

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hosseini v. Taheri*,
2024 BCSC 1145

Date: 20240628
Docket: S235359
Registry: Vancouver

Between:

Abbasali Shapour Hosseini

Petitioner

And

Abo Taheri, Denna Homes Corp. and Denna Marketing Corp.

Respondents

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Petitioner:

J.A. Dawson

Counsel for the Respondent Abo Taheri:

R. Robertson
T. Falcone

Place and Date of Trial/Hearing:

Vancouver, B.C.
May 30–31, 2024

Place and Date of Judgment:

Vancouver, B.C.
June 28, 2024

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Introduction

[1] This application for costs thrown away arises from a petition involving a bitter dispute between two business partners engaged in multi-residential developments in North Vancouver, BC.

[2] The petitioner, Abbasali Shapour Hosseini (“Dr. Hosseini”), seeks costs thrown away for preparation for the petition hearing undertaken between May 21, 2024, and May 27, 2024, which he says were unnecessary in light of the respondent Abo Taheri (“Dr. Taheri”) suddenly changing his litigation position after advising that he did not intend to do so.

Background

[3] Dr. Taheri is the president and a director of the corporate respondents, Denna Homes Corp. and Denna Marketing Corp (collectively, the “Denna Companies”). Dr. Hosseini is also a director and officer of the Denna Companies.

[4] Dr. Taheri filed a counterclaim against the Denna Companies in a Federal Court trademark action, styled *Seylynn (North Shore) Development Limited Partnership v. Abo Taheri*, Federal Court File No. T-1059-22 (the “Trademark Action”). The Trademark Action is about the ownership of the “DENNA” trademark. The plaintiff in the Trademark Action is a partnership controlled by Dr. Hosseini.

[5] On July 28, 2023, Dr. Hosseini filed a petition seeking to remove Dr. Taheri as director of the Denna Companies, pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCBCA]. The petition is framed in shareholder oppression. It alleges that Dr. Taheri’s decision to include the Denna Companies as defendants to his counterclaim in the Trademark Action amounts to oppression warranting his removal as a director.

[6] In the alternative, Dr. Hosseini sought leave, under s. 232 of the BCBCA, to defend the Denna Companies against the counterclaim that Dr. Taheri filed in the Trademark Action. Dr. Hosseini sought this alternative relief so that the Denna Companies could defend against the counterclaim brought by Dr. Taheri.

[7] Two days before the petition was scheduled to be heard, Dr. Taheri discontinued his counterclaim against the Denna Companies. The discontinuance took Dr. Hosseini by surprise because, on April 9, 2024, Dr. Hosseini suggested to Dr. Taheri that he discontinue the counterclaims against the Denna Companies. By agreement, the counterclaim had been stayed in the Federal Court.

[8] On May 21, 2024, through his counsel, Dr. Taheri explained why he was unwilling to discontinue his claims. On that basis, Dr. Hosseini’s counsel continued to prepare for the petition hearing.

Discontinuance of the Counterclaims in the Trademark Action

[9] On May 27, 2024, at 3:33 p.m., Dr. Hosseini’s counsel received an email from Dr. Taheri’s lawyers in the Trademark Action, attaching a copy of a notice discontinuing the counterclaim against the Denna Companies. To that point, Dr. Hosseini had not been advised or warned that Dr. Taheri had reconsidered his position and would discontinue that part of the counterclaim.

[10] I was advised that, as a result of Dr. Taheri discontinuing his claims, Dr. Hosseini has to reconsider the basis for the petition.

[11] Dr. Taheri agrees that the notice of discontinuance changes the basis for the petition because it seeks Dr. Taheri’s removal, or leave to defend against his claims, on the basis of what Dr. Hosseini alleges is the untenable position in which it put the Denna Companies—Dr. Taheri was suing companies of which he is a director and the president.

[12] Dr. Hosseini sought to have the petition adjourned generally and an order for his costs thrown away. Dr. Taheri opposes the adjournment and the costs order.

[13] I adjourned the petition generally so that counsel for Dr. Hosseini could seek instructions and consider whether there was a basis on which it could continue. I suspect that the petition is now moot.

[14] I heard submissions from Dr. Hosseini about: the difficulties he had in serving the petition, ultimately requiring an alternative service order that was granted by Associate Judge Hughes on September 8, 2023; Dr. Taheri's late response and proposal of a temporary stay of the counterclaim against the Denna Companies; and Dr. Taheri's late decision to discontinue the counterclaim.

[15] I also heard submissions from Dr. Taheri about: the merits of the petition; the fact that the counterclaim never imperiled the Denna Companies in any real way; and that the Denna Companies were not active players in the Trademark Action; and the conflict that might result is Dr. Hosseini was able to control the defence of the counterclaim in a Trademark Action in which a company that he controlled was the plaintiff.

[16] None of those submissions were relevant, except as untested and unproven background to the very simple issue I have to decide. I will, however, refer to the communications between counsel regarding the temporary stay and later discontinuance of the counterclaim in the Trademark Action.

[17] Dr. Taheri's response to the petition was due on October 10, 2023. On October 5, 2023, he offered to temporarily stay his counterclaim against the Denna Companies until his claims against the other defendants had been tried. On October 16, 2023, Dr. Hosseini accepted the stay proposal. Dr. Taheri asked Dr. Hosseini to confirm that he would "not be moving forward with any of the relief sought in the petition". Counsel for Dr. Hosseini responded:

Respectfully, I don't think the stay changes that much. The stay is only temporary. The issue of who should defend [the Denna Companies] after the stay expires has to be determined. The other issue of whether your client should remain a director of [the Denna Companies] also remains extant. Further, there is the issue of costs.

[18] On October 19, 2023, Dr. Hosseini advised Dr. Taheri that his reply materials were past due and wrote:

Given the temporary stay, matters are less urgent. Therefore, I am willing to give you an extension of time, until October 27, 2023, to deliver your reply materials to me.

[19] After the temporary stay was in place, Dr. Hosseini's counsel corresponded with Dr. Taheri's counsel to find out why, as a director and the president of the Denna Companies, Dr. Taheri was intent upon suing those companies, and to suggest that Dr. Taheri discontinue these claims. On April 9, 2024, Dr. Hosseini's counsel wrote:

There is also another matter on which I would like to hear from you. Previously, you have said that Dr. Taheri will only agree to a temporary stay of the Federal Court action that he has commenced against [the Denna Companies]. Although he is a director of these companies, Dr. Taheri takes the position that he may resume his prosecution against [the Denna Companies] once his claims against other parties have been determined in the Trademark Action.

The benefit of this is not clear to me and can you please tell me why Dr. Taheri will not simply agree to a permanent stay of his action against [the Denna Companies]? Alternatively, why is Dr. Taheri unwilling to discontinue the action that he has commenced against [the Denna Companies]?

[20] Counsel for Dr. Taheri responded:

With respect to the Federal Court stay, I think your question is best directed to Dr. Taheri's counsel in that case.

[21] Counsel for Dr. Hosseini replied:

You have told me that the stay of your client's claims against [the Denna Companies] is temporary. I don't think I need to ask your client's other lawyers why he won't agree to discontinue his claims. The point is that he won't and that [the Denna Companies] will need defend themselves when his prosecution resumes.

[22] No further correspondence was exchanged until counsel for Dr. Taheri wrote on May 21, 2024:

The questions you pose relating to the stay of proceedings for [the Denna Companies], were discussed by us in October 2023 when the stay was proposed, and when your client agreed to it. Should you have had any lingering questions about why Dr. Taheri was not offering a full discontinuance, his position was made clear in our Response to Petition of October 27, 2023, and in particular at paragraph 39 of the Legal Basis.

[The Denna Companies] have been deadlocked since about April 2021. Dr. Hosseini used the Denna tradename after the deadlock arose, and on at least two occasions purported to do so on behalf of Denna Homes. One known instance is when (despite purporting to decree a moratorium on the use of Denna) he issued the letter to the BC Corporate registry in February

2022 on behalf of [Denna Homes] to enable him to incorporate the two new Denna corporations. Another is a letter we have found through public disclosure means, dated December 2021 issued to the District of North Vancouver Council, allegedly on behalf of “Denna Homes” and signed by Dr. Hosseini and Rouzbeh Rabiei as its “Managing Partners”. We intend to submit this letter to you attached to an affidavit shortly.

This unauthorized use of “Denna” was clearly done by Dr. Hosseini. But Dr. Hosseini can and likely will argue that these letters were in fact issued by [Denna Homes], notwithstanding that the company was in a deadlock and the other director did not agree. If Dr. Taheri succeeds in the Federal Court action, and is determined to be the owner of the Denna name, he will be entitled to orders preventing unauthorized use or infringement. If [the Denna Companies] were removed from the Federal Court action, Dr. Taheri would not be able to obtain any order prohibiting Dr. Hosseini from the type of use in the above two examples.

[23] Nonetheless, in his letter of May 27, 2024, shortly after the notice of discontinuance was filed in the Federal Court, Dr. Taheri’s BC counsel wrote:

Dr. Taheri’s decision to not discontinue the Trademark Action completely, as against [Homes and Marketing], must completely nullify whatever may have remained of any live issue in the petition, and surely Dr. Hosseini must now agree that it would be a pointless waste of court time and parties’ resources to pursue the hearing scheduled for May 30th and 31st, 2024.

With all due respect, this new development has a very simple effect on the proceeding and should not take your client very long to react to. I expect to hear from you by tomorrow sometime that you will be abandoning the Petition. Should Dr. Hosseini decide that notwithstanding the discontinuance, he still wishes to proceed to court for the hearing of this matter, Dr. Taheri will be seeking the highest order of costs against Dr. Hosseini, including special costs.

[24] Dr. Hosseini’s counsel argues that the change in position between May 21, 2024, when Dr. Taheri told Dr. Hosseini that he would not discontinue his counterclaim and then doing that very thing, six days later, imposed an unnecessary financial burden which merits an award of costs thrown away. When counsel advised Dr. Taheri that Dr. Hosseini intended to seek such an award, Dr. Taheri’s counsel responded:

The primary reason Dr. Hosseini is not entitled to any costs is because this Petition never had any merit - especially the petition seeking removal of Dr. Taheri as director which never had any chance of succeeding. The Notice of Discontinuance in the Federal Court proceeding certainly was not an acknowledgement that this Petition had merit. It did not have merit and we believe it would not have succeeded.

The stay was proposed in October 2023 to assuage any concerns that the Denna companies could be negatively affected by the Federal Court proceeding. Dr. Hosseini agreed to the stay and the clear implication of the agree[ment] was that it would make the derivative leave aspect of the petition unnecessary. Your client broke that agreement and wanted to continue to litigate the derivative leave. Dr. Hosseini has continued to be unreasonable.

Furthermore, while I do not believe Dr. Hosseini's derivative leave application would have succeeded (especially given his conduct), the greater concern was Dr. Hosseini's unauthorized conduct. Since removing the [Denna Companies] from the Trademark action has very little impact on that case, a prudent, if conciliatory step was then taken by discontinuing, and in our view the court will not penalize Dr. Taheri for taking this conciliatory step. Rather costs ought to be awarded against any party who continues litigating when doing so becomes a pointless exercise. We will seek costs against Dr. Hosseini if the matter proceeds to hearing on Thursday.

Analysis

[25] Regardless of the merits of the petition itself, which is not before me, Dr. Taheri's late decision to discontinue the counterclaim, thereby rendering the petition potentially moot, or at least resulting in a need to reconsider whether it should proceed and on what basis, resulted in steps being taken by Dr. Hosseini's counsel that were entirely unnecessary. Counsel for Dr. Hosseini invited Dr. Taheri to consider discontinuance, but was advised that would not happen. They then prepared to argue the petition, only to have it discontinued.

[26] Dr. Hosseini does not seek his costs thrown away for the petition as a whole.

[27] I agree that Dr. Hosseini is entitled to his costs thrown away as a result of unnecessary preparation between May 21, 2024, when counsel advised that the counterclaim would not be discontinued, and May 27, 2024, when it suddenly was.

[28] In some jurisdictions in Canada, costs thrown away are awarded as indemnity costs. In this jurisdiction, the *Supreme Court Civil Rules* do not contemplate indemnity costs. Special costs may be awarded based on reprehensible litigation conduct.

[29] In my view, a last-minute change in litigation position does not amount to reprehensible conduct, warranting an award of special costs absent a finding that

the last-minute changed was strategic on Dr. Taheri's part to increase Dr. Hosseini's costs. I accept that when Dr. Hosseini first suggested the discontinuance of the counterclaim in the Trademark Acton against the Denna Companies, it warranted serious consideration by Dr. Taheri. I also accept that Dr. Taheri's late decision to discontinue, after informing Dr. Hosseini that he was not going to do so, led to unnecessary preparation for the hearing of the petition.

[30] However, I conclude that the conduct here does not fall within the ambit of the "milder forms of misconduct deserving of reproof or rebuke" captured by the reprehensible standard for special costs: *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.) at para. 17; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177. As a result, special costs are not appropriate in this case and I award costs at Scale B for Dr. Hosseini's costs thrown away for preparation for the hearing of the petition between May 21–27, 2024. Dr. Hosseini is also entitled to his costs for the hearing before me.

[31] If, based on these reasons, the parties are unable to agree on the quantum of costs thrown away they will appear before the Registrar for an assessment of those costs.

"MacNaughton J."