

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ponder v. Dodds*,
2017 BCSC 995

Date: 20170607
Docket: M133443
Registry: Vancouver

Between:

Kristina Lucille Ponder

Plaintiff

And

Peter Stephen Dodds

Defendant

Before: The Honourable Mr. Justice Steeves

Oral Ruling

In Chambers

Counsel for the Plaintiff:

Ruth E. McIntyre
Cocuta Sirian

Counsel for the Defendant:

Jennifer J.L. Brun

Place and Date of Hearing:

Vancouver, B.C.
June 7, 2017

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[1] **THE COURT:** In an application filed on May 12, 2017, the defendant seeks an order that the plaintiff is not entitled to costs in this action and two other actions. The two other actions are M13342 and M151720. Costs for this application are also sought by the defendant. The plaintiff opposes the defendant's application.

[2] By way of background this action arose out of a motor vehicle accident on June 23, 2012. The other two actions arose out of motor vehicle accidents on September 10, 2012, and October 14, 2014. The plaintiff in this action is the plaintiff in the other two actions. She claimed in all three actions damages for a number of injuries such as neck and back pain, headaches, post-traumatic stress disorder and others.

[3] On June 22, 2016, by consent, all three actions were ordered to be tried at the same time. A 15-day trial was scheduled to commence on September 12, 2016, before a jury. Liability was denied by the defendants.

[4] The plaintiff's claim for insurance coverage for her damages included a witness statement from Amanda Smith. This was filed online on June 26, 2012. Ms. Smith claimed to have witnessed the June 23, 2012 accident and described events which supported the claim of the plaintiff.

[5] The insurance carrier commenced an investigation and discovered there were family connections between Ms. Smith and the plaintiff. An investigator then interviewed Ms. Smith on June 21, 2016. According to an affidavit sworn by the interviewer Ms. Smith said she was not a witness and that the plaintiff wanted her to be a false witness. On July 26, 2012, the insurance carrier advised the plaintiff that her claim for the first accident was forfeited because she willfully made a false statement. This decision was made under s. 75(c) of the *Insurance (Vehicle) Act*.

[6] On July 18, 2016, counsel for the plaintiff proposed settlement of all three actions for \$263,356 plus all taxable costs and disbursements.

[7] On September 9, 2016, counsel for the defendants on all three actions sent to counsel for the plaintiff a formal offer to settle all three actions for \$10,000 plus

necessary and reasonable disbursements to the date of delivery of the offer. The defendants reserved the right to bring the offer to the attention of the court for consideration of costs.

[8] The plaintiff accepted the \$10,000 offer to settle on September 10, 2016. According to the defendants no money was paid for the plaintiff's claim for the first action, \$9,000 was paid under the second action and \$1,000 was paid under the third action. That appears to have been an internal accounting of the distribution of the damages and the evidence is that the plaintiff did not know about that distribution.

[9] On September 22, 2016, the plaintiff provided a disbursement account to counsel for the defendants. A detailed list of objections was sent by the defendants by letter dated February 27, 2017. The parties appeared before the registrar on March 10, 2017, and further dates are set for July 2017.

[10] By their application in this court the defendants now seek an order that the plaintiff should not be entitled to any costs. Obviously if that is successful, the July dates before the registrar will not be necessary.

[11] There is an issue as to whether all three accidents come under the allegation of fraud by the defendants. That is the position of the defendants. However, in the letter dated July 26, 2016 advising the plaintiff that her claim had been forfeited because of a false statement, only the first accident on June 23, 2012 was referenced. It follows that if there is fraud it is only under the first accident and the other two accidents are unaffected by that allegation.

[12] There is also the agreement between the parties to settle the litigation prior to trial. That is subject to reasonable costs to be agreed later. The plaintiff says that agreement cannot be interfered with by this court and authorities such as *Sahota v. Sandulo*, 2011 BCSC 87, are cited.

[13] I accept the plaintiff's point and the authority in *Sahota* and other judgments, but the agreement to settle here was different than in *Sahota*. There only "costs"

were to be determined. Here “reasonable costs” were to be determined. In any event if there was fraud underlying a claim, then the claim cannot be reasonable.

[14] Turning to the issue of fraud, I accept that I have equitable jurisdiction to award or not award costs. This is described succinctly in *Fan v. Chana*, 2011 BCCA 516 at para. 32, where the previous decision of *Oasis Hotel Ltd. v. Zurich Ins. Co.*, 1981 CanLII 433 (B.C.C.A.), is cited and again, I accept that authority. As a technical matter an application to assert that authority would properly come under Rule 14-1(14), as cited in the application here.

[15] The defendants say that the plaintiff presented a false witness as part of her case. That witness was to be presented in court until the settlement between the parties. There are some problems with this allegation. First of all, under oath in her examination for discovery the plaintiff denies it. Indeed she says when asked about the statement by Ms. Smith that Ms. Smith did it essentially without the plaintiff’s knowledge and in order to obtain something else in return. That something else is not described.

[16] With respect to Ms. Smith, the source of her recantation of the statement she made in support of the plaintiff’s claim was presented to the court through an affidavit of the person interviewing her. There was no transcript. At my request an audio tape was provided of the interview and was played in court. It is about seven minutes long.

[17] Technically the information from Ms. Smith is hearsay in the sense that she is not available to be examined. The interview was not done under oath. She was given a warning in the manner somewhat like a peace officer gives someone. The interview was done in a car, apparently in the front seat. There was considerable talking over each other as between the interviewer and Ms. Smith. There is reference to a prior meeting between the two individuals but we do not know what occurred at that meeting.

[18] The interviewer used a number of leading questions. For example, Ms. Smith was asked whether she was prompted to give a statement as a favour to the plaintiff. She was asked whether she was asked to be a false witness. There are references to extortion by the interviewer. The interviewer also gave advice to Ms. Smith about what lawyers might or might not do with what she was saying.

[19] Ms. Smith could not remember key issues like who actually wrote the statement. She noted that it had been four years previously. The interviewer read some documents to Ms. Smith to get her response. Some documents were read very quickly. One document was read very quickly and then abruptly stopped before the end of the document.

[20] Overall on the issue of fraud there are competing stories. One story is that the plaintiff denies there is fraud. That was given under oath in discovery, albeit with some inconsistencies. The other by Ms. Smith was given in a hurried conversation in the front seat of a car. Fraud is a serious matter and requires cogent and admissible evidence. These issues are notoriously difficult to decide based on affidavit evidence. Here the evidence is something less reliable than affidavit evidence, certainly in the case of Ms. Smith.

[21] In the result I conclude that it is not possible to say there was no fraud but equally it is not possible to say there was fraud on the basis of the evidence on the record today. The allegation of fraud by the defendants must be dismissed.

[22] There is reference in the material about the plaintiff apparently participating in a wedding and going on vacation at material times when she alleges she was injured from the accident. Those issues are not directly relevant to the issue of fraud here. They were presumably issues that were the basis of the settlement decisions made by the parties.

[23] Finally with respect to the costs of this application, neither party will have their costs against the other.

[24] The application is dismissed and will proceed to the taxation in the usual course. All right. Thank you.

“The Honourable Mr. Justice Steeves”