IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Society for the Prevention of Cruelty to Animals v. Ulmer,* 2011 BCSC 1704

Date: 20111213
Docket: S102350
Registry: Vancouver

Between:

The British Columbia Society for the Prevention of Cruelty to Animals
Plaintiff

And

Cary Ulmer
Defendant

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff:	Christopher A. Rhone
Counsel for the Defendant:	Alan David
Place and Date of Hearing:	Vancouver, B.C. November 25, 2011
Place and Date of Judgment:	Vancouver, B.C. December 13, 2011

[1] Cary Ulmer brings this application for reconsideration of an order which requires her to pay $97,027.14 plus interest and costs to the British Columbia Society for the Prevention of Cruelty to Animals (the "SPCA"). The order was made by Masuhara J. on September 6, 2011 in the absence of Ms. Ulmer or counsel on her behalf (the "Order"). She brings this application pursuant to Rule 22-1(3) of the Supreme Court Civil Rules. Ms. Ulmer says that while she did not appear at the hearing of the application, she was not guilty of willful delay or default. She also says the effect of the Order is that she is being significantly overcharged for the cost of caring for the cats taken from her by the SPCA.

Background

[2] This proceeding has a lengthy history. On October 20, 2009, the SPCA removed 69 cats from a residential home in Delta, B.C. (the "Delta Residence"), where Ms. Ulmer lived with Graham Willis. Pursuant to s. 11 of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372 (the "*Act*"), the SPCA may remove animals if one of its authorized agents is of the opinion that the animals are in distress. Here, an authorized agent obtained a warrant to take custody of the cats. After the cats were removed, Ms. Moriarty, the General Manager of Cruelty Investigations, gave notice to Ms. Ulmer that the SPCA intended to dispose of the animals. Ms. Moriarty also informed Ms. Ulmer that she had a right to contest the Notice of Disposition and to seek the return of the cats. Ms. Ulmer contested the removal of the cats and the Notice of Disposition. On November 30, 2009, Ms. Moriarty rendered her decision, and refused to return the animals to Ms. Ulmer.

[3] Ms. Ulmer brought a petition seeking judicial review of Ms. Moriarty's decision. The petition was dismissed by Dorgan J. on February 12, 2010: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCSC 199. The Court found that the animals were in distress when removed; that the SPCA agent reasonably formed the opinion that Ms. Ulmer could not take steps to relieve the distress; and that the decision not to return the animals was reasonable. Ms. Ulmer also sought a declaration that she need not pay the costs of care of the cats

incurred by the SPCA. However, Dorgan J. found that the issue was premature as no invoice or demand for payment had been issued by the SPCA.

[4] Ms. Ulmer filed a notice of appeal and brought an application to stay the execution of the order made by Dorgan J. The application for a stay was dismissed: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 98. On November 23, 2010, the Court of Appeal unanimously dismissed Ms. Ulmer's appeal: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519. Ms. Ulmer applied for leave to appeal the decision to the Supreme Court of Canada, but the leave application was dismissed on June 16, 2011.

[5] On February 16, 2010, the SPCA demanded that Ms. Ulmer pay its costs of housing and caring for the animals. It said the costs totaled $84,216.21 to that date. On April 8, 2010, the SPCA commenced this action to recover those costs. The claim is based on the provisions of s. 20 of the *Act*, which make an animal owner liable to the SPCA for "the costs incurred by the society under this Act with respect to the animal." A statement of defence was filed on April 30, 2010 on behalf of Ms. Ulmer by her counsel, Mr. Robin Bajer. Mr. Bajer also acted for Ms. Ulmer on the original petition. Ms. Ulmer alleged in the statement of defence that the action was premature because the appeal had not been determined.

[6] The SPCA did not pursue the action for costs while the appeal and leave application were before the courts. However, on August 2, 2011, following the dismissal of the Supreme Court of Canada leave application, the SPCA filed a notice of application (the "Costs Application"), pursuant to Rule 9-7, seeking judgment in the amount of $97,027.14 plus interest and costs. The notice of application set September 6, 2011 as the date for hearing. On August 3, 2011, the Costs Application materials were delivered to Ms. Ulmer's counsel. Mr. Bajer never filed a response on behalf of Ms. Ulmer, but took steps to obtain instructions from her. Ms. Ulmer does not provide any details regarding the status of the solicitor-client

relationship with Mr. Bajer, but it appears to have broken down to some extent by the summer of 2011.

[7] Mr. Bajer did not file an affidavit on this application but advised counsel for the SPCA and his articled student of the steps he took to contact Ms. Ulmer after he received the notice of application. Mr. Bajer said he took the following steps:

- On August 4, 2011, he left a message on the answering machine at the Delta Residence (this was one of two numbers he had for Ms. Ulmer) indicating he had an urgent message for her and asked that she return his call.

- On the same day he sent an e-mail message to the e-mail address he had consistently used to communicate with her throughout his retainer. In the e-mail he informed her about the Costs Application.

- He believes that he also called Ms. Ulmer's cell number and left a voice message on the same day. However he does not have a note confirming he did that.

- On August 5, 2011, he sent a letter by regular post to Ms. Ulmer at the Delta Residence. The letter was marked "urgent". Mr. Bajer requested that she contact another lawyer immediately to act on her behalf as the deadline to respond to the Costs Application was 4:00 p.m. on August 11, 2011. It appears that Mr. Bajer was not prepared to act for Ms. Ulmer on this application although this is not mentioned in any affidavit.

- On August 17, 2011, Mr. Bajer filed a notice of withdrawal as lawyer which indicated that the Delta Residence was Ms. Ulmer's last known address. Mr. Bajer sent it to Ms. Ulmer at that address by means of regular mail. He also sent a copy of the notice of withdrawal by e-mail on August 18, 2011 to Ms. Ulmer at her e-mail address.

- Mr. Bajer received no response from Ms. Ulmer or from anyone on her behalf until October 3, 2011 when he received a call from Mr. Willis requesting that Ms. Ulmer's file be delivered to him.

[8] Counsel for the SPCA also received the notice of withdrawal from Mr. Bajer and so retained a process server to serve the materials for the Costs Application on Ms. Ulmer. The process server delivered the materials to the Delta Residence on August 24, 2011. The process server swore that he deposited the documents in the mail slot situated on the front door of the house such that the documents must have landed inside the entrance to the home.

[9] Both Ms. Ulmer and Mr. Willis swore affidavits in support of this application. Ms. Ulmer says she did not become aware of the Costs Application until she received a letter from Mr. Rhone, counsel for the SPCA, on September 28, 2011. The letter dated September 19, 2011, enclosed the entered Order and contained a demand for payment. Ms. Ulmer says the letter had been delivered by a courier to an unused mailbox at her property in Langley, B.C. (the "Langley Residence"). She is currently living at the Langley Residence but does not check the old mailbox on a regular basis.

[10] Until May 23, 2011, Ms. Ulmer was acting as the caregiver for Mr. Willis. She was also his fiancée. She lived with Mr. Willis at the Delta Residence, which belongs to him. Ms. Ulmer owns the Langley Residence. Mr. Willis is disabled and confined to a wheelchair. Without assistance, he is unable to open mail or use a telephone without a speaker phone. Ms. Ulmer says that she told Mr. Willis she was "leaving the relationship" on May 23, 2011. She alleges that Mr. Willis e-mailed his daughter and made statements about her which caused the Delta Police to order her to leave the Delta Residence. This evidence comes from Ms. Ulmer. Mr. Willis's affidavit contains no evidence about Ms. Ulmer's departure or his discussions with his daughter or the police. However, there is no doubt that Ms. Ulmer was required to give an Undertaking to a Peace Officer on May 24, 2011. In the Undertaking she

agrees to abstain from communicating directly or indirectly with Mr. Willis and to abstain from going to the Delta Residence.

[11] Ms. Ulmer says Mr. Willis told her in late July that he believed the police behaved in a high-handed manner in May when they wrongly took it upon themselves to order her out of the home. He also told Ms. Ulmer that the restraining order was no longer in effect. She says that until she heard that from Mr. Willis she was unable to contact him or attend at the Delta Residence. She does not explain why it took so long for that matter to be clarified and provided no corroborating evidence from Mr. Willis or others about how long the restraining order was in effect. Ms. Ulmer says that in spite of Mr. Willis's advice in late July that the Undertaking was not in effect, she was not satisfied until mid-August that she could re-attend at the Delta Residence.

[12] In his affidavit of October 12, 2011, Mr. Willis says, "On May 23, 2011 I was admitted to hospital where I am currently still a patient." No further details are provided of that admission. He did not have access to his home and was not able to access his voice messages until his speaker phone was brought to him in the hospital in mid-September. At that time, he recalls hearing a voice message from Mr. Bajer, in which the lawyer asked Ms. Ulmer to call him. However, Mr. Willis forgot to mention that to Ms. Ulmer until late September when she told him about the Order. He also says he did not have access to mail from his Canada Post mailbox because he lost the key and Canada Post delayed installing a new lock for the mailbox. He says that he did not see any correspondence from his mailbox (which his sister obtained for him in September) about the Costs Application.

[13] Neither Mr. Willis nor Ms. Ulmer says anything about a mail slot at the front door of the Delta Residence. Neither of them makes any comment about the allegation that the material was delivered through the mail slot on the front door by a courier. Ms. Ulmer says nothing in her affidavits about the e-mail address which Mr. Bajer says he used to communicate with her. She does not deny receiving the e-mails he says he sent to her.

[14] Ms. Ulmer says she took steps to bring this application for reconsideration of the Order as soon as she could after learning about the Order in late September. Mr. Willis, who is a Certified Management Accountant, prepared a report titled "Examination of Costs of Care Claimed by BCSPCA in Respect of VLC-S-S-102350" which is attached to his affidavit. Ms. Ulmer relies on the report for her argument that the costs ordered are excessive and do not truly reflect the reasonable costs incurred.

Law regarding Rule 22-1(3)

[15] Rule 22-1(2) and (3) provide as follows:

> (2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.
>
> (3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[16] There are two leading decisions of the Court of Appeal regarding the application of this rule. Both decisions consider Rule 52(5) of the former Rules of Court. The relevant portion of the old rule is identical to the present rule and so the decisions are applicable to this case. The decisions are *Anderson v. Toronto-Dominion Bank* (1986), 70 B.C.L.R. 267 (C.A.); and *Lin v. Tang* (1997), 147 D.L.R. (4th) 577 (B.C.C.A.).

[17] In *Anderson*, at 270, the court found that the rule applies only where the conduct of the party in default was blameworthy:

> In my opinion, the phrase "guilty of wilful delay or default" carries with it the sense of a blameworthy action. The word "guilty" likewise emphasizes that the person who delayed or defaulted or both must be one deserving of blame and of the consequent penalty of not being heard on the merits of the application. Among other things, if satisfactory explanations are given for the delay and the default, then it is open to the court to reconsider whether there is any merit in the defence. The failure may have been "purposeful, deliberate or intentional" but, depending on the circumstance, it may not be blameworthy.

[18] In *Lin*, the Court of Appeal set out the proper approach to the application of the rule where there is a finding of blameworthy conduct on the part of a defendant. The language used in the rule is mandatory. A court shall not reconsider an order, including a summary trial order, "unless the court is satisfied that the party failing to attend was not guilty of wilful delay or default." In spite of that language, the court in *Lin* determined that even where a party is guilty of wilful delay or default, an order may be reconsidered if it would result in a serious miscarriage of justice. In other words, the court determined that the test for reconsideration of a decision made after a summary trial should be less stringent than the rule appears to require. The requirement that a party show that a serious miscarriage of justice would result is similar to the test applied to admit new evidence following trial.

[19] In *Lin*, Huddart J.A. was not prepared to reconsider the order and stated as follows at para. 59:

> Nevertheless, were I persuaded that the evidence established on a balance of probabilities that a serious miscarriage of justice had occurred, I would feel constrained to set aside a judgment even if it were obtained by reason of the defendant's default. I would do so on terms such as those imposed on an application under Rule 18(5) by this court in *Lam Company v. O'Lori Holdings Ltd.* (1981), 27 B.C.L.R. 378 (C.A.). In that case this court required that the defendant provide security for the amount of the judgment and costs. It follows that I would admit the affidavit filed by Mr. Liao on this appeal for the purpose of determining whether he has established a miscarriage of justice on a balance of probabilities.

[20] Madam Justice Huddart found that the defendant's actions in failing to defend himself on the summary trial application amounted to "wanton recklessness". She then considered whether the defendant had established that there was a serious miscarriage of justice. At paras. 61 and 64, she made the following comments as to what could amount to a miscarriage of justice:

> Miscarriage of justice is a difficult concept. It is not simply unfairness as viewed by the party who perceives himself the victim of an unfair process.
>
> ...
>
> In my view, miscarriage of justice means that which is not justice according to law. A miscarriage of justice will almost always be procedural. The blemish must be such as to make the judicial procedure at issue not a judicial

procedure at all: *Robins v. National Trust Co. Ltd.*, [1927] 2 D.L.R. 97 (P.C.), affirming 57 O.L.R. 46 (C.A.).

Issues

[21] In the circumstances of this case the following issues require determination:

1. Was Ms. Ulmer guilty of wilful delay or default, and if so, were her actions blameworthy?

2. If the answer to the first question is “no”, is there any merit to her defence to the claim for costs?

3. If the answer to the first question is “yes”, would there be a miscarriage of justice if the order is not reconsidered?

[22] For the reasons that follow, I have determined that Ms. Ulmer was not guilty of wilful delay or default and that she has established that there is merit to her defence to the claim for costs.

1. Was Ms. Ulmer guilty of wilful delay or default, and if so, were her actions blameworthy?

Positions of the Parties

[23] Ms. Ulmer says she has established that she was not guilty of wilful delay or default and that, in any event, it cannot be said that her actions were blameworthy. She stresses that she pursued the petition in which she challenged the SPCA’s removal of her cats all the way to the Supreme Court of Canada. It is inconceivable that she would wilfully default or delay in relation to the Costs Application when she fought the removal order so vigorously. She says that I must conclude from her evidence and the evidence of Mr. Willis that she had no knowledge of the Costs Application and there was nothing blameworthy about the way in which she handled the defence of this matter.

[24] The SPCA says that Ms. Ulmer was properly served with the Costs Application and that her failure to respond to it was blameworthy. It says that Ms.

Ulmer knew the Costs Application was pending. The action was started in 2010 and was put on hold awaiting the final result from her appeals. The refusal of the Supreme Court of Canada to grant leave meant that the SPCA would proceed with the action to recover its costs. Accordingly, Ms. Ulmer must have known in June that the proceeding would move forward. At the very least she should have maintained communication with her counsel. Further, the SPCA argues that the explanation for not receiving notice of the Costs Application is not credible. It says Ms. Ulmer failed to respond to the allegations that she received e-mails about the Costs Application, and that the Costs Application materials were delivered through the mail slot at the Delta Residence. The SPCA submits I should infer from this failure that she received those materials and that her default was intentional. In the alternative, the SPCA argues that she was wantonly reckless in her defence of the action.

Analysis

[25] This case is very close to the line. The explanation offered by Ms. Ulmer is somewhat incomplete. She does not respond at all to Mr. Bajer's allegation that he sent information about the Costs Application to her by e-mail. She had access to the Delta Residence by mid-August and yet says nothing about the presence of a mail slot at the front door. She does not deny receiving the couriered material, although she gives a general denial that she did not receive the Costs Application. Further, there is no doubt that she should have been aware that the SPCA would continue with its action to recover costs.

[26] In spite of these shortcomings in the affidavit evidence, I simply cannot reject Ms. Ulmer's contention that she would have fought the Costs Application had she been aware of it. She has vigorously opposed all of the actions of the SPCA and even sought leave to appeal to the Supreme Court of Canada. Her petition sought a declaration that she need not pay the SPCA costs. There is simply no possibility she would have sat back and let the Costs Application proceed without opposition if she had received notice of the application.

[27] In these circumstances, I must find that Ms. Ulmer was not aware of the Costs Application. As a result, I must conclude that she did not intentionally permit the default. I also find that her actions did not amount to wanton recklessness, as alleged by the claimant. The SPCA says that the circumstances here are similar to those in *Lin*. In that case, the defendant dismissed his lawyer and established a B.C. address and an extra-provincial phone number as his addresses for service. The plaintiff's lawyer gave notice that documents would be delivered to the B.C. address alone. The defendant acknowledged that he may have picked up the material for the application from that address but did not read the documents. The chambers judge also inferred from all of the evidence that the defendant had conveyed his B.C. property and moved to another jurisdiction so as to put himself beyond the reach of the court and his creditors.

[28] There are significant differences between the present circumstances and those in *Lin*. Here, I have concluded that Ms. Ulmer did not actually see the application materials. While the explanation provided by her could have been fuller, I accept that the separation between Ms. Ulmer and Mr. Willis compounded by the Undertaking she entered into with the Delta Police resulted in her failing to receive the communications about the Costs Application. Further, I conclude that Ms. Ulmer did not ignore the Costs Application once it came to her attention. While there was no affidavit evidence to explain the delay of approximately two weeks in setting down this application, I can accept counsel's explanation that he had difficulty retrieving the file from Ms. Ulmer's former counsel. In addition, and unlike the situation in *Lin*, there is no suggestion here that Ms. Ulmer was attempting to defeat the claim of the SPCA. She has property in B.C. and the judgment has been registered against that property. The order I make will ensure that any priority gained by that registration will not be lost.

[29] When I take all of the circumstances into account, I conclude that Ms. Ulmer's actions were not blameworthy.

2. If the answer to the first question is "no", is there any merit to her defence to the claim for costs?

[30] Ms. Ulmer argues that there is merit to her defence in at least two respects. First she says that the total cost claimed for veterinarian services for the cats does not stand up to scrutiny. She says that the SPCA has claimed both the cost invoiced to the SPCA for the care of her cats ($4,906.21) plus an additional cost of $7,010.93 that the SPCA owed to the same veterinary clinic for services provided for other animals. The SPCA has conceded on this application that Ms. Ulmer's assertion in this regard is correct but says the appropriate way to deal with this is to amend the Order by way of application of the slip rule (Rule 13-1(17)).

[31] The second defence to the costs claim that appears to have some merit is the argument that there is a double claim for the staff costs of feeding and caring for the cats. Ms. Ulmer says that all the SPCA can claim are the actual "costs incurred by the society under this Act with respect to the animal(s)". Here, she says that the costs claim according to Ms. Moriarty's affidavit is calculated at $10 per day per cat. This includes both an estimated labour cost in the amount of $6 per day for each cat, plus a claim for a portion of the operating cost of the facility, which is estimated at $3 per day for each cat. This is based on the operating costs for the Chilliwack facility as set out in the annual financial statement. She says that the operating cost of the facility clearly includes the same labour costs that the SPCA is specifically claiming by way of the daily labour cost for the cats.

[32] I find that this is a defence that is worthy of further examination. The SPCA argues that a similar formula was applied in *Haughton v. BC SPCA*, 2010 BCSC 406. That cannot be an answer to Ms. Ulmer's defence. The claimable costs are only those relating to these cats. The calculation of costs in *Haughton* related to different animals at three other facilities in the province. In addition, the SPCA in *Haughton* did not claim costs for the first month it cared for the petitioner's animals.

[33] It would be inappropriate for me to comment further on the specific merits of this aspect of the defence except to say that the error made in respect of the

veterinary costs certainly supports Ms. Ulmer's argument that the cost of caring for the cats may not have been properly calculated. I may have been prepared to apply Rule 13-1(17) to amend the judgment amount if that had been the only defence with merit. However, as I have found that the entire amount of the cost of care requires reconsideration, there is no reason to apply the slip rule at this time.

Form of Order

[34] In *Lin*, the court noted that if the order was to be set aside, the defendant should post security in accordance with the terms imposed in *Lam Company v. O'Lori Holdings Ltd.* (1981), 27 B.C.L.R. 378 (C.A.). In that case, McFarlane J.A. stated as follows at 381:

> I would allow the appeal to the extent only of imposing a condition that the order of Mr. Justice Toy be not set aside unless and until the defendant shall have provided security for the amount of the judgment authorized by that order to be entered, including costs.

He went on to state that the costs should be in an amount satisfactory to the registrar and granted the defendant 60 days to post the security.

[35] Here, the SPCA has security for its judgment by way of the Certificate of Judgment filed against the Langley Residence. The secured position of the SPCA should not be impaired even though I have ruled that the Order should be reconsidered. At the end of the day, Ms. Ulmer will be indebted to the SPCA for a substantial sum for the care of the cats even though that sum will be less than the amount of the Order. The proper amount of the costs for the care of the cats to be paid by Ms. Ulmer pursuant to s. 20 of the *Act* will be determined following a rehearing of the Costs Application. The application can likely be heard promptly by way of summary trial.

[36] In these circumstances, it is appropriate that the Certificate of Judgment remain registered against the Langley Residence until that application has been heard. Accordingly, I order that the Certificate of Judgment not be removed from the Langley Residence unless and until Ms. Ulmer has provided security for the

judgment and costs in an amount agreed to by the parties or as ordered by the Registrar of this Court. Once the amount of the costs of care has been established by way of a further order of this Court, the Certificate of Judgment will be amended accordingly.

Costs

[37] Ms. Ulmer has been successful on this application and so she is entitled to costs of the application at Scale B.

"Butler J."