IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cragg v. Stephens,*
2014 BCSC 1981

Date: 20140922
Docket: S092485
Registry: Vancouver

Between:

Diane Cragg, Angela D'Elia, and Clayton Harmon

Plaintiffs

And

Sylvia Stephens and Barbara Zvatora

Defendants

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	D.F. Sutherland
Counsel for the Defendant, B. Zvatora:	F. Wu
S. Stephens:	No appearance
Place and Date of Hearing:	Vancouver, B.C. September 22, 2014
Place and Date of Judgment:	Vancouver, B.C. September 22, 2014

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[1] **THE COURT:** This is an application brought by the plaintiffs for an order that the defence of the defendant, Barbara Zvatora ("Ms. Zvatora") be struck or, alternatively, that there be orders concerning her attendance at an examination for discovery.

[2] By way of background, the plaintiffs have commenced an action in defamation against the defendants, Sylvia Stephens and Ms. Zvatora. This application deals only with Ms. Zvatora.

[3] Ms. Zvatora says that she suffers from numerous chronic medical conditions which makes it impossible or has made it impossible to date for her to attend an examination for discovery. The basis of the application before me today is Ms. Zvatora's failure to attend an examination for discovery as ordered by Madam Justice Gray on April 9, 2014. That order was a consent order providing that Ms. Zvatora submit to an examination for discovery in Vancouver for one day on June 16, 2014, subject to adjournment for medical or other compelling reason and subject to further order of the court.

[4] That order was made after numerous attempts initiated by counsel for the plaintiffs to secure the attendance of Ms. Zvatora at an examination for discovery either in Terrace where she resides or in Vancouver where both counsel work. An examination for discovery in Vancouver would be less expensive for all concerned, and counsel for Ms. Zvatora agreed to an examination for discovery in Vancouver, in principle, subject to Ms. Zvatora not being able to attend for these claimed medical reasons.

[5] The efforts made by counsel for the plaintiffs to secure the attendance of Ms. Zvatora at an examination for discovery are very thoroughly set out in the application materials. Numerous attempts to obtain a date by consent were made. Finally, a unilateral setting of the examination for discovery occurred, and Ms. Zvatora failed to attend. This led to the consent order being made as described above.

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[6] To summarize the efforts made by counsel for the plaintiffs to achieve the examination for discovery, I note that they have gone on for almost 18 months, and I cannot fault for one moment the efforts of counsel for the plaintiffs who was unfailingly courteous and yet persistent on behalf of his clients. To put it bluntly, I do not think he could have done anything more to get this examination for discovery done in a reasonable period of time.

[7] Counsel for Ms. Zvatora cannot be faulted personally for Ms. Zvatora's lack of attendance at the court-ordered examination for discovery. Ms. Zvatora has various claimed medical conditions, and various medical reports have been tendered on behalf of Ms. Zvatora from time to time which Ms. Zvatora relies on as a "lawful excuse" for her nonattendance at, most recently, the examination for discovery of June 16, 2014.

[8] For instance, on November 22, 2013, Ms. Zvatora's doctor, Dr. Lennox Brown, wrote:

> To Whom It May Concern:
>
> ... She has two medical appointments in Vancouver; one on December 4th with Dr. Teichman and one on December 9th with Dr. Bala. Given the nature of the investigations and test that will be done, I feel that she requires an escort.

[9] This letter is tendered in support of Ms. Zvatora's position that she is unable to attend an examination for discovery for medical reasons. However, as I read this letter, it was probably written so that Ms. Zvatora could obtain funding for an escort to attend with her in Vancouver, and I am advised by counsel for Ms. Zvatora that Ms. Zvatora did in fact attend the two medical appointments on December 4 and December 9 but she was not able to tell me, because the evidence is not in front of me, how Ms. Zvatora travelled to Vancouver or how long she stayed.

[10] The most recent letter of Dr. Brown, which is September 2, 2014, outlines multiple medical problems. He says:

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> These are mostly chronic in nature and I don't see a chance of immediate resolution of any of the medical problems as described above in the near future.

[11] He goes on to describe that Ms. Zvatora would have trouble sitting for any length of time, and he also describes that she reports she has problems with her memory, and she gets flustered quite easily, and she has mental problems. He says that she was unable to attend court in and around June 16, 2014, due to medical reasons. This letter was written quite a long time after the missed examination for discovery on June 16, 2014. There was no medical evidence provided when the June 16, 2014 discovery was missed, which was after the plaintiffs had incurred the disbursements for Ms. Zvatora's attendance in Vancouver.

[12] The nature of the application insofar as it is an application to strike the defence of Ms. Zvatora is clearly, in accordance with the case law, a Draconian remedy. *Schwarzinger v. Bramwell*, 2011 BCSC 304, para. 110 quotes the case of *Muscroft v. Eurocopter S.A*., 2003 BCCA 229:

> … that striking the defence "is a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence". This principle is enshrined in Rule 1-3(1) which provides that "[t]he object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding <u>on its merits</u> [emphasis added]."

[13] That quotation is applicable to the present case. However, first I must consider whether Ms. Zvatora had a lawful excuse for failing to attend the examination for discovery on June 16, 2014. I will put this as plainly as I can. Ms. Zvatora, in my view, had a lawful excuse for failing to attend, but just barely. Her excuse for not attending the examination for discovery was perhaps in her view provided to her by the wording of the consent order, which says that her attendance at the discovery was subject to adjournment for medical or other compelling reason. She may have thought that the adjournment of the discovery could be at her own initiative, that it did not have to be applied for in court, and that she did not have to produce a medical letter in advance of the examination for discovery.

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[14] In my view, she probably was very well aware of her obligation, but given that the consent order gives her what I might call a bit of wiggle room, I am not going to make the finding that she lacked lawful excuse.

[15] I want to make it perfectly clear to Ms. Zvatora that she is required to attend an examination for discovery, the terms of which I will set out, and if she fails to attend the examination for discovery that I am just about to order, she would be seriously at risk of having her defence struck out on the next application. So to use perhaps a workplace discipline analogy, this is a situation of escalating discipline, and the defendant is just on the verge, in my respectful opinion, of having her defence struck out.

[16] So I am not going to grant the first order sought by the plaintiffs. I am going to order that Ms. Zvatora attend an examination for discovery in Vancouver at a location to be determined by counsel for the plaintiffs at a mutually agreeable time to be no later than November 30, 2014, for one day. Ms. Zvatora will attend at her own expense. Any claimed inability to afford travel to Vancouver will not be considered a lawful excuse for failure to attend that examination for discovery.

[17] In addition, Ms. Zvatora will pay to the plaintiffs their costs of this application on Scale B in any event of the cause and, in addition, will pay the plaintiffs' disbursements incurred for the examination for discovery scheduled for June 16, 2014, in any event of the cause, and those disbursements will be paid forthwith.

[18] MR. SUTHERLAND: Your Honour?

[19] THE COURT: Yes?

[20] MR. SUTHERLAND: Disbursements only forthwith or the costs of this application in any event of the cause, is that in the cause or is it in any event of the cause taxable now?

[21] THE COURT: I am not going to have the costs of this application taxable right now. Those will be costs payable in any event of the cause, but not taxable forthwith.

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[22] MR. SUTHERLAND: Thank you.

[23] THE COURT: The disbursements thrown away will be paid forthwith. The distinction is that there is actual out-of-pocket cash money paid by the plaintiffs that they should recover, and Ms. Zvatora should be responsible for - I am repeating myself - transporting herself to Vancouver.

[24] I will make an alternative order in terms of the venue of the examination for discovery that if Ms. Zvatora opts to have her examination for discovery held in Terrace, she may do so within the same time frame that I have ordered, i.e., November 30, 2014, but in that case, she will be responsible for paying the disbursements of counsel for the plaintiffs to attend in Terrace for that discovery.

[25] The rationale for that order is that if Ms. Zvatora is serious that she has medical conditions that prevent her from travelling to Vancouver and would prefer to have her discovery in Terrace, which is presumptively her right, then she may do so, but in light of her conduct to date, the plaintiffs should not be put to any further expense, so she has to have a serious think about how she approaches this litigation.

[26] I have given oral reasons in which I have not gone over every piece of evidence put in front of me, nor have I cited all of the case law put to me, but I have considered it all, and my conclusion, and this is really for the benefit of Ms. Zvatora, if she does not attend the discovery, and if I were hearing the next application, I would be very much persuaded that her defence should be struck out. If the only evidence that she had to provide is the evidence that was provided to me today, she would no longer have any lawful excuse for failing to attend. Her claimed medical conditions are not such, in my view, that should prevent her attending an examination for discovery.

[27] As a final note, I note that she did have the physical stamina and strength to write a 29-page letter, and therefore, her claims of medical disability are extremely weak, in my view.

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[28] Are there any questions?

[29] MR. SUTHERLAND: I have one. If the Terrace option were taken, can I have a term that she pays the disbursement of counsel attending in Terrace one week in advance of the agreed-upon date?

[30] THE COURT: Yes, that is reasonable.

[31] MR. SUTHERLAND: Yes. And I am expecting that my friend and I can agree on a date, but I would like the liberty to apply if there is a problem.

[32] THE COURT: Yes, you can have that.

[33] MR. SUTHERLAND: Yes, liberty to apply to the court generally.

[34] THE COURT: To the court generally and not to me.

[35] MR. SUTHERLAND: Yes.

[36] THE COURT: I am not seized of any further matters concerning this application.

[37] MR. SUTHERLAND: I understood you to imply that.

[38] THE COURT: I do not think you will have any difficulty getting a date. I think Ms. Wu will be able to explain my decision to her client.

"Master Harper"
Master Harper

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