IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rae v. Gadalla,*
2023 BCSC 1781

Date: 20231013
Docket: S196329
Registry: Vancouver

Between:

Robert Rae

Plaintiff

And

Samir Hanna Gadalla and Rofah Boulis Abdel-Malik

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment Re Costs

Counsel for the Plaintiff:	F. Balandari
Counsel for the Defendants:	A. Johnson B. Leibel, Articled Student
Place and Dates of Trial:	Vancouver, B.C. July 10–14, 2023
Dates of Written Submissions Received:	September 7–8, 2023
Place and Date of Judgment:	Vancouver, B.C. October 13, 2023

I. Introduction

[1] On August 11, 2023, I issued my reasons for judgment, indexed as *Rae v. Gadalla,* 2023 BCSC 1398, following the five-day trial of this personal injury action involving a dog bite. In the result, I found the defendants liable in negligence and under the doctrine of *scienter*, and awarded the plaintiff, Mr. Rae, non-pecuniary damages of $5,000. I made no order as to costs at that time, but gave the parties leave to deliver written submissions on costs to my attention within the ensuing 30 days. The parties have since taken the opportunity to do so. These supplemental reasons for judgment address that issue.

II. Mr. Rae's Argument

[2] Mr. Rae seeks an award of double costs, relying on an offer to settle that he delivered to the defendants pursuant to Rule 9-1 of the *Supreme Court Civil Rules* on July 4, 2023, six days before the trial commenced. In that offer, Mr. Rae proposed to settle his claim in exchange for payment of:

a) $2,500;

b) an unstated amount under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27;

c) his costs and disbursements to the date of the offer, plus double costs from the date of the offer until its acceptance, with liberty preserved for Mr. Rae to seek special costs against the defendants at a later date.

[3] The defendants rejected the offer that same day.

[4] Mr. Rae submits that although he was ultimately awarded an amount that was well below the small claims limit of $35,000, he had sufficient reason to bring the action in this court, so as to justify an award of double costs in his favour, despite Rule 14-1(10). Those reasons are said to include the following:

a) he could not have known when he commenced the action that his award of damages would be under the small claims limit; and

b) the defendants were denying liability and that he had suffered a compensable injury, and therefore:

i. he required legal representation to present his case; and

ii. he required discovery.

III. The Defendants' Argument

[5] The defendants submit that the parties should each bear their own costs. They rely primarily on Rule 14-1(10), arguing that Mr. Rae has not shown that he had sufficient reason to bring the action in this court. In particular, they say it was plain and obvious when Mr. Rae commenced the action that his damages, if he was successful, would not exceed the small claims limit.

[6] In addition, the defendants submit that the July 4, 2023 offer does not justify an award of double costs, for the following reasons:

a) it was not an offer that the defendants ought reasonably to have accepted;

b) the defendants made reasonable counteroffers, proposing that Mr. Rae abandon the claim without costs;

c) when viewed globally, the defendants fared no worse at trial than they would have had they accepted Mr. Rae's offer;

d) the defendants' limited financial means weigh against an award of double costs; and

e) the defendants took various steps during the course of the litigation to reduce its cost.

IV. Discussion

A. Did Mr. Rae have sufficient reason to bring this action in this court?

[7] Rule 14-1(10) states as follows:

> A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[8] It has been held that the sufficiency of a plaintiff's reason for bringing a proceeding in this court should be assessed as of the time the proceeding is commenced, which in this case was May 31, 2019. Subsequent events that occurred during the course of the litigation are therefore not relevant to the analysis: *Gehlen v. Rana*, 2011 BCCA 219.

[9] In *Sultan v. Corporation Gardaworld ServicesTransport De Valeurs Canada*, 2019 BCSC 692, Dardi J. conveniently summarized the factors that are properly to be considered in the analysis, as follows:

> [15] The jurisprudence that informs the determination of "sufficient reason" is well-settled. The burden is on the plaintiff to establish circumstances that are persuasive and compelling to justify "sufficient reason": *Gehlen* at para. 37. The application of the rule does not involve an exercise of discretion, but rather, "the court must make a finding that there was sufficient reason for bringing the action in the Supreme Court": *Reimann* at para. 13.
>
> [16] The likely quantum of the claim, although an important factor, is not the only factor the court may consider: *Gehlen* at para. 37. In *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2011 BCCA 136, aff'g 2010 BCSC 356 [*Gradek* CA], Prowse J.A., for the Court, stated the following:
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> > [19] … there may be circumstances which may constitute sufficient reason for bringing an action in the Supreme Court, thereby triggering its costs provisions, despite the fact that it is apparent from the outset that the award will fall within the monetary jurisdiction of the Provincial Court…
>
> [17] In *Hall-Smith v. Yamelst*, 2016 BCSC 325 [*Hall-Smith*], Madam Justice Dillon helpfully distilled the factors that potentially inform the analysis of sufficient reason:
>
> > [30] While the list of factors for consideration is not closed, factors commonly considered under this subrule that are potentially relevant to this case include: (a) the likely quantum of the claim; (b) whether the assistance of counsel was reasonably required; (c) whether documentary discovery or examinations for discovery were reasonably necessary; and (d) the suitability of the summary procedures available in Supreme Court (see generally *Spencer v. Popham*, 2010 BCSC 683 at paras. 9–12).

[10] In urging me to deny Mr. Rae any award of costs under Rule 14-1(10), the defendants rely primarily on the small size of the damages award, which was far below the small claims limit. Mr. Rae responds that he was unable to determine when he commenced the action how large the damages award would be because he had not yet received the expert report of Dr. Mian, a plastic surgeon, which was delivered to him only on July 22, 2020.

[11] I do not find Mr. Rae's argument persuasive. The dog bite occurred on October 12, 2018. By the time Mr. Rae commenced this action on May 31, 2019, his wound had essentially healed. He was swimming in the pool again. It would have been apparent to him that the injury would not be getting any worse, and therefore that the quantum of damages to which he would be entitled if successful was unlikely to rise anywhere near the small claims limit. Dr. Mian's report, prepared the following year, did not reveal anything that Mr. Rae did not already know. His conclusion was that Mr. Rae had suffered a three-month period of temporary partial disability, which means that Mr. Rae's level of function had already returned to his pre-incident baseline by the end of January 2019. I therefore find that this factor weighs heavily in favour of the defendants' position.

[12] I accept that there are also some factors weighing in favour of Mr. Rae's position, but these are of less significance. Although the defendants were denying liability, this is not a case like *Garcia v. Bernath*, 2003 BCSC 1163, where the defendant denied that the plaintiff had suffered any injury at all. Nor is this a case like *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2011 BCCA 136, aff'g 2010 BCSC 356, where the plaintiff required legal representation because of a language difficulty.

[13] Further, I am not persuaded that it was necessary for Mr. Rae to proceed in this court so that he could obtain discovery, particularly as to a previous pattern of aggressive behaviour exhibited by the dog that bit him. In this case, there had already been an investigation by the strata council and a bylaw prosecution by the City of Vancouver relating to the same incident. Mr. Rae already had available to

him the testimony of Mr. Tian about a previous incident. Although Mr. Rae subsequently came to learn of a second such witness, Mr. Rabey, through his examination for discovery of a strata corporation representative while it was still named as a defendant, the prospect of such a revelation would not have been an important part of the calculation in May 2019 in deciding whether it was necessary to proceed in this court rather than the Provincial Court.

[14] On balance, I have concluded that Mr. Rae has failed to show that he had sufficient reason to bring this action in this court.

B. Does the July 4, 2023 offer justify an award of double costs?

[15] I agree with the defendants that, in view of my finding that Mr. Rae lacked sufficient reason to bring this action in this court, Rule 14-1(10) precludes any award of costs in his favour, whether payable as double costs or otherwise.

[16] However, to the extent that the July 4, 2023 offer remains relevant to the analysis, I am not persuaded that it would justify an award of double costs in any event.

[17] In assessing whether an award of double costs should be made, it is the entire offer that must be compared with the overall result achieved: *S.S.T. v. L.M.G.*, 2019 BCSC 686 at para. 43; *McLaughlan v. Nestor*, 2018 BCSC 2102, at para. 71; *Paul v. Pumple*, 2013 BCSC 1844, at paras. 32–34. To justify an award of double costs, the offer must set out the amount payable by the opposing party clearly and unambiguously: *Park v. Donnelly*, 2018 BCSC 219.

[18] In my view, the July 4, 2023 offer did not satisfy that requirement. The amount payable on acceptance was unclear. It follows that Mr. Rae has failed to show that it was an offer that the defendants ought reasonably to have accepted at the time it was made, or that, had they accepted it, the defendants would have been in a better position than the one in which they find themselves now.

V. Conclusion

[19] For those reasons, I have concluded that the appropriate order is that the parties bear their own costs, except that Mr. Rae is entitled to his reasonable disbursements.

"Milman J."