IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bains v. Dadwal,*
2024 BCSC 2429

Date: 20241212
Docket: S245441
Registry: New Westminster

Between:

Khuspal Singh Bains

Plaintiff

And

Jusjeet Singh Dadwal

Defendant

Before: The Honourable Associate Judge Nielsen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S. Shergill
Counsel for the Defendant:	P. Leask, K.C.
Place and Dates of Hearing:	New Westminster, B.C. December 6, 10 and 12, 2024
Place and Date of Judgment:	New Westminster, B.C. December 12, 2024

[1] **THE COURT:** There are two applications before me. The first application is brought pursuant to *Supreme Court Civil Rule* 22-7(5) for orders striking the defendant's response to civil claim, that default judgment in the amount of $188,000 be entered, plus interest in the amount of $153,869.61, with a *per diem* rate of $125.14, and costs. In the alternative, the plaintiff seeks an order striking the response to civil claim, with damages and costs to be assessed.

[2] The second application is brought by the defendant to adjourn the trial, which is currently set for five days commencing December 16, 2024.

[3] The plaintiff describes the action as follows:

> This action involves a simple written loan agreement between the parties, pursuant to which the plaintiff loaned the defendant a total of $193,000, which was due and owing March 29, 2022. The defendant has failed or neglected to pay the amount, along with the contractual interest amount.

[4] The action was commenced August 9, 2022 and a response was filed March 3, 2023. The defendant has been self-represented for much of the legal action and the plaintiff has had considerable difficulty getting the defendant to provide a proper list of documents, answer questions on examination for discovery, and to provide a proper witness list summarizing, in a meaningful way, the evidence of the non-party non-expert witnesses for the upcoming trial.

[5] The plaintiff previously brought an application for summary judgment on February 27, 2024. However, that application was unsuccessful. Plaintiff's counsel advises Judge Caldwell referred the matter to the trial list, as he was of the view that repayment terms of the loan were unclear. The reasons of Justice Caldwell were not transcribed.

[6] A TMC took place November 6, 2024, wherein Justice Layton ordered that the parties exchange witness lists that meaningfully set out the substance of non-party, non-expert evidence. The witness list of the defendant was deficient as it did not provide a name and contact information, nor did it provide a summary of the proposed evidence.

[7] An examination for discovery was scheduled October 29, 2024. However, the defendant refused to answer any questions without a lawyer.

[8] On November 4, 2024, following an application to strike the defendant's response to civil claim, Justice Dion ordered the defendant to re-attend at an examination for discovery on November 8, 2024, and answer questions put to him. Although the defendant attended, he did not answer many of the questions put to him.

[9] The parties reappeared before Justice Dion on November 25, 2024 and made submissions. On November 29, 2024, Justice Dion provided oral reasons where she ordered:

> (1) the plaintiff's application to strike the defendant's pleading is dismissed;
>
> (2) the defendant shall provide the plaintiff full and complete responses to the request made during the examination for discovery of the defendant by 12 p.m. on December 2, 2024;
>
> (3) the defendant must provide his list of documents to the plaintiff by 12 p.m. on December 2, 2024;
>
> (4) if the defendant fails to comply with this order, the plaintiff is granted short leave to bring a further application to strike the defendant's pleadings;
>
> (5) costs will be in the cause; and
>
> (6) the requirement for the signature of the defendant on this order approving it as to form is hereby dispensed with.

[10] The plaintiff submits the defendant has still not provided the plaintiff with full and complete responses to the requests made during the discovery, or provided a proper list of documents.

[11] The defendant’s failure to answer was often on the basis of a failed recollection, or a disagreement with respect to the relevance of the question posed.

[12] The plaintiff submits that the defendant has failed to comply with Justice Dion's orders, and therefore the defendant's response to civil claim ought to be struck and the plaintiff awarded special costs. There are no written reasons of

Justice Dion and her orders have not yet been entered. However, I was directed to the clerk's notes.

[13] The defendant has provided a list of documents, a witness list, and has attended examination for discovery. However, the plaintiff submits that the list of documents and the witness list are deficient, and the defendant has failed to properly answer questions posed to him on examination for discovery, contrary to the order of Justice Dion.

[14] The defendant submits that he has not purposely disregarded the orders of Justice Dion and that, since he has retained counsel, the defendant, in the materials, states:

> “Any deficiencies can easily be remedied.”

[15] Further, the defendant alleges that the plaintiff did not answer questions put to him on examination for discovery, and left discovery early because he had to go to work. It is the defendant's position, as stated in the notice of application, that the plaintiff's examination is therefore incomplete. Counsel for the plaintiff indicates otherwise.

[16] The defendant also submits that the existence of several witnesses was revealed at discovery, and they must be interviewed prior to trial. Plaintiff's counsel questions the relevance of these witnesses to the underlying debt claim.

[17] *Rule* 22-7 grants the court the discretion to strike pleadings where warranted and *Rule* 12-1(9)(a) grants the court the discretion to adjourn a trial where necessary to ensure a fair trial on the merits.

[18] An order to strike pleadings pursuant to *Rule* 22-7 is only granted in extreme cases. Parties are typically given a second chance to rectify the deficiencies. There is also an element of proportionality between the alleged conduct and the remedy sought. The court is to consider whether a lesser penalty is appropriate. Finally, the court is to consider the explanation for the alleged noncompliance. See *Barrie v.*

B.C. Ministry of Forests, 2020 BCSC 10, at para. 16. The onus to prove a lawful excuse for the disobedience is on the noncompliant party. See *Barrie, supra,* at para 17. Finally, the court must consider whether, in all the circumstances, justice requires that the defence be struck. See *Barrie, supra,* at para. 18.

[19] There is no doubt that the conduct of the defendant has caused difficulty. The plaintiff alleges the defendant has not provided a proper list of documents; has not provided full and complete responses to the requests made at examination for discovery, or to answer questions; and, their witness list is defective.

[20] The defendant's witness list is obviously defective and not in keeping with the court's orders made at the TMC. However, I find myself in agreement with plaintiff's counsel that the characterization of the legal action herein being a simple written loan agreement between the parties. Nevertheless, the defendant was cross-examined for discovery for three hours on what counsel characterizes as a simple loan agreement. The examination for discovery of the plaintiff appears to have taken a similar amount of time; and allegedly, did not finish, although that is in dispute.

[21] In the notice of civil claim, a constructive trust is alleged to exist *vis-à-vis* the property having a residential street address of 33474 Kingsley Terrace in Abbotsford, B.C., which is owned by the defendant. The defendant was examined extensively in relation to that property, and it is my understanding he still owns it, although it is under foreclosure. The defendant was not prepared to agree that the funds he borrowed from the plaintiff went towards the purchase of this property. The defendant also indicated that he did not recall what investments he directed the plaintiff's loan money towards.

[22] The trial of this matter is scheduled for five days commencing December 16, 2024. In the event that the plaintiff was to obtain judgment, the 33474 property, if owned by the defendant, could be the subject of an order for sale pursuant to an unpaid judgment. Further, the defendant would be subject to a subpoena to debtor or an examination in aid of execution pursuant to the *Rules*. Tracing remedies could

still be pursued. I am advised, although it is not in evidence, that the 33474 property is in foreclosure.

[23] In my view, taking the factors in *Barrie, supra,* into account, this is not an extreme case, given that the defendant has gone through a three-hour examination for discovery, although not answered all the questions put to him, has provided a list of documents, which is allegedly deficient; and, has provided a witness list with contact information, but without the evidential summary ordered by the court at the TMC; and finally, the defendant was self-represented for a great part of the action and has indicated that further clarification and evidence will be forthcoming.

[24] It would, in my view, be disproportionate to strike the response to civil claim at this juncture. The application to dismiss the defendant's response to civil claim is therefore dismissed, without prejudice, to bring the application again, in the event that the defendant fails to further comply with the *Rules*. That hurdle will be less, as the defendant is now represented by counsel.

[25] The defendant has applied to adjourn the trial commencing December 16, 2024. A comprehensive review of the legal principles governing an adjournment of a trial under *Rule* 12-1(9)(a) is set out in a seminal case of *Navarro v. Doig First Nation*, 2015 BCSC 2173, at paras. 18 through 28.

[26] To summarize, the court is to balance the interests of both the plaintiff and the defendant, with the paramount consideration being the interests of justice. The natural frustration of the parties over delays must give way to the interests of justice, which favour the litigants having their day in court and a fair chance to make out their case. A fair trial on the merits of the action is the ultimate goal. Individual factors for consideration include:

a) the expeditious and speedy resolution of the matter;

b) the reasonableness of the request;

c) the grounds or explanation for the request;

d) its timeliness;

e) the potential prejudice to each party;

f) the right to a fair trial;

g) the proper administration of justice;

h) the history of the matter;

i) the fact of a self-represented litigant.

[27] If an adjournment is granted, the court may impose conditions.

[28] In the present case, both parties point to the other in regard to the need for a full examination for discovery and answers to questions thereon; the production of documents; and the need for further investigation of witnesses.

[29] Until recently, the defendant has been self-represented and his lack of proper compliance with the rules is, in part, attributable to his misunderstanding of his obligations. However, excusing the defendant's failure to comply with the rules and an adjournment of the trial comes with a price to the plaintiff, which constitutes prejudice. I note there has not been a prior adjournment of the trial.

[30] Since the defendant has retained counsel, the matter seems to be back on track. The defendant alleges the plaintiff will not accept interest payments, which the plaintiff denies; and the plaintiff states that the defendant has not made any payments since June of 2022.

[31] The plaintiff alleges the adjournment application comes at the eleventh hour and is merely aimed at delaying the matter so that those investment properties owned by the defendant, currently under foreclosure proceedings, will complete and the defendant will get the funds which represent equity in those properties, and the plaintiff's claims will ultimately be defeated. I do not have any evidence in the materials regarding the alleged foreclosure proceedings.

[32] Considering all the factors, I find that an adjournment is warranted. There is simply insufficient time to be ready for the trial, which is to commence in three days' time.

[33] The trial commencing December 16, 2024 is adjourned. The parties are to agree, within two weeks' time, to a subsequent trial date; and, if no agreement is reached, the plaintiff may set the date unilaterally. The subsequent date will be pre-emptory on the defendant.

[34] The plaintiff will have the costs thrown away by the adjournment at Scale B, in the cause.

[35] The defendant has represented that they are prepared to pay the interest on the costs of the plaintiff's personal line of credit owed by the plaintiff's loan to the defendant on an ongoing basis. Accordingly, the defendant is to make those interest payments, commencing January 1, 2025.

[36] The funds owed are to be paid into counsel for the defendant's trust account and forwarded to plaintiff's counsel thereafter.

[37] If an interest payment is missed, the defendant will have five days to remedy the matter; and, if not, the defendant's response to civil claim will stand as struck.

[38] The plaintiff will have the costs of both applications in the cause at Scale B.

[39] THE COURT: All right. We are adjourned. Thank you.

[40] THE CLERK: Who's going to draft?

[41] CNSL S. SHERGILL: I will draft -- I'm wondering if we can also dispense of the defendant's signature --

[42] THE COURT: Well, you have got --

[43] CNSL S. SHERGILL -- on that order?

[44] THE COURT: -- representation -- counsel representing, so no.

[45] CNSL S. SHERGILL: Okay.

[46] CNSL S. SHERGILL: Thank you.

[47] THE COURT: Thank you.

[48] THE CLERK: Order in chambers.

"Nielsen A.J."