Date: 20080520

Docket: T-1332-07

Citation: 2008 FC 620

BETWEEN:

TIMOTHY E. LEAHY, ESQ.
and
FOREFRONT MIGRATION LTD.

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

MACTAVISH J.

[1] The defendant appeals from a decision of a prothonotary refusing to strike the plaintiffs' statement of claim as disclosing no reasonable cause of action.

[2] For the reasons that follow, the appeal will be dismissed.

Background

[3] The statement of claim relates to three incidents involving comments allegedly made by government agents as to whether the plaintiff Timothy Leahy qualified as an "authorized representative", as defined in the *Immigration and Refugee Protection Regulations*, and

consequently whether he was able to represent clients with applications or proceedings pending under the *Immigration and Refugee Protection Act*.

[4] The defendant brought a motion before a prothonotary seeking to have the statement of claim struck out as an abuse of process, and as disclosing no reasonable cause of action.

[5] The defendant's abuse of process argument was based upon the decision of the Federal Court of Appeal in *Grenier v. Canada* [2005] FCJ No. 1778. In this regard, the prothonotary found that it was not plain and obvious that the plaintiffs could not proceed by way of an action for damages for the tortious acts that they allege were committed by the government agents in question.

[6] No appeal has been taken by the defendant with respect to this aspect of the prothonotary's decision.

[7] The prothonotary also found that the statement of claim did disclose a reasonable cause of action. In this regard the prothonotary stated that:

> The Plaintiffs have pleaded in tort, alleging that the Defendant's communications were defamatory and that they intentionally interfered with his contractual relations with the immigration clients being represented by Mr. Leahy and/or Forefront Migration Ltd. The elements of the causes of action are pleaded. If the defendant claims there are insufficient material facts for it to understand the nature of the claim being asserted or lacks particulars in order for the defendant to plead a defence, the appropriate remedy is a motion for particulars.

Standard of Review

[8] Where a discretionary order of a prothonotary is vital to the final issue in a case, the decision should be reviewed on a *de novo* basis: see *Merck & Co. Inc. v. Apotex Inc.*, [2003] F.C.J. No. 1925, 2003 FCA 488 at ¶ 18-19. However, where the decision under review is not vital to the final issue in the case, it ought not to be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck*, at ¶ 19.

[9] The plaintiffs made no submissions in relation to the standard of review. The defendant says that while a decision to strike the statement of claim would have been vital to the final issue in the case, having refused to strike the statement of claim, the decision was not vital to the final issue, and, as a result, this Court should not interfere with the prothonotary's decision unless it is clearly wrong.

[10] In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, the Federal Court of Appeal addressed the situation where a decision could be final or interlocutory, depending upon the result. At paragraph 98 of its decision, the Federal Court of Appeal held that a decision that could be either interlocutory or final, depending on how it was decided, must nevertheless be considered vital to the final resolution of the case, regardless of the outcome.

[11] As a consequence, I am of the view that I should exercise my discretion *de novo* in this matter: see also *Vogo Inc. v. Acme Window Hardware Ltd. et al.*, [2004] F.C.J. No. 1042, 2004 FC 851, and *AstraZeneca Canada Inc. v. Apotex Inc.*, [2005] F.C.J. No. 74, 2005 FC 43.

General Principles on Motions to Strike a Statement of Claim

[12] Rule 174 of the *Federal Courts Rules* establishes that a pleading must contain a concise statement of the material facts on which a party relies.

[13] When a particular cause of action is pleaded, the claim must contain material facts satisfying all the necessary elements of the cause of action. Otherwise, the inevitable conclusion will be that such a claim discloses no reasonable cause of action: see *Benaissa v. Canada (Attorney General)*, [2005] F.C.J. No. 1487 and *Howell v. Ontario* (1998), 159 D.L.R. (4th) 566.

[14] There must be facts to support the claim - the bare assertion of a conclusion is not sufficient: see *Malkine v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 789 and *Canadian Olympic Assn. v. USA Hockey Inc.*, (1997), 74 C.P.R. (3d) 348 at 350-351 (F.C.T.D.), [1997] F.C.J. No. 824.

[15] That said, as the Federal Court of Appeal observed in *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 255, [2002] F.C.J. No. 882, although a pleading may be very broad and encompassed in general terms, it should not be struck out so long as a cause of action, however tenuous, can be gleaned from a perusal of the statement of claim.

[16] Although the courts have historically demanded strict compliance with the technical rules of pleading in defamation matters, there has been a move in recent years to take a more liberal approach to pleadings in such cases. Nevertheless, pleadings in defamation cases remain more important than in any other class of actions: see *Lysko v. Braley*, [2006] O.J. No. 1137, at paragraph 91. Plaintiffs will still be required to provide adequate disclosure of the basis of the claim, and to properly define the issues: see E.R. Brown, 2004, *The Law of Defamation in Canada*, (loose-leaf) Toronto: Carswell at pp. 19-3 to 19-6.

[17] The onus on the party moving to strike a statement of claim is heavy, and it must be shown that it is beyond doubt that the case cannot possibly succeed at trial. Only if there is no chance of success, or to put it another way, if the action is certain to fail, can the Statement of Claim be struck out: see *Shubenacadie* cited above, and *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959.

Analysis

[18] The plaintiffs' statement of claim relates to three incidents, where, the plaintiffs say, government agents made comments about Mr. Leahy to individuals involved in the immigration process. The statement of claim asserts that these comments were defamatory, and further, that they amounted to intentional interference with the plaintiffs' contractual relations with their clients.

[19] Dealing first with the defamation claims, there are three essential elements of the tort of defamation: see E.R. Brown, previously cited at pp. 19-16 to 19-74.

[20] That is, the plaintiffs must show that:

1. the words complained of are defamatory;
2. the words in question refer to one or both of the plaintiffs; and
3. the words in question were published to a third party.

[21] As a general rule, the precise words complained of should be set out in a statement of claim. Ideally they should be set out verbatim, or, at a minimum, with sufficient particularity as to allow the defendant to respond: *Jensen v. Alberta*, [2002] A.J. No. 1078.

[22] Absolute precision cannot, however, be demanded in relation to oral communications, which may not have been recorded, and will depend upon witnesses' recollections of what was said.

[23] In this case, the plaintiffs have paraphrased the words complained of in all but one case, and have pleaded that they are defamatory. The statements with which the plaintiffs take issue are clear from the statement of claim, as are the circumstances in which those statements were made.

[24] Moreover, it is clear from the statement of claim that the words in question refer to Mr. Leahy, and that they were published to third parties.

[25] In my view, the plaintiffs have pleaded the essential elements of the tort of defamation. As the prothonotary noted in her decision, it is of course open to the defendant to bring a motion for

particulars, in the event that additional information is deemed necessary by the defendant prior to delivery of a statement of defence.

[26] Insofar as the claims based on intentional interference with economic or contractual relations are concerned, there are three essential elements of this tort. That is, a plaintiff must show:

1. The existence of a valid contract between the plaintiffs and a third party;
2. That the defendant interfered or attempted to interfere in the plaintiff's contract;
3. That the interference was deliberate, and done with knowledge of or recklessness as to the existence of the contract; and
4. The interference was direct.

It is not necessary that the defendant's action actually cause the third party to breach their contract with the plaintiffs: see G.H.L. Fridman, *The Law of Torts in Canada*¸ (2d ed.), Toronto: Carswell, 2002 at 791 to 814.

[27] In this case, the statement of claim identifies the contracting parties as being the plaintiffs and the named clients: see statement of claim "Incident 1", paragraph 1, "Incident 2", paragraph 3, and "Incident 3", paragraph 2.

[28] Moreover, the statement of claim states that the interference by government agents was done directly, through defamatory statements made about Mr. Leahy to the plaintiffs' clients by government agents. The claim further asserts that the statements were made with knowledge of the contractual relationship between the plaintiffs and their clients, and that they were intended to

interfere with those contractual relations: see statement of claim “Incident 1”, paragraph 1, “Incident 2”, paragraph 1, and Incident 3”, paragraph 3.

[29] Thus the plaintiffs have pleaded the essential elements of the tort of intentional interference with economic or contractual relations. Once again, if the defendant is of the view that it requires additional facts for it to plead a defence, it may bring a motion for particulars.

Conclusion

[30] For these reasons, the appeal is dismissed.

Costs

[31] The plaintiffs shall have five business days in which to provide written submissions, not to exceed three pages, plus whatever relevant supporting documentation on which the plaintiffs wish to rely with respect to the issue of costs.

[32] The defendant shall then have five business days in which to provide its own written submissions on the issue of costs, which shall also not exceed three pages in length, plus supporting documentation. Any issue that the defendant may have as to the appropriateness of the supporting documentation on which the plaintiffs seek to rely in relation to the issue of costs may be addressed at that time.

[33] The plaintiffs shall then have three business days in which to file reply submissions, which are not to exceed two pages in length.

"Anne Mactavish"
Judge

Ottawa, Ontario
May 20, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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