IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20190809
Docket: S132325
Registry: Vancouver

Between:

Hiroka D. Crawford, Also Known as Donna Crawford

Plaintiff

And:

Providence Health Care and Dr. Anna Nazif

Defendants

And

Nicholas Osuteye, Providence Health Care, and Dr. Anna Nazif

Third Parties

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment Re Application to Strike a Response to Civil Claim Due to Non-Attendance

In Chambers

Counsel for the Plaintiff:	S.L. Kovacs J. Malhi, Articling Student
Counsel for Dr. Anna Nazif:	D.W. Pilley
Counsel for Nicholas Osuteye:	N. Wells, Articling Student
Place and Date of Hearing:	Vancouver, B.C. August 8, 2019
Place and Date of Ruling:	Vancouver, B.C. August 9, 2019

[1] **THE COURT:** This is an application of the plaintiff brought to this Court pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The application rests on the allegation that the defendant, Dr. Anna Nazif, failed to attend a scheduled mediation as that attendance is mandated pursuant to the provisions of the regulations.

[2] Consequent upon such failure to attend, the plaintiff has filed an allegation of default and seeks a remedy pursuant to s. 34(1) of those regulations. In particular the plaintiff seeks an order that the response to civil claim filed by Dr. Nazif be struck and judgment granted in favour of the plaintiff. In the alternative, the plaintiff seeks special costs of the action.

[3] The proceeding before the court is a result of gratuitous violence inflicted upon an innocent citizen of our city. On December 7, 2012, the plaintiff was viciously attacked on the streets of Vancouver by the defendant Nicholas Osuteye. The plaintiff was badly injured and has sued for damages. The gravamen of the case, however, is now aimed at the defendant Dr. Nazif. This is so because the day before the attack, Mr. Osuteye was involuntarily admitted to St. Paul's Hospital due to experiencing what appears to have been some kind of psychotic episode. Mr. Osuteye was seen by Dr. Nazif, assessed, and ultimately released. It is alleged by the plaintiff Dr. Nazif has incurred tort liability in so releasing Mr. Osuteye. The liability of Dr. Nazif is vigorously contested. The matter is scheduled for trial to commence in approximately three weeks. Dr. Nazif is represented by Mr. Daniel Reid and Mr. Jonathan Meadows as trial counsel.

[4] A notice to mediate in this matter was issued on April 30, 2019. Ultimately the date of July 4, 2019, was settled upon, and the mediation proceeded on that date before the Honourable Mary Ellen Boyd. Mr. Reid attended on behalf of Dr. Nazif, Ms. Kovacs on behalf of the plaintiff.

[5] In addition, arrangements had been made by Mr. Reid that Ms. Donna McKenzie be available by phone during the course of the mediation. Ms. McKenzie resides in Ottawa and is a general counsel to the Canadian Medical Protective

Association ("CMPA"). The CMPA is a statutory body that provides its members with discretionary assistance in dealing with medicolegal matters; including civil suits, hospital or disciplinary investigations, criminal allegations, issues pertaining to matters of privacy, regulatory matters and general legal advice.

[6] It is a term of the arrangement, as I understand it, between the CMPA and their members that it is not the individual physician that has the ultimate authority with respect to the expenditure of funds for the purposes of settlement of claims such as the claim before the court. It is the CMPA that provides instructions to counsel concerning matters relating to settlement of claims. In the context of a mediation, the CMPA will provide instructions to local counsel concerning the mediation. Consequently, it is often prudent, if not necessary, to have access by phone to a representative of the CMPA during a mediation should matters arise that require further instruction. Ms. McKenzie was fulfilling that role concerning this particular matter

[7] The mediation in this matter unfolded in that way. Ms. McKenzie, although indisposed in her office for a short while at the commencement of the mediation, was thereafter available by phone throughout the mediation so that a resolution could be finalized if required. The mediation was unsuccessful.

[8] It is conceded by the defendant that the defendant committed the default alleged. Dr. Nazif, as a party to the proceeding, failed to attend the mediation as required under the regulation. The policy underpinning this requirement of attendance is sound. It is the party to the litigation that normally has ultimate authority to resolve matters, and mediations have a dynamic that requires decisions or instructions to counsel without undue delay. In addition, it can be constructive, both pragmatically and psychologically, for the parties to have the opportunity to engage in a direct way with one another at a mediation.

[9] I agree in the particular circumstances of this case these considerations lose some practical importance due to the fact that Dr. Nazif has no authority to resolve the matter in any event. The usefulness of her attendance is certainly somewhat

muted. In my view, however, this does not relieve Dr. Nazif of her obligation under the regulation.

[10] The defendant has conceded the default has been made out under the regulation. Dr. Nazif failed to attend, and counsel on behalf of the plaintiff did not consent to such non-attendance. The defendant submits, however, that Dr. Nazif has demonstrated a reasonable excuse for such non-attendance. Section 34(1) of the regulation reads in part as follows:

> On an application referred to in s. 33(1), the Court may do any one or more of the following, unless the participant in respect of whom the allegation of default is filed satisfies the Court that the default did not occur or there is a reasonable excuse for the default ...

[11] Thereafter the section sets out a series of remedies.

[12] It is submitted that the lack of the utility in Dr. Nazif attending should be seen as at least a factor to be weighed in determining whether a reasonable excuse has been made out. With respect, I do not agree, at least on the facts of this case. There is no evidence this consideration was brought to bear by Dr. Nazif in her decision–making process to not attend the mediation; either standing alone or in combination with other factors.

[13] Mr. Reid has filed an affidavit. The evidence clearly reveals Mr. Reid was proceeding under the honest but mistaken belief counsel on behalf of the plaintiff did not require the attendance of Dr. Nazif. The plaintiff concedes it was an inadvertent error or innocent misunderstanding on the part of Mr. Reid. It is submitted by Dr. Nazif that the circumstances surrounding the misunderstanding of Mr. Reid allows for an inference not only that a discussion or communication occurred between Dr. Nazif and her counsel relating to the mediation, but that the communication was such that it provided a reasonable excuse for her non-attendance. In my respectful view, the evidence does not allow for such an inference. It is simply an invitation to speculate.

[14] Dr. Nazif has been presented with an opportunity today to tell the court why she did not attend and why she failed in this important obligation. She has chosen

not to do so. In my view the default has occurred, and the evidence falls short of providing a reasonable excuse.

[15] I disagree however that the remedies sought by the plaintiff in this case are appropriate in the circumstances. The jurisprudence is clear: pleadings will be struck and a party deprived of his or her day in court only in the most egregious of circumstances. Special costs will be awarded in circumstances where the conduct in issue is reprehensible. Both remedies are reserved only for the clearest of cases. With all due respect, the circumstances at bar fell well below these thresholds.

[16] The plaintiff has submitted the invisible underbelly of what occurred on the surface in this case is, in fact, the institutional policy of the CMPA to frustrate and undermine good-faith engagement with this plaintiff, and indeed other plaintiffs, in the context of mediations. It is submitted the circumstances at bar are simply another example of the CMPA hiding behind form and ignoring the substance of good faith negotiations. It is submitted it is this behaviour that should attach to Dr. Nazif and dictate the consequences in this case. Again, with all due respect, the evidence, at least the evidence before me, cannot support such a theory relating to the intentions and motives of the CMPA.

[17] I do, however, grant relief to the plaintiff in the form of ordinary costs. The plaintiff shall have her costs of the mediation and of this application in any event of the cause.

(SUBMISSIONS ON COSTS)

[18] THE COURT: I do order costs forthwith, and by forthwith, before the trial.

[19] MR. PILLEY: That being the case, My Lord, it might assist if Ms. Kovacs has an estimate of those costs now for the court to make a specific order so there is no difficulty with that being done very promptly.

[20] THE COURT: All right.

[21] MR. PILLEY: I do not know if Mr. Kovacs is able to do that.

[22] THE COURT: That is a very helpful suggestion.

[23] MS. KOVACS: Yes, it is a helpful suggestion. Unfortunately, I am unable to do that given my current predicament in the discovery office in Nanaimo. I do not have access and cannot quickly quantify the units for each of the applications. I do not expect that the advance claim will be anything unexpected or untoward, and I do hope that, my relationship with counsel at Harper Grey, that we can certainly resolve that issue rather quickly.

[24] THE COURT: Well, okay. I will leave it with you to come to an agreement, then. If you are unable to come to an agreement, I am in this Court all next week. It would have to be before 10:00, and I would be happy to entertain that.

[25] MS. KOVACS: I will endeavour to get a bill of costs to my friend before the end of the day today.

[26] THE COURT: Okay.

[27] Is that satisfactory, Mr. Pilley?

[28] MR. PILLEY: It is. And thinking about it, My Lord, there are relatively few, if any, discretionary items. So there should be no difficulty.

[29] THE COURT: I would not have thought so. All right.

[30] MR. PILLEY: Thank you.

[31] THE COURT: Thank you, counsel.

"Crossin, J."