

Federal Court



Cour fédérale

Date: 20140225

Docket: T-874-13

Citation: 2014 FC 174

Ottawa, Ontario, February 25, 2014

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

LARRY PETER KLIPPENSTEIN

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal of an order made by Prothonotary Lafrenière dated July 8, 2013, wherein the statement of claim of Larry Peter Klippenstein was struck out without leave to amend and costs were awarded to the defendant.

[2] Larry Peter Klippenstein was self-represented at the hearing before the Court.

Factual background

[3] On September 20, 2012, Larry Peter Klippenstein (the plaintiff) initiated an application for judicial review of the Canadian Human Rights Commission's decision not to hear his complaint (Court File no. T-1744-12).

[4] On October 3, 2012, the plaintiff attempted to file evidence with unsworn affidavits. The plaintiff refused to swear his affidavit on the Bible that was provided by this Court's Registry in Winnipeg because it was not an "undefiled" Bible. Being of Mennonite faith, he stated that acting otherwise would be an offence to his conscience. The Registry sought directions from the Court regarding the unsworn affidavit evidence.

[5] On October 5, 2012, Justice Gleason of this Court issued directions in which she directed the plaintiff, pursuant to rules 363 and 80 of the *Federal Courts Rules*, SOR/98-106 (the Rules) and to section 15 of the *Canada Evidence Act*, RSC 1985, c C-5, to either obtain access to an "undefiled" Bible and swear on it, or to make a solemn affirmation to affirm his affidavit.

[6] The plaintiff attempted to appeal this order for directions directly to the Supreme Court of Canada. The appeal was rejected by the registrar.

[7] On April 11, 2013, Chief Justice Crampton of this Court issued a Notice of Status Review asking the plaintiff to submit representations explaining why his application should not be dismissed for delay. The plaintiff made no submission concerning the delay.

[8] On April 30, 2013, Justice Manson of this Court issued an order dismissing the application for judicial review for delay.

[9] On May 6, 2013, the plaintiff sent a letter to Court explaining that he never received the Notice of Status Review.

[10] On May 8, 2013, Justice Manson of this Court issued directions directing the plaintiff to either bring a motion pursuant to Rule 399 to set aside the April 30, 2013 order, or to appeal the order to the Federal Court of Appeal. The plaintiff did neither and Justice Manson issued an order dismissing the judicial review application in the T-1744-12 proceeding.

[11] On May 16, 2013, the plaintiff filed a statement of claim commencing an action against the Crown and initiating the present file (Court File no. T-874-13). In his statement of claim, he sought *inter alia* an order declaring the Federal Court Registry in Winnipeg in contempt of Court, an order directing a “Court who has the Jurisdiction” to hear his application, and an interim order providing a means of affirming or swearing his affidavit evidence that does not offend his conscience and an award of costs.

[12] On May 23, 2013, the plaintiff applied for leave to appeal the April 30, 2013 Order in the T-1744-12 proceeding directly to the Supreme Court of Canada. After initially rejecting the application, the Supreme Court of Canada Registry accepted the application although it appeared to be premature.

[13] On June 17, 2013, the defendant filed a motion to strike the plaintiff's statement of claim in the T-874-13 proceeding pursuant to Rule 221(1).

[14] On July 8, 2013, Prothonotary Lafrenière of this Court issued an order in which he struck out the applicant's statement of claim in the T-874-13 proceeding without leave to amend and awarded costs in the amount of \$300.00 to the defendant (Prothonotary's Order in Plaintiff's Motion Record at p 50).

[15] On July 15, 2013, the plaintiff applied to appeal the order to this Court.

[16] On October 17, 2013, the Supreme Court of Canada dismissed the appeal of the Court order dated April 30, 2013 in the T-1744-12 proceeding.

Impugned decision: the Order of Prothonotary Lafrenière dated July 8, 2013

[17] In his Order, Prothonotary Lafrenière concluded that the plaintiff's statement of claim disclosed no reasonable cause of action and constitutes an abuse of process.

[18] The Prothonotary stated that the test to strike out a statement of claim is if it is "plain and obvious" that the claim discloses no reasonable claim (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 74 DLR (4th) 321 [*Hunt*]). The Prothonotary recalled that the "burden on the defendant is very high and the Court should exercise its discretion to strike only in the clearest of cases" (Plaintiff's Motion Record at p 51).

[19] The Prothonotary determined that the statement of claim was “fundamentally flawed” in that its “allegations are incomprehensible and consist of bald statements, arguments, and conclusions”. He also noted that it contained no material facts indicating who interfered with the plaintiff’s rights, what exactly was done to interfere with his rights and when and where the interference took place (Plaintiff’s Motion Record at p 52).

[20] The Prothonotary also concluded that the statement of claim should be struck out as an abuse of this Court’s process. The Prothonotary insisted that the issues contained in the statement of claim are the same as those that were before the Court in the related T-1744-12 proceeding. In that proceeding, the plaintiff failed to act diligently and his claim was dismissed for delay. Since the plaintiff is attempting to re-litigate issues that were raised or could have been raised during those proceedings and to collaterally attack Justice Gleason’s directions, the Prothonotary found that the present proceedings were “a waste of judicial resources, vexatious and an abuse of the Court’s process” (Plaintiff’s Motion Record at p 52-53).

Issues

[21] The Court is of the view that this appeal raises the issue of whether the Prothonotary erred in striking out the plaintiff’s statement of claim on the grounds that it lacked a reasonable cause of action or that it constituted an abuse of process.

Relevant provisions

[22] The following provisions of the *Federal Courts Act*, RSC 1985, ch F-7 (the Act) are relevant to the case at hand:

JURISDICTION OF
FEDERAL COURT

COMPÉTENCE DE LA
COUR FÉDÉRALE

Relief against the Crown

Réparation contre la Couronne

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

17. (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

...

[...]

How proceeding against Crown instituted

Acte introductif d'instance contre la Couronne

48. (1) A proceeding against the Crown shall be instituted by filing in the Registry of the Federal Court the original and two copies of a document that may be in the form set out in the schedule and by payment of the sum of \$2 as a filing fee.

48. (1) Pour entamer une procédure contre la Couronne, il faut déposer au greffe de la Cour fédérale l'original et deux copies de l'acte introductif d'instance, qui peut suivre le modèle établi à l'annexe, et acquitter la somme de deux dollars comme droit correspondant.

...

[...]

[23] The following provisions of the *Federal Courts Rules* are also applicable to the present appeal:

PRELIMINARY
OBJECTIONS

CONTESTATIONS
PRÉLIMINAIRES

Motion to object

Requête en contestation

208. A party who has been served with a statement of claim and who brings a motion to object to

208. Ne constitue pas en soi une reconnaissance de la compétence de la Cour la présentation par une partie :

(a) any irregularity in the commencement of the action,

(b) the service of the statement of claim,

(c) the Court as not being a convenient forum, or

(d) the jurisdiction of the Court, does not thereby attorn to the jurisdiction of the Court.

a) d'une requête soulevant une irrégularité relative à l'introduction de l'action;

b) d'une requête contestant la signification de la déclaration;

c) d'une requête remettant en question la qualité de forum approprié de la Cour;

d) d'une requête contestant la compétence de la Cour.

STRIKING OUT PLEADINGS

Motion to strike

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

RADIATION D'ACTES DE PROCÉDURE

Requête en radiation

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un

and may order the action be dismissed or judgment entered accordingly.

abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

DISPUTE RESOLUTION SERVICES

SERVICES DE RÈGLEMENT DES LITIGES

Order for dispute resolution conference

Ordonnance de la Cour

386. (1) The Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.

386. (1) La Cour peut ordonner qu'une instance ou une question en litige dans celle-ci fasse l'objet d'une conférence de règlement des litiges, laquelle est tenue conformément aux règles 387 à 389 et aux directives énoncées dans l'ordonnance.

...

[...]

CONTEMPT ORDERS

ORDONNANCES POUR OUTRAGE

Contempt

Outrage

466. Subject to rule 467, a person is guilty of contempt of Court who

466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

(a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;

a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance;

(b) disobeys a process or order of the Court;

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

(c) acts in such a way as to interfere with the orderly administration of justice, or to

impair the authority or dignity of the Court;

(d) is an officer of the Court and fails to perform his or her duty; or

(e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.

c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour;

d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions;

e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.

Analysis

[24] As a preliminary matter, the Court notes that the plaintiff filed a new affidavit in reply. As a general rule, evidence on appeal should be limited to what was before the Prothonotary and new evidence is only admissible when it could not have been made available earlier, it will serve the interests of justice, it will assist the court, and it will not seriously prejudice the other side (*Shaw v Canada*, 2010 FC 577 at paras 8-9, [2010] FCJ No 684 (QL)). Upon hearing the parties on this issue, the Court is of the view that the plaintiff's affidavit can be considered by the Court.

[25] The test setting out the standard of review for discretionary orders of Prothonotaries was outlined by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.*, (CA) [1993] 2 FC 425, 149 NR 273. This test was subsequently affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450, and was then reformulated by the Federal Court of Appeal in *Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19, [2004] 2 FCR 459:

[19] ... Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

- (a) the questions raised in the motion are vital to the final issue of the case, or
- (b) the orders are 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.

[26] When the Court is reviewing a discretionary decision by a Prothonotary dealing with questions that are vital to the final issue of the case, it must conduct a *de novo* review (*Sauvé v Canada*, 2012 FCA 280, [2012] FCJ No 1415 (QL)). In the present case, the appeal from the decision of the Prothonotary striking out the plaintiff's statement of claim raises an issue vital to the case and should, therefore, be assessed *de novo*.

[27] Rule 221(1) provides that, on motion, the Court may order that a pleading, or a part of a pleading, be struck out, with or without leave to amend. The defendant claims that the plaintiff's statement of claim can be struck out pursuant to paragraph (b) because it discloses no reasonable cause of action, and (f) because it constitutes an abuse of process.

[28] The jurisprudence clearly states that a pleading must not be struck if, assuming that the facts pleaded are true, there is a reasonable prospect that the claim will succeed. In doing so, courts must adopt a generous approach and err on the side of permitting a novel but arguable claim to proceed to trial (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21, [2011] 3 SCR 45). The test to apply is, as established in *Hunt*, above, whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim.

[29] When assessing if a statement of claim contains a reasonable cause of action, a court must look at the presence of material facts linking the defendant to the allegations made or the relief sought (*Chavali v Canada*, 2001 FCT 268 at para 21, 202 FTR 166, aff'd *Chavali v Canada*, 2002 FCA 209, 237 FTR 318).

[30] The plaintiff raised a number of issues at hearing before this Court.

[31] The plaintiff submits that the Federal Court Registry in Winnipeg is in contempt of court for failing to provide a suitable Bible for the purpose of swearing affidavits. The plaintiff relies on Rule 466 which provides a list of situations when an individual may be in contempt of court.

[32] However, the Court agrees with the defendant that Rule 466 only applies to the conduct of individuals during the course of existing proceedings, and cannot form the basis of a cause of action (*Johnson v Canada (Attorney General)*, 2008 FC 119 at para 5, [2008] FCJ No 144 (QL)).

Furthermore, this Court has ruled that contempt proceedings are not available against Her Majesty the Queen or federal departments (*Ayangma v Canada*, 2002 FCT 79 at para 18, 215 FTR 26). Accordingly, the plaintiff's argument must fail.

[33] Also, although the plaintiff brought a statement of claim before this Court, he now alleges that this Court does not have jurisdiction to hear the claim and, hence, it should go to another court or another body pursuant to Rule 386. However, Rule 386 allows the Court to refer a matter to a dispute resolution conference, it cannot be used to transfer a proceeding to another jurisdiction. The

plaintiff could no more rely on Rule 208, which deals with preliminary objections available to the party served with a statement of claim, and not the one initiating the proceedings.

[34] In addition, the statement of claim is very vague and is entirely devoid of material facts clearly linking the defendant to the relief sought by the plaintiff. More particularly, the statement of claim does not identify a cause of action against the Crown, allege any tortious act on the part of a Crown servant or allege that it is vicariously liable for a tort committed by a servant of the Crown.

[35] On that basis, the Court is therefore of the view that the Prothonotary did not err by finding that the statement of claim did not disclose a reasonable cause of action.

[36] Finally, upon reading the statement of claim, the claims made by the plaintiff are almost identical to the claims related to the T-1744-12 proceeding, which was dismissed for delay. The plaintiff is merely attempting to re-litigate what appear to be the same issues that were before this Court, and that were eventually appealed to the Supreme Court of Canada and dismissed. In these circumstances, it constitutes an abuse of this Court's process.

[37] For all of these reasons, the Court is of the view that the Prothonotary did not err in striking out the plaintiff's statement of claim.

ORDER

THIS COURT ORDERS that:

1. The motion appealing the order of Prothonotary Lafrenière, dated July 8, 2013, is dismissed;
2. The plaintiff shall pay to the defendant costs in the amount of \$500.00 inclusive of disbursements and taxes.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-874-13

STYLE OF CAUSE: LARRY PETER KLIPPENSTEIN
v HER MAJESTY THE QUEEN

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: FEBRUARY 18, 2014

**REASONS FOR ORDER AND
ORDER:** BOIVIN J.

DATED: FEBRUARY 25, 2014

APPEARANCES:

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(ON HIS OWN BEHALF)

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