IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wu v. Ma,*
2024 BCSC 449

Date: 20240318
Docket: S182040
Registry: Vancouver

Between:

Hong Fang Wu

Plaintiff

And

Zhi Yong Ma and Superoptionforex Consulting Inc.

Defendants

Corrected Judgment: The front page of the judgment was corrected on March 20, 2024.

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Plaintiff:	N. Ng
The Defendant, appearing in person:	Z.Y. Ma
Date of Written Submissions, received from the Plaintiff:	February 8, 2024
Date of Written Submissions, received from the Defendants:	February 26, 2024
Place and Date of Judgment:	Vancouver, B.C. March 18, 2024

[1] The plaintiff seeks an order that she be entitled to double costs on the basis that she delivered a timely offer to settle that was exceeded by the judgment of the Court.

[2] On October 5, 2022, I issued reasons for judgment in *Wu v. Ma*, 2022 BCSC 1737 [*Reasons*] in favour of the plaintiff. The plaintiff's damages claim was expressed in US dollars. I granted leave to the parties to provide further submissions on the amount of the judgment after considering the conversion rates of foreign currency. The parties appeared before the Court to provide submissions about conversion rates. By Court order entered on February 21, 2023, the amount of the judgment was broken down as follows:

a) USD$744,500; and

b) CNY$60,000.

[3] In addition, the plaintiff was awarded pre-judgment interest on the converted amounts.

[4] In his responding submission on costs, the defendants raise many complaints about the findings of fact in the *Reasons*. In particular, the defendants suggest the plaintiff was responsible for the loss of her investment and for misstating what had occurred before, during and after the trial. In my view, many of the allegations set out in the responding submission are not properly raised on this application for double costs. However, with respect to the offer to settle, as I understand the submission, the defendants take the position that the offer to settle was ambiguous. The defendants submit that the ambiguity arose in large part because the offer was expressed in US currency, included Mr. Ma in his personal capacity and because the judgment amount just barely exceeded the offer.

[5] Briefly, the action involved the loss of investment funds. The plaintiff delivered a substantial amount of money to the defendants for investment purposes. The defendant represented that he was an experienced investment dealer. He was not. He ultimately invested the entirety of the plaintiff's investment in one stock. The

plaintiff lost the entirety of her investment and she sued both the personal and corporate defendant to recover her loss.

[6] In the *Reasons*, I found in favour of the plaintiff. This decision on costs should be read in conjunction with the trial reasons.

[7] The plaintiff now seeks an order for double costs as a consequence of an offer to settle made on June 30, 2021 where counsel for the Plaintiff wrote to the defendants' lawyer with a formal offer under R. 9-1 of the *Supreme Court Civil Rules*, proposing to settle the action against the defendants for USD$720,000 (the "Offer to Settle").

[8] Offers to settle are governed by R. 9-1.

[9] Rule 9-1(5) sets out the options available to the court where an offer to settle has been made, including in subparagraph (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.

[10] Rule 9-1(6) identifies a number of factors that the Court may consider when making a costs award in the face of an offer to settle, including:

> (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.

[11] The Court of Appeal summarized the purposes of costs awards in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74. Those purposes include:

> a) deterring frivolous actions or defences;

b) encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;

c) encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and

d) to have a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation and by discouraging the continuance of doubtful cases or defences.

[12] While the *Rules* and the cases interpreting them are instructive, the issue of costs is in the discretion of the trial judge.

[13] I turn to a consideration of the factors set out in R. 9-1(6).

[14] First, was the plaintiff's offer one that ought reasonably to have been accepted?

[15] The plaintiff submits this was a straightforward monetary offer in lump sum and ought to have been accepted.

[16] Whether the Offer to Settle is one that ought reasonably to have been accepted is assessed under the circumstances existing when it was open for acceptance: *Hartshorne v. Hartshorne*, 2011 BCCA 29, at para. 27.

[17] On this point, I have considered the plaintiff's submission that the Court may consider the lack of credibility as a separate factor under R. 9-1(6)(d): *McIsaac v. Healthy Body Services Inc.*, 2010 BCSC 1033. Further, I have considered the plaintiff's submission about misconduct on the part of the losing party: *Frame v. Rai*, 2013 BCSC 686.

[18] I have also considered the plaintiff's submission that the defendants should have accepted the Offer to Settle because of the strength of the expert evidence.

Coupled with this was the defendants' decision to proceed without an expert opinion. In my view, this factor does not weigh heavily in favour of the plaintiff. I make that determination considering the defendant was challenging the admissibility of the expert opinion and, as I understand the litigation history, had indicated his intention to do so, through counsel. The expert opinion was lengthy and I agreed with the defendants that some aspects of the expert opinion was inadmissible. As a result, the expert opinion was redacted. The amount of the Offer to Settle must be considered with this context in mind. Without engaging in hindsight, I am of the view that the defendants were correct with respect to some aspects of their challenge to the admissibility of the expert opinion and the plaintiff agreed to remove some of its content accordingly.

[19] Considering the amount of the Offer to Settle and the issues to be determined at the trial, including the admissibility of the expert opinion, I am of the view that it is not so clear that the defendants ought to have accepted the Offer to Settle. I have also considered the relationship between the terms of the Offer to Settle and the final judgment of the Court. The amount of the Offer to Settle and the final judgment were, relatively speaking, not so disproportionate so as to encourage settlement between these parties.

[20] The third factor is the relative financial circumstances of the parties. The parties did not say much about this factor. In light of the circumstances presented here and having taken into account the plaintiff's financial position, I have concluded that this is a relatively neutral factor.

[21] The fourth factor is whether there exists any other factor that the Court considers appropriate. In my view, there are no other factors or considerations that inform the analysis in the circumstances presented here.

[22] I do not agree with the plaintiff's submission that this is an offer that ought reasonably to have been accepted. The Offer to Settle was for an amount that was not significantly less than the judgment granted. In addition, the Offer to Settle was delivered less than two weeks before the first trial date. Though the Offer to Settle

was within the time limits designated by R. 9-1, it was for a substantial amount of money expressed in a foreign currency.

[23] The plaintiff was wholly successful at trial. She is to receive the return of her investment. As the successful party, she is entitled to her costs. However, I exercise my discretion that the costs be awarded as ordinary, not double, costs.

"Winteringham J."