

Court of King's Bench of Alberta

Citation: AIG Insurance Company of Canada v Kostic, 2024 ABKB 032

Date: 20240119
Docket: 1701 06258
Registry: Calgary

Between:

AIG Insurance Company of Canada

Plaintiff

- and -

Liliana Kostic

Defendant

**Supplemental Reasons for Decision
of the
Honourable Justice Robert A. Graesser**

Introduction

[1] I delivered a decision on Ms. Kostic's application for permission to bring summary judgment and summary dismissal applications against AIG Insurance Company of Canada ("AIG") on December 4, 2023 at 2023 ABKB 702. In that decision, I dismissed her application on the basis that summary dismissal was unlikely to succeed and, in any event, would not prevent AIG from defending against Ms. Kostic's counterclaim. I dismissed the summary judgment application on the basis that summary proceedings are not an appropriate manner of adjudicating her claim.

[2] After I delivered my decision, On December 13, 2023 I received a number of materials from Ms. Kostic:

- A covering letter advising that she had a number of responses “near completion” in October.
- An “Executive Summary” of a letter written by her regarding her fiat application for summary dismissal/summary judgment/summary trial attaching a copy of a letter to me dated October 20, 2023;
- A letter dated seeking to expand on her arguments surrounding ACJ Rooke’s Order of October 8, 2020;
- A copy of the Order;
- A 9-page document entitled Summary National Questions; and
- A letter referencing an Application Summary and Striking Motion for an application against AIG and Raymond James Limited (“RJL”).

[3] Mr. Picco, counsel for AIG, responded on December 20, 2023. His response was brief:

We have reviewed Ms. Kostic’s 38 pages of additional and draft submissions. There are only two issues raised that require a response not previously addressed in AIG’s earlier submissions. We have not sought Ms. Kostic’s consent to send this communication to you and we are copying Ms. Kostic and Mr. Zinner.

Ms. Kostic has included submissions that AIG has breached her rights under the *Canadian Charter of Rights and Freedoms*. The Charter does not apply to the conduct of private parties, it only applies to governmental and legislative bodies: *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 32*. Accordingly, this line of argument has no bearing on these proceedings.

Ms. Kostic repeatedly states that AIG consented to her request for leave to file her summary judgment and summary dismissal applications on July 28, 2021. This is not accurate.

On July 28, 2021, ACJ Rooke set a deadline of September 30, 2021 for Ms. Kostic to provide AIG with her proposed amended pleadings and application for leave for striking and/or summary judgment...

On October 21, 2021, Ms. Kostic asked me for an extension of time to two weeks to provide her materials and offered to provide her draft materials. I replied consenting to the extension request and advising that I did not need to see her drafts. I did not provide consent to her request for leave to file the materials. An excerpt of the relevant email exchange is below.

We submit that your (insert date) order does not require correction.

[4] My December 4 decision does not reference Ms. Kostic’s 11-page letter dated October 20, 2023 because I had not seen the letter until Ms. Kostic’s communications of December 13. The letter responds to Mr. Picco’s 2-page reply of September 29, 2023.

[5] I also note that the Fiat protocol does not contemplate that the fiat applicant have a response to the respondent's reply, although I have previously permitted a response when specifically requested. No request was made by Ms. Kostic.

[6] I assume from Ms. Kostic's covering letter of December 13 requesting that she be able to expand on the arguments "surrounding the order obtained by her" under her counterclaim, together with the "Executive Summary" and the letter of October 20, 2023 that she wishes me to reconsider my decision.

[7] I also received a separate letter regarding "the application filed by Liliana Kostic against AIG and Raymond James Ltd." In that letter, Ms. Kostic appears to be seeking a fiat to add her former employer RJL as an additional defendant in her Counterclaim.

[8] This letter seeks various remedies, including summary dismissal of AIG's claim, summary judgment under her counter claim, factual findings, indemnity from RJL, enhanced costs and other declarations.

[9] I am unclear what Ms. Kostic wants me to do regarding the Summary of National Questions.

Reconsideration

[10] Ms. Kostic's letter goes far beyond responding to Mr. Picco's September 22, 2023 letter. It reargues her position and adds other arguments. In any event I will deal with each of her arguments.

[11] In support of her various arguments, she cites a number of cases:

- *XS Technologies Inc v Veritas DGC Land Ltd*, 2016 ABCA 165;
- *Rahmani v 959630 Alberta Ltd*, 2021 ABCA 110;
- *Weaver v Cherniawsky*, 2016 ABCA 152;
- *Terrigno v Fox*, 2022 ABKB 89;
- *Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135;
- *Baron Real Estate Investments Ltd v Tri-Arrow Industrial Recovery Inc*, 2023 ABKB 531,
- *Altex International Heat Exchanger Ltd v Foster Wheeler Limited*, 2018 ABQB 620;
- *Déjà vu Holdings Ltd v Securex Master Limited Partnership*, 2018 ABQB 597;
- *Berlinic v Peace Hills General Insurance Company*, 2016 ABQB 104;
- *Darby v Citifinancial*, 2022 ABQB 9;
- *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*;
- *Phoenix Piston Hydraulics Inc v Echo Valley Farms Inc*, 1996 CanLII 10495??:
and

- *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 (and cases cited therein)

[12] The Court of Appeal decisions set out the basic principles for the application of these dismissal rules and the Queen's and King's Bench decisions are examples of how Applications Judges (formerly Masters) and Chambers Judges have applied the Rule and the Court of Appeal's interpretation to the specific facts before them.

[13] The Court of Appeal emphasizes that these cases are very fact specific and contextual. A "functional approach" is to be applied. Just because something has been found to have not substantially moved the action along in one case does not mean the identical result will happen every time the same "thing" has been done.

[14] I do not intend to deal with the case law in any more detail than that. I have already made my decision with knowledge of the fundamental principles and governing cases.

Leave Not Required

[15] Ms. Kostic submits that she has a right to bring summary dismissal and summary judgment proceedings. She says that this action was never part of the February 5, 2013 case management order and there has been no litigation plan filed in the action. She argues that the fiat requirement is only for self-represented litigants. Essentially, she objects to my imposing the fiat application requirement in this case.

[16] My response is that I have made it clear throughout my case management proceedings in the various actions assigned to me in April 2023 that I intended to follow the fiat process for all applications for all intended applications by any party, whether self-represented or not. The progress of all of these actions has been delayed by numerous unnecessary and unhelpful proceedings. I intend to allow only those applications that have a reasonable prospect of success and which may be of overall benefit to the progress of the action in accordance with the foundational rules to proceed.

[17] In case management, there is no "right" to take any particular proceeding; everything is subject to the overall direction of the case management judge.

[18] Ms. Kostic says, "leave is not required in the AIG, SVR or Jeffrey N. Thom and Miller Thomson LLP ("Thom") action." She suggests that the court is *functus*. I do not know what Ms. Kostic is referring to, and in any event, she is mistaken. All parties require leave for any applications in any of the actions I am managing under Acting ACJ Jeffrey's April order.

[19] Ms. Kostic is mistaken that leave for these applications was not required.

Stay misunderstood or misinterpreted

[20] Ms. Kostic argues that I have misunderstood the effect of the Order granted by ACJ Rooke on October 8, 2020. The body of the Order says, "This interim order is granted staying the running of time under Rules 4.31, 4.33(1) pursuant to Rules 4.14, 4.33(2)(a) and 4.33(9) pending a subsequent determination of whether this Interim Order should have been granted".

[21] Ms. Kostic points out again that she was the one who initiated the application and she was only seeking relief for her counterclaim. That may be, but the body of the Order does not

distinguish between the claim and the counterclaim. Having regard to the body of the Order, it would not have been unreasonable for AIG to rely on the order itself and to feel it unnecessary to apply for a separate order to preserve their causes of action.

[22] The Order was stated to be a temporary one, pending a subsequent determination of whether it should have been granted in the first place. No such determination has been sought by either party. Believing that they were already covered by the Order may explain why AIG did not seek to have the Order set aside.

[23] Ms. Kostic also argues that her counterclaim is “separate and independent” from the claim. She is correct that a counterclaim is considered to be “an independent action” (Rule 3.58). That does not mean that something done in regard to the counterclaim is insignificant to the claim itself.

[24] No case law was cited supporting Ms. Kostic’s argument that Rule 4.33 might apply to a claim but not the counterclaim. I have not found any myself. Because of the close connection between the claim and the counterclaim, and the fact that this action has been in case management since its inception, I do not think this is the appropriate case to determine the point under Rule 4.33. Ms. Kostic’s only claims against AIG relate to the insurance policy or policies it issued in favour of RJL and the rights (if any) Ms. Kostic had under them. This lawsuit is a fight over the policy and Ms. Kostic’s actions in relation to the policy or policies. The claim and the counterclaim are entirely connected.

[25] In any event, Ms. Kostic’s recent submission ignores the chronology of events in my decision, which noted that following correspondence from ACJ Rooke as case management judge on November 4, 2021 Ms. Kostic was to make a Fiat application in relation to her proposed motion to strike and for a summary trial. Nothing was done by Ms. Kostic in that regard until June 19, 2023 when Mr. Zinner wrote me about this.

[26] It would not have been unreasonable for AIG to wait for Ms. Kostic to take the steps she was instructed to do by ACJ Rooke.

[27] If the case management direction on November 4, 2021 is considered to be of significance to the claim, AIG is well within the 3-year time limit for doing something to move the action along.

Supporting evidence

[28] Ms. Kostic objects to AIG’s submission that she has not filed any evidence in support of her fiat application. She is correct that a fiat application in these proceedings generally does not require an affidavit. The fiat process is intended to weed out hopeless or unnecessary applications and not to start weighing evidence.

[29] That said, nothing in my decision turned on the presence or absence of evidence on her part. The thrust of Ms. Kostic’s comments here are complaints against AIG’s conduct in this litigation, and her allegation that AIG, RJL, Thom, Miller Thomson, and Scott Venturo Rudakoff LLP (“SVR”) are colluding and delaying her access to justice. These allegations have nothing to do with the merits of her fiat applications.

Relitigation of prior unappealed decisions

[30] Ms. Kostic maintains that she is not trying to relitigate any prior decisions, although it is obvious that she and AIG take different views as to how ACJ Rooke’s decision at 2018 ABQB 947 should be interpreted and applied. In that regard she says that she will provide an affidavit setting forward her evidence and she “is open to (me) setting a date that questioning must be complied with”. She notes that ACJ stated that there was “significant conflicting evidence regarding (Ms. Kostic’s) conflicts with AIG, RJL, Thom and SVR.”

[31] If anything, this submission reinforces the need for there to be a trial to resolve the conflicting evidence. I do not see how this argument assists Ms. Kostic in having me revisit my decision. In her submission, she encourages me to set a date for questioning.

Length of AIG response

[32] Ms. Kostic objects to AIG having included a procedural history as part of its correspondence. She says it should not have been admissible based on the-3-page limit set for responses in the Case Management Order.

[33] I have a discretion to permit more materials to be filed. The materials filed by Mr. Picco were helpful, as were some of the 278 pages she filed with her application. Her objection is not a valid basis to revisit my decision.

Outstanding Kostic Amendments

[34] As far as I know, the amended Statement of Defence Ms. Kostic says was approved in October 2020 and June 2021 has never been filed, and Mr. Picco says that the terms of it have never been finalized. Ms. Kostic says they were approved; AIG says they were not. This will obviously have to be the subject of an application by Ms. Kostic if she still wants to pursue amending her Statement of Defence. She says Her position on this and AIG’s are fundamentally opposed. In accordance with the fiat protocol, Ms. Kostic will have to apply for a fiat permitting this application to proceed although I doubt that there will be much difficulty with that. AIG still has the right to weigh in on whether such an application should proceed.

[35] The finalization of important pleadings is something that has in the case law been considered to be a significant step in moving the action along, as finalized pleadings allow the parties to properly prepare affidavits of records and conduct questioning as they will then know the issues. Proceedings involving Ms. Kostic attempting to amend her counterclaim was something that was likely critical to the progress of the action, as finalizing substantive pleadings allows the parties to understand the scope of the action and the cases they have to meet.

[36] There is nothing raised by Ms. Kostic here that suggests I should revisit my decision.

Limitations Act

[37] Ms. Kostic boldly says that the Act does not apply and that she is not out of time for adding parties. She references adding RJL as a third party or defendant by counterclaim. Mr. King for RJL advised on September 27, 2023 that RJL has not been served with a fiat application seeking to have RJL added to this action. It does not appear that Ms. Kostic served RJL with any of her December 13, 2023 materials. I need not comment on this issue at this stage, as the basis

for wanting to add RJL as a third party or defendant by counterclaim is not clear, nor has RJL had any opportunity to respond.

[38] It is not something that has me question my decision and I will not revisit it on this ground.

RJL as a Party

[39] At this stage, RJL is not a party to this action. Ms. Kostic says that she “sought to add RJL in a third-party claim obtained a fiat to file the Summary trial Application in 2020”. There is no record of any fiat having been granted on the Court file. Ms. Kostic refers to RJL getting benefit under her policy with AIG. It is not obvious to me how that might expose RJL to Ms. Kostic’s defence to AIG’s claims or to her claims against AIG. If she has some sort of indemnification from RJL that would be a relevant factor in both limitation period issues and potential liability to Ms. Kostic. I am unaware of any documentation to that effect, and it would be highly relevant to any fiat application.

[40] If Ms. Kostic wishes to seek a fiat to add RJL as a third party or defendant by counterclaim, she will have to make a fiat application and properly serve AIG and RJL. That was certainly not anything that was part of the fiat application for summary dismissal or summary judgment.

[41] It is certainly not something that was before me when I made the decision Ms. Kostic complains about.

Kostic Damages

[42] Ms. Kostic says, “it is premature to provide damage particulars at this time because Kostic is only seeking judgment for liability at present.” She says evidence regarding damages “will be presented at a Damage Assessment.” Generally liability and damages are determined at one proceeding unless the Court otherwise orders. There is no order severing liability from damages. Ms. Kostic’s fiat application did not seek to determine liability only. This only supports the need for a trial and not a summary proceeding.

Procedural Order

[43] Ms. Kostic objects to the procedural order. She states, “there exist no protocols for drafting procedural orders.” That may be the case, but procedural orders will only come out of case management proceedings. There is no restriction on fiat applications or requests for case management conferences. Those remain in my discretion. Ms. Kostic can suggest timelines but they must be agreed to by the other affected parties or directed by me.

Three-year delay

[44] Ms. Kostic argues that the 3-year period started with the filing of the statement of claim. She is mistaken. The three-year period starts with the last thing that happened that advanced the action. She reviews her position on what has happened in the action to date, distinguishing what she has done to advance her counterclaim from AIG’s claims against her. I have already

determined that the 3-year time period has not yet passed, and nothing new has been raised by Ms. Kostic to have me revisit my decision.

Dismissal for delay

[45] Ms. Kostic's submissions her relate to what she says AIG has failed to do in responding to her. She disputes that the October 20, 2020 Order has any application to AIG. I have already dealt with that.

Supporting Evidence

[46] Ms. Kostic says that AIG has not provided particulars of the evidence they say is contested. Their objection to her not providing an affidavit in support of her fiat application is "a tactic to deny access to justice". She says that the only credibility involved "concerns AIG's."

[47] It is obvious from the lengthy history Ms. Kostic's relationship with AIG since 2006 and the number of lawyers who have represented her through AIG that the lawsuit will turn on the Court's findings on whether Ms. Kostic has cooperated with AIG in her defence. Where there are contested facts, the credibility and reliability of everyone involved is usually in issue.

[48] This case appears to be one that will turn more on its facts than the law. The evidence necessary to determine the issues will be lengthy and will likely include large numbers of documents and considerable viva voce evidence from Ms. Kostic and her former lawyers, amongst other witnesses.

[49] I see no shortcuts regarding the evidentiary requirements of this case.

Conclusion

[50] Ms. Kostic's October 25 letter would not have changed my decision had I received it and reviewed it before making my fiat decision. She raises nothing new factually and she has given me no reason to revisit the decision I made. Regardless of Ms. Kostic's disagreement with the result, I make no change to the decision published at 2023 ABKB 702.

New Fiat Requests

[51] As noted above, Ms. Kostic seems to think that she already has leave to amend her statement of defence and to add RJL as a third party or defendant by counterclaim. Her position on the statement of defence is disputed by AIG. There is nothing on the court file to suggest that RJL has ever been added as a party or that leave was given to do so, or that leave was given to bring an application.

[52] If Ms. Kostic wishes to pursue amending her statement of defence, she will have to submit a Fiat application to me, copying AIG so they can respond. Similarly, if Ms. Kostic wishes to pursue adding RJL to this action, she will have to submit a fiat application to me, copying AIG and RJL so they can respond. It is her responsibility to serve RJL, not AIG's.

[53] As noted above, I do not know what Ms. Kostic intends regarding the “Summary National Questions.” Ms. Kostic will have to make a fiat request if she wants me to consider them in some way. It is not apparent as to what application the *Charter* may have to commercial relations between an insured and their insurer.

Heard by way of submissions received from Ms. Kostic and Mr. Picco.

Dated at the City of Calgary, Alberta this 19th day of January, 2024.

Robert A. Graesser
J.C.K.B.A.

Appearances:

Dennis Picco KC
Dentons LLP
for the Plaintiff

Liliana Kostic
Self-Represented Litigant
for the Defendant