COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Taylor v. Dr. Lens Change Inc.,* 2024 BCCA 401

Date: 20241204
Docket: CA49519

Between:

Skye Taylor

Appellant
(Plaintiff)

And

Dr. Lens Change Inc.

Respondent
(Defendant)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Iyer
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated November 7, 2023 (*Taylor v. Dr. Lens Change Inc.*, 2023 BCSC 2459, Vancouver Docket S229720).

The Appellant, appearing in person (via videoconference):	S. Taylor
Counsel for the Respondent:	R. Eichler
Place and Date of Hearing:	Vancouver, British Columbia November 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia December 4, 2024

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice Edelmann

Summary:

This appeal involves a civil claim in which the appellant alleged breach of contract and fraud specific to the online purchase of eyeglass lenses. A Supreme Court trial judge found a breach of contract and awarded $90 in damages. He dismissed the claim in fraud. The appellant appeals from the dismissal, alleging multiple legal errors and an unfair summary trial. HELD: Appeal dismissed. The appellant has not established legal error or procedural unfairness. Applying the governing standards of appellate review, there is no principled basis for intervention with the trial judgment.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] This appeal arises out of a dispute over two pairs of eyeglass lenses that the appellant (Skye Taylor), ordered and paid for, but turned out to be something other than what had been promised. The appellant sued for breach of contract and fraud. The respondent (Dr. Lens Change Inc.), counterclaimed for defamation and breach of privacy.

[2] After a summary trial in the Supreme Court, a judge found a breach of contract and awarded the appellant $90 in damages. The remainder of his claims were dismissed. This included a request that an owner of the respondent be imprisoned for fabricating documents and committing perjury. The counterclaim was also dismissed. The parties could not agree on costs, which necessitated a further hearing. Ultimately, they were each ordered to bear their own costs of the trial.

[3] The appellant appeals from the dismissal of his claim in fraud. The respondent has not appealed the outcome of the counterclaim. Neither party has asked to review the costs order.

[4] These reasons address two matters: (1) an application by the respondent to extend time to file an application record in support of a variation of an order denying an extension of time to file a factum; and (2) the appeal itself.

[5] At a hearing on November 13, 2024, we dismissed the application for an extension of time, with reasons to follow. We then heard the appeal without submissions from the respondent.

Proceedings in the Supreme Court

[6] It is not necessary to detail the evidence adduced at the trial. A thorough summary is contained in the related reasons for judgment, indexed at 2023 BCSC 2459.

[7] The judge concluded that the respondent breached its contract with the appellant by delivering Blue Barrier lenses, rather than lenses with a protective coating:

> [22] … Mr. Taylor's claim can be addressed as a breach of contract claim. I find that on Dr. Lens Change's website, at stage five of the purchase process, Select Lens Coatings, Dr. Lens offered blue light blocker and UV 40 protection as a coating, with no conditions attached. I find that Mr. Taylor accepted the offer by selecting blue light blocker and UV 40 protection as a lens coating. I find that Mr. Taylor provided consideration for this contract by paying for two pairs of lenses with the options that he selected.
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> [23] I find that Dr. Lens breached the contract by delivering Blue Barrier lenses, which is not what Mr. Taylor ordered and paid for.
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> [Emphasis added.]

[8] The appellant was awarded $90 for the breach: at para. 28. He also claimed fraud against the respondent. The judge concluded that the fraud claim had not been proved. Among other things, he was not persuaded that the respondent acted "… with the intent to deceive …" or "dishonestly or fraudulently": at para. 32. These were findings of fact that attract considerable deference on appeal and can only be set aside for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23.

Proceedings in This Court

[9] The appellant appealed the summary trial judgment on December 1, 2023. By February 29, 2024, he had filed an appeal record, appeal book, and factum.

[10] On May 30, 2024, the appellant was directed in chambers to file an amended appeal book because his first one did not comply with the *Court of Appeal Rules,* B.C. Reg. 120/2022 [*Rules*]. That same date, the respondent was granted an extension of time to file its factum to June 20, 2024.

[11] The respondent did not meet the deadline and applied for a second extension. That application was dismissed on October 11, 2024 by Justice Winteringham:

> [26] … I have considered whether or not an award of costs would be an appropriate remedy for the appellant in order to address the delay and any prejudice arising from it. However, in my view, this is an unusual case because the extension was granted once before, several months ago. The applicant was to file its factum by June 20, 2024. We are now three months after that date. I accept that counsel had sought to bring the application sooner. However, even the draft factum was only provided to Mr. Taylor yesterday. In my view, when I consider the final *Davies* factor with respect to the interests of justice, it is not in the interests of justice to grant yet another extension of time to file the respondent's factum.
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> [*Taylor v. Dr. Lens Change Inc.* (11 October 2024), Vancouver CA49519 (B.C.C.A.)]

[12] On October 18, the respondent filed an application to vary the dismissal. However, the appeal had already been set for hearing on November 13, 2024.

[13] The respondent sought direction from the Court's Associate Registrar on whether the variation application could be heard before the appeal. Counsel was told that the application would be set for the same day as the appeal. The respondent was directed to: file a notice of application returnable for November 13, 2024; identify the order(s) sought on review; and provide a supporting affidavit. In accordance with this Court's R. 62(3), the application record for a variation was due on November 1, 2024. The respondent did not meet this deadline. Counsel attempted to file an application record electronically on November 1, but ran into technical difficulties. A second attempt to file electronically was made on November 4. However, that attempt also failed. The material was submitted too late for receipt.

[14] Before us, the respondent's counsel candidly acknowledged that after the second attempt to file electronically, he "gave up", downed tools on the variation application, and took no further steps to file an application record. It was only after a prompting by the Court's Registry staff on November 8, 2024, that he moved forward. That same day, he submitted an application for an extension of time to file the application record. The supporting material included an affidavit attaching a draft factum.

Discussion

Extension of time

[15] The legal test for an extension of time to file is well-established. To obtain an extension, the respondent was required to show: (a) a *bona fide* intention to file the application record in support of the variation application; (b) that the appellant was informed of that intention; (c) that the appellant would not be unduly prejudiced by an extension of time; (d) that there is merit to the variation application; and (e) it is in the interests of justice to grant an extension: *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256, 1987 CanLII 2608 (C.A.) at para. 20. The "interests of justice" criterion is broad-scoped and allows for consideration of a myriad of factors, including the interests of the parties and the circumstances and length of the delay: *Sielsky v. Monaghan*, 2020 BCCA 346 (Chambers) at para. 30, citing *Clock Holdings Ltd. v. Braich*, 2009 BCCA 437 at para. 24.

[16] After hearing the respondent's explanation for the delay, we were satisfied it was not in the interests of justice to grant an extension. We accepted that the respondent had a *bona fide* intention to seek a review of the October 2024 order and that counsel made preliminary efforts to file an application record within the prescribed period. We also accepted that the appellant received notice of the application record. However, after the electronic filing efforts failed, the respondent's counsel made no attempt to rectify the situation until prompted by Registry staff on November 8, 2024. That was four days later, with the application for a variation and the appeal both scheduled to be heard the next week, on November 13.

[17] The respondent was given ample time to file its factum in these proceedings. It missed the deadline prescribed by the *Rules*, as well as the deadline that accompanied the first extension. When denied a second extension, the respondent filed for a variation of that order, but missed the deadline for filing the application record. The appeal has been outstanding since December 2023. The issues in the appeal are not complex. Assuming without deciding that the variation application had merit (at least to the extent required to secure an extension), we were satisfied it was not in the interests of justice to allow additional time to file the supporting record. A ruling to that effect would likely have necessitated an adjournment of the appeal, which would have been unduly prejudicial to the appellant. The appellant would have required time to respond to the variation application before a determination of that issue could proceed.

[18] Whether an extension of time is granted involves an individualized assessment. In the particular circumstances of this case, we determined that the interests of justice weighed against the order sought. Accordingly, we dismissed the application for an extension. The fact that we did so renders the outstanding application for a variation of the October 2024 order moot.

Appeal

[19] That brings me to the appeal.

[20] After the above ruling, we proceeded to hear the appeal on the merits. As noted, we did so without a factum or oral submissions from the respondent. The appellant represented himself in the appeal.

[21] In deciding the appeal, I have not considered the draft factum filed by the respondent in support of its extension application. At the hearing on November 13, the respondent had a copy of unpublished reasons for judgment from the costs hearing (the “Costs Reasons”), and I have taken those into account. On our request, the Costs Reasons were produced to us. In our view, they addressed issues that arose at the trial and were both relevant to and informative of the appeal. The appellant (who was present when the Costs Reasons were delivered), was given

time to review them, make submissions about their relevance to the appeal, and answer specific questions posed by the Court. The information in the Costs Reasons was not new to him. It is also clear from an affidavit he filed in response to the request for an extension (dated November 12, 2024), that the appellant had turned his mind to the costs hearing prior to his appearance before us and had reminded himself of the circumstances.

[22] After completion of the hearing on November 13, the appellant sent additional submissions and supporting material to the Court. We declined to receive that material and I have not taken it into account. I am of the view the appellant received sufficient opportunity on November 13 to make his submissions, including submissions about the extent to which the results of the costs hearing properly inform our determination of the substantive issues on appeal. The interests of finality weighed against receiving the additional post-hearing material.

[23] In his factum, the appellant seeks three orders:

- An order setting aside the summary trial judgment other than dismissal of the counterclaim, "… thus allowing for the completion of discovery and for the trial to proceed based on the original Notice of Civil Claim".

- Alternatively, an order "[re-assessing] damages to accurately reflect the full extent of the [appellant's] losses …".

- Costs of the appeal.

[24] In support of these orders, the appellant alleges a number of errors. He says: (a) the $90 damages award is wholly inadequate; (b) the judge erred in finding that the respondent did not act fraudulently; (c) the fraud claim should not have been dismissed without resolving the question of whether the respondent fabricated evidence; and (d) the judge admitted to not reading the appellant's response to the application for a summary trial, which rendered the trial unfair.

[25] In the body of his factum, the appellant expresses additional concern about the judge's decision to resolve the dispute by summary trial, alleging that doing so represents a "significant error in judgment". However, this has not been raised as a separate ground of appeal, and in any event, I am satisfied there is no basis on which to interfere with the judge's exercise of discretion to proceed as he did.

[26] The judge turned his mind to the appropriateness of a summary trial, assessed the matter, and was satisfied it should proceed. He concluded that the communications the appellant relied upon to establish his claims were "all in writing" and a trial "… would add nothing to [the] issue": at para. 33. This Court will not interfere with a discretionary decision of this nature unless it has been demonstrated that no weight or insufficient weight was given to relevant considerations, or that the decision was "clearly wrong" and may result in an injustice. See *Universe v. Fraser Health Authority*, 2022 BCCA 201 at para. 53 and the cases cited therein. On the material before us, the appellant has not met that test.

[27] I will address each of the stated grounds of appeal in turn.

Insufficiency of damages award

[28] The appellant argues that the $90 awarded by the judge fails to account for: (a) loss of opportunity in using his glasses with proper lenses; (b) the time and effort he invested in finding another lens retailer; (c) financial losses associated with printing, mailing, and transportation; and (d) the psychological and emotional consequences of the respondent's conduct, including the burden of having to "… continually respond to [the respondent's] … false pleadings".

[29] Assessing damages is a fact-based process. Consequently, damages awards are entitled to significant deference on appeal. This Court may not intervene unless an appellant establishes a palpable and overriding error of fact, is able to show that the judge proceeded upon a mistaken or wrong principle, or the award is so inordinately high or low that it amounts to a wholly erroneous estimate of the damage suffered: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 27; *Murphy v. Snippa*, 2024 BCCA 30 at para. 43.

[30] The appellant has not met this test. He asserts, generally, that the award is too low. He also says the award fails to account for (or overlooks) the multiple ways in which the respondent's conduct has adversely affected his life. However, his factum does not identify an actual legal or factual error made by the judge in reaching his conclusion on damages. As I read the reasons on the summary trial, the judge was plainly alive to the bases for the appellant's damages claim. He was not obliged to explicitly consider every argument or piece of evidence before him. Instead, the reasons are to be read as a whole, in the context of the record: *R. v. R.E.M.*, 2008 SCC 51 at paras. 19–20, 45, 57.

[31] Nor is it the role of an appeal court to reconsider and re-weigh the evidence adduced in support of damages, reach its own conclusion on an appropriate award, and then use that conclusion as a benchmark for finding error: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 27, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435, 1980 CanLII 17. Respectfully, that is what the appellant asks us to do and I would not accede to this ground of appeal.

Error in deciding the fraud claim

[32] The appellant challenges the judge's conclusion on the fraud claim on two main bases. First, he says the judge erred in finding that the evidence did not support fraud. Second, he argues that this cause of action should not have been dismissed without determining whether the respondent fabricated evidence in defending the civil action. The judge considered the allegation of fabricated evidence at the trial, but decided he was "… unable to find one way or another …" whether the act of fabrication occurred: at para. 82.

[33] In response to the first of these alleged errors, it was for the judge to assess the evidence for credibility, reliability, and weight, and to determine whether it proved fraud on a balance of probabilities. In that assessment process, the judge was entitled to accept all, none, or only part of the evidence. He was not bound to agree with the appellant's theory of the case or the appellant's interpretation of the evidence. Ultimately, he found as a fact that in its pre- and post-sale interaction with

the appellant, the respondent did not act with the intent to deceive, dishonestly or fraudulently: at para. 32. The appellant disagrees with that finding. He believes the respondent's conduct, as a whole, "… undeniably fulfill[ed] the elements of fraud"; however, standing alone, the fact that a party sees the case differently than the judge does not provide a basis for appellate interference. On appeal, the judge's factual findings attract deference and the appellant has not identified a palpable and overriding error that would justify setting those findings aside: *Housen* at para. 10.

[34] With respect to the second alleged error, I am satisfied it was open to the judge to decide the fraud claim as pleaded by the appellant without first resolving whether the respondent committed fabrication in defending the civil action during the litigation process. The appellant acknowledged before us that the fabrication allegation was predominantly grounded in litigation conduct that occurred after the appellant filed his notice of civil claim. This conduct did not form the underlying basis for the cause of action in fraud and it was not pleaded in the original claim.

[35] Instead, specific to the transaction involving the eyeglass lenses, the appellant pleaded fraud based on: (a) the respondent falsely representing that the lenses contained a "blue light blocker lens coating"; (b) the respondent knowing that the lenses had no coating; (c) arguing in response to issues raised by the appellant that the impugned lenses were "exactly" what he ordered; (d) profiting from deceit; (e) providing two false certificates of authenticity to the appellant; and (f) advertising and selling an unconditional "customer's vision guarantee" (refund policy) with no intention to fill it.

[36] In light of these pleadings, any submission that the fraud claim could not be resolved without first deciding whether the respondent fabricated evidence during and for the purpose of the litigation is without merit. Instead, that conduct, if established, was relevant to the issue of costs.

[37] Indeed, that is how the judge chose to treat this specific issue at the trial: at paras. 82–84. The appellant sought special costs and when analysing that issue, the judge turned his mind to the assertion that the respondent had fabricated evidence in responding to the notice of civil claim.

[38] Costs are also the context in which the allegation of litigation misconduct was raised again after-the-fact. As noted, the parties could not agree on costs of the trial and in May 2024, they re-appeared before the judge to address that issue. The appellant sought special costs in the amount of $19,000. In doing so, he reiterated his position that the respondent fabricated evidence in defending the claim and committed perjury. The judge once again turned his mind to the issue, reviewed the relevant evidence, and was not persuaded that the respondent "… deliberately attempted to mislead the Court through contrived, concocted or fabricated evidence": Costs Reasons at paras. 25–42, emphasis added.

[39] The costs judgment is not under appeal. As such, the finding of fact about the respondent not misleading the trial court is not open to review or variation by this Court. Even if it was, that finding attracts a deferential standard of review and the appellant has not established palpable and overriding error. Finally, the existence of this factual finding undermines the appellant's suggestion that had the judge properly considered the litigation misconduct allegation in his analysis of the fraud claim, it would have changed the outcome. Clearly such is not the case. When the judge did resolve that issue, the resolution was not in the appellant's favour. The appellant says the post-trial resolution is irrelevant because it was done for purposes of a costs hearing and not the summary trial, but this submission ignores the practical reality that after considering evidence the appellant relied upon in support of fraud at the trial, the judge found no attempt to mislead or any concoction in fact. It was the appellant who renewed and advanced the litigation misconduct allegation at the costs hearing in continuation of the trial process, and it was the appellant who invited the judge to re-engage on that issue. He cannot now be heard to say that the factual finding is irrelevant.

[40] Finally, to the extent that this aspect of the appellant's appeal rests on an alleged failure by the judge to resolve whether the respondent manipulated its website (including its refund policy), at the time of or shortly after the sales transaction in an effort to avoid responsibility and reimbursement, I consider that submission to also be without merit. It is clear from the judge's reasons that he was alive to this issue:

> [26] Mr. Taylor further argues that Dr. Lens refused to honour its product in vision guarantee. He argues that Dr. Lens ought to have provided a full refund or else covered the shipping to resolve the issues he had raised with the lens product and with his vision.
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> [27] There is, as I say, a dispute in the evidence as to what the policy was on the date that Mr. Taylor placed his order. I find that it is unnecessary to resolve that dispute. As I will explain at the conclusion of these reasons, I am unable to resolve the dispute as to what the website said in terms of the refund policy on the date that Mr. Taylor placed his order. I am, however, able to find the facts as stated to find a breach of contract.
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> [Emphasis added.]

[41] The judge found that he was unable to resolve the evidentiary dispute on the record before him. That was a determination for him to reach as the trier of fact. The appellant alleged a number of ways in which the respondent had committed fraud. It was up to the judge to assess the evidence, weigh it, and decide whether the record established the facts that the appellant said it did. The appellant was the plaintiff on the fraud claim and although it was the respondent who brought the application for a summary trial, the appellant bore the onus of proving that cause of action: *Universal Supply Co. Ltd. v. Lockerbie & Hole Contracting Limited*, 2023 BCCA 280 at para. 91.

[42] In any event, as I read the reasons for judgment in the context of the record, even had the judge determined that the website or parts of it had been changed after-the-fact, it would not have affected the dismissal of the claim for fraud. The judge found on the remainder of the evidence that the respondent did not act dishonestly. That finding would have necessarily informed any inference drawn or conclusion reached about any online changes and/or the intent behind them.

Evidence is not considered in isolation. To the contrary, judges are bound to consider evidence as a whole.

[43] I also note that this same issue (manipulation of the website for nefarious purposes), arose at the costs hearing. An owner of the respondent company testified and was cross-examined by the appellant. The appellant was not satisfied with the answers and applied for leave to cross-examine a second individual. That application was denied. Ultimately, the judge concluded (again), that the respondent had not acted dishonestly: see paras. 14, 18, 19, 25, 26–35, 38-40 of the Costs Reasons. In my view, there has been a full airing and consideration of the fabrication allegation and it has not gone in the appellant's favour. Respectfully, that result speaks volumes about whether resolving the factual question of website changes at the trial, specific to the respondent's refund policy or otherwise, would have materially affected the outcome.

[44] I would not accede to this ground of appeal.

Failure to read application response

[45] The appellant's last ground of appeal alleges procedural unfairness. A correctness standard applies. See, for example, the discussion at para. 139 of *L.P. v. A.E.*, 2024 BCCA 270.

[46] The appellant says the judge acknowledged during the trial that he had not read the appellant's response to the summary trial application (or at least not the entirety of it). The appellant says the response contained essential arguments and the failure to read it rendered the trial unfair. There is no transcript confirming the judge's purported comment. Furthermore, even had the comment been made, it does not mean the judge would not have read the response prior to rendering judgment. Indeed, the appellant's factum does not identify any particular portion of the application response that is not reflected in the judge's reasons. Instead, he simply asserts that by "… disregarding this crucial document, [the judge] overlooked significant evidence and failed to full consider [his] case".

[47] In my view, the appellant's bare assertion of unfairness does not provide a proper foundation for appellate interference. Canadian law recognizes a presumption of judicial integrity, which presumes that judges will carry out their oath of office, and among other things, fully and fairly consider the issues before them. Only "cogent evidence" will displace this presumption. See *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 at paras. 28, 32 *per* Justices Cory and Iacobucci and para. 117 *per* Justices Heureux-Dubé and McLachlin.

[48] I have reviewed the appellant's response to the application for a summary trial. Much of it is repetitive of the allegations made in his notice of civil claim, which was squarely before the judge. There is also considerable discussion of the respondent's litigation conduct after the appellant filed his notice of civil claim which, as noted, was relevant to his request for special costs, not the cause of action for fraud. To the extent that the response to the application for a summary trial challenged the credibility and reliability of the respondent's affidavit evidence based on possible manipulation of the website and/or other documentation at the time of the lens purchase, the reasons for judgment show that the judge was alive to this aspect of the appellant's position. I infer from this that he did review and consider the submissions that the appellant now says were ignored.

[49] Accordingly, I would not accede to this ground of appeal.

Disposition

[50] The judge thoroughly considered the fraud claim as framed and presented by the appellant, provided careful and comprehensive reasons for judgment, and it is clear from those reasons that the appellant received fair opportunity to advance his claim and to challenge the evidence of the other side. He did not achieve the outcome that he wanted. However, that does not mean the judge erred or that the trial process was unfair. The appellant has not established reversible error on appeal, and in my view, there is no principled basis on which to order a new hearing or substitute a different damages award.

[51] At the costs hearing, the judge expressed the view that the litigation undertaken in this case "… was not proportionate to the amount involved, the importance of the issues, or the complexity of the proceedings": Costs Reasons at para. 60. I agree.

[52] The respondent's application for an extension of time to file an application record in support of a variation of the October 2024 order denying an extension of time to file its factum was dismissed at the hearing. That ruling renders the application for a variation moot. There is no proper record in support of appellate review.

[53] In addition, I would dismiss the appeal.

[54] In light of how this appeal has unfolded, I would order costs payable by the respondent on the application for an extension of time to file the application record. With that exception and consistent with the approach taken in the court below, the parties are to bear their own costs of the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Edelmann"