Citation: Davis v. District of Sechelt
2000 BCSC 0202

Date: 20000202
Docket: C980879
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARY LOU DAVIS

PLAINTIFF

AND:

DISTRICT OF SECHELT

DEFENDANT

AND:

PAULI MARTI HAIKONEN AND
TUIJA KATARINA HAIKONEN

THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SCARTH

(IN CHAMBERS)

Counsel for the Plaintiff: Judith M. Wilson

Counsel for the Defendant: Eileen E. Vanderburgh

Date and Place of Hearing: December 7, 1999
Vancouver, BC

[1] The defendant District of Sechelt applies for an order under Rule 26(1), (1.1) and (2), and Rule 18A(10)(b), that M.W., the plaintiff's former solicitor, attend before a court reporter at a time and place to be agreed on for cross examination on his affidavit sworn to September 21, 1999 and relied upon by the plaintiff in defence of the defendant's application for dismissal of the action, and that within 7 days the plaintiff produce to counsel for the defendant all documents within her control and/or possession, and in particular those documents contained in the file of her former solicitor relating to her claims against Martii Pauli Haikonen and Tuija Katarina Haikonen and the District of Sechelt, including all matters related to this action and to Action No. C943488, Vancouver Registry, over which the plaintiff has asserted a claim of privilege.

[2] The background to these applications is as follows. In 1992 the plaintiff Mary Lou Davis purchased the property at 4847 Blueberry Place in Sechelt from the third parties, Mr. and Mrs. Haikonen. Mr. and Mrs. Haikonen had, in 1990, commenced the construction of a single family dwelling on the property. At the time the sale of the property to Ms. Davis completed at the end of June, 1992 the District of Sechelt had not issued a final occupancy permit. The District alleged

faulty and incomplete work, including crushed perimeter drain pipes and improperly poured foundations which caused seepage into the basement of the house, and an unsafe chimney, which required correction before an occupancy permit would be issued.

[3] There is a conflict in the plaintiff's own evidence as to when she took possession of the property. In her statement of claim filed in this action Ms. Davis alleges that she took possession of the property on or about June 27, 1992. In her response dated April 24, 1998 to the defendant's notice to admit she states that she did not physically take possession of the property until the last week of July, 1992. In her affidavit sworn to July 21, 1999 and filed with respect to the present application, however, she deposes that she moved into the house in August of 1993.

[4] According to her affidavit problems of water seeping into the basement commenced shortly after she moved into the house in August, 1993. Ms. Davis states that she undertook repairs of the perimeter drain to correct the problem. These corrections, she deposes, appeared to solve the water seepage problem until the winter of 1996 and the early spring of 1997 albeit, on her examination for discovery held on November 27, 1998, it was put to her that the leakage stopped from about

September, 1993 to September, 1995; her response was: "Around that time".

[5] In the meantime, on June 21, 1994, Ms. Davis commenced an action [No. C943488, Vancouver Registry] against Mr. and Mrs. Haikonen in which she claimed damages arising from, amongst other things, the defective perimeter drains, water leakage into the basement of the home and an unsafe chimney and wood stove unit. That action was commenced on her behalf by M.W., her former solicitor. An action was not commenced by Ms. Davis against the District of Sechelt at that time. The action against Mr. and Mrs. Haikonen [No. C943488] was apparently settled. It was dismissed without costs by consent on October 6, 1998.

[6] The within action against the District of Sechelt was commenced on February 19, 1998. The plaintiff's former solicitor, M.W., had ceased to act for her on October 30, 1997. This action was commenced on her behalf by a new solicitor.

[7] In this action Ms. Davis claims that the District was negligent with respect to the construction of the house by, amongst other things, failing to inspect the construction of the house and to warn the plaintiff that the design and construction were not adequate and did not comply with the

applicable by-laws, regulations and building and fire codes, and by failing to require the builder to obtain all necessary permits and licenses for the construction of the house.

[8] In its statement of defence filed on March 10, 1998 the District pleads that the plaintiff's claim is barred by virtue of s. 286 of the Municipal Act, R.S.B.C. 1979, c. 323, because the plaintiff did not give notice in writing to the municipal clerk within two months from the date on which the damage was sustained setting out the time, place and manner in which the damage was sustained, and did not commence the action within six months after the cause of action first arose.

[9] Sections 285 and 286 of the Municipal Act provide as follows:

> 285 All actions against a municipality for the unlawful doing of anything that
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> (a) is purported to have been done by the municipality under the powers conferred by an Act, and
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> (b) might have been lawfully done by the municipality if acting in the manner established by law,
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> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.
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> 286 (1) A municipality is in no case liable for damages unless notice in writing, setting

> out the time, place and manner in which the damage has been sustained, is delivered to the municipal clerk within 2 months from the date on which the damage was sustained.
>
> (2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action.
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
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> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[10] I am told by Ms. Vanderburgh, on behalf of the District, that the defendant District has an outstanding application for dismissal of the plaintiff's action based on the plaintiff's failure to provide notice of the claim to the District in accordance with s. 286 and to commence this action within the six months' limitation period.

[11] What has given rise to the present application by the District for an order directing Ms. Davis to produce the file(s) of her former solicitor, M.W., with respect to this action and Action No. C943488 against Mr. and Mrs. Haikonen, and directing her former solicitor to attend for cross

examination on the affidavit he swore on September 21, 1999, are assertions by the former solicitor in his affidavit and by Ms. Davis in her affidavit sworn to July 21, 1999 and on her examination for discovery with respect to why the District was not given notice of the claim until October 24, 1997 and the action against the District was not commenced until February 19, 1998.

[12] On her discovery Ms. Davis stated that she spoke to her former solicitor, M.W. in May, 1993 about commencing an action against Mr. and Mrs. Haikonen with respect to the problems with the house. At the same time they discussed commencing an action against the District but did not feel at that time there was enough evidence regarding the drainage to bring an action against the District. As she deposes in her affidavit:

> 8. I commenced an action against the builders in 1995 [sic.] but on the advice of my then lawyer, [M.W.], did not take action against the District of Sechelt. I was advised that I did not have sufficient evidence of negligence to bring an action against the District that had a reasonable chance of success at that time.

[13] According to her evidence on discovery Ms. Davis left the decision regarding which parties to sue to her former solicitor. She does not recall receiving advice from him with respect to the requirement to give notice to the municipality

of her intention to sue or the limitation period for commencing an action against the District.

[14] Ms. Davis, in her affidavit, deposes that during the winter of 1996-97 the water seepage resumed and rendered her basement uninhabitable. She engaged the services of one Michael Ryan, a building consultant, to inspect the home and advise her what would be needed to stop the water from coming in.

[15] According to his report dated February 10, 1997 Mr. Ryan inspected the property on February 4, 1997. In his opinion water seepage into the basement was in part the result of using poor material for backfill which did not drain properly and pouring the concrete for the foundation walls without vibrating it properly which caused the foundation to have several voids of "honeycomb" through which the water was forced. Mr. Ryan recommended that the house should be carefully excavated out to the level of the footings under the supervision of an engineer to prevent movement of the saturated soils and certain remedial measures taken with respect to the foundation walls and water drainage.

[16] In the opinion of her former solicitor the conclusions contained in Mr. Ryan's report were not of themselves sufficient to provide proof of negligence because:

> … no direct evidence of the cause of the seepage of water in the home had been observed by Michael Ryan. Such direct evidence required excavation of the home to expose the footings which the Ryan report recommended be conducted or supervised by an engineer.

[17] As well, the solicitor states, Mr. Ryan was not a qualified building inspector or engineer whose opinion could likely be used for court purposes.

[18] A report by Lloyd Engineering dated October 14, 1997 was obtained. According to Ms. Davis it was necessary to wait until the summer and early fall so that the soil would be as dry as possible when the test holes were done to expose the foundation to its footings.

[19] On her discovery Ms. Davis was asked if there was some reason why she hadn't had an engineer or expert look at the house before February, 1997. Her response was:

> Because we … we didn't … I just left everything up to my lawyer.

[20] The report by Lloyd Engineering appears to confirm Mr. Ryan's opinion with respect to the cause of the water seepage. The report states in part:

> From our observations of the foundation walls, it is evident that due to the poor quality of concrete

> work, combined with the nature of back-fill soil, water trapped against the exterior of the foundation walls is flowing in through voids in the foundation walls.

[21] Ms. Davis's former solicitor states in his affidavit that building inspections at the time of the construction of the house took place once when the forms were in place, but before the pour, and secondly, just before backfill. He deposes:

> 8. Until receipt of the Lloyd Engineering report I had no evidence of the exterior condition of the foundations, including waterproofing of the exterior of the foundations, which might have been visible to a building inspector and more importantly, as to the state of the drainage installed which would have been visible to a building inspector.
>
> 9. Up to the receipt of the Lloyd Report, it appeared that the problem was improper backfilling and honeycombing of the concrete from improper compaction, two matter which are not subject to building inspection, and it was only after the Lloyd report was received that I believed and advised the plaintiff that she may have a claim against the District of Sechelt.

[22] Notice of the plaintiff's claim was given to the District by letter dated October 24, 1997.

[23] The question before the Court on the present application is not whether the plaintiff had a reasonable excuse for not giving notice of her claim to the District prior to October

24, 1997. That question, however, does lie at the heart of the District's application under Rule 18A to have the action against it struck out for non-compliance by the plaintiff with the requirements of s. 286 of the Municipal Act. It is with respect to that application that both the plaintiff and her former solicitor have filed their affidavits to which I have referred and Ms. Davis has been examined for discovery. The issue before me is whether the District ought to be permitted to examine the files of the plaintiff's former solicitor and to cross examine him on his affidavit in order to test the assertion that Ms. Davis had a reasonable excuse for not giving the District notice of her claim until October 24, 1997.

[24] I conclude the District is entitled to the order sought.

[25] Plainly, by deposing in her affidavit that her former solicitor advised her she did not, at the time she commenced an action against the builders, have sufficient evidence of negligence on the part of the District to justify bringing an action against the District, and that she left all decisions regarding which parties to sue to her solicitor, and by tendering on the application to strike out her claim the affidavit of her former solicitor which deals with the substantive issues of whether she has provided notice in

accordance with the ***Municipal Act*** and commenced the action within the prescribed time, the plaintiff has waived solicitor-client privilege over all documents relating to the subject-matter which are contained in her former solicitor's files: Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd. (1998), 161 D.L.R. (4th) 750 (B.C.S.C.); Williams Van Lines Ltd. v. SKR-Robinson Inc., [1999] B.C.J. No. 534 (S.C.).

[26] Moreover, questions arise from the affidavit evidence and Ms. Davis's discovery evidence, including questions concerning why, apart from the assertion she lacked evidence of the District's negligence, she did not include the District in the action she commenced against the builders in 1994 and why an expert did not inspect the property until February, 1997. Given his evidence with respect to the critical substantive issues it is appropriate in my judgment that the plaintiff's former solicitor be cross examined on his affidavit: Sholinder and MacKay Sand and Gravel Ltd. v. Lake Windermere Resort Ltd., [1998] B.C.J. No. 779 (S.C.).

[27] I have considered Ms. Wilson's submission, on behalf of the plaintiff, that if production of the solicitor's files is ordered production should be limited to the issue of the

notice. Otherwise, it is said, the summary trial, if not successful, would give the District an unintended benefit.

[28] In my judgment the issues concerning the knowledge Ms. Davis and her solicitor had at various points of time with respect to the District's fault and the reasons for deferring the giving of notice require production of the entire files.

[29] An order will go requiring the plaintiff to produce for inspection by the District's solicitors the documents sought in the notice of motion within 7 days and directing her former solicitor, M.W., to attend for cross examination on his affidavit sworn to September 21, 1999 at a time and place to be agreed on.

[30] Costs in the cause.

"Scarth, J."

February 21, 2000 -- Corrigendum issued by Judge Scarth advising that the Docket Number was incorrect and which has now been amended.