TAB 7

1961 CarswellAlta 7
Alberta Supreme Court

Alberta (Public Trustee) v. Koblanski

1961 CarswellAlta 7, 34 W.W.R. 24

Public Trustee of Alberta v. Koblanski (No. 2) *

Riley, J.

Judgment: January 27, 1961

Counsel: *G. A. C. Steer* and *P. C. Power*, for plaintiff.
J. L. Bassie, for defendant.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.iii Action frivolous, vexatious or abuse of process
XVI.3.c.iii.B Miscellaneous
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.ii Fraud, perjury or collusion
Headnote
Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process
Practice --- Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion
Judgments and Orders — Attacking Judgment in Second Action on Ground of Fraud or Fresh Evidence — Principles Applicable.
A plaintiff who wishes, in a second action, to attach a judgment in a first action on the ground that he has obtained fresh evidence, should reveal in his statement of claim what such evidence is. He must also show that it is of a conclusive nature and that it was not discoverable by diligence before the first trial.
Authorities on attacking a judgment on the ground that it was obtained by fraud, extensively considered.

***Riley, J.*:**

1 This is an application to have the present plaintiff's action dismissed on the ground that it is vexatious, frivolous, and an abuse of the due process of law. In support the defendant submits that the real matters in question have been tried by the Supreme Court of Alberta on May 15, 1957, and that the said action was appealed to the appellate division of this honourable court and the judgment of the learned trial judge was affirmed, (1958-59) 27 W.W.R. 268. The defendant says that all permissible facts that may now come out were already before the court in the prior action, have been decided on in the former action and therefore should not be tried again. In the former action the trial judge made it quite plain that he did not believe the present plaintiff's witnesses.

In my opinion this ought not to be permitted without an allegation that something entirely new in the way of evidence has been discovered and there is no such allegation.

To this it may be answered that the plaintiff is not bound to disclose his evidence. But why not? In my opinion this usual rule ought not to be applied in an action of this kind for several reasons. In the first place in most actions the matter is between the parties who have not come into Court before. One party is attacking merely the other. But here a solemn judgment of the Court itself is what it attacked. Should not the reasons for that attack be set forth in the record so that the Court will see what the reasons alleged are for which it is asked to expunge its own record? I think they should be so shown. Moreover, the rule that a party must not be obliged to disclose his evidence is not applied in the case of a motion to the Court of Appeal for a new trial (i.e., to set aside the judgment below), upon the ground of discovery of fresh evidence. Certainly there the appellant is bound, at least, to say that he has some fresh evidence. And here he does not even say that. And still more on such a motion he is forced to disclose the nature of the evidence which he has discovered, so that it may be seen whether it is likely to change the result. *Riverside Lbr. Co. v. Calgary Water Power Co.* (1916) 9 W.W.R. 471, 10 W.W.R. 980, 32 W.L.R. 858, 34 W.L.R. 859, 10 Alta. L.R. 128. And he must do this even where there is no suggestion of fraud or perjury on the part of his opponent.

If that is so then, surely, *a fortiori* where the defeated party instead of merely appealing and asking for a new trial actually brings an action to set aside the record, he ought to allege such facts as will show on their face that if they are true he has a right to bring his action, that is, that he has a good cause of action. There would be no need perhaps of disclosing the names of the witnesses but certainly the nature of any fresh evidence ought to be disclosed. In such a proposed action as this the discovery of new evidence assuming that to be sufficient ought to be treated as the very gist of the action. I think there is no right to bring it otherwise unless the fraud alleged is extraneous to the Court proceedings, which was undoubtedly the case in *Cole v. Langford*. In all the modern contested cases (in none of which, by the way did the plaintiff succeed, except *Cole v. Langford*) it will be observed that the Court had before it a statement of what new evidence the plaintiff proposed to adduce, although, of course, he was perhaps forced to divulge it by motions to dismiss before trial.

33 See also *Glatt v. Glatt*, [1937] S.C.R. 347, where at 350, Duff, C.J. held:

... a judgment cannot be set aside on such a ground [of facts established by newly discovered evidence] unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule was applied with the utmost strictness.

34 See also *Friesen v. Braun*, [1926] 2 W.W.R. 257, at p. 267, 20 Sask. L.R. 512:

A new trial may sometimes be ordered on the ground of the discovery of fresh evidence after the hearing; but as it is in the public interest that litigation should end, the right to a new trial on this ground is subject to restriction. The party applying must satisfy the court that the new evidence could not have been obtained before the hearing by the exercise of reasonable diligence, and that it is of such a character that, if admitted, it would be practically conclusive the other way.

35 I think, too, that in a second action such as this the plaintiff should reveal his evidence to the court; that has not been done. A mere allegation in the statement of claim that he has now evidence fresh discovered is not sufficient. He must show not only what type of evidence it is but he must show that it is of a conclusive nature, and he must also show that it is evidence he could not by the use of diligence have discovered at the previous trial.

36 In the result the plaintiff's action is dismissed on the ground that it is vexatious, frivolous and an abuse of the due process of law. There will be costs to the defendant to be taxed on col. 5. There will be a special fee to the defendant for the argument submitted in the sum of $100.

Footnotes

