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Leblanc v. Parry

Between
Lianne Leblanc, plaintiff, and
David Parry, defendant

[1998] O.J. No. 1242

File No. 76766/96

Ontario Court of Justice (General Division)
Whitby, Ontario

Stong J.

Heard: March 12, 1998.
Judgment: March 23, 1998.

(8 pp.)

Estoppel -- Estoppel by record (res judicata) -- Res judicata as a bar to subsequent proceedings -- When applicable -- Practice -- Judgments and orders -- Consent judgments -- Summary judgments -- To dismiss action.

Motion by the defendant for summary judgment. The plaintiff was injured in a motor vehicle accident. She brought an action in Small Claims Court against the defendant for loss of wages, vehicle damage, and pain and suffering. The plaintiff was not represented by counsel. At a pre-trial conference, she consented to a dismissal of the action after a student-at-law representing the plaintiff told her that her claims for lost income and property damage were to be filed with her own insurer. She then brought an action in the Ontario Court (General Division) against the defendant, seeking general damages of \$100,000 and special damages of \$50,000. The defendant sought summary judgment on the grounds of res judicata and abuse of process.

HELD: Motion dismissed. Although the plaintiff consented to the dismissal of her original action, it was not a fully informed consent because it was based on advice given by an opposing party. As a result it was tantamount to no consent for the purposes of res judicata. As such, the plaintiff's second action was not an abuse of process.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I.8, s. 267.1.

Counsel:

Lawrence A. Berg, Q.C., for the plaintiff.

David Zarek, for the defendant.

1 STONG J. (endorsement):-- On the 11th day of January, 1995, the plaintiff Lianne Leblanc, was proceeding westbound on Highway 401 near the Brock Road interchange, in the Town of Pickering, in the Regional Municipality of Durham. The plaintiff's vehicle came into collision with the dislodged left front wheel of the defendant David Parry's motor vehicle. In her affidavit in response to the motion brought by the defendant, the plaintiff swears that she sustained serious personal injuries. LeBlanc did not seek any legal counsel, the primary concern at the time being that of loss of income as a waitress/bartender as a result of being disabled from working for a significantly long period of time following the accident.

2 On January 31, 1995, LeBlanc commenced Whitby Small Claims Court action no. 00203/96, claiming damages in the amount of \$6,000.00 for loss of wages, damage to her vehicle, and damages for "pain for changing" her life. In her affidavit in response to this motion, she attests that "by way of an afterthought I added 'pain for changing my life'".

3 In his Whitby action statement of defence, the defendant David Parry, alleged that the plaintiff's claim for damages and change in her life did not come within the exception under Section 267.1 of the Insurance Act, R.S.O. 1990 Chapter I.8 as amended, and that the plaintiff contributed to her own injuries by failing to use safety equipment in her motor vehicle, and failing to mitigate her damages.

4 On June 5, 1996, the defendant represented by Alan Tonner, former student-at-law, and the plaintiff Lianne Leblanc attended a pre-trial conference with respect to the Whitby action.

5 The plaintiff attests in her affidavit to not being represented by counsel at that pre-trial, and being told by the student-at-law for the defendant that her claims for lost income and property damage should properly be filed with her own insurer. She swears that "there was no discussion at that time with regard my claims for pain or changing my life, and under the circumstances and based on the information provided to me by the person representing the defendant, I agreed to sign a dismissal of the Small Claims Court proceedings". Such a consent to dismissal was executed on a no cost basis.

6 On November 15, 1996, the plaintiff Lianne Leblanc commenced Ontario Court (General Division) action No. 76766/96 herein by way of statement of claim. In her General Division action statement of claim, Lianne Leblanc has claimed general damages for pain and suffering in the amount of \$100,000.00 and special damages in the amount of \$50,000.00. In his general division action statement of defence, the defendant David Parry has alleged that the plaintiff's claim for general damages for pain and suffering do not come within the exception under Section 267.1 of the Insurance Act, R.S.O. 1990 Chapter I.8 as amended. Furthermore, that the plaintiff has contributed

to her injuries by failing to use safety equipment in her motor vehicle and failing to mitigate her damages.

7 In this motion the plaintiff seeks an order that no genuine issue for trial of this action as against the defendant David Parry exists, and therefore summary judgment in favour of the defendant should be granted. The issues to be decided on this motion are two-fold:

- (a) Is a consent to the dismissal of an action a final judgment on the merits, thereby barring a commencement of a second action as res judicata?
- (b) Is it an abusive process for a party who has consented to a dismissal of a first action to subsequently commence a second action arising from the same cause of action and involving the same issues?

8 It is well established in jurisprudence that for the doctrine of res judicata to apply, three elements are required to be present: firstly, the subsequent proceeding must involve the same parties; secondly, the matters in dispute in the second action are identical to those in the first action; thirdly, the judgment in the first action must have been on the merits of the case. While the first two requirements appear to have been met, it is clear that there has been no disposition on the merits of the case by a court of competent jurisdiction. Had the matter before this court been determined on the merits by a court of competent jurisdiction, then the two-armed doctrine of res judicata would apply; the cause of action estoppel, where a second action is brought for the same cause of action and has been the subject of a first action; and issue estoppel where a point or issue of fact in a second action has already been decided in a first action, although the cause of action may be different.

9 It must be decided in this case whether the consent to the dismissal of an action is a final judgment on the merits, thereby barring a commencement of a second action pursuant to the doctrine of res judicata.

10 Counsel for the defendant, David Parry has referred me to jurisprudence which dates as early as 1910, *Re Ontario Sugar Co; McKinnon's Case* (1910), 22 O.L.R. 621 at 623, 625; affirmed (1911), 24 O.L.R. at page 332 Ontario Court of Appeal at 336, in which the Ontario Court of Appeal upheld a finding of the weekly court that a judgment by consent is in the same position as a judgment pronounced after the trial of the action.

11 The same principle has been recognized in subsequent cases, and forms a well settled doctrine of law. The defendant's affidavit of Mr. David Zarek in support of this motion, deals with the consent to dismissal of the Small Claims action No. 00203/96 by simply outlining the chronology of events surrounding the attendance at a pre-trial conference in the Small Claims action by Mr. Alan Tonner, former student-at-law and representative of the defendant and the plaintiff. The affidavit in support of this motion simply states that the parties consented to the dismissal of said action on a without cost basis. Exhibit C to that affidavit is a form of consent to dismissal dated June 5, 1996, signed by the parties and witnessed. In the absence of an affidavit of Mr. Alan Tonner, the representative for David Parry at the pre-trial conference which resulted in the execution of a consent to the dismissal of the action, the only direct affidavit material dealing with the circumstances surrounding the obtaining of the consent dismissal are contained in the affidavit of Lianne Leblanc, who swore that although she was not represented by counsel at the pre-trial meeting, she was told by "a student-at-law for the defendant that my claims for lost income and property damage should properly be filed with my own insurer". Also, "there was no discussion at that time with regard to my claims

for pain, for changing my life". Based on the claim within the limits of the Small Claims Court, the advice given by the student-at-law, although appropriate insofar as it went, certainly did not have as its' basis the interests of the plaintiff. I am satisfied on the statement under oath of the plaintiff that there was no discussion at the time with regard her claims for "pain for changing my life". Nor was the student-at-law under any obligation to make any inquiries in that regard. The consent was obtained in circumstances giving rise to a claim for compensation for impairment of important physical, mental or psychological functions, which compensation could extend the claim beyond the statutory deductible amount of \$10,000.00. Keeping in mind the legal maxim that not only must justice be done, but must be seen to be done, it is difficult to sustain the proposition that the consent was an informed consent because it was based on advice given by an opposing party to the plaintiff, which advice was not in pursuit of the interests of the plaintiff but rather the opposing party, and upon which advice the consent to dismissal was obtained and executed.

12 Although consent was obtained, that consent was not a fully informed consent. As a result it is tantamount to no consent insofar as the obtaining of a judgment is concerned, and the implementation of the doctrine of res judicata. It is the opinion of this court that in these circumstances the doctrine of res judicata has no grounds, and that the initiation of this action in the General Division can proceed without interference.

13 As this court has found that the consent to the dismissal of the first action was not a fully informed consent, the question of whether it is an abuse of process for the plaintiff to subsequently commence this second action at the Ontario Court (General Division) arising from the same cause of action and involving the same issues is to be answered in the negative. The motion seeking an order granting summary judgment in favour of the defendant on the grounds that the plaintiffs' action discloses no genuine issue for trial as the cause of action and issues giving rise to this action, having been finally determined by the consent to dismissal executed by the plaintiff, Lianne Leblanc and the defendant's representative of Whitby Small Claims Court Action No. 00203/96 is refused.

14 Likewise the defendants request that an order be granted stating that the plaintiff's commencement of Ontario Court (General Division) action No. 76766/96 is an abusive process is denied.

15 This court will entertain submissions in writing from both sides with respect costs of this action.

STONG J.

qp/d/alp/DRS