

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Popoff v. Popoff*,
2023 BCCA 439

Date: 20231027
Docket: CA48895

Between:

Michael Popoff

Appellant
(Plaintiff)

And

Larry Mike Popoff and Patricia Mildred Popoff

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated
February 16, 2023 (*Popoff v. Popoff*, Kamloops Docket 54121).

Oral Reasons for Judgment

Counsel for the Appellant: T.W. McNeil-Hay

Counsel for the Respondents: K.R.W. Shortreed

Place and Date of Hearing: Vancouver, British Columbia
October 27, 2023

Place and Date of Judgment: Vancouver, British Columbia
October 27, 2023

Summary:

Chambers judge below erred in striking pleadings under Rule 9-5.

[1] **NEWBURY J.A.:** We are all of the view that the chambers judge below did err in many, if not all, the ways argued by the appellant. We do not think it necessary to rehearse the facts as pleaded in this appeal since they are of interest only to the parties; but at the least, we find that the judge erred in striking the pleadings of the appellant under R. 9-5(1)(a) of the *Supreme Court Civil Rules* (as disclosing no cause of action) and under R. 9-5(1)(b) (as frivolous or vexatious), and on the basis that there was no genuine issue to be tried under R. 9-6(5)(a). He also erred in referring to evidence in relation to R. 9-5(1)(a), given that R. 9-5(2) prohibits doing so; and in finding facts and weighing evidence generally under R. 9-5(1)(a). Indeed, the chambers judge seems almost to have conducted a summary trial without being asked to do so, and without the parties being prepared for same.

[2] It was certainly not correct to say no cause of action was disclosed, in our view. The plaintiff has pleaded his case and the defendant, Ms. Popoff, has pleaded a defence, which may include a limitation bar. One side's position may ultimately be weaker than the other's, but that does not mean the action is frivolous or vexatious on the pleadings such that the case was bound to fail.

[3] In the result, we would allow the appeal and dismiss the notice of application. This dismissal is without prejudice to any argument regarding want of prosecution, or regarding the *Limitation Act*, S.B.C. 2012, c. 13, generally. These seem to us to be eminently appropriate for trial or summary trial along with the other issues arising from the pleadings.

“The Honourable Madam Justice Newbury”

“The Honourable Mr. Justice Abrioux”

“The Honourable Justice Marchand”