

In the Court of Appeal of Alberta

Citation: Benc v. Parker, 2016 ABCA 82

Date: 20160330
Docket: 1501-0260-AC
Registry: Calgary

2016 ABCA 82 (CanLII)

Between:

Krystyna Benc

Respondent
(Plaintiff)

- and -

Laura Parker

Appellant
(Defendant)

The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Barbara Lea Veldhuis**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.A. Neufeld
Dated the 2nd day of October, 2015

Memorandum of Judgment

The Court:

[1] This appeal arises in the context of a personal injury action brought after a motor vehicle accident. Counsel for the parties had completed Form 37, a condition precedent to setting the underlying action down for trial pursuant to rule 8.4 of the *Rules of Court*.

[2] In completing the Form, counsel for the appellant wrote “not applicable” in response to the question of whether all medical examinations and reports had been completed and exchanged. He forwarded the document to the respondent’s counsel who returned it in October 2014. Form 37, although signed by counsel for both parties, was not filed.

[3] In support of her claim for personal injury damages, the respondent has served two expert reports. She has not, however, attended a Certified Medical Examination (CME). She declined to attend, in part, because her request to have a videographer present was refused.

[4] Before filing the Form 37, the appellant applied to determine whether the respondent’s failure to attend a CME deems her injuries to be minor for the purposes of the *Minor Injury Regulation*. A chambers judge in June 2015 found that the deeming provisions did not apply. She ruled that the respondent’s objection was reasonable.

[5] Having elected, albeit unsuccessfully, to have the respondent’s injury designated “minor” (referred to as the “main defence” at the time of signing Form 37), the appellant elected “a change in strategy” and brought an application for an order requiring the respondent to attend for an independent medical examination. The respondent filed a cross-application pursuant to rule 8.5 for an Order to file a request to schedule a trial date in reliance upon Form 37.

[6] The chambers judge denied the appellant’s application and directed that the matter proceed to trial.

[7] The appellant submits that the chambers judge erred in interpreting rule 8.4 to mean a signed, but unfiled, Form 37 prevents a defendant from obtaining an independent medical examination prior to trial. Rule 8.4 reads as follows:

Rule 8.4

8.4(1) The parties may, in Form 37, request the court clerk to schedule a date for trial.

(2) The request must contain at least the following information unless otherwise directed by the Court:

- (a) the anticipated number of witnesses, including the number of expert witnesses;
- (b) the anticipated length of trial;
- (c) a copy of the pleadings and particulars, if any, for the judge's use at trial;
- (d) if applicable, the order directing that the trial be by jury;
- (e) the certifications required by subrule (3);
- (f) any administrative requirements for the trial;
- (g) any potential conflict of interest a judge may have and the reasons for it.

(3) In addition to the requirements of subrule (2), the parties requesting a trial date must

- (a) provide
 - (i) a certificate that the parties have participated in at least one of the dispute resolution processes described in rule 4.16(1), or
 - (ii) a copy of an order made under 4.16(2) waiving the dispute resolution process requirement,
- (b) certify that questioning under Part 5 is complete,
- (c) certify that any expert reports have been exchanged and the process described in Part 5, Division 2, including questioning of experts, is complete,
- (d) certify that any medical examination and report under Part 5, Division 3 is complete,
- (e) certify that any undertaking given by a person questioned under Part 5 has been discharged,
- (f) certify that they will be ready for trial by a specified date,
- (g) in the case of a jury trial, certify that the deposit required under rule 8.3 has been paid,

(h) certify that all amendments to pleadings have been filed and served, and

(i) certify that all applications related to the action have been disposed of and no other pre-trial steps are required.

(4) If the court clerk is satisfied that subrules (2) and (3) have been complied with, the court clerk must schedule a trial date.

(5) If the parties cannot certify as to the matters referred to in subrule (3) but are satisfied that the matter will be completed or undertaking discharged in a timely way, the parties must so disclose and may request the court clerk to schedule a trial date.

(6) If the court clerk is satisfied that the parties will or are likely to be ready by the proposed trial date, the court clerk may schedule a trial date, but if the court clerk is in doubt about any matter, the court clerk must refer the matter to a judge for directions or decision.

[8] The appellant submits that Form 37 must be filed for Rule 8.4 to apply. While acknowledging that Form 37 is the equivalent of a certificate of readiness under the old rules, the appellant says that because filing did not occur, Rule 8.4 was not contravened and that the appellant's application for an independent medical examination should have been granted.

[9] As we see it, the disposition in the Court below is unassailable. Appellant's counsel in completing Form 37 cannot be said to have certified that medical examinations or reports under part 5, division 3 were incomplete and that such matters would be completed in a timely way. The purpose of rule 8.4 is to authorize the Clerk to fix a date for trial if the conditions precedent are met. The Clerk has no authority to do so unless Form 37 is filed. In our opinion, writing "not applicable" does not alert the Court Clerk to any deficiency so as to be satisfied that subrules (2) & (3) of rule 8.4 have been complied with, nor, if in doubt, to refer the matter to a judge for directions or decision.

[10] Put another way, the purpose of the filing requirement of rule 8.4, given scarce judicial resources, is to assure that the Clerk of the Court does not set matters down for trial unless and until the parties certify that all pre-trial steps have been completed, or is satisfied that the parties will, or are likely to be ready by the proposed trial date. The rule contemplates that administrative step i.e. filing to provide the Clerk of the Court with requisite certifications and assurances that the time set aside for trial will not be squandered.

[11] It does not follow, however, that a completed Form 37 that has been reviewed, signed and exchanged by the parties is of no effect. As we see it, it constitutes a binding mutual representation to the opposite party that the issues are joined and that no further steps will be taken by either party

save to proceed to trial (or as otherwise disclosed). Counsel for both parties are entitled to rely upon such representations in preparation for trial and, by way of illustration, to dispense with witnesses, to pursue others, or to discard documentary evidence now thought unnecessary. That is not to say that it is incumbent upon counsel to demonstrate prejudice. On the contrary the completion of a Form 37 constitutes, in our opinion, an undertaking in the throes of litigation by one party to another that absent mutual error or unilateral mistake in completing the Form (in which case an application for relief may be brought before a judge), the plaintiff and the defendant will take no further pre-trial steps.

[12] In this case, it matters not that Form 37, as completed, was not filed. Bearing as it did the signatures of both counsel, it was both relied upon by the respondent and capable of being filed. In our opinion, the applications brought by the parties in the court below, were for the reasons set out above, properly adjudicated.

[13] The appeal must be dismissed.

Appeal heard on February 08, 2016

Memorandum filed at Calgary, Alberta
this 30th day of March, 2016

Berger J.A.

Authorized to sign for: Martin J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

B.W. Conway
for the Respondent

D.M. Pick
for the Appellant