IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Varesi v. Cadelina,*
2011 BCSC 284

Date: 20110308
Docket: M103661
Registry: Vancouver

Between:

Lara Varesi

Plaintiff

And

Pelsie S. Cadelina and Cantrail Coach Lines Ltd.

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:	W. Mussio
Counsel for the Defendants:	J. Bye
Place and Date of Trial/Hearing:	Vancouver, B.C. March 2, 2011
Place and Date of Judgment:	Vancouver, B.C. March 8, 2011

[1] The defendants seek a declaration that this action has been settled.

[2] The subject matter of the action is a collision between the plaintiff's motor vehicle and a bus operated by the defendants. It occurred on August 5, 2008, on Terminal Avenue in Vancouver.

[3] The plaintiff's claim is for soft tissue injuries. She had a series of discussions with representatives of the Insurance Corporation of British Columbia, attempting to settle on behalf of the defendants. The plaintiff also had, potentially, a direct claim against the Insurance Corporation of British Columbia as her insurer for no-fault, or "Part 7" benefits, for certain prescribed expenditures arising from the accident.

[4] On January 30, 2009, Roger Lam, an adjuster from the Insurance Corporation of British Columbia offered the plaintiff $4,216 to settle her claim. He explained the circumstances in his affidavit:

> I offered her $4,216.00 in total in exchange for a signed release, which I explained would mean that she is accepting that amount of money to permanently close her claim.

[5] Mr. Lam's covering letter to the plaintiff said "You may cash the enclosed cheque as soon as the release is received." The release was expressed to be full and final, and to include claims against the Insurance Corporation of British Columbia under Part 7.

[6] There was a modest amendment to add another expense bringing the total to $4,289.49.

[7] Later on January 30, 2009 the plaintiff contacted Mr. Lam to say she had had second thoughts. She wrote a letter on February 11, 2009 saying that she was not comfortable settling for $4,289.49:

> I am writing in regards to our previous phone conversation about settlement of my claim. I thank you for your offer but I have not yet signed off on anything or cashed the cheque at this point due to my concerns about my ongoing pain at the injury site and the stress this accident has caused me.

She said, instead, that she was prepared to settle for $10,000 “inclusive of all non-pecuniary damages and disbursements incurred.”

[8] Mr. Lam recorded his reaction as follows:

> On or about February 18, 2009 I telephoned the Plaintiff to discuss her February 11, 2009 letter. I advised her that we had come to an agreement as to settlement on January 30, 2009. In response, the Plaintiff queried whether I could keep her file open as she was still in pain and required further treatment. I agreed to keep the file open and that I would follow up with her in a month’s time.

[9] A second adjuster, Bharti Gopal, became involved with the file. On April 6, 2009 she discussed the matter with the plaintiff who reiterated her position that she would settle for $10,000. Ms. Gopal declined that offer.

[10] On October 1, 2009 Ms. Gopal had a telephone discussion with the plaintiff wherein she reiterated her view that Mr. Lam’s offer was fair. She also asked for return of the cheque, while advising the plaintiff that the $4,284.49 offer remained open.

[11] On March 23, 2010 Ms. Gopal wrote the plaintiff setting out an offer to settle for $6,971.25 following a review of some new clinical records.

[12] The plaintiff made a further proposal on April 30, 2010. After setting out some treatment information, she said:

> I would like to settle this matter but as I will need to continue with as much massage therapy as finances will allow I feel that my future needs must be taken into account. I have been working at home for Craftworks during this time doing hand and machine sewing and have found that the pain has hindered me from working more at my sewing machine. It has been very difficult having additional pain to deal with and as it has continued for close to 2 years I feel that my original request of $10,000 is still fair. Although my research on the CanLII website leads me to believe I may be entitled to a higher settlement, at this time I am still willing to settle the claim for this amount. I have consulted with a lawyer in regards to filing a writ but again would like to be able to reach a fair conclusion outside of the court system.

[13] On May 13, 2010 a third adjuster, Grahame Boswell, contacted the plaintiff to accept her offer of $10,000. Mr. Boswell describes this contact as follows in his affidavit:

> On or about May 13, 2010 I telephoned the Plaintiff to discuss her offer of $10,000. I asked whether she was willing to move off the figure of $10,000 and she replied in the negative. And so, while I thought the offer was too high and that the claim was worthless, I made an economic decision to avoid legal fees and to settle the claim for the $10,000 the Plaintiff had demanded. I advised the Plaintiff that I would pay her the $10,000 she was asking for and that the claim was settled on the condition that the Plaintiff provide all the original receipts for her physical therapies when she attended the claims centre to sign the release and pick up her cheque. The term as to the provision of receipts was intended to be solely for the benefit of the Defendants.

[14] The notes he recorded contemporaneously read as follows:

> SETTLEMENT - SPOKE TO LARA- ATTEMPTED TO NEGOTIATE WITH HER A OFF HER DEMAND BUT SHE WILL NOT MOVE. DECIDED TO SETTLE AT THIS TIME AS THIS FILE WILL BECOME EXPENSIVE TO DEFEND IN THE HANDS OF THE WRONG LAWYER GIVEN THE MULTIPLE ISSUES SHE HAS. WE WERE 3K APART. SETTLED OVER THE PHONE ON THE CONDITION SHE HAS TO PROVIDE ALL ORIGINAL RECEIPTS WHEN SHE COMES IN TO SIGN RELEASE.
> PART 7 - 69.00 FOR 3 MASSAGE TX
> SPECIALS - FOR ACUPUNCTURE/MASSAGE TX-404.25

[15] On May 19, 2010 the plaintiff sent Mr. Boswell an email saying she did not wish to settle her claim. She says that her memory of the telephone conversation is different from Mr. Boswell's:

> I have a different recollection of the telephone call on May 13, 2010. Mr. Boswell purported to accept my settlement offer of $10,000 and requested that I submit all of my out-of-pocket expense receipts. It was my understanding that my out-of-pocket expenses would be reimbursed over and above the $10,000 for pain and suffering.

[16] Mr. Boswell described the email as follows:

> On or about May 19, 2010, I received an email from the Plaintiff advising that she had decided to "hold off on settling [her] case right away". In particular, she advised that since our conversation on May 13, 2010 she had received medical advice to the effect that it was uncertain how long it would take for her symptoms to resolve. She also advised that it was a difficult time of year for her as it was approximately the one-year anniversary of the death of her

> common law husband and did not feel comfortable "signing off of anything while in a distressed state". Prior to this email, the Plaintiff had not mentioned the death of her husband to me, nor did she mention being in a distressed state.

[17] The file then appeared to have returned to Ms. Gopal, who wrote the plaintiff on June 21, 2010, to say the following:

> We write regarding the settlement of the above noted matter. As you know, on May 13, 2010, we agreed to settle your claim against the defendants Cantrail Coach Line Ltd, Pelsie S. Cadelina and ICBC for injuries sustained in a motor vehicle collision of August 5, 2008, for a total payment to you from ICBC of $10,000.00. ICBC waives the terms of this agreement that you provide receipts for special damages sustained as a result of the collision, and we enclose a cheque payable to you in the amount of $10,000.00 in full settlement of this matter.
>
> I understand that you no longer wish to abide by the agreement and have asked to re-open your claim. I am satisfied that the agreement has been completed and that this claim is now resolved. Therefore, we will not be considering further payment to you or further negotiate with you regarding this claim.
>
> Everything in this letter is intended to be for the purpose of negotiating a claim settlement and is written "without prejudice". Nothing in the letter is, or shall be, considered an admission of fault on the part of the insured and/or ICBC, or a waiver or extension of any applicable limitation period.

[18] Following the discussion on May 13, 2010, Mr. Boswell had left a cheque for $10,000 and a release of all claims at the front desk in the Claims' office for the plaintiff to execute. She never attended.

[19] The plaintiff filed a Notice of Civil Claim in respect of this matter on July 23, 2010.

[20] The defendants (and collaterally the Insurance Corporation of British Columbia) submit that the matter was settled as of May 13, 2010 and that the requested receipts and the release were waivable requirements, being solely for the benefit of the defendants. They take the view that they were accepting the plaintiff's standing offer of $10,000 which she previously had expressed to be "inclusive of non-pecuniary damages and disbursement incurred."

[21] The plaintiff's position is primarily that there was no meeting of the minds and that no settlement had been completed. The plaintiff's position is that the defendants, having rejected her $10,000 offer, were making a new offer for $10,000 which she was being asked to accept.

[22] The defendants take the position that there was, in fact, a complete oral contract at the point at which the plaintiff apparently accepted an offer for $4,289.49, which they did not insist upon, although they maintain it would have been legally enforceable. That agreement was said to be "in exchange for a release" which the plaintiff did not sign. The oral terms the defendants say were concluded on May 13, 2010 do not appear to have been accompanied by a similar stipulation, although it is clear that in order to pick up the cheque, the plaintiff would have been expected to sign a release, including a release of the Part 7. These were noted in the release, but not specifically noted as discussed elsewhere in the materials. Properly speaking, a release of the claims in the action would not include Part 7 benefits which arise separately.

[23] The defendants are claiming that there was an enforceable oral contract before the cheque passed or a release was signed. It is not at all clear that signing the release was not a condition of releasing the cheque. It had been the first time an offer had been made by the defendants, and a requirement to sign the release was presumed in Mr. Boswell's note of the May 13, 2010 conversation. "Signing off" also appears to have been in the plaintiff's mind as of February 11, 2009, as the point at which a settlement was irrevocable (see para. 7 herein).

[24] It is not clear that the terms were fully and completely understood when the conversation occurred on May 13, 2010, given the lack of evidence that Part 7 was discussed. It is also not at all clear that the defendants would not have insisted that the release be signed (that is, that the contract be evidenced in writing), had she refused to sign, or that the plaintiff was not labouring under a contrary view as to when the contract was made, induced by the defendants' insistence on a release on past occasions.

[25] Where an oral contract is asserted and denied the case will generally come down to a contest of credibility. An example in the contest of an automobile insurance claim is *Barclay v. Insurance Corp. of British Columbia*, 2002 BCPC 15.

[26] This is not a case of duress or unconscionability or undue influence. Depending on the evidence there may be an element of mistake. As the motion for summary judgment has been defended, the issue is whether there was a "meeting of the minds." The material is not at all decisive on that point, specifically as to the inclusion of the Part 7 benefits in the settlement. Mr. Boswell and the plaintiff differ on what was discussed, and such, if it remains an issue in the action when it is tried will have to be resolved on an assessment of credibility. Such an issue cannot be safely undertaken on the affidavit and documentary material before the court.

[27] The defendants' application for summary judgment on the alleged settlement contact is, therefore, dismissed, with leave to bring the issue on at trial, on a better evidentiary foundation, if the defendants consider it in their interests to do so.

[28] Costs will be in the cause.

"The Honourable Mr. Justice McEwan"