IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vassilaki v. Vassilakakis,*
2023 BCSC 1692

Date: 20230927
Docket: S132206
Registry: Kelowna

Between:

John Vassilaki

Plaintiff

And

Florio Vassilakakis, Nicholas Vassilakakis and The Cellar Wine Bar Ltd.

Defendants

And

John Vassilaki

Defendant by way of Counterclaim

Before: The Honourable Justice Hardwick

Reasons for Judgment
re Costs

Counsel for the Plaintiff:	G. Douvelos
Counsel for the Defendants, Florio Vassilakakis and Nicholas Vassilakakis:	J.D. Shields
Counsel for the Defendant, The Cellar Wine Bar Ltd.:	J. Dawson
Written Submissions Received:	September 7 and 21, 2023
Place and Date of Judgment:	Kelowna, B.C. September 27, 2023

[1] These are my reasons for judgment on the issue of costs, following the trial of this action.

[2] My reasons for judgment following the trial in this matter were released on August 25, 2023 and are indexed as 2023 BCSC 1487 (the "Reasons").

[3] As the relevant facts are set out in the Reasons, I will not repeat them in detail. Rather, I will briefly summarize them as follows:

a) On August 26, 2021, the plaintiff filed a notice of civil claim against four defendants: Florio Michael Vassilakakis ("Michael"), George Ioannis Vassilakakis ("George"), Nicholas and The Cellar Wine Bar Ltd.

b) The notice of civil claim was amended twice, including removing the defendant George from the proceedings pursuant to a court order.

c) Nicholas filed a counterclaim against John alleging that in June 2020 John committed the torts of assault and battery as against him.

d) With leave, John sought to discontinue the claims set forth in the notice of civil claim pursuant to R. 9-8(2) of the *Supreme Court Civil Rules* (the "*Rules*") on the basis that counsel for the remaining defendants remain at liberty to make submissions as to the imposition of special costs.

e) Pursuant to R. 9-8(4) of the *Rules*, it is conceded by counsel for John that ordinary costs pursuant to Appendix B of the *Rules* are payable on the basis that the matter is one of ordinary difficulty.

f) The counterclaim proceeded to trial in this Court between July 31, 2023 and August 1, 2023.

g) Upon hearing the evidence proferred in respect of the counterclaim and making certain assessments of credibility, I found in favour of Nicholas. The damages awarded, however, were modest and would generally fall within the jurisdiction of the Provincial Court of British Columbia.

[4] In my final order arising from the trial, I invited the corporate defendant and the personal defendants to make written submissions on the issue of costs.

[5] They did so. The corporate defendant seeks an order of special costs in respect of the discontinued claim. The personal defendants seek special costs in respect to the claim and the counterclaim.

[6] I have concluded that the defendants, as successful parties, are entitled to ordinary costs related to the claim and the counterclaim. I will not, however, exercise my discretion to order special costs for either claim for the reasons that follow.

Brief Summary of the Law Regarding Costs and Special Costs

[7] Rule 9-8(4) of the *Rules* sets out that a person wholly discontinuing an action against a party must pay the costs of that party to the date of service of the notice of discontinuance. As noted, the plaintiff acknowledges this obligation to pay ordinary costs of the claims set forth in the notice of civil claim. His opposition is primarily in relation to the claim for special costs.

[8] Further, although the final assessment of damages regarding the counterclaim falls within the jurisdiction of the Provincial Court, 14-1(10) of the *Rules* provides for the discretion to bring the proceeding within the Supreme Court.

[9] Specifically, R. 14-1(10) of the *Rules* reads:

> (10) 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.

[10] In this case, I ultimately do conclude there was sufficient reason to bring the counterclaim to this action. I specifically refer to *Gehlan v. Rana*, 2011 BCCA 219 wherein our Court of Appeal considers the interpretation of the defined term “sufficient reasons”.

[11] As set forth in the Reasons, there was a Supreme Court petition involving substantially the same parties upon which I previously adjudicated upon earlier this year.

[12] If Nicholas had elected to bring forward his damages claim for the torts of assault and battery in the Provincial Court, that would have resulted in three separate concurrent proceedings: the petition, this action and a Provincial Court action. That is not an efficient use of judicial resources.

[13] To the contrary, I was able to adjudicate upon and give judgment on all matters arising from this unfortunate family conflict in approximately four sitting days. I further addressed the delayed filing of the counterclaim in the Reasons as part of my overall consideration of the factual matrix. Given liability was found on account of the tort of battery, I cannot accept that the counterclaim was brought for an improper purpose. It may very likely have been strategic given its timing, but that does not make it improper.

[14] Having found sufficient reason for the personal respondent to bring the counterclaim in the Supreme Court, under R. 14-1(1) of the *Rules*, costs are, as referred to above, presumptively assessed as ordinary costs (otherwise known as party and party costs) in accordance with Appendix B unless certain circumstances exist. Namely, as sought here, an order for special costs.

[15] Special costs are distinct from party and party costs.

[16] In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 1994 CanLII 2570 (BCCA), the British Columbia Court of Appeal described the key factor in an order for special costs as “reprehensible conduct”.

[17] In *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314, reprehensible conduct was said to include, but is not limited to, conduct which is scandalous or outrageous. It may also include milder forms of conduct deserving of reproof or rebuke, such as advancing meritless claims; however, the fact that an action or an appeal “has little merit” is not in itself a reason for awarding special costs-something more is required.

It must be shown that the action or claim was obviously unfounded, reckless, made out of malice or an improper motive: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352.

[18] In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, the Supreme Court of Canada held that an unsuccessful attempt to prove fraud or dishonesty on balance of probabilities does not *de facto* lead to an award of special costs. There must be evidence of improper motive. For example, if it is shown that the unsuccessful litigant had access to information that the other party was neither dishonest nor fraudulent, this may warrant special costs.

[19] In *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2003 BCCA 268, the Court of Appeal found that the plaintiffs had an obligation to discover some evidence to support the claim before advancing it. At the same time, ill informed positions are not always deserving of special costs. Rather, in *Webber v. Dulai Roofing Ltd.*, 2006 BCCA 501 at para. 18, the Court noted that it will observe behaviour that is careless or indifferent with respect to facts “on which they have advanced unmeritorious positions with serious repercussions”.

Conclusions

[20] Having regard to the foregoing and taking into account my findings of fact as set out in the Reasons, I do not find that the conduct of the plaintiff has been beyond the threshold of “reprehensible conduct”.

[21] The plaintiff initially brought forward a claim which on the face of the pleadings had some merit and was founded on well-recognized causes of action. Beyond giving notice of his intention to discontinue his claims some seven days before trial (see paras. 15-19 of the Reasons), I heard no submissions at all that the conduct of the plaintiff during the course of the litigation was reprehensible.

[22] Further, as set out in the Reasons, I made certain findings regarding the credibility of the witnesses who testified. That was necessary, as the trier of fact, to reach my ultimate conclusion given the nature of the claims. However, as is

apparent from the Reasons, I accepted some but not all of the evidence of both the plaintiff and Nicholas.

[23] As I also noted in the Reasons, the plaintiff did have the opportunity to admit certain facts in the notice to admit which was served on or about October 29, 2021. Making factual admissions can, in certain cases, significantly reduce the amount of trial time required to adjudicate on the outstanding issues. Refusing to make such admissions and prolonging the trial process is, where appropriate, deserving of some additional cost sanction by this Court.

[24] In this case, however, the plaintiff's refusal to admit certain facts in the notice to admit is somewhat peculiar as he generally admitted to all of said facts during direct examination. Those additional few facts which were admitted on cross-examination or admitted with some additional clarification/context did not require extensive probing by counsel.

[25] The result being, I find that, in this case, the plaintiff's initial denial to admit the contested portions of the notice to admit did not prolong the litigation or extend the trial. To the contrary, with the benefit of good counsel, this trial was conducted very expeditiously.

[26] The final point which I will address, based on the submissions filed on behalf of the plaintiff, is whether consideration should be given to certain settlement offers made by the plaintiff. Settlement of this matter would have been a prudent decision and I thus commend the plaintiff for having made reasonable and *bona fide* overtures in this regard. The fatal flaw to this argument is that all offers attached to the plaintiff's submissions were global offers which did not contemplate discontinuing the notice of civil claim, the stand-alone trial of the counterclaim and the presumptive entitlement of the defendants to costs. As such a detailed analysis of R. 9-1 is not necessary. In reaching this conclusion I rely upon both *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2019 BCSC 83 and *McCarty v. McCarty*, 2018 BCSC 1296. Specifically, considering *McCarty*, I cannot see how this particular case could have been settled globally with a BC Ferries release.

[27] I thus conclude that it is appropriate to order that:

a) The remaining personal defendants and the corporate defendant are entitled to their costs of the discontinued notice of civil claim, as assessed pursuant to Scale B of the *Rules*.

b) Nicholas is entitled to costs of the counterclaim as assessed pursuant to Scale B of the *Rules*. Although counsel for the corporate defendant was present for the trial of the counterclaim on its merits, he did not participate as no relief was sought by his client. As such, his client's entitlement to costs ceased after I granted the plaintiff leave to file the notice of discontinuance and I thus order that the corporate respondent bears its own cost of the counterclaim. This is consistent with *White v. Nuraney*, 2000 BCCA 675.

c) The claim by the corporate defendant and the personal defendants for special costs are dismissed with respect to both the notice of civil claim and the counterclaim.

"Hardwick J."