IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20250401
Docket: S130363
Registry: Kelowna

Between:

Leneen Joan Fast, on behalf of the Estate of Norman Bruce Severn

Plaintiff

And

Bruce Donald Severn and Diane Marie Severn aka Diane Bullach

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on April 28, 2025

Before: The Honourable Justice Latimer

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J. Keeley M. Vu, Articled Student
The Defendants, appearing in person:	B. Severn D. Severn
Place and Date of Hearing:	Kelowna, B.C. March 31, 2025
Place and Date of Judgment:	Kelowna, B.C. April 1, 2025

[1] **THE COURT:** These are my oral reasons for judgment, and if a transcript is ordered, I may edit them, but the result will not change.

[2] This application for summary trial involves a dispute concerning the estate of Norman Bruce Severn (the "Deceased").

[3] On November 30, 2023, the parties entered into a settlement agreement following mediation (the "Settlement Agreement"). A dispute has arisen between the parties with respect to the interpretation of the Settlement Agreement.

[4] For reasons I will explain, the plaintiff's interpretation of the Settlement Agreement is correct and the plaintiff is entitled to judgment in the amount of $27,351.95 plus court ordered interest from December 14, 2024.

Background Facts

[5] The background facts are not contested and, briefly, the most relevant facts are as follows.

[6] The plaintiff and the defendant, Bruce Severn, are siblings and the only natural children of the Deceased. The defendant, Diane Severn, also known as Diane Bullach, is Bruce Severn's wife.

[7] The Deceased died on March 25, 2020.

[8] The Deceased's last will and testament divided the residue of his estate equally between the plaintiff and the defendant, Mr. Severn.

[9] On March 4, 2021, the plaintiff initiated this litigation on behalf of the Deceased's estate claiming that the defendant, Mr. Severn, breached his fiduciary duty to the Deceased by misusing a power of attorney to misappropriate the Deceased's funds for his own benefit and use, or on the basis that money that Mr. Severn received from the Deceased were not valid gifts.

[10] On November 30, 2023 the parties entered the Settlement Agreement. The Settlement Agreement provided, in part:

> (1) Bruce and Diane will pay to Leneen the sum of $50,000 by no later than December 22, 2023 and will pay to Leneen a further $148,000 by no later than December 13th, 2024 in full and final satisfaction of any and all claims Leneen may have against Bruce and Diane in any capacity and any and all claims Leneen may have against the estate of Norman Bruce Severn;
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> (2) Leneen will be paid the estate funds remaining in the trust account of Pushor Mitchell LLP, currently $27,351.95, within 14 days of the date of the settlement agreement and release;
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> (3) All payments to Leneen will be made to Sabey Rule LLP in trust;
>
> …
>
> (13) The terms of the settlement agreement herein are contractual and not recitals.

[11] On November 23, 2023, Pushor Mitchell LLP sent a trust cheque in the amount of $27,351.95 to counsel for the plaintiff pursuant to paragraphs 2 and 3 of the Settlement Agreement.

[12] On December 13, 2023, the defendants paid the sum of $50,000 pursuant to paragraphs 1 and 3 of the Settlement Agreement.

[13] On December 2, 2024 at 11:26 a.m., a paralegal at the defendants' counsel's office emailed the plaintiff's counsel, Ms. Keeley, attaching correspondence and indicating that a trust cheque in the amount of $120,648.05 was being couriered to the plaintiff's counsel's attention that afternoon and would likely be received the following day. Counsel's letter of that date indicated that this sum represents "the remaining amount owing to your client pursuing to paragraph 1 (page 2) of the Agreement."

[14] On December 2, 2024 at 11:52 a.m., Ms. Keeley wrote to counsel for the defendants, Ms. Metherell, as follows:

> … the amount owing under the settlement agreement is $198,000 as per paragraph 1 of the agreement. Paragraph 2 is not and never has been a set-off to the two payments to be made in December 2023 and December 2024. Please confirm you are sending the additional funds prior to the 13th as required by the agreement.

[15] On December 2, 2024 at 12:09 p.m., Ms. Metherell wrote: "we will get back to you."

[16] On December 2, 2024 at 3:22 p.m., a paralegal at the defendants' counsel's law firm wrote to Ms. Keeley as follows:

> I think this was all my mistake and while you were emailing us I was reviewing our file. The cheque and letter were picked up by RPX to deliver to your office. I am leaving tomorrow morning, so if either you or Adelynne could reach out to Simi (copied), we can make arrangements for that envelope to be picked up.

[17] The next day, on December 3, 2024, Ms. Metherell wrote as follows:

> I no longer represent Diane and Bruce Severn. Please feel free to communicate with them directly.
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> My final instructions from Diane and Bruce are that they take the position that the funds you received from our office earlier this week in the amount of $120,648.05 is all that is owing under the terms of the Settlement Agreement and Release. I'm not sure if you have returned those funds to our office or not, but if you have not you may retain them.
>
> I do not have instructions to provide you with any contact information for Diane and Bruce at this time.

[18] There is no affidavit evidence before me from either Ms. Metherell or her paralegal.

[19] In reasons for judgment dated February 10, 2025, this Court dismissed the plaintiff's application for summary judgment. The record before Associate Judge Schwartz did not include the December 2, 2024 3:22 p.m. email from the defendants' paralegal.

[20] In dismissing the application for summary judgment, Associate Judge Schwartz held:

> [2] I am unable to determine that it is manifestly clear that no *bona fide* issue for trial exists. While at first blush the language of the settlement agreement does appear clear in that there are two separate payors, the defendants have put forth some evidence that it was their understanding, clearly, that the $27,351.95 was meant to be part of the $198,000 payments, as opposed in addition to.

[21] Associate Judge Schwartz noted at para. 5 that Rule 9-6 permitted him to consider but not weigh evidence beyond a consideration of whether that evidence was incontrovertible. He held that if the defendants' presumptive evidence was

contradicting the plaintiff's evidence, the application for summary judgment had to be dismissed. Associate Judge Schwartz concluded:

> In these circumstances, I do find that the test of plain and obvious or beyond a reasonable doubt has not been satisfied, and therefore I elect to dismiss the application. Of course, that does not mean that the plaintiff is not at liberty to bring some other form of summary application if they wish. It may be that a summary trial is appropriate for these circumstances, but given the high bar in effect for a summary judgment application, I do not find that the Rule 9-6 requirements have been met.

[22] The plaintiff has now applied for summary trial against the defendants jointly and severally in the amount of $27,351.95 plus court ordered interest from December 14, 2024 to the date of judgment.

Issues

[23] For the reasons that follow, I have determined that I have the necessary evidence and am able to find the facts necessary to decide the issues of fact and law raised in this proceeding. It would be just and proportional to do so in the circumstances.

[24] The plain and ordinary meaning of the Settlement Agreement supports the interpretation put forward by the plaintiff.

[25] If I am wrong about that, then the extrinsic evidence also supports the interpretation put forward by the plaintiff.

[26] Judgment is pronounced in favour of the plaintiff in the amount of $27,351.95 plus court ordered interest from December 14, 2024 to the date of judgment.

[27] Costs are ordered in favour of the plaintiff at Scale B.

Legal Analysis

[28] The test for summary trial is different than the test for summary judgment which was considered by Associate Judge Schwartz.

[29] A summary trial is governed by Rule 9-7 of the *Supreme Court Rules*. The scope of a summary trial application is set out in Rule 9-7(15) of the *Supreme Court Civil Rules*:

> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
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> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[30] In *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd*., [1989] 36 BCLR (2d) 202 at para. 40 the court confirmed that the court under the Rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose even though there may be disputed issues of fact and law" provided that the judge does not find "it unjust to do so" (page 211).

[31] In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (page 215):

> The chambers judge is entitled to consider, among other things, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, and any other matters which arise for consideration on this important question.

[32] To this list have been added other factors, including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result

in litigating in slices: *Dahl et al. v. Royal Bank of Canada et al*, 2005 BCSC 1263 at para. 12 upheld on appeal at 2006 BCCA 369.

[33] The authorities are clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claims and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised: *Gichuru v. Pallai*, 2013, BCCA 60 at para. 35 [*Gichuru*].

[34] The parties agree that this matter is suitable for a determination by summary trial.

[35] However, a determination of the suitability of an application for summary trial is a discretionary exercise that I must decide for myself, having regard to the particular circumstances of the application: *Gichuru, supra*, at para. 34.

[36] In this case, I am asked to enforce the Settlement Agreement following a summary trial. For reasons I will explain in the course of this judgment, I have concluded on the whole of the evidence before the court on this application, that I am able to find the facts necessary to decide the issues of fact and law before me. I am also of the opinion that it would be just to decide the issues on this application.

[37] Section 10 of the *Law and Equity Act*, RSBC 1996, c. 253 authorizes this court to enforce settlement agreements in an existing action rather than requiring a party to commence a new action. I am satisfied that it is appropriate to do so here to avoid a multiplicity of proceedings concerning the matters at issue. I note as well that no party has argued to the contrary.

[38] A settlement agreement is a contract between the settling parties. As such, general contract principles apply: *Linde v. Linde*, 2021 BCSC 1494 at para. 28.

[39] The BC Court of Appeal in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 [*Athwal*] stated the applicable principles of contractual interpretation.

> [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
>
> [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of Cheshire, Fifoot and Furmston's Law of Contract, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."

[40] I find that the words in the Settlement Agreement are clear and unambiguous. Viewed objectively, the Settlement Agreement raises only one reasonable interpretation, so that extrinsic evidence is not admissible to modify or contradict the express words used.

[41] There is no basis for the defendants' position that paragraph 2 is intended to be used as a set-off for the obligations established by paragraph 1.

[42] As set out above, paragraphs 1 and 2 of the Settlement Agreement set out separate obligations as against different payors on different timelines. In particular, paragraph 1 establishes a personal obligation to the defendants to make payments by no later than December 2, 2023 and December 13, 2024, respectively.

[43] In contrast, paragraph 2 establishes an obligation that the plaintiff be paid by the estate within 14 days of the date of the Settlement Agreement.

[44] There is no provision in the Settlement Agreement linking those two obligations or providing that the obligations established in paragraph 2 may be used as a set-off for the obligations established in paragraph 1.

[45] Even if I accepted that the defendants did not understand the meaning of the words used in the Settlement Agreement, this would not be a basis to vary, modify, add to, or contradict the express words of this unambiguous written contract: *Athwal, supra*, at para. 43.

[46] If I am wrong and the Settlement Agreement is ambiguous, then I also conclude that the extrinsic evidence supports the interpretation put forward by the plaintiff.

[47] I acknowledge that there are two different interpretations of the Settlement Agreement put forward in the affidavits of the defendants on the one hand, and that of the plaintiff's counsel on the other.

[48] I have the affidavit of Ms. Keeley, the plaintiff's lawyer, who explains her recollection of the mediation conducted on November 20, 2023. In particular, she deposes:

> I recall that the mediation concluded in the late afternoon of November 20th, 2023 with a final offer from my client that she would not accept less than 225,000 or else we were going to proceed to trial.
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> The defendants' payment of 198,000 plus the estate funds of 27,351.95 totals 225,351.95. This was how the defendants' total payment of 198,000 was calculated and why it is not a round number such as 200,000. It was to get the total amount that the plaintiff would receive to the 225,00 threshold.
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> There was never an understanding or intention by any of the parties at the mediation that the payment of the estate funds would offset the defendants' payment obligations. If that had been the intention, both Ms. Metherell and myself are competent lawyers who would have drafted the set-off into the settlement agreement.

[49] The defendants have each made an affidavit which argues that the total settlement amount was $198,000. They attach a letter from their counsel which erroneously sets out the balance owing on September 16, 2024 as $120,648.05. They also present arguments about what is not contained in the Settlement Agreement. They also attach the December 2 correspondence from their former counsel which repeats that the amount owing was $120,648.05. They do not contradict Ms. Keeley's evidence about what occurred at the mediation or how the

sums set out in paragraphs 1 and 2 of the Settlement Agreement were arrived at; nor do they expressly state that they believed that paragraph 2 was to be a set-off. They do, however, each depose that they have upheld their obligations under the Settlement Agreement.

[50] Conflict in the evidence *per se* is not necessarily always a reason to render a summary trial application unsuitable. As the Court of Appeal stated in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 22:

> [22] … the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[51] The court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. There must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another: *Brissette v. Cactus Club Cabaret Ltd*., 2017 BCCA 200 at para. 27.

[52] In this case, there is a basis to prefer Ms. Keeley's affidavit over those of the defendants.

[53] First, as I have noted, the defendants have not, in their sworn evidence, contradicted Ms. Keeley's rationale for the sums set out at paragraphs 1 and 2 of the Settlement Agreement. In particular, they have not contradicted her recollection that the plaintiff was not prepared to settle for less than $225,000, and that the figure of $198,000 was arrived at by calculating the amount needed to arrive at $225,000 in light of the funds held in trust for the estate. Orally, at the hearing of the application, the defendant Ms. Severn did offer an alternate version of events from the mediation. However, this alternate version is not supported by sworn evidence.

[54] More significantly, the plaintiff's position is also supported by the documentary evidence generated from the defendants' counsel's own law firm. In particular, in response to the plaintiff's counsel's correction of the amount owing under the settlement agreement, on December 2, 2024 at 3:22 p.m., a paralegal at the defendants' former counsel's law firm wrote to Ms. Keeley acknowledging her "mistake".

[55] The next day, the defendants' counsel confirmed she was no longer retained and that her final instructions from the defendants was that they take the position that the funds received in the amount of $120,648.05 is all that is owing under the terms of the Settlement Agreement and Release.

[56] As I noted, there was no affidavit from Ms. Metherell or the paralegal in the record before me.

[57] While the defendants depose that they have upheld their obligations under the Settlement Agreement, I do not find that this conflict in the evidence is a reason to render a summary trial application unsuitable. On the record, the defendants' view of their obligations under the Settlement Agreement may arise from genuine confusion as to their obligations under the agreement which was introduced months later by their counsel after the settlement was reached. At worst, the defendants may simply seek to take advantage of a mistake made by their former counsel's law firm and one which is inconsistent with the wording and intent of the Settlement Agreement. Neither circumstance is a reason to depart from the agreement actually reached between the parties, all of whom were represented by counsel.

[58] In *Kuo v. Kuo*, 2017 BCCA 245, Justice Dickson observed, quoting para. 37:

> [37] There is a strong public interest in favour of resolving lawsuits by agreement. As Abella J. observed in *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 at para. 11, "[s]ettlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation". As a result, the policy of the courts is to promote settlement and to enforce settlement agreements: *Catanzaro v. Kellogg's Canada Inc*., 2015 ONCA 779. This judicial policy contributes to the effective administration of justice …

[59] Having regard to the amount involved, the cost of taking this matter forward to a conventional trial in relation to the amount, the stage of the proceedings, and the totality of the evidence, including the affidavits and the documentary evidence which I have discussed, I find it is just, reasonable, fair, and appropriate to determine this issue following trial.

[60] I find that Ms. Fast should be awarded judgment against the defendants in the amount of $27,351.95 plus court ordered interest from December 14, 2024 to the date of judgment.

Costs

[61] The plaintiff seeks special costs of this application on the basis that parties should generally be indemnified for their efforts to have a settlement agreement enforced. The plaintiff notes this Court's views that a party's failure to complete a settlement agreement is unreasonable and reprehensible when the terms are clear and unambiguous.

[62] I will not exercise my discretion to award special costs in the circumstances of this case when, on the record before me, the defendants appear to have relied upon a mistaken calculation of their former counsel's law firm in forming their erroneous view that they had complied with the terms of the Settlement Agreement.

[63] The plaintiff is entitled to her costs at Scale B.

"Latimer J."