IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lang v. Lapp,*
2023 BCSC 503

Date: 20230331
Docket: S225228
Registry: Vancouver

Between:

Kathryn D. Lang, Whatever You Want LLC, O.K.D. Tour, Inc., US Tour Inc., D. Tour, Inc.

Plaintiffs

And

Annabel Lapp (a.k.a. Annabel Curry)

Defendant

Before: The Honourable Justice C. Ross

Reasons for Judgment

Counsel for the Plaintiffs:	R.W. Grant, K.C L. Young-Babbit
Counsel for the Defendant:	J.R. Pollard
Place and Date of Trial/Hearing:	Vancouver, B.C. February 23, 2023
Place and Date of Judgment:	Vancouver, B.C. March 31, 2023

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Introduction

[1] This is an application for judgment in favour of the plaintiffs Kathryn D. Lang, Whatever You Want LLC, O.K.D. Tour Inc., US Tour Inc., D. Tour Inc. pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[2] The plaintiffs obtained judgment against the defendant Annabel Lapp (a.k.a. Annabel Curry) in the Los Angeles Superior Court of the State of California in action No. SC 087550 on March 22, 2007 (the "California Judgment"). The California Judgment was for damages in the amount of $1,921,673 USD. No payment was made on the California Judgment.

[3] The plaintiffs commenced an action in the Supreme Court of British Columbia for recognition and enforcement of the California Judgment on or about May 25, 2007.

[4] In reasons indexed as *Lang v. Lapp*, 2009 BCSC 638, Justice Pearlman granted judgment in favour of the plaintiffs and ordered the defendant to pay:

a) the amount of Canadian currency required to purchase $1,921,673 USD on the conversion date, being the last day before the date on which a payment of the judgment is made;

b) pre-judgment interest from May 27, 2007; and

c) costs.

(the "BC Judgment")

[5] No payment has been made on the BC Judgment.

[6] The defendant appealed the BC Judgment. In Reasons indexed at 2010 BCCA 517, the BC Judgment was affirmed.

[7] The defendant made an assignment into bankruptcy on or about August 10, 2011. Pursuant to s. 69.3(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3 [*BIA*] there was an automatic stay of proceedings that prevented collection proceedings until the defendant was discharged from bankruptcy.

[8] In Reasons that are indexed at 2017 BCSC 670, Justice Adair held that the BC Judgment survives the defendant's discharge from bankruptcy because it created a liability captured by s. 178(1)(d) of the *BIA*. That section provides:

> **Debts not released by order of discharge**
>
> **178(1)** an order of discharge does not release the bankrupt from
>
> …
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity…

[9] The defendant was discharged from bankruptcy on or about January 11, 2018.

[10] Counsel for the plaintiffs conducted an examination in aid of execution of the defendant on April 13, 2021. During the course of the examination, the defendant confirmed that she had changed her name from Annabel Lapp to Annabel Curry.

[11] No payment has been made on amounts owing under the BC Judgment.

[12] The plaintiffs commenced an action for judgment for the debt arising from the BC Judgment and now bring this application for summary trial pursuant to Rule 9-7. The plaintiffs submit that the matter is suitable for summary trial because no material facts are in dispute and the case raises only legal questions.

[13] The plaintiffs submit that the action was commenced in time and the defendant has not pleaded any facts sufficient to establish an abuse of process.

[14] The defendant submits that the action should be stayed. The defendant submits that the law in this jurisdiction is that, if the judgment can be enforced in some other way, the action to enforce is brought without necessity and should be stayed as an abuse of process. In the present case, the limitation period is not on the eve of expiration and therefore the judgment can be enforced in the normal course. It follows, the defendant submits, that the action should be stayed.

[15] The defendant submits further that the action is barred by operation of California law and the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*]. Finally, the defendant submits that the action is not suitable for summary trial because further inquiry is required to find the facts to decide the issues of law raised in the pleadings.

[16] The defendant seeks a stay of the action until a time closer to the expiration of the British Columbia limitation period during which time examinations for discovery can be conducted of the plaintiffs and the defence based upon California law can be tried.

Are the plaintiffs precluded from bringing the action at this time?

[17] The defendant submits, relying upon *Young v. Verigin*, 2007 BCCA 551 [*Young*], that the law in British Columbia is as set out in *Halsbury's Laws of England*; namely that if a British Columbia judgment can be enforced in some other way, then an action brought on it is brought "without any necessity" and should be stayed as an abuse of process. The defendant submits that according to the plaintiffs' pleading, the limitation period for enforcement of the BC Judgment expires on October 13, 2025. Therefore, the BC Judgment is not about to become barred by limitation and can be enforced. The defendant submits that it follows that the present action is not necessary and accordingly, it is an abuse of process.

[18] The plaintiffs submit that *Young* does not stand for the proposition advanced by the defendant. Rather, the test in British Columbia is that whether an action to renew amounts to an abuse of process is a matter to be considered in the circumstances of the case. The necessity of the action is one factor that the court may consider. However, the test for oppression, in the plaintiffs' submission, requires that there be vexation, oppression, unfairness or dishonesty in sufficient depth to awaken the conscience.

[19] *Young* concerned a new action to enforce a judgment brought on the eve of the expiration of the limitation. The defendant had argued that the action constituted an abuse of process. Neither party had submitted evidence with respect to the issue

of abuse. The issue on appeal was which party bore the onus to show that the action was an abuse of process as Justice Newbury stated at para. 15:

> The real question for us on this appeal is where the onus lies in respect of an allegation of abuse of process.

[20] In the result, Newbury J.A., for the Court, concluded at para. 17 that the onus was on the defendant to show that the action was an abuse of process. In the course of her analysis, she traced the history of actions commenced to enforce a judgment. This included a reference at para. 5, in her review of British jurisprudence to the passage in *Halsbury's,* relied upon by the defendant in the present case:

> [5] The right to sue on a judgment was, however, qualified in one respect: in *Pritchett v. English and Colonial Syndicate* [1899] 2 Q.B. 428 at 435, Lindley, M.R stated that where a plaintiff who has obtained a garnishment order brings an action "without any necessity", he or she runs the risk of having it stayed as an abuse of process. This ruling was relied on by the editors of *Halsbury's Laws of England* (1st ed., 1911) for the proposition that "... if an English judgment can be enforced in some other way it is an abuse of process of the Court to bring an action upon it." (Vol. 19, para. 574.)

[21] It is clear, in my view, that the court in *Young* did not adopt the passage in *Halsbury's* as a statement of the law in this jurisdiction. An earlier decision in *Young v. Younge*, [1985] B.C.J. 2342 [*Younge*], addressed the issue of abuse of process in the context of an action to enforce a previous judgment. The circumstances in that case were also an action to enforce a judgment commenced shortly before the limitation period was to expire. The plaintiff applied for summary judgment. The defendant took the position that the action was *res judicata*.

[22] Justice Esson noted with respect to the issue of *res judicata* that the causes of action were distinct. With respect to the issue of a defence of abuse of process he noted:

> [8] The only case to which we have been referred which has arisen under the present Limitations Act in respect of this issue is *Toore v. Braich* (1979), 12 B.C.L.R. 303 (S.C.). That is a judgment of Judge van der Hoop, sitting as a local judge. The circumstances there were somewhat similar in that a second action had been commenced just before the ten-year limitation period expired. The plaintiff applied for default judgment and the matter was referred to Judge van der Hoop by the Registrar to determine whether it was an

> appropriate case in which to give judgment. He held that it was. He went on to say this:
>
> > "Obviously, a plaintiff cannot, immediately after obtaining one judgment of the court, start action on that judgment, obtain judgment on such action together with costs of the second action and thereafter ad infinitum pile judgment after judgment with costs on the original judgment, and, therefore, it must be determined in each case whether the new action does constitute an abuse of the process of the court."
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> [9] I think that that is a correct approach to the issue; that is, there must be limits upon the right of a plaintiff to rest upon his judgment and to extend the time for pursuing the defendant by issuing new writs. Essentially, that is to be determined by deciding whether there has been an abuse of process.

[23] In the course of his reasons in *Younge*, Esson J.A. referenced a decision of Chief Justice Faris in *Holme v. Holme*, [1946] B.C.J. No. 142 (S.C.) on the issue of abuse of process. Justice Esson distinguished that decision on the basis that the real ground of the decision was that the foundation of the suit was not a formal and conclusive judgment as to the amount. In any event, although Faris C.J.S.C. referred to the passage in *Halsbury's*, what he concluded with respect to abuse of process was that the court has an inherent discretion to stay or dismiss an action which is an abuse of process. His observations were made in relation to a passage in a decision of the Alberta Court of Appeal that suggested that the court was without such discretion in cases involving an action commenced to enforce a judgment.

[24] Justice Esson, with Craig J.A. concurring, dismissed the appeal noting:

> [14] We have been referred to the affidavits filed by both parties here. There were efforts by the plaintiffs to recover but, for a long time, they were unable to locate the defendant. It therefore became necessary to issue a writ to preserve their right of recovery. There is no evidence of any effort by the defendant to in any way meet his obligations. I can see nothing which could raise a triable issue as to whether there has been an abuse of process. As the matter came before Judge Hogarth, that was the only issue upon which he could properly have refused to give judgment to the plaintiffs. I can see no ground for interfering with his decision and I would dismiss the appeal.

[25] Chief Justice Nemetz concurred with Esson J.A.'s reasons adding that the passage in *Halsbury's* is to the same effect.

[26] More recently, in *Laventure Estate v. Ovelson*, 2022 BCCA 136 [*Laventure Estate*] Justice Griffin, for the Court, stated:

> [32] In *Young v. Verigin*, 2007 BCCA 551, this Court affirmed the longstanding proposition that a party who has obtained a domestic, or local, personal judgment (as distinguished from a foreign judgment), may bring a new action to enforce the judgment, effectively reviving it and starting the running of the limitation period afresh, so long as the new action is brought within the 10-year limitation period. In some circumstances, there may be a defence raised that the new action is an abuse of process, but the onus lies on the defence to prove this. There is no onus on the plaintiff to show that the plaintiff took steps to collect on the judgment in the ensuing years. (emphasis added)

[27] There is no suggestion in this statement of the law that the action is available only when necessary or only when there is no other way to enforce the judgment or that it can only be brought on the eve of the expiration of the limitation period.

[28] I note that counsel have provided no British Columbia case which stands for the proposition that it is an abuse of process to bring an action on a judgment at a time when it was still possible to enforce the judgment in other ways. There is, however, further definition of what constitutes abuse of process in the jurisprudence.

[29] In *University of British Columbia v. Kapelus*, 2012 BCSC 486 Justice Pearlman stated:

> [52] In the absence of an abuse of process, a plaintiff may bring an action on a judgment for the payment of money granted by a British Columbia court, provided it does so prior to the expiry of the 10-year limitation period under s. 3(3)(f) of the *Limitation Act*: *Young v. Verigin*, 2007 BCCA 551 at paras. 8, 9 and 14.
>
> [53] The onus is on the defendant to show that the plaintiff's action to enforce the previous judgment is an abuse of process: *Young* at para. 17.
>
> [54] In order to support a finding of abuse of process, there must exist "some reasonably obvious aspects of vexation or oppression, or unfairness or dishonesty, in sufficient depth to awaken the conscience": *Federal Business Development Bank v. Holm*, [1995] B.C.J. No. 2416 at para. 8 (S.C.).

[30] Justice Pearlman's decision was affirmed on appeal, indexed at 2014 BCCA 42, and his reasons with respect to abuse of process were cited with approval in *Laventure Estate.*

[31] I conclude that the applicable legal principles are as stated in *Laventure Estate.* In the particular circumstances of the present case, the plaintiffs are not

precluded from commencing the action because the judgment remains enforceable and the limitation period is not about to expire.

California Limitation Act

[32] The defendant submits that there was never an extension granted in California of the California limitation period for the enforcement of the California Judgment and therefore, under California law and s. 7(b)(i) of the *Limitation Act*, the action cannot be brought after the time frame for enforcement of the California Judgment expired, citing *Wei v. Mei*, 2017 BCSC 1864 [*Wei*].

[33] Section 7 of the *Limitation Act* provides:

> **Basic limitation period for court proceeding to enforce or sue on judgment**
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> **7** Subject to this Act, a court proceeding must not be commenced to enforce or sue on a judgment for the payment of money or the return of personal property,
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> (a) if the judgment is a local judgment, more than 10 years after the day on which the judgment becomes enforceable, or
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> (b) if the judgment is an extraprovincial judgment, after the earlier of the following:
>
> (i) the expiry of the time for enforcement in the jurisdiction where the extraprovincial judgment was made;
>
> (ii) the date that is 10 years after the judgment became enforceable in the jurisdiction where the extraprovincial judgment was made.

[34] I agree with the plaintiffs that there are two fundamental problems with the defendant's submissions concerning this issue. The first is that foreign law is a question of fact, which expert evidence is required to prove, see *Friedl v. Friedl*, 2009 BCCA 314 at para. 20. No such evidence has been tendered.

[35] Based upon the submission concerning necessity, the defendant had proposed that the action be stayed until shortly before the expiration of the limitation period, at which time the defence based upon California law could be argued.

[36] I have not accepted that the proposition advanced by the defendant is a proper statement of the law in British Columbia. It follows, in my view, that if the defendant wanted to pursue this defence, the evidence of California law should have been adduced on this application. As Newbury J.A., speaking for the Court noted in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 [*Everest*]:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A motion. In this instance, it was not realistic for Everest to hope that the Court at the summary trial would of its own volition decline to proceed because it was being asked to determine issues of dishonesty, or because the possibility of certain viva voce evidence had been discussed in a different context.

[37] The second problem with the defendant's submission is that the plaintiffs are not suing on the California Judgment, but on the BC Judgment. *Wei* is addressing the situation in which an action is commenced to enforce the foreign judgment.

[38] As noted in the authorities cited above, an action to enforce a judgment must be commenced before the expiration of the limitation period. The defendant conceded in the course of submissions that the limitation period for the enforcement of the BC Judgment was suspended during the time the defendant was in bankruptcy. It follows and I find that this action has been commenced before the expiration of the limitation period of the BC Judgment.

Abuse of Process

[39] The defendant submitted that because the action has been commenced at this stage, before the eve of the expiration of the limitation period, and the plaintiffs have not any evidence why it was necessary to commence the action in June 2022

rather than September 2025, “there must be an ulterior purpose”. The defendant submits that I should draw this inference.

[40] There are a number of difficulties with this submission. First, as noted in the earlier discussion, the defendant has the burden of adducing evidence to support an allegation that the action is an abuse of process. Second, the plaintiffs did in fact provide counsel with a response setting out counsel’s reasons for proceeding at this time. These were communicated to counsel for the defendant by email dated November 4, 2022 which states in part:

> 1. Your client has changed her name, which has made enforcement more difficult. Since we have to apply to court to change the name of the judgment debtor it makes sense to renew the order at the same time rather than make another application later - particularly given your client's history of dragging out proceedings and running up expenses;
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> 2. There is an issue regarding when the current order expires because of your client's bankruptcy. You have raised this very issue in defence to the action. It is important to provide certainty, rather than leave this unresolved. There Is no reason to delay the granting of a new order that would restore certainty between the parties.
>
> 3. The existing order has been in place since 2009. On its face, it appears to have expired. In the absence of a renewal order third parties may doubt that it is still in effect. The judgment creditor should not be put to the trouble and inconvenience of persuading third parties that the order remains in effect, even though issued in 2009.
>
> 4. Your client has identified no prejudice or inconvenience in having the order renewed now, other than costs, which she will never pay and which we have agreed to waive. Unlike most judgment debtors, she has not had to respond to a renewal application for almost 13 years. There is absolutely no reason for her to oppose the renewal other than as part of her continuing effort to frustrate the enforcement of the order.

[41] In the circumstances, I find that there is no basis upon which to draw the inference that the action amounts to an abuse of process because of the timing of the commencement.

[42] In the alternative, the defendant submits that since there is no urgency and no prejudice to the plaintiffs, I should find that the matter is not suitable for summary disposition at the present time in order to give the defendant an opportunity to examine the plaintiffs for discovery to explore the issue of whether the process of the

court is being used unfairly or dishonestly or being employed for an ulterior or improper purpose.

[43] There is no rule that discoveries must take place before a summary trial can proceed. In *Tassone v. Cardinal*, 2014 BCCA 149, Justice Stromberg-Stein, for the Court, stated:

> [38] …There is no rule that discovery must always take place before a matter can be dealt with by way of summary trial. Indeed, in *Hamilton v. Sutherland* (1992), 14 B.C.A.C. 51, 68 B.C.L.R. (2d) 115, this Court held that arguing "with the aid of the discovery processes something might turn up" is insufficient to defeat a summary trial application.
>
> And see *Everest* cited above.

[44] Counsel for the defendant has included in the materials a lengthy statement from Ms. Curry setting out her “side” of the dispute in relation to the California litigation. Her counsel acknowledges that it is not open to the defendant to attempt to re-litigate the matters adjudicated in the California litigation. However, counsel submits that, given her strong feelings about her history of dealings with the plaintiffs, I should infer that she will suffer an unusual level of distress at the prospect of enforcement of the judgment.

[45] The plaintiffs have a judgment which they are entitled to enforce. The fact that enforcement of the judgment will cause distress to the defendant does not amount to an abuse of process. Other than reference to the fact that the action has been brought before the eve of the expiration of the limitation period, the defendant has not identified anything that would or could amount to abuse of process. I am satisfied that the defendant has not identified anything that raises a triable issue regarding abuse of process. In the circumstances, I conclude that the matter is suitable for summary trial despite the fact that examinations for discovery have not been conducted.

Disposition

[46] In the result, judgment is granted in favour of the plaintiffs with costs of the application and the action.

"C. Ross J."