Court of Queen's Bench of Alberta

Citation: Kent v. Martin, 2011 ABQB 416

Date: 20110630
Docket: 0801 08414
Registry: Calgary

Between:

Arthur Kent

Plaintiff/Defendant by Counterclaim

- and -

Don Martin, The National Post Company, Canwest Publishing Inc., National Post Holdings Ltd., Canwest Mediaworks Inc., Kristine Robidoux, Q.C., and John Does 1-10

Defendants/Plaintiffs by Counterclaim

Memorandum of Decision of the Honourable Mr. Justice W.A. Tilleman

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Introduction

[1] The Plaintiff in this case is a journalist with international prominence. He alleges, *inter alia*, that the Defendants defamed him and/or were responsible for the failure of his bid at a political office in Alberta. He now wants to add more Defendants.

Background

[2] The facts that brought this matter to the Court are summarized well by Justice Miller in his related decision dated April 29, 2011.[1] Justice Miller said at paras. 3 through 9:

> [3] Arthur Kent is a well known journalist, turned provincial politician. He was a candidate for the Progressive Conservative Party of Alberta in the March 3, 2008 provincial election.

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[1] ***Kent v. Martin***, 2011 ABQB 298.

> [4] Don Martin was a columnist for the National Post and Calgary Herald newspapers.
>
> [5] It is alleged by Arthur Kent that Don Martin wrote, and the corporate Defendants published, a defamatory and false column, about Arthur Kent and his campaign. In particular, the February 12, 2008 article is alleged to have represented Arthur Kent as a candidate unworthy of public trust and public confidence, and unfit for elected office. This article is said to be untrue and to have damaged Arthur Kent's reputation. It is also argued that the writing of the article was motivated by malice on the part of Don Martin.
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> [6] Arthur Kent did not win the election on March 3, 2008.
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> [7] In July 2008 Arthur Kent commenced this action. At the examination for discovery held in July, 2009, the Defendant Don Martin voluntarily disclosed one of his journalist sources for the impugned article: Kristine Robidoux, Q.C. Ms. Robidoux, Q.C. was Arthur Kent's official Agent under the *Election Act*, R.S.A. 2000, c. E-1, and his legal counsel for the election.
>
> [8] Upon discovering that his official Agent and legal counsel was the main source of information upon which Don Martin's article was written, Arthur Kent commenced proceedings against Robidoux and John Does 1 to 10 in the fall of 2009.
>
> [9] That action was struck by Justice Belzil in July 2010, ***Kent v. Martin et al***, 2010 ABQB 479. The rationale for dismissing the action was the decision ***Juman v. Doucette***, 2008 SCC 8, where the Supreme Court of Canada confirmed the existence of the implied undertaking rule under which evidence, compelled by way of pre-trial discovery in civil litigation, can be used by the parties only for the purpose of the litigation in which it was obtained. ...

[3] In the result, Justice Miller decided to add the now-Defendant Kristine Robidoux, Q.C. She has now filed a Statement of Defence and Counterclaim against Mr. Kent. In adding Ms. Robidoux Q.C. as a party, Justice Miller reasoned as follows at para. 25:

> [25] Justice Belzil was quite right in saying that "none of the evidence produced in the Canwest action may be used for any purpose outside that action". It is now the intent and application of Arthur Kent to keep it in the present action. In my view, Arthur Kent has met the requisite test in ***Juman v. Doucette*** and has demonstrated to the court that there is a public interest of greater weight. In any case, information sought to be used by Arthur Kent involves "the same or similar parties" and "the same or similar issues". There is really no prejudice to the original examinee and therefore leave is granted

Discussion

[4] In the present application, the Plaintiff seeks to substitute the parties previously referred to as generic John Does 1- 4 with four named individuals: Roderick Love, Alan Hallman, Bruce

Thorpe and Bill Smith. The Plaintiff takes the position that these individuals properly are brought into the action at this point because, as he states in his Notice of Application, he "did not know and could not reasonably have known of a viable cause of action worth pursuing against any of [them] until revelation of in the discovery process ... on July 14, 2009 and subsequently on May 24, 2010".

[5] The Plaintiff became aware of the four individuals who are the subject of this application when, according to his Notice of Application, "On May 26, 2010 the Defendants Don Martin, The National Post Company, Canwest Publishing INC., National Post LTD., Canwest Mediaworks INC. ... produced hundreds of ps. of emails of [the Plaintiff's campaign manager] Bruce Thorpe". The Plaintiff states that, based on his review of those records in conjunction with previous disclosure and on his prior knowledge of the relationship of the new four individuals with each other, with him and with the Alberta Progressive Conservative Party, he is now prepared to identify each of them as one of the John Doe Defendants in this lawsuit.

The Law

[6] Under the old *Rules of Court*, there were several cases dealt with amendments adding parties. The leading cases were the decisions of the Court of Appeal in ***Leung (Wong) v. Al-Hassan***, 2003 ABCA 366 and ***Balm v. 3512061 Canada Ltd.***, 2003 ABCA 98, 327 A.R. 149. In his decision in this matter, Justice Miller stated that the application before him was akin to the ***Balm*** case because the Alberta Court of Appeal had held on similar facts that "... the implied undertaking rule had not been violated when information from discovery was used to add parties and amend pleadings."[2]

[7] At present, such amendments are governed by new Rules 3.74(2) and (3):

> 2 On application, the Court may order that a person be added, removed or substituted as a party to an action if
>
> > ...
> > (b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party *and the Court is satisfied the order should be made.*
>
> 3 The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms. [Emphasis added.]

[8] Two recent cases have been decided on amendments adding parties under these Rules: ***Manson Insulation Products Ltd. v. Crossroads C&I Distributors***, 2011 ABQB 51; and ***869120***

[2] For discussion of the implied undertaking rule, see Belzil J. in ***Kent v. Martin et al.***, 2010 ABQB 479.

Alberta Ltd. v. B&G Energy Ltd., 2011 ABQB 209. In ***Manson***, Justice Poelman discussed Rule 3.74(2)(b) and concluded at para. 50 that there is no express guidance on what is meant by the Court being "satisfied" that the order should be made. For her part, Justice Eidsvik pointed out in ***869120 Alberta Ltd.*** at paras. 22 and 23 that both this Rule and the former Rules 132 and 133, while worded somewhat differently, were broad. She went on to state that Rule 3.74(3) codifies the "classic rule" outlined by Justice Côté in ***Balm*** at para. 43 and in ***Milfive Inv. v. Sefel*** (1998), 216 A.R. 196 that "an amendment should be allowed no matter how careless or late, unless there was prejudice". In addition, Justice Eidsvik pointed out at para. 24 that the amendment must not be "hopeless"; it must raise a triable issue as against the party sought to be added.

[9] The requirement in Rule 3.74(2)(b) that the Court must be "satisfied the order should be made" means justice must require the addition of the parties. In the case of a new Defendant, the Court would want to see a link between the new Defendant and the facts and incidents originally alleged against the extant Defendants. There must not be bad faith in the pleadings as against the new Defendant or misconduct by the Plaintiff in bringing them in. Procedurally, the new Defendant should be added as soon as is reasonable in the circumstances; in other words there should not be inexplicable concerns regarding tardiness. Finally, of course, as Rule 3.74(3) states, an order should not be made if prejudice would result that could not be remedied by a costs award, an adjournment or the imposition of terms.

Conclusion

[10] As was necessary, the Plaintiff brought his application to add the four additional parties with notice to the current parties; see ***V.W.W. (Guardian and Trustee of) v. Al-Hassan***, 2003 ABCA 366 at para. 3. I note from the current parties' participation at the motions hearing, the media Defendants take no issue with adding the four parties, and Ms. Robidoux actually consents to it. Further, the Plaintiff has met the requirement that he provide at least "some evidence" to convince me to add the additional four parties.[3] I do point out that "evidence" in this context is not established *pro tanto* in a pleading and I discuss that *infra* at para. 17.

[11] Further to the Plaintiff's references, he sets out the involvement of the four individuals and their nexus with the lawsuit in his affidavits. First, Messrs. Love and Hallman were identified in the discoveries on July 14, 2009. In addition, various exhibits to the Plaintiff's June 17, 2011 affidavit link these gentlemen to the Defendant Martin.[4] One of the more prominent allegations linking Mr. Love to Mr. Martin is the comment that Mr. Love gave "...every tidbit that Martin has ever written about [former Premier] Klein [to Martin]." More specific to this action, the allegations are that Mr. Love, Mr. Hallman and Mr. Martin shared a close relationship

[3] See ***Al-Hassan***, *supra* at para. 4.

[4] See eg. Exhibits "C" (Love), "D" (Hallman), "F" to the June 17, 2011 Affidavit of the Plaintiff. See also para. 37 of that Affidavit.

regarding at least some of Mr. Martin's journalistic duties. That, in my view, is sufficient to cross the threshold for bringing Messrs. Love and Hallman into this action.

[12] In addition to the above, the allegations against Mr. Hallman stem from extensive email exchanges between him and the Plaintiff[5] and also emails between him and the three other individuals in question. The Plaintiff alleges that much of this email traffic went on among these individuals behind the Plaintiff's back. This strengthens the linkage to warrant bringing Mr. Hallman into the lawsuit.

[13] Email exchanges are also the basis for the proposed involvement of Mr. Smith, who was apparently the Vice-President of the Alberta Conservative Party[6] at the relevant time which of course was related to the potential new occupation of the Plaintiff. Mr. Smith had emails forwarded to him from now-Defendant Ms. Robidoux Q.C., who was then counsel to the Plaintiff.[7] They directly involve and discuss the Plaintiff.

[14] The involvement of Mr. Thorpe comes from his more prominent and self-explanatory role as the Plaintiff's campaign manager but that is only the starting point. The Plaintiff also alleges Mr. Thorpe should be a Defendant because of his communications *inter se* to the three other individuals (and others) regarding *inter alia,* the comments of the Defendant Martin.

[15] On the issue of timing, I am mindful of the fairly quick application by the Plaintiff following Justice Miller's decision referenced above. Once I received this application I reviewed the references to the four individuals in the various emails attached to the several Plaintiff's affidavits, which I have also reviewed. Rule 3.74(2)(b) having been satisfied and there being no concern with respect to Rule 3.74(3), I am prepared to substitute those four individuals for John Does 1-4 as Defendants in the action. The time periods for parties to act and in the case of the new Defendants, to file the necessary Statements of Defence, will follow Rule 3.76.

[16] In summary, the substitution of the Defendants is founded upon their link to the Plaintiff and arises from the many emails and other communications documented in the filed materials as between one or more of the four, and often, several of them.

[17] What happens at trial happens at trial. This is the pleading stage and I say this to point out that pleadings are not evidence. (See Rule 13.6(2)). Adding a party to a pleading makes it a different document. It doesn't end the matter between the new parties, it only begins it. It

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[5] See eg. Paras. 10 -12 of the Plaintiff's June 17, 2011 Affidavit.

[6] See Affidavit of Plaintiff December 15, 2010, Exhibit "D-1" and Affidavit of Plaintiff June 17, 2011, paras. 14 and 22-23.

[7] See eg. December 15, 2010 Affidavit Tab 6, Exhibit "D-2".

characterizes the claims between them, tells the court with broadness what the issues are; and it gives notice to the Defendants of what is to be defended.[8]

[18] Thus at this stage of the litigation the amendment to the pleadings is allowed. In addition to what the reasons above reveal, the Plaintiff's application far exceeds the threshold of "hopelessness". It discloses similar parties and issues. The substitution will comprehensively provide the Court with assistance regarding the fuller dispute.

Heard on the 27th day of June, 2011.
Dated at the City of Calgary, Alberta this 30th day of June, 2011.

W.A. Tilleman
J.C.Q.B.A.

Appearances:

Michael Bates and Gabor I. Zinner
for the Plaintiff, Defendant by Counterclaim

David Pick
for the Defendant/Plaintiff by Counterclaim, Kristine Robidoux, Q.C.

Peter Cline and Gordon Watson
for the Defendants/Plaintiffs by Counterclaim, Don Martin, The National Post Company, Canwest Publishing Inc., National Post Holdings Ltd. and Canwest Media Works Inc.

Arthur Kent
in person (Plaintiff/Defendant by Counterclaim)

[8]See e.g., ***Zavitz Technology Inc. v. 146732 Canada Ltd.***, (1991) 49 C.P.C. (2d) 26 (Ont. Gen. Div.)