Federal Court of Appeal | Cour d'appel fédérale

Date: 20170410

Docket: A-237-16

Citation: 2017 FCA 74

CORAM: **SCOTT J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

JOHN LAUER

Appellant

and

THE ATTORNEY GENERAL OF CANADA (RCMP)

Respondent

Heard at Charlottetown, Prince Edward Island, on March 6, 2017.

Judgment delivered at Ottawa, Ontario, on April 10, 2017.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

I. The Appeal

[1] In an Order dated May 25, 2016, Annis J. of the Federal Court (the Judge) dismissed an appeal filed by Mr. John Lauer (the appellant) against an Order rendered by Prothonotary R. Morneau (the Prothonotary) dated April 18, 2016, that had struck out the appellant's entire amended statement of claim filed on February 29, 2016.

II. Procedural History

[2] The appellant was acquitted on appeal in 2011 following a Royal Canadian Mounted Police (RCMP) criminal fraud investigation against him. The appellant subsequently filed two public complaints. His first complaint was filed in 2011 internally with the RCMP regarding the wrongful conduct of certain of its employees during the fraud investigation. In the first complaint, the RCMP later concluded that the appellant's complaint was unfounded.

[3] The appellant filed a second complaint in 2013 seeking the review of this decision before the RCMP's Commission for Public Complaints. Following its review, the Commission for Public Complaints issued a report overturning the first decision and found that his complaint regarding the conduct of certain RCMP employees during the fraud investigation was supported.

[4] In 2013, the appellant filed a civil action in the Prince Edward Island Supreme Court against the Attorney General of Canada and two RCMP employees claiming that he had been the victim of a negligent investigation, malicious prosecution and breach of trust as a result of the RCMP's fraud investigation against him. On April 24, 2015, this claim was dismissed on the basis that these allegations were unsupported.

[5] He also filed an initial statement of claim before the Federal Court in 2013 seeking identical relief, which was subsequently dismissed the same year by the Prothonotary, since his claim was *res judicata* in view of the decision rendered by the Prince Edward Island Supreme Court.

[6] In 2015, the appellant filed a new statement of claim before the Federal Court seeking 14.5 million dollars in damages, alleging that the RCMP's conduct during the fraud investigation and the handling of his two public complaints amounted to negligence, conspiracy, unlawful conduct, misfeasance in public office, nonfeasance in public office and breach of trust. It is this statement of claim, which was subsequently amended, that now lies at the core of this appeal.

[7] That amended statement of claim had been filed further to an Order rendered by Mactavish J. of the Federal Court on February 1, 2016, which confirmed on appeal an earlier Order rendered by the Prothonotary on October 29, 2015, striking out in the appellant's original statement of claim allegations against the RCMP, including individual employees, with respect to their conduct during the fraud investigation.

[8] Mactavish J. concluded that the appellant was barred from filing another action related to the conduct of the RCMP during the fraud investigation, in light of the Prothonotary's prior direction in this regard. Mactavish J. concluded that the Prothonotary did not err by striking out his statement of claim, since his repeated claims and unsupported allegations regarding the RCMP's conduct in the fraud investigations were scandalous, frivolous or vexatious and otherwise amounted to an abuse of process. The appellant was, however, granted leave by Mactavish J. to file an amended statement of claim but only with respect to his claims against the RCMP relating to its conduct in the two public complaints brought against the RCMP by the appellant.

[9] The appellant filed an amended statement of claim on February 29, 2016. It was struck out by the Prothonotary on April 16, 2016, for reasons similar to his previous Order, namely on the basis that his claim did not disclose a reasonable cause of action, was vexatious and amounted to an abuse of process.

III. The Decision Under Appeal

[10] The appellant appeal from the Prothonotary's April 16, 2016 Order was dismissed by the Judge. In coming to his decision, the Judge considered Rule 174 of the *Federal Courts Rules* S.O.R./98-106 (the Rules) and relied on the decision of this Court in *St. John's Port Authority v. Adventure Tours Inc*., 2011 FCA 198, 420 N.R. 149 at paragraph 29. He noted that a plaintiff must plead sufficient particulars and material facts to support every cause of action pleaded, in this case, misfeasance in public office, breach of trust and conspiracy. The Judge came to the conclusion that the appellant's amended statement of claim did not provide any material facts to support his claims of misfeasance in public office, breach of trust and conspiracy, and that it was plain and obvious that it should be struck pursuant to Rule 221(1)(*a*) of the Rules because it disclosed no reasonable cause of action.

[11] The Judge also found that the appellant's amended statement of claim contained allegations regarding the RCMP's conduct in the fraud investigation, despite Mactavish J.'s Order, which had found that these allegations had been properly struck by the Prothonotary's Order dated October 7, 2015. He concluded that the appellant was attempting to re-litigate the matter of the RCMP's conduct in the fraud investigation and considered this to be an abuse of process pursuant to Rule 221(1)(*f*) of the Rules.

IV. The Standard of Review

[12] In sitting on an appeal from an order, which dismissed an appeal from a Prothonotary's discretionary order striking an amended claim under Rule 221(1)(*a*), (*c*) and (*f*) of the Rules, the standard of review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, applies: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943 (QL). The Judge's decision will stand unless the appellant identifies an extricable error of law or an overriding and palpable error committed by the Judge.

V. The Appellant's Representations

[13] At the hearing, the appellant proceeded firstly to recall the events that have led him to file this appeal, including the allegations associated with the RCMP's fraud investigation which had been struck out by Mactavish J. as an abuse of process.

[14] He then sought permission to introduce, under Rule 351 of the Rules and in support of his appeal, the following materials that had been filed in Federal Court file T-1297-15: i) a briefing note detailing the risks faced by the RCMP given his 2011 Public Complaint (the Baillie briefing note); ii) an email confirming that someone had interfered in his 2011 Public Complaint investigation (the Baillie Email) and thus committed Code of Conduct violations; and iii) a letter sent by Sergeant K.G. MacKay (the Letter of Disposition). The appellant's motion was denied at the hearing as it failed to meet the test set out by this Court in *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270; and *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8

(SCC) for the introduction of new evidence and because Rule 221(2) of the Rules specifies that no evidence shall be heard on a motion for an order under paragraph 221(1)(*a*).

[15] Notwithstanding the fact that the appellant's Memorandum of Fact and Law had not identified a precise error committed by the Judge, at the hearing he argued that the Judge erred by considering the matter as a claim based on the RCMP's conduct in the fraud investigation, rather than a claim aimed at the RCMP's handling of his complaints.

[16] The appellant also asserted that his pleadings on the causes of action and the factual bases presented were sufficient on their own to allow his action to proceed. He also claimed that the Judge should have reviewed the entire file and taken notice amongst others of the documents that he tried to introduce before this Court (the Baillie Email, the Letter of Disposition and the Baillie briefing note) as they established a reasonable prospect of success at trial.

[17] The appellant then turned the Court's attention to the case law citing *Barkley v. Canada*, 2014 FC 39, [2014] F.C.J. No. 43 (QL) at paragraph 15, which reaffirms *Brazeau v. Canada (Attorney General)*, 2012 FC 648, [2012] F.C.J. No. 1489 (QL), affirming the principle that pleadings must be read generously and that if there is a reasonable prospect of success, the matter should be allowed to proceed to trial. He also referred the Court to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (QL) at paragraph 33 [*Hunt*] where it is stated that it is only where it is plain and obvious that a statement of claim discloses no reasonable cause of action that it should be struck. Finally, he relied on *Sivak v. Canada*, 2012 FC 272, 406 F.T.R. 115 at paragraph 53 [*Sivak*] in support of his claim that he suffered irreparable harm to his

reputation, loss of prestige and severe mental distress as a result of the Respondent's improper plan to issue false conclusions in its disposition of his public complaints.

VI. The Respondent's Submissions

[18] In response, counsel for the respondent underlined that when dealing with a motion pursuant to Rule 221(1)(*a*) of the Rules, a judge is confined to the pleadings as written. Consequently, the Judge could not consider the materials in the Federal Court files the appellant relied upon. The facts, as pleaded, are to be presumed as true and the Judge is tasked with evaluating whether the facts as stated reveal a cause of action.

[19] The respondent also argued that the appellant had not provided a basis for a cause of action resulting from the complaints process because he had previously sought and obtained a remedy with respect to the RCMP's response to his initial complaint. Since the final report issued by the Commission for Public Complaints was favourable to the appellant as it overturned the RCMP's initial response to the appellant's complaint, there is consequently no basis to support a cause of action. In its view, the claim was properly struck.

VII. Analysis

[20] I am of the view that this appeal should be dismissed for the following reasons.

[21] I have reviewed the amended statement of claim filed by the appellant on February 29, 2016. The first 16 paragraphs recall the factual matrix related to the fraud investigation. I must

point out that I cannot find any error with respect to the Judge's conclusion that the appellant's allegations with respect to the fraud investigation constituted an abuse of process. At the hearing, the appellant claimed that these paragraphs were inserted in his amended statement as factual background information. Since Mactavish J. confirmed the Prothonotary's October 7, 2015, decision to strike the paragraphs of the initial statement of claim related to the conduct of the RCMP in the fraud investigation, I am of the view that it was open to the Judge to find that they constituted an abuse of process under Rule 221(1)(*f*) of the Rules as they could be read as an attempt to re-litigate matters that had been settled by judgments in previous proceedings.

[22] I acknowledge, as pleaded by the appellant, the principle that a motion to strike should only be granted where it is plain and obvious that the action cannot succeed, assuming the facts advanced in the statement of claim to be true (see *Hunt*). It is also well settled that in considering a motion to strike, the statement of claim should be read as generously as possible as stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 (QL) at paragraph 14. One should accommodate any inadequacies in the statement of claim that are the result of deficiencies in the drafting of the document.

[23] As I turn to paragraph 19 of the appellant's amended statement of claim, I note that it recites the elements of a claim for misfeasance in public office and alleges the existence of a conspiracy, but fails to provide specific material facts in support thereof. There is no identification of the public officers who acted improperly, nor are there specific facts alleged to establish how they would have acted maliciously.

[24] As stated in *Sivak* at paragraph 54, citing *Normart Management Ltd. v. West Hill Redevelopment Co.*, (1998), 37 OR (3d) 97 (CA), and relied upon by the appellant, where the tort of conspiracy is alleged, the following elements are necessary. All the parties to the conspiracy must be identified and their relationship to each other must be described. Overt acts of each of the alleged conspirators in pursuit of the conspiracy must be pled with clarity including the times and dates of such acts. The pleadings must also identify the injury and the damage suffered by the plaintiff and the monetary loss sustained as a consequence thereof.

[25] In this case, none of these elements are to be found.

[26] With respect to the breach of trust claim, it should at a minimum describe the relationship between the parties and identify the conduct and the specific facts that can support a breach of the duty owed to the plaintiff. Here again, the amended statement of claim is deficient.

[27] In view of the appellant's failure to bring forward sufficient material facts for every cause of action asserted, there is no reviewable error in the Judge's order. The Judge applied the correct principles when considering the appellant's amended statement of claim. He guided himself correctly by noting that the amended statement of claim needed to contain sufficient facts to support every cause of action alleged as per Rule 174 of the Rules.

[28] I must also reject the appellant's argument that the Judge should have considered documents in the file and taken notice, amongst others, of the documents that he tried to introduce before this Court (the Baillie Email, the Letter of Disposition and the Baillie briefing

note), as they established his prospect of success at trial to be reasonable. As stated above, it is well established in jurisprudence that on a motion to strike, no evidence may be considered to decide whether a claim reveals a reasonable cause of action. The Judge was confined to assuming that the facts as pleaded are true and to determine whether they disclosed a cause of action (*Hunt*).

[29] Finally, the Judge did not err in denying the Appellant leave to amend his claim yet again. First, the Appellant failed to provide material facts to support his bald assertion that his public complaint was improperly handled at the initial stage. Moreover, it is not clear what cause of action could lie from the initial decision; the Appellant has already obtained a remedy, as the Commission for Public Complaints struck the initial RCMP decision and issued one that was favourable to him.

[30] Consequently, I conclude that this appeal should be dismissed with costs and leave to further amend the amended statement of claim be denied.

"A.F. Scott"

J.A.

“I agree.
Yves de Montigny J.A.”

“I agree.
J. Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-237-16
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PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
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CONCURRED IN BY:	DE MONTIGNY J.A. WOODS J.A.
DATED:	APRIL 10, 2017

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