COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Masjoody v. Trotignon,*
2023 BCCA 220

Date: 20230530
Docket: CA48922

Between:

Masood Masjoody

Appellant
(Plaintiff)

And

Amélie Trotignon and Simon Fraser University

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 3, 2021 (*Masjoody v. Trotignon*, 2021 BCSC 1502, Vancouver Docket S204587).

The Appellant, on his own behalf: M. Masjoody

No one appearing on behalf of the Respondents

Written Submission Received: May 5, 2023

Place and Date of Judgment: Vancouver, British Columbia
May 30, 2023

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon

Summary:

A chambers judge dismissed the appellant's action on the basis the court lacked jurisdiction over the underlying dispute. This is the appellant's second appeal of that order; his first appeal was unsuccessful and he now seeks a new appeal on the grounds that a term in the judge's order — that she be seized of further applications in the proceeding — was improper due to a reasonable apprehension of bias. The Registrar referred this appeal to a division for summary determination under s. 21(1) of the Court of Appeal Act. HELD: Appeal dismissed. The principle of res judicata and, in particular, cause of action estoppel, prevents the appellant from mounting a new appeal based on alleged errors that could and should have been raised in his first appeal. As well, the issue raised by the appellant is moot.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The appellant, Dr. Masjoody, appealed the order of a chambers judge who struck his amended notice of civil claim and dismissed his action on the basis that the Court did not have jurisdiction over the dispute. Dr. Masjoody's subsequent appeal from that order was dismissed. Dr. Masjoody then filed a new Notice of Appeal and other supporting materials seeking to appeal further aspects of the original chambers judge's order. The Registrar of the Court of Appeal referred Dr. Masjoody's appeal to a division of this Court pursuant to s. 21(1)(a) and (b) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [the "*Act*"]. Those provisions allow for a summary determination of an appeal on various bases.

[2] The doctrine of cause of action estoppel, whose object is to advance finality and fairness in litigation, is directly engaged and is determinative of Dr. Masjoody's appeal. Further, the issue Dr. Masjoody now seeks to raise is moot.

[3] For the reasons that follow, I would dismiss the appeal.

Background and Procedural History

[4] Dr. Masjoody and the respondent, Dr. Trotignon, both obtained their Ph.D.'s in mathematics at the respondent Simon Fraser University ("SFU"). Both worked as sessional instructors or teaching assistants, both were members of the Teaching Support Staff Union and both were subject to a collective agreement between SFU and the Union (the "Collective Agreement").

[5] On April 30, 2020, Dr. Masjoody filed a notice of civil claim against Dr. Trotignon and SFU. He amended that claim on June 25, 2021. The amended pleading advanced claims in defamation and conspiracy against Dr. Trotignon and SFU.

[6] The respondents brought an application to strike the claim on the basis that the Court did not have subject matter jurisdiction to address the issues or, in the alternative, that the proceedings were an abuse of process.

[7] On August 3, 2021, in reasons for judgment indexed at 2021 BCSC 1502, Justice Fitzpatrick struck Dr. Masjoody's amended pleading, and dismissed his claim on the basis that the Court did not have jurisdiction over the dispute. In her view, the "essential character" of the dispute concerned Dr. Masjoody's treatment at his workplace and involved the "interpretation, application, administration or violation" of the Collective Agreement. She did not consider it necessary to address the alternative argument that the action should be dismissed as an abuse of process.

[8] The judge also ordered Dr. Masjoody to pay the costs of the proceeding and, if she was available, that she would be seized of any further applications that were to be scheduled in the action.

[9] Dr. Masjoody filed a Notice of Appeal (CA47689) on August 17, 2021. His appeal was dismissed on April 8, 2022. In reasons for judgment indexed at 2022 BCCA 135, the Court agreed with the reasoning of the chambers judge and concluded that "the essential character of Dr. Masjoody's dispute with Dr. Trotignon and SFU [was] inextricably bound up with and related to his employment at SFU". As such it was governed by the mandatory dispute resolution process within the Collective Agreement. Dr. Masjoody did not seek leave to appeal this determination.

[10] On March 8, 2023, or almost a year later, Dr. Masjoody filed a further Notice of Appeal (CA48922) together with various other materials. That Notice of Appeal indicated that Dr. Masjoody wished to appeal Justice Fitzpatrick's order that she be seized of any further applications in the proceeding on the basis that

Justice Fitzpatrick did “not have any jurisdiction in this matter due to a reasonable apprehension of bias”.

[11] On March 9, 2023 the Registrar of the Court of Appeal wrote to Dr. Masjoody confirming receipt of his new Notice of Appeal and the other materials he had filed. The Registrar advised Dr. Masjoody that he intended to refer his materials to a division of the Court under s. 21(1) of the *Act* for summary determination on the basis that Dr. Masjoody was “seeking to file a new appeal of an order already finally adjudicated by this Court”. On March 20, 2023, Dr. Masjoody sent a letter to the Court of Appeal Registry asking that the letter be directed to this division.

[12] Section 21(3) of the *Act* requires that the Court “give the appellant an opportunity to make written submissions or otherwise be heard”. On April 18, 2023, the Court directed Dr. Masjoody to provide any further submissions he wished to make by April 28, 2023. Thereafter, Dr. Masjoody provided two further letters. However, neither addressed the question of why his appeal should not be summarily determined. On April 27, 2023, Dr. Masjoody was advised he had until May 5, 2023 to provide his submissions. He did so and we have reviewed those submissions as well as the other materials he has filed or delivered.

Analysis

[13] Section 21(1) is a recent addition to the *Act*. It provides:

> Referral to court for summary determination
>
> 21 (1) A justice or the registrar may refer an appeal to the court for summary determination if the justice or registrar considers that the appeal
>
> (a) is frivolous or vexatious, or
>
> (b) can otherwise be dismissed on a summary basis.
>
> (2) On a referral under subsection (1), the court may dismiss all or part of the appeal if the court considers that the appeal meets the criteria set out in subsection (1) (a) or (b).
>
> (3) Before dismissing all or part of an appeal under subsection (2), the court must give the appellant an opportunity to make written submissions or otherwise be heard.

[14] In *Yang v. Shi*, 2022 BCCA 317 Justice Willcock (Chambers) explained the purpose and ambit of the amended s. 21 and he addressed its relationship with Rule 60 of the *Court of Appeal Rules*, B.C. Reg. 120/2022:

> [21] In my view, s. 21 establishes a mechanism for a justice or the registrar on their own motion to refer an appeal to the court. For that reason, there is no prescribed mechanism for a party to seek an order from a justice or the registrar that an appeal be referred to the court. An application for an order quashing an appeal is provided for in R. 60. An order may be made setting the motion to quash for hearing before the date set for the hearing of the appeal.
>
> …
>
> [24] The distinction between the orders that may be made under s. 21 and those that may be made on application pursuant to R. 60 is that one is court driven and the other is driven by the parties. A referral may be made where there is an apparent defect in the appeal. An application, on the other hand, is appropriate where evidence or argument is necessary in order to satisfy the court that the appeal is manifestly devoid of substance or merit or so devoid of merit as to constitute an abuse of process. These are the tests described in *Nederland Holdings Inc. v. British Colombia*, 2018 BCCA 373 and *Sangha v. Bhamrah*, 2017 BCCA 434.

[15] The principle of *res judicata* is relevant to Dr. Masjoody's new appeal (CA48922). *Res judicata* refers to "something that has clearly been decided" such that a litigant is "estopped" by a prior proceeding from bringing another claim: *R. v. Duhamel*, [1984] 2 S.C.R. 555 at 208. In *Re Cliffs Over Maple Bay*, 2011 BCCA 180 at para. 25 Justice Newbury, for the Court, explained the rationale behind this principle, citing Spencer Bower and Handley, *Res Judicata*, 4th ed (London, U.K.: LexisNexis, 2009):

> Two policies support the doctrine of a res judicata estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
>
> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action… it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

[16] There are two forms of *res judicata*: issue estoppel and cause of action estoppel. The leading authority on the doctrine of issue estoppel in Canada is *Angle*

v. Canada (Minister of National Revenue), [1975] 2 S.C.R. 248 where Dickson J., for the majority, and quoting from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2), [1967] 1 A.C. 853 at 935, explained the requirements of the doctrine:

> …(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.

See also *Re Cliffs Over Maple Bay* at para. 31.

[17] If Dr. Masjoody, in filing his new Notice of Appeal (CA48922), sought to revisit the issue that had been determined in his original appeal (CA47689), issue estoppel would be relevant. The same question, that being whether the courts have jurisdiction over the claims Dr. Masjoody advanced in his amended pleading, would have already been decided. The judicial decision creating the estoppel would be final because his appeal was dismissed, and the parties to his action, as well as his original appeal and his intended new appeal, would be the same.

[18] It appears, however, that in his new Notice of Appeal (CA48922) Dr. Masjoody seeks to raise an issue that was determined by Justice Fitzpatrick but not raised by him in his initial appeal (CA47689). In particular, it appears from both his Notice of Appeal and his submissions that he intends to challenge the portion of Justice Fitzpatrick's order where she directed that she was to "be seized of any further applications in this proceeding", though the parties were permitted to "schedule any further application before another presider if Madam Justice Fitzpatrick [was] unavailable".

[19] In such circumstances it is the doctrine of cause of action estoppel that is relevant. Cause of action estoppel is generally directed towards preventing a litigant from advancing a new legal theory in support of a claim based on essentially the same facts. In *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*, [1980] 19 B.C.L.R. 59, 1980 CanLII 393, Carrothers J.A. explained:

> [16] …The maxim res judicata does not apply to distinct causes of action …, but it does apply where the second action arises out of the same

> relationship, and the same subject matter, as the adjudicated action, although based on a different legal conception of the relationship between the parties… . It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belong to the subject of the first litigation in which the parties, exercising reasonable diligence, might have brought forward at the time…
>
> [Citations omitted; emphasis added.]

[20] The second aspect of this principle, which I have underlined, is relevant in this appeal. In his initial appeal (CA47689), it may have been open to Dr. Masjoody to appeal Justice Fitzpatrick's order that she was seized of all further applications unless she was unavailable. He chose not to do so. It is not open to him, absent compelling circumstances, to now bring a new appeal to raise this new issue: *Re Cliffs Over Maple Bay* at para. 13.

[21] This principle was recently expressed, in the appellate context, in *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2021 ABCA 153 where the Court said:

> [69] An appellate court is not "a never-closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal": *R v EFH* (1997), 1997 CanLII 418 (ON CA), 33 OR (3d) 202, 115 CCC (3d) 89 (CA), leave to appeal dismissed [1997] SCCA No 256.

[22] Simply put, if a trial or motions judge makes a series of orders in a proceeding, an appellant is required to appeal each of the orders they seek to challenge in a single appeal. Conversely, an applicant may not appeal separate orders by means of successive appeals.

[23] The importance and purpose of this principle is discussed in some of the authorities I have referred to, but it may be that an example would assist Dr. Masjoody and other self-represented individuals. Assume two parties are involved in a matrimonial dispute. The trial judge makes a series of orders addressing the various issues the parties have raised. This includes custody and access issues, the interpretation of an agreement the parties entered into before they were married, the division of property, child support, spousal support and other

matters. One or the other party can appeal any or all of these orders. Absent extraordinary circumstances, however, it is not open for either party to appeal each such order separately in a series of distinct appeals.

[24] These principles directly engage the policy considerations I referred to earlier and that are founded in two important objectives: finality (that it is in the interests of the public that litigation be put to an end), and fairness (that no person should be troubled repeatedly by different matters that arise from the same dispute): see D. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Markam, Ont.: LexisNexis, 2021) at 6; see also *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18. Dr. Masjoody's new appeal (CA48922) offends both these principles.

[25] In addition, the issue Dr. Masjoody seeks to raise on appeal appears to be moot. A moot issue is one that does not engage a "live controversy" and whose resolution will have "no practical effect" on the rights of the parties: *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at para. 17; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353. The Court of Appeal does not generally entertain moot appeals: see *Borowski* at 353; *Webber v. Anmore (Village) (Approving Officer)*, 2012 BCCA 390 at paras. 4–5. In *Johnson v. British Columbia (Workers' Compensation Board),* 2008 BCCA 436 at para. 41, this Court explained that the doctrine of mootness "is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question". An appeal is moot where "the concrete dispute has disappeared, rendering the issues academic", and where there is no compelling reason for the court to exercise its discretion to hear the case anyway: *Johnson* at para. 41.

[26] In *Borowski* at 356-360, the Supreme Court of Canada explained that three important policy rationales underpin the doctrine. The first rests on a fundamental tenet of our legal system: a court's competence to resolve legal disputes within an adversarial system where both parties have a full stake in the resolution of the issues. The second is based on the need for judicial economy, which requires courts

to carefully consider whether the particular circumstances of a case weigh in favor of allocating scarce judicial resources to its resolution. The final rationale is the need for the judicial branch to be sensitive to its proper role within the political framework. Rendering judgments in the absence of a live controversy may be viewed as entrenching on the role of the legislative branch. See also *Lising v. Kent Institution*, 2008 BCCA 10 at paras. 14–15.

[27] In the case at bar, although Justice Fitzpatrick seized herself of any further matters that might arise, the reality is that her central conclusion put an end to the action that Dr. Masjoody had brought. She determined, and this Court agreed, that the trial court did not have jurisdiction over Dr. Masjoody's claim. Accordingly, she struck that claim. With this conclusion in hand there was, and there is, simply no need for the parties to reappear before Justice Fitzpatrick. A review of the trial court file confirms this. No matter has been scheduled before Justice Fitzpatrick since she first struck Dr. Masjoody's claim some 20 months ago.

[28] In my view, the issue Dr. Masjoody seeks to raise is moot. I see no compelling reason why this Court should exercise its discretion to hear Dr. Masjoody's appeal despite its mootness. This constitutes a separate or independent basis on which to determine Dr. Masjoody's further appeal.

Disposition

[29] For the forgoing reasons, I would dismiss Dr. Masjoody's appeal (CA48922).

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Fenlon"