007) vol. 2, at 38-7. The threshold for awarding special costs has been found to be "reprehensible" conduct: *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA) at para 17.

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[15] On the issue of special costs, the BC Court of Appeal recently noted the following in *Nazmdeh v. Ursel*, 2010 BCCA 131 at para. 41:

> …Special costs (formerly solicitor and client costs), also have a compensatory function, but they carry a punitive or deterrent element. They are reserved for cases where the conduct is scandalous, outrageous or reprehensible, and are deserving of punishment or rebuke: *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 (C.A.).

[16] Dealing first with the plaintiff's claim that the allegation of sexual harassment is a basis for finding that the defendant's conduct was reprehensible, it is important to recognize that this allegation was not initiated by the defendant. Rather, the human rights claim was initiated by a former employee of the defendant, and implicated both the defendant and the plaintiff. As noted above, the defendant made that issue part of the case because it had a reasonable basis to believe that, if it found itself held liable in that proceeding for the conduct of the plaintiff, it should have a means of seeking indemnification for damages that might be assessed against it.

[17] In my view, that motive is materially different from the defendant making an independent allegation of misconduct against the plaintiff for some improper purpose. In the circumstances, I am unable to conclude that the defendant's conduct is brought into the category of reprehensible due to this aspect of the litigation.

[18] On this issue, it is also relevant that the defendant's counterclaim with respect to this matter was dismissed by a consent order, without costs.

[19] Otherwise or additionally, as noted above, the plaintiff claims that there were other aspects of the defendant's conduct which warrant the court's censure in the form of an order for special costs. This impugned conduct includes the defendant's decision to abandon its allegation of cause for termination on the first day of trial, and its failure to call two witnesses who were listed. In addition, the plaintiff notes that, in the course of trial, the defendant made reference to the circumstances of the sexual harassment complaint and also, in the course of adducing evidence, made reference to the plaintiff's job performance. The plaintiff submits that that was

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unnecessary, prolonged the trial, and was principally for the purpose of disparaging the plaintiff.

[20] With reference to the defendant's abandonment of the allegation of cause, in the context of the case as it developed at trial, I cannot say that it was improper such as would justify the imposition of censure in the form of a special costs order.

[21] I find that there was no obligation on the defendant to call witnesses, even though they had at one point been listed.

[22] Similarly, I conclude that the defendant's reference to the sexual harassment complaint, as well as questions touching upon the plaintiff's job performance, do not warrant the court's censure in the form of special costs. In coming to this conclusion, I note that, notwithstanding that the defendant did not persist in its claim of termination for cause, the evidence was still relevant. This is because it was necessary for the court, in the circumstances, to have a proper appreciation of the events which occurred during the plaintiff's time as the defendant's employee. Specifically, the matters of the plaintiff's job responsibilities, and the reassignments of those responsibilities while the plaintiff was still employed by the defendant, were material information in the context of the action. In that sense, evidence relating to the plaintiff's job performance was relevant.

[23] In the result, I am not prepared to conclude that the defendant's conduct warrants the court's rebuke.

[24] The plaintiff also claimed for double costs as a result of his two settlement offers of January 22, 2015 and February 10, 2015, being rejected.

[25] The Rule engaged in determining this claim is 9-1(6):

> (6) In making an order under subrule (5), the court may consider the following:
>
> > (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
> >
> > (b) the relationship between the terms of settlement offered and the final judgment of the court;

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(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[26] I consider it significant that, when the offers were made, the plaintiff had not produced his tax returns and other relevant financial documents. To my mind, the fact that the plaintiff had not disclosed those materials at the time the offers were made materially informs the issue of whether the offer "… ought reasonably to have been accepted…" by the defendant.

[27] Given the above, I am not satisfied that it is reasonable to find that the defendant should be significantly sanctioned for failing to have accepted either of the offers. As a result, I find that the plaintiff has not made out a basis upon which the Court should exercise its discretion to order double costs.

[28] I turn now to the defendant's submission that each party should bear its own costs which would, in effect, deprive the plaintiff of his costs.

[29] The defendant says that the plaintiff's conduct warrants sanction. He points to four specific circumstances in the course of the litigation, which were already set out in detail above. He also notes that the plaintiff's claim originally sought damages in excess of $400,000. Accordingly, gauged by the actual award of $107,893.33, the plaintiff must be deemed to have fallen significantly short of achieving a successful result in this action.

[30] My view is this: litigation is an adversarial process. The parties often fight hard. They see matters from their own perspectives. That does not mean they are acting improperly or being dishonest.

[31] This case fits squarely within that description.

[32] As the parties' final submissions reflected, and as the submissions with respect to costs demonstrate, each side found many reasons to dispute the other's positions and to assign fault to the other.

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[33] While not all cases are as hard fought as this one, the manner in which this case was conducted was not such as should, in my view, result in the cost remedies sought by the parties. Courts should exercise a reasonable degree of restraint in resorting to the making of exceptional orders for costs without good, sound reasons.

[34] Given that the plaintiff was substantially successful in making out his case, I am not persuaded that these circumstances warrant an order making each party responsible for their own costs and thereby depriving the plaintiff of his costs.

[35] Therefore, in the totality of the circumstances, justice is most properly served by ordering that the plaintiff recover his costs from the defendant at Scale B, and I so order.

"J. Williams, J."

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