Court of Queen’s Bench of Alberta

Citation: Torrance v Calgary Catholic School District No 1, 2017 ABQB 488

Date: 20170802
Docket: 1501 13939
Registry: Calgary

2017 ABQB 488 (CanLII)

Between:

Edward Torrance

Plaintiff/Respondent

- and -

Calgary Catholic School District No. 1

Defendant/Applicant

Reasons for Judgment
of the
Honourable Mme. Justice Michele H. Hollins

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[1] The Defendant, the Calgary Catholic School District No. 1 (“CCSB”) has applied to have the claim of the Plaintiff/Respondent, Edward Torrance (“ET”) either struck out under Rule 3.68 of the *Alberta Rules of Court* or summarily dismissed under Rule 7.3(1) of the *Alberta Rules of Court*.

Background

[2] In 2011, ET retained a psychologist, Mr. Ken Kwan (“Kwan”) to provide an assessment of his then 6 year old son, MT, in the context of a custody/access dispute. MT was and is a student at a school within the Defendant’s administration. ET asked Kwan to communicate with MT’s school counsellor regarding MT, which Kwan did. Kwan ultimately produced a report with which ET took issue and in fact, sued Kwan for defamation (the “Defamation Action”).

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[3] ET also reported Kwan to the College of Psychologists ("CAP") which resulted in disciplinary proceedings against Mr. Kwan (the "CAP Proceedings"). Under the *Health Professions Act (Alberta)*, CAP issued a Notice to Attend and Produce dated September 3, 2014 to the Defendant (the "Notice"). The Notice was addressed to Ms. Rosanna Taylor who was the school counsellor at MT's school and an employee of the Defendant. The Notice required Ms. Taylor to bring to the disciplinary hearing "MT's counselling file from September 2010 to May 2011".

[4] In response to the Notice, the Defendant's lawyer, Mr. Hokanson, collected a number of written records from the school and provided them to the lawyers for CAP and Kwan. These records were described as one page of Ms. Taylor's counselling notes and 10 additional emails and letters; one from MT's mother to the school and the remainder from ET to MT's school (the "Records"). ET received no notice of the Notice being issued to the Defendant or of the Defendant's response.

[5] Although the parties had intended to address protections for the confidentiality of the Records at Kwan's hearing, the disciplinary hearing did not proceed as a settlement was reached. Kwan then wished to use certain of the Records disclosed to him in the CAP Proceedings in his defence of the Defamation Action. He applied for a Court Order allowing him to use 6 of the 11 Records in the Defamation Action, specifically the one page of Ms. Taylor's notes and 5 other letters from ET to personnel at MT's school. Master Mason granted that Order on June 22, 2015 after several days of submissions. ET unsuccessfully appealed that Order to the Court of Queen's Bench and from there to the Alberta Court of Appeal, again unsuccessfully.

[6] ET also filed a complaint with the Privacy Commissioner of Alberta alleging breaches of the *Freedom of Information and Protection of Privacy Act (Alberta)* ("*FOIP*"). The Commissioner declined to investigate in the face of Master Mason's decision and advised ET of this decision on July 6, 2015.

[7] Also concurrently, ET reported Mr. Hokanson to the Law Society of Alberta ("LSA"). While not in the filed material, this Court was advised that ET's complaint against Mr. Hokanson was dismissed, which fact did not appear to be contested.

[8] The Defendant applies to either strike out the Amended Statement of Claim in this Action or alternatively, to have the claim summarily dismissed. I grant that application and, for the reasons that follow, do so under both Rule 3.68 or Rule 7.3(1).

The Plaintiff's Cause of Action

[9] ET was not represented by counsel at any time in this Action, although he had been for portions of the Defamation Action. His Amended Statement of Claim makes the identification of his particular cause(s) of action in this lawsuit somewhat difficult. Much of the claim is devoted to alleging that the Defendant's provision of the Records to CAP and Kwan in the course of the CAP Proceedings was, in ET's words, "criminal" and "illegal", "abuse", "criminal abuse" and "child and father abuse". Counsel for the Defendant pointed to paragraph 33 of the Amended Statement of Claim as a fair summary of the Plaintiff's claim and I agree. It reads:

> "CCSD has caused the Plaintiff [ET] and his innocent Child to suffer serious emotional and psychological damage, stress, humiliation, irreparable harm to reputation, serious financial loss, injury and other loss and damage as a result of

> the immoral and illegal distribution of the Plaintiff's child's Private and Confidential School Counselling Records and the criminal/illegal actions of CCSD through their lawyer, Mr. Hokanson."

[10] ET's Amended Statement of Claim does not allege that the Notice itself was illegal but rather that the Defendant did not comply with the Notice (paragraph 18 of the Amended Statement of Claim). This non-compliance, which ET believes is illegal, is in his view evidenced by the following:

(1) The Notice was addressed to Ms. Taylor and yet Mr. Hokanson responded (paras. 10 and 14 of the Amended Statement of Claim);

(2) The Notice required Ms. Taylor to bring the counselling file to the hearing and in fact, the Records were provided before the hearing (paras. 11, 13, 16 of the Amended Statement of Claim);

(3) ET was not provided with notice of the Notice (para. 12 of the Reply to the Statement of Defence); and

(4) The Notice required Ms. Taylor to produce MT's "counselling file" and ET maintains that only the one page of Ms. Taylor's counselling notes should have been included as part of the "counselling file" (this is not actually pleaded in the Amended Statement of Claim but was argued before me).

Striking out a Claim (Rule 3.68)

[11] On an application to strike out a pleading under Rule 3.68, this Court may strike out a pleading if any one or more of the following conditions exist:

(1) The pleading discloses no reasonable claim (Rule 3.68(2)(b));

(2) The pleading is frivolous, irrelevant or improper (Rule 3.68(2)(c)); or

(3) The pleading constitutes an abuse of process (Rule 3.68(2)(d)).

[12] The Defendant argues that the propriety of the Defendant's disclosure of the Records has been already been confirmed in three separate decisions made in the Defamation Action and therefore a further attempt to have this Court declare otherwise should be struck out as an abuse of process. I agree.

[13] Counsel for the Defendant properly conceded that this case may not fit squarely within the doctrine of *res judicata* as the CAP Proceedings and the Defamation Action were instituted by ET against Mr. Kwan, whereas this is an action by ET against a different defendant. In other words, there is no mutuality of parties in the related lawsuits. However, as evidenced by the Plaintiff's own pleading, this claim arises from the same facts and events as the CAP Proceedings and the Defamation Action. I have jurisdiction to consider the doctrine of abuse of process even where *res judicata* may not apply (*Reece v. Edmonton (City)*, 2011 ABCA 238 at para. 17).

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[14] The following review of the prior decisions in the Defamation Action will illustrate the overlap between those decisions and the one a future trial judge would be called upon to decide in the within Action.

Decision of the Master in Chambers (ET v. Rocky Mountain Play Therapy Institute Inc., 2015 ABQB 396)

[15] Master Mason first addressed her jurisdiction to hear ET's standing to oppose the release of the Records to Kwan in the Defamation Action by saying "The records at issue engage privacy issues relating to ET's son. In my view ET is entitled to address their use in this litigation". Clearly, the same underlying privacy concerns that seem to be the basis for this Action were front and centre in the initial application to Master Mason. ET, with the benefit of counsel at that time, had opportunity to make full argument regarding the propriety of disclosure of the Records before her.

[16] Master Mason considered the operation of *FOIP* and the *Health Professions Act* and concluded that no notice to ET of the Notice was required (paras. 38-41). In terms of the scope of disclosure, she characterized the disclosure as a "selective response" (para. 43) and rejected ET's argument that there was something improper about Mr. Hokanson providing the Records to CAP prior to the hearing as opposed to at the hearing itself (para.45).

Decision of the Court of Queen's Bench (T.(E.) v. Rocky Mountain Play Therapy Institute Inc., 2016 ABQB 108)

[17] Justice Strekaf, then of the Court of Queen's Bench, heard ET's appeal from Master Mason's decision and dealt squarely with ET's argument that "the records were produced "illegally" in the CAP proceeding" (para. 14). She agreed with Master Mason that there was nothing improper or illegal in the Defendant having provided the requested records in advance of the CAP hearing (para. 17). She further agreed that the records provided by the Defendant were documents that Mr. Kwan was entitled to use in his defence.

Decision of the Court of Appeal (ET v. Rocky Mountain Therapy Institute Inc., 2016 ABQB 320)

[18] The Court of Appeal was even stronger in its dismissal of ET's further appeal from Justice Strekaf's decision, saying:

> "There is no merit in any of the arguments ET advances. The chambers judge gave ET a fair and full hearing. ET takes issue with the subpoena process used in Mr. Kwan's scheduled disciplinary hearing that did not proceed. The appellant submits that documents from his son's school records were improperly or illegally obtained, having been produced prior to the scheduled hearing. ET complains that the person to whom the subpoena was directed should not have delivered them before the hearing commenced. That proposed procedure is inefficient and impractical."

[19] Not only did the Court of Appeal dismiss the appeal, it awarded full indemnity costs against ET because of the serious nature of the allegations of abuse being made, allegations that he continues to advance in this current Action.

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Abuse of Process: Re-litigation of issues

[20] I agree that the within claim is an attempt by ET to re-litigate the issues initially brought before Master Mason. ET's focus in the aforementioned motions and appeals appears to have been more on the timing of the provision of the Records, whereas before this Court he argued more strenuously that the definition of "counselling file" as that phrase was used in the Notice should not have included his own letters and emails. First, as mentioned, this is not pleaded. More importantly, the general propriety of the Defendant's disclosure, which is the unequivocal essence of this Action, was argued by ET’s counsel before Master Mason, whose decision was confirmed by two further levels of Courts.

[21] The rationale for striking pleadings which attempt to re-litigate the same issues is plain; we do not allow duplicate proceedings in part to avoid inconsistent legal results based on the same facts, which is precisely the risk here if the Plaintiff's Action is allowed to proceed.

[22] As better stated by Arbour, J in *Toronto (City) v. CUPE Local 79 (2003 SCC 63)*:

> “Rather than focus on the motive or the status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense….Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.” (para. 51).

[23] Further, given the repetitive allegations of abuse and illegality in the Plaintiff's Statement of Claim, none of which connect any facts to any actual illegality much less criminal abuse, the description used by Associate Chief Justice Rooke in striking an Action before him as an abuse of process may be apt:

> "…aside from the fact that this is clearly an attempt to re-litigate a matter that has already been determined by this Court, Onischuk's pleadings essentially complain about those actions of lawyers and judges involved in his prior action, alleging conspiracies against him, tampering with court transcripts and fils, misrepresentations, perjury and acting against the public interest. I have found the proceedings to contain the hallmarks of vexatious litigation. To allow Onishuck to continuously bombard counsel, the judiciary and this Court with lengthy pleadings, replete with inflammatory accusations, irrelevant legal argument, jurisprudence and legislation that advance no reasonable cause of action, is manifestly unfair to all parties involved and other participants vying for scare judicial resources. Consequently, to allow this action to proceed would surely bring the administration of justice into disrepute." (*Onischuk v. Alberta*, 2013 ABQB 89 at para. 35).

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[24] I find that the within Action is an abuse of process as it is an attempt by ET to re-litigate issues that have been previously determined as set out above and I grant the Defendant's application on that basis.

Summary Judgment

[25] Rule 7.3(1)(b) allows this Court to grant summary judgment dismissing a claim (R.7.3(3)(a)) when the claim is without merit. As our Court of Appeal has said, "Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication." (*Windsor v. Canadian Pacific Railway Ltd.*, 2014 ABCA 108 at para. 15). The record before me, in my opinion, permits a fair and just adjudication of whether ET's claim is without merit and that is, in fact, what I find.

[26] On a summary judgment motion, the Court may consider Affidavit evidence. Specifically here, the Court had the Affidavit of Gary Strother, the Chief Superintendent of the Defendant, the transcript of Mr. Strother's cross-examination on Affidavit conducted by ET and the Affidavit of the Plaintiff.

[27] Even if the question of what constitutes MT's "counselling file" was not squarely before the various levels of Court in the Defamation Action, I will deal with that question now as it is raised in the Plaintiff's Affidavit.

[28] Although not expressly pleaded in the Amended Statement of Claim, ET referred the Court in his argument to the Student Record Regulation (Alberta Reg 225/2006) (the "Regulation"). He repeatedly argued that MT's "counselling file" ought to have been comprised of only the one page of notes made by Ms. Taylor and should not have included the letters and emails sent to the school by himself and MT's mother. It is somewhat telling that, although ET's pleading decries loudly the breach of his son's privacy, it is actually only the production of ET's own letters and not the actual counselling information about his son to which he objects.

[29] The Regulation defines a "student record" only by setting out things that must be included and things that cannot be included. One of the types of records that <u>cannot</u> be included in the student record is that student's "counselling records". Counselling records are not defined in the Regulation at all. In other words, the Regulation only operates to say that the Defendant could not put MT's counselling records in his student record. Beyond that, the contents of what constitutes MT's "counselling records" appears left to the Defendant's discretion.

[30] On that point, while not all of the letters and emails were tendered to this Court on this application, I infer from the description of these Records given to me and found in the pleadings that they were letters about MT and possibility also about the relationship between his parents, all of which would touch on MT's counselling by Ms. Taylor and ultimately, on Kwan's defence of both the CAP Proceedings and the Defamation Action. There is nothing improper, much less anything illegal, about the Defendant's inclusion of those letters as part of MT's "counselling file" as legally demanded by CAP under the *Health Professions Act (Alberta)*. Further, the Records were documents properly producible by ET in the Defamation Action, aside from their production for the CAP Proceedings.

[31] The other issues that ET seeks to pursue to trial, identified above in paragraph 10, equally have no merit. There was no requirement that CAP or the Defendant notify ET of the issuance of the Notice or the response thereto. There is similarly no merit and certainly no damages that

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could ever flow from the procedural efficacy of having provided the Records in advance of the hearing, certainly where any confidentiality concerns were intended to be dealt with had the hearing proceeded.

[32] There is no doubt that ET feels genuinely aggrieved by the conduct of the Defendant but that conduct does not constitute a claim in law for which ET could ever successfully recover damages. In conclusion, I would also grant summary judgment in favour of the Defendant and dismiss the Plaintiff's Action under Rule 7.3(1)(b).

[33] Lastly, I must mention that there is also an allegation in the Amended Statement of Claim that the provision of the Records by Mr. Hokanson to the LSA in the course of his own disciplinary hearing was also "criminal" and "child abuse". However, this Action does not name Mr. Hokanson as a Defendant. Therefore, the Plaintiff cannot obtain any relief against Mr. Hokanson, who was simply acting as the retained lawyer and thus legal agent of the Defendant in any event, in this Action,

[34] The parties may speak to costs if necessary.

Heard on the June 27, 2017.
Dated at Calgary, Alberta this 2nd day of August, 2017.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Edward Torrance
for himself (Plaintiff/Respondent)

David M. Pick
for the Defendant/Applicant

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