IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davis v. Lasuta,*
2023 BCSC 1934

Date: 20231106
Docket: S1811037
Registry: Vancouver

Between:

Reginald Evertt Davis and Sofia Kripotos

Plaintiffs

And

Bruce Michael George Lasuta, Carol Sue Hautala and Royal Lepage Sussex

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment - Costs

The Plaintiffs, appearing in person:	R. Davis S. Kripotos
Counsel for Defendants:	A. Peck M. Sterns
Written submissions of plaintiffs:	October 13, 2023
Written submissions of defendants:	September 28, 2023
Place and Date of Judgment:	Vancouver, B.C. November 6, 2023

[1] In this application, the defendants seek double costs of this action following one of the two settlement offers they made in 2022. The plaintiffs were not successful at trial. There is no question the defendants are entitled to their costs. The only question is the scale of costs to which they are entitled.

Background

[2] The plaintiffs were not represented at trial, but they were represented for a number of years before trial. However, at the time of both offers from the defendants, the first made on July 25, 2022 and the second made on November 30, 2022, the plaintiffs were not represented by counsel.

[3] Originally, the plaintiffs included the sellers of the land as defendants in this action. After the original trial was adjourned, the plaintiffs filed an amended claim and discontinued their action against the sellers. On June 17, 2021, the plaintiffs filed a notice of trial, setting the matter down for eight days beginning December 5, 2022.

[4] On May 21, 2022 the parties attended mediation. The plaintiffs had counsel at that time. Before the mediation, the parties had exchanged expert reports valuing the property. The mediation did not result in settlement. On August 28, 2022, the plaintiffs delivered a second expert valuation report, on September 8, 2022 the defendants delivered an addendum report to their original valuation report, and on October 12, 2022 the defendants served a rebuttal report to the plaintiff's expert valuation report. In addition to the reports on value, on August 2, 2022, the plaintiffs obtained an opinion on the standard of care of a realtor. The defendants did not produce a report to rebut the plaintiffs' expert's opinion on the standard of care of a realtor.

[5] The defendants made their first formal settlement offer on July 25, 2022, in which they offered to pay the plaintiffs $100,000 in exchange for a dismissal of the action. It was open for acceptance until August 15, 2022.

[6] The plaintiffs did not accept the offer, and made a counter offer in the amount of $500,000 on September 5, 2022.

[7] On November 30, 2022, the defendants reinstated their prior settlement offer of $100,000, with an acceptance deadline of December 4, 2022.

[8] On November 30, 2022, the plaintiffs countered with an offer of $400,000.

[9] No offers were accepted, and the matter proceeded to trial.

Legal basis

[10] Rule 9-1(5) sets out the options available to the court in awarding costs following an offer to settle. For this application, the pertinent subrule is 9-1(5)(b):

> **Cost options**
>
> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
>
> ...
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> ...

[11] An award of double costs has a punitive element to it. It is designed to encourage parties to make and accept reasonable settlement offers, and avoid the time and expense of holding a trial. Where a reasonable offer is not accepted, the court has the discretion to award double costs against the party who did not accept the offer: *Radke v Parry*, 2008 BCSC 1397, *Hartshorne v Hartshorne*, 2011 BCCA 29.

[12] There are several factors which the court must consider in assessing whether to exercise its discretion to award double costs. These are set out in Rule 9-1(6):

> **Considerations of court**
>
> (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;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

Should the offer reasonably have been accepted?

[13] In determining whether the offer should reasonably have been accepted, the court must consider what was known to the parties at the time, what the circumstances of the parties were at the time, and whether the party refusing the offer had objectively reasonable reasons for their refusal.

[14] In the case before me, in July 2022 the parties had exchanged their primary expert reports, and had been through a mediation. Discoveries had been completed and documents had been exchanged. While at trial no assessment of damages was undertaken, given no liability was found, in July 2022 the defendants had an opinion that the maximum diminution of value of the property was $130,000.

[15] The defendants offered to settle the case for $100,000, which was a reasonable offer given their expert's opinion and the fact that the court would need to determine whether any deductions would have to be made from their expert's valuation to account for actions of the sellers or the plaintiffs, which may have contributed to any diminution in value.

[16] The fact that defendants' offer was reasonable, based on their own evidence, is not the end of the analysis. At the time the offer was delivered, the plaintiffs had their own expert report, which established the diminution of their interest in the property to be $350,000. In addition, prior to the expiry of the offer on August 15, 2022, the plaintiffs had an opinion on the standard of care of a realtor, which bolstered their conviction that they had reasonable chance of success at trial.

[17] I am satisfied that the defendants' July 2022 offer was not an offer which the plaintiffs ought to have reasonably accepted, based on the information they had at the time.

[18] On November 30, 2022, the defendants renewed their July 2022 offer. No additional terms or information were included in the November offer, other than an extension of time for acceptance of the offer.

[19] The July offer, which was reinstated in November, contained the following language:

> Taking that much reduced potential claim as the new starting point, we remain confident that if this matter goes to trial, we will succeed in convincing the court that the realtors have no liability. As noted, if anyone should have advised you about the ALC issues related to the Reeves Road property it was the Defendants Rayment and Rigaux who were the ones intimately familiar with the property's history and who had direct dealings with the ALC about the property in the past. There are also questions about the level of due diligence that you both performed personally when looking at purchasing the property. While you were entitled to rely on others to a certain extent, at all times you both had a responsibility to take steps to protect your own interests. Mr. Davis admitted he did not even read much of the disclosure materials about the property provided to him, and neither of you made any inquiries yourselves about the applicable bylaws or regulations despite knowing that the property was located in the Agricultural Land Reserve.

[20] Both Mr. Rayment and Ms. Rigaux were scheduled to be witnesses at the trial set to commence shortly after the offer was made.

[21] In October 2022, Sechelt re-zoned the property from RR2 Rural to AG1, which appeared to not allow campgrounds. While the impact of this change was not known at trial, it certainly increased the risks for the plaintiffs at trial in establishing any loss attributable to the defendants.

[22] The defendants were objecting to two of the plaintiffs' expert reports – the opinion on standard of care, and one of the opinions on value. Therefore, the plaintiffs knew that there was some risk that their expert evidence would not be accepted by the court.

[23] Since the July offer, the plaintiffs had received a new report on value from their expert. This opinion supported an increase the diminution in value to $537,000, based on the impact of an Agricultural Land Commission decision the plaintiffs had received.

[24] Also since the July offer, the defendants had delivered an addendum report and a detailed rebuttal report to the opinion on value produced by the plaintiffs' expert.

[25] The plaintiffs submit on this application that the decision in *Luminary Holding Corp. v Fyfe*, 2022 BCCA 185 led them to believe they were pursuing a claim with merit against the realtors. However, in *Luminary Holding*, the realtor failed to disclose that the subject property was subject to a boundary review and some or all of it may be in the Agricultural Land Reserve. I have some difficulty with the plaintiffs submission that this case provided a parallel to their situation, in which the realtors went out of their way to advise that the property was in the ALR and provided the plaintiffs with documents to that effect. I do not consider their reliance on *Luminary Holding* to be reasonable.

[26] Therefore, the question before me on this issue, is whether the risks of the certainty of the sellers testifying, the change in zoning by the district, the new rebuttal report from the defendants on diminution of value, and the risk that the plaintiffs' opinions would not be received by the court, were sufficient to render the plaintiffs' decision to refuse the offer unreasonable in all the circumstances.

[27] I cannot find in all of the circumstances that it was unreasonable for the plaintiffs to refuse the offer. With the benefit of hindsight, it was clearly misguided. However, they had evidence which supported a much higher award, should liability have been established. I did not accept the opinion of their expert on the standard of care of a realtor, but there was no contrary opinion before them which would alert them to the frailties of that opinion. As such, I find that this factor does not weigh in favour of a double costs award.

Relationship between settlement terms and final judgment

[28] In the quote from the offer which I have set out above, the defendants' counsel telegraphed the findings which were determinative in this case. I found no liability on the part of the realtors for many, if not all, of the reasons set out in the settlement offer.

[29] The offer from the defendants to pay the plaintiffs $100,000 in exchange for a dismissal was a generous offer in light of the dismissal of all the plaintiffs claims at trial. This factor, standing alone, does support an award of special costs.

Relative financial circumstances of the parties

[30] I do not have evidence of the financial circumstances of the plaintiffs. They submit that they are concerned that their assets will be taken, but they have submitted no evidence of their financial circumstances. The defendants submit that the plaintiff Ms. Kripotos has four properties registered in her name, not including the subject property and, as such, this is not a case where the plaintiffs have no assets to draw on should a costs award be made.

[31] The defendants submit that the fact they are insured should not be taken into account in this assessment, relying on *Assadimofrad v. Cowan*, 2020 BCSC 1276 and *Smagh v. Bumbrah*, 2009 BCSC 623.

[32] I find that the relative financial circumstances are not determinative of the issues of double costs. I am not satisfied the plaintiffs are impecunious, and I have no evidence before me that the defendants' insurer used its financial resources to lever any improper advantage against the plaintiffs.

[33] The relative financial circumstances is a neutral factor.

Any other factors the court considers appropriate

[34] The plaintiffs submit that they were unrepresented at trial because they could not afford the lump sum fees requested by their counsel.

[35] When the plaintiffs made their counter offer to the defendants in September 2022 and again in November 2022, they stated that "as self-represented Plaintiffs, we see minimal costs and no risks in proceeding with the eight-day trial set to begin December 5, 2022." This is a somewhat cavalier attitude to the potential for a costs award against them at trial, and one which should be discouraged.

[36] The plaintiffs also pursued allegations of fraudulent misrepresentation and breach of fiduciary duties. These are serious allegations which, if not proven, raise the potential of a special costs award against the party making the unproven claims: *Paniccia v Eckert*, 2013 BCSC 156.

[37] The defendants do not argue special costs ought to flow as a result of the unproven allegations of fraudulent misrepresentation and breach of fiduciary duty, but they do argue that these factors militate in favour of a double costs award.

Disposition

[38] I have considered all of the factors raised by the parties. The issues in this case were somewhat unusual. This was not a case where the parties could look to a wealth of similar cases to assist them in assessing their risks. The parties obtained expert reports in a responsible way, and there was a divergence between the opinions.

[39] I find the plaintiffs were reckless in their expressed position in their offers, and pursued serious claims which were not successful – namely the claims of fraudulent misrepresentation and breach of fiduciary duty. However, on balance I am not satisfied that it would be appropriate to exercise my discretion to award special costs against the plaintiff solely for these reasons.

[40] It is only with the benefit of hindsight that the reasonableness of the defendants' offers was established. In my view, focussing on the ultimate result detracts from the positions of the parties at the times the offers were made, which needs to be the focus in this assessment.

[41] I conclude that in all of the circumstances the decision of the plaintiffs to refuse the offers of the defendants was not unreasonable or irresponsible such that I ought to exercise my discretion to punish the plaintiffs for their conduct and make an order of double costs against them.

[42] I order ordinary costs of this action in favour of the defendants.

[43] The plaintiffs seek an order that any costs award be paid in installments. I decline to make such an order. The defendants are entitled to their costs without delay.

"W.A. Baker J."