IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***O'Mara v. Son, Kim et al.,***
2007 BCSC 871

Date: 20070615
Docket: M034298
Registry: Vancouver

Between:

Tom O'Mara

Plaintiff

And

Jong-Pil Son and Hyung Sup Kim

Defendants

AND

Docket: M051284
Registry: Vancouver

Between:

Tom O'Mara

Plaintiff

And

Birgitta Villanueva
Jose Wyeth Greyan Villanueva

Defendants

AND

Docket: M051283
Registry: Vancouver

Between:

Tom O'Mara

Plaintiff

And

Steven Michael Berg
Deborah Ann Wiffen

Defendants

Before: Master G. Taylor

Reasons for Judgment

Counsel for the Plaintiff: K.C. Jarvis and J.M. Rice

Counsel for the Defendants: T.H. Pettit

Date and Place of Hearing: May 28, 2007
Vancouver, B.C.

[1] A number of issues arise from the cross motions of the parties. The various applications were heard as part of a Case Management Conference.

[2] The plaintiff, Tom O'Mara seeks to set aside a consent order dated March 11, 2005 joining together action numbers M034298 and M034297. The Villanueva, Berg and Wiffen defendants seek orders that action numbers M051284 and M051283 be heard at the same time and before the same jury as action number M034297.

[3] The various numbered actions refer to the three accidents in which the plaintiff, Tom O'Mara was involved. The first and most serious of the three is action number M034298 which occurred on December 15, 2001 (the "first accident").

[4] The consent order entered into by the parties in respect of action numbers M034298 and M034297 relate to the separate actions commenced by Tom and Janis O'Mara arising out of the accident of December 15, 2001.

[5] Tom O'Mara was involved in two further accidents on October 1, 2003 (the "second accident") and December 7, 2004 (the "third accident"). By virtue of the defendants' notices of motion dated April 19, 2006, the defendants seek to have all the O'Mara matters heard together.

[6] Altogether, four lawsuits have been initiated on behalf of the O'Maras in relation to the various accidents. The consent order of March 11, 2005 was entered into before the actions related to Tom O'Mara's second and third accidents were commenced. The O'Mara's are represented by the same counsel as are all the defendants.

[7] In November, 2005, plaintiffs' counsel sent two letters to defence counsel. The first letter was to advise that the Janis O'Mara matter had been set for trial for five days commencing May 14, 2007. The second letter advised that Tom O'Mara's three matters had been set for a five-day trial commencing May 28, 2007. Needless to say, defence counsel did not agree with this procedure in light of the consent order which had been entered eight months earlier in relation to the hearing together of the O'Mara's matters regarding the first accident. Those trial dates were subsequently adjourned by me at a Case Management Conference on March 8, 2007.

[8] Liability has been denied for the first accident. The driver, Jong-Pil Son has never been produced by the defendants for examination for discovery even though dates were set for his examination on July 18, 2005 and May 15, 2006. As well, at the earlier Case Management Conference on March 8, 2007, I made an order that Jong-Pil Son produce himself for examination for discovery within 30 days of the date of the order. That has not been done, and now the plaintiff, Tom O'Mara, seeks to have the defence filed on behalf of Son struck and the proceeding continue as if no defence had been filed.

[9] Not much can be said in the defence of Mr. Son other than it appears he returned to Korea shortly after the accident of December 15, 2001 and no one has been able to contact him since. Accordingly, it is very difficult for counsel for the defence to obtain any instructions regarding this accident as defence counsel has never had an opportunity to interview his own client.

First Issue

[10] Accordingly, the first issue is identified: can or should the statement of defence filed on behalf of Jong-Pil Son be struck as a result of him not being available for examination for discovery even after the court issued an order requiring him to do so?

[11] Rule 2(5) of the *Rules of Court* sets out certain remedies for non-compliance with the *Rules.* It provides as follows:

> 2(5) Where a person, contrary to these rules and without lawful excuse,
>
> (a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for his or her examination for discovery,

…

then

(g) where the person is the defendant…the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed.

[12] Is the defendant, Son, without a lawful excuse? The plaintiff in the case at bar cited the case of ***Karas v. Lattin*** [1992] B.C.J. No. 2576, a decision of Cowan, J. for the proposition that in the face of failing to attend two scheduled examinations for discovery, the defendant did not have a lawful excuse where he forgot the first discovery and did not show for the second discovery when ordered to do so even when he said he was unaware of the second date. Cowan, J. cited the Court of Appeal decision of ***Ultra Fuel v. Kern et al.,*** [1992] B.C.J. No. 1697 which determined that it is incumbent on the party against whom an order is sought under Rule 2(5) to explain the reason for the neglect to comply with the particular default in issue and to show that there was a lawful excuse for such neglect.

[13] It has been urged on me by counsel for the defence that the defendant's lawful excuse would be actual ignorance of the discovery dates or the order made at the Case Management Conference. It has also been suggested by defence counsel that striking out of a statement of defence is a Draconian measure only to be invoked in the most egregious of cases where the defendant is so ill-deserving as to warrant such a fate: ***Homer Estate v. Eurocopter*** (2003), 297 WAC 316, 12 B.C.LR. (4^{th}) 321.

[14] There may be cases where the defendant has actual knowledge but refuses time and again to attend for examination for discovery. In such a case, no doubt it could be considered to be egregious conduct of the defendant not to attend for discovery. But what of the defendant, who, for whatever reason, leaves the jurisdiction of the court and cannot be located even with the assistance of private investigators?

[15] The defendant, Son, was the driver of the vehicle. He certainly had knowledge of the accident. He has left the jurisdiction without providing any information to his insurer. How can it now be said that he should benefit from the lack of knowledge of the current proceedings? I think it could be fairly said that the defendant, Son, is wilfully blind to the fact that there may be proceedings against him in British Columbia. In my view, this conduct is just as egregious as that of the person who intentionally does not attend for discovery.

[16] Accordingly, I determine that the defendant, Son, has been wilfully blind to the fact that he may be required to give evidence about the accident and therefore does not have a lawful excuse for not attending the examinations for discovery of him, whether he has direct knowledge of the dates or not. I therefore grant the plaintiff's application to strike the statement of defence of the defendant, Jong-Pil Son.

Second Issue

[17] Can the consent order entered on March 11, 2005 be set aside? Does it matter if the consent order is an interlocutory order rather than a final order?

[18] The other issue that arises in regard to the consent order is whether or not it should be set aside at all.

[19] In argument about this issue, plaintiff's counsel says that the consent order was executed because liability had been denied by the defendants, notably the defendant, Son, thereby creating a central and common issue between the two lawsuits that could be most conveniently and expeditiously resolved in one joint action.

[20] Essentially this is an application for severance by the plaintiffs where they have already consented to the matters related to Janice and Tom O'Mara arising out of the accident of December 15, 2001 being heard at the same time. This begs the question as to why they were not co-plaintiffs in one action in the first place, rather than having two separate actions commenced.

[21] The plaintiff relies on Rule 5(6) as authority for allowing the severance of the Janice and Tom O'Mara matters insofar as the December 15, 2001 matter is concerned.

[22] Rule 5(6) reads as follows:

> 5(6) Where a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings or make any other order it thinks just.

[23] At pages 5 to16 of McLaughlin & Taylor, a non-exhaustive list of considerations is set out based on ***Wirtz v. Constantini,*** [1982] B.C.J. No. 792, 137 D.L.R. (3d) 393 (S.C.); ***Merritt v. Imasco Enterprises Inc.,*** [1992] B.C.J. No. 160, 2 C.P.C (3d) 275 (S.C.-M); ***Katinic v. Bruno,*** [1995] B.C.J. No. 3065 (S.C.); ***Shah v. Bakken,*** [1996] B.C.J. No. 2836, 20 B.C.L.R. (3d) 393 (S.C.-M.); and ***Insurance Corporation of British Columbia v. Sam,*** [1998] B.C.J. No. 947, 24 C.P.C. (4th) 338. Therefore, according to the learned authors, when faced with an application to sever matters pursuant to Rule 5(6),a court should consider:

1. whether the order sought will create a saving in pre-trial procedures;
2. whether there will be a real reduction in the number of trial days taken up by the trial being heard at the same trial;
3. whether a party may be seriously inconvenienced by being required to attend a trial in which the party may have a marginal interest;
4. whether there will be a real saving in expert's time and witness fees;
5. whether one of the actions is at a more advanced stage than the other;
6. whether the order sought will result in delay of the trial of any one of the actions and, if so, whether any prejudice which a party might suffer as a result of that delay outweighs the potential benefits which a consolidated trial might otherwise have;
7. the possibility of inconsistent findings and common issues resulting from separate trials.

[24] In ***Schaper v. Sears Canada Inc.,*** [2000] B.C.J. No. 2246, Master Groves, as he then was, and without referring to any of the cases cited above, stated that while "not intending to create an exclusive test, the case law that I have reviewed suggest that the following factors should be considered:

1. Is there prejudice as set out in Rule 5(6), to the parties applying to sever matters if the court does not exercise its discretion to sever? Clearly, to satisfy this test, the party making the request must show that hearing the claims together would unduly complicate, delay the hearing, or otherwise be inconvenient. If a party applying does not meet this threshold, the court need not go further in any analysis and the application should be dismissed.
2. Have the actions of any party in the proceeding been unreasonable and have they contributed to the complication, the delay, or the inconvenience alleged by the party applying? If this found, that would strengthen the argument to sever.
3. Are the issues between the plaintiff and defendant and the issues between the defendant and the third party sufficiently distinct so as to allow them to be tried separately? If so, that strengthens the argument to sever off third party proceeding.
4. Is the relief claimed by, or the potential obligation of, any party best determined by hearing the evidence of all parties at one hearing? If so, that weakens an application to sever.
5. Does the prejudice to the party applying, prejudice based on undue complication, delay or inconvenience, outweigh any benefit of matters being heard together, or outweigh any considerations related to the overall objective of the rules to ensure a just, speedy and inexpensive determination of every proceeding on its merits, including the avoidance of a multiplicity of proceedings for the benefits of litigants and having concern to congestion in the courts generally?

[25] At the very outset of the analysis, it must be remembered that the plaintiffs had originally wanted a joint trial evidenced by their counsel executing a consent order to have both matters heard together. After that, I must ask myself, what, if anything, has changed sufficiently to require me to now sever the two matters which arise out of the

same set of circumstances – that is, other than the fact that Mr. O'Mara was involved in two subsequent accidents and that I have struck the statement of defence of Jong-Pil Son.

[26] The plaintiff's application for severance has emphasized that having the two claims heard together would unduly complicate matters for a jury. As well, it is argued on behalf of Janice O'Mara that she would be seriously inconvenienced by having to attend the whole trial when only a small portion of the trial relates to her. It is also argued that no time would be saved as both Tom and Janice O'Mara have seen different specialists for their complaints.

[27] On behalf of the defence. It is submitted that the parties are married and have claims which are intertwined one with the other. Accordingly, the defence says that the two cases should be heard at the same time so as to allow the jury to assess each of their claims together, otherwise the possibility of inconsistent findings may arise. This seems to be especially so since some domestic disharmony has arisen since the accident.

[28] On behalf of both plaintiffs it was urged on me that neither of them is doing well, that their marriage is unravelling, and that each has personal issues arising from the accident which need to be addressed in a timely way.

[29] On balance, I think it is preferable for the claims of Janice and Tom O'Mara to be heard together insofar as these matters arise out of the accident of December 15, 2001 and insofar as they are interrelated in relation to the claims for compensation. I exercise my discretion in ordering the claims arising out of this accident to be heard together notwithstanding that there may be some complicating factors for the jury to deal with since neither plaintiff seems to have any common care-givers with the other plaintiff. This may cause the jury to work a little harder, but in my view, does not justify having two separate trials. Thus, to paraphrase the words of Master Groves, I do not think that the plaintiff is unduly prejudiced by exercising my discretion not to sever Tom and Janice O'Mara's claims arising out of the December 15, 2001 motor vehicle accident. This will also allow both plaintiffs to get to trial as quickly as possible so that the compensation due to them can be assessed.

[30] As will also be apparent, I do not think it necessary to deal with the question as to whether or not a consent order can be set aside or whether it matters if the consent order is interlocutory or final in nature.

[31] That now leaves the issue of whether or not the second and third accidents of Tom O'Mara should be combined with his first accident and that of Janice.

[32] Defence counsel submitted that if severance were denied that the proceeding might be unduly complicated if all of Tom O'Mara's matters were heard with that of Janice O'Mara. In that case, the defence is content to deal with accidents numbers two and three together at a later time, however, I see no need to stand in the way of any agreement the parties might reach should they wish to have all matters heard at the same time. I also understand that liability for accident number two is now being admitted.

[33] All parties seek costs for various reasons. Insofar as the plaintiff's application for severance after endorsing a consent order, I award the defendants their costs of that application at scale B. I decline to make any other cost awards.

"Master G. Taylor"