CITATION: Martynenko v. 2000007 Ontario Inc, 2024 ONSC 3947
COURT FILE NO.: CV-23-00697540
DATE: 20240711

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VIACHESLAV MARTYNENKO	)	Stefan Rosenbaum, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	Jason Squire, for the Defendant
	)	
2000007 ONTARIO INC.	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** June 7, 2024

PAPAGEORGIOU J.

Overview

[1] The defendant employer seeks to strike out certain paragraphs of the plaintiff's Amended Statement of Claim. In the impugned paragraphs, the plaintiff seeks punitive damages on the basis that the defendant employer's counterclaim in the amount of $1,000,000 for misappropriation of confidential information is a tactic to bully him into withdrawing his claim.

[2] The defendant employer argues that these pleadings disclose no cause of action, and are frivolous, vexatious and an abuse of process. It argues that they should be struck pursuant to rr. 21.01(1)(a)(b)(d) and 21.01(3)(d) and 25.11, as such, without leave to amend.

Decision

[3] For the reasons that follow, I dismiss the motion.

Issues

- Issue 1: Is it plain and obvious that the impugned pleadings disclose no reasonable cause of action?

- Issue 2: If so, should leave to amend be granted?

Analysis

Issue 1: Is it plain and obvious that the impugned pleadings disclose no reasonable cause of action?

Rule 25

[4] Rule 25 of the *Rules of Civil Procedure* sets out detailed rules applicable to pleadings and there is a comprehensive body of case law discussing the various ways that pleadings may be defective. Rule 25.11 directs that upon concluding that a claim discloses no reasonable cause of action, the court may strike out all or part of such pleading on the grounds that the pleading (a) may prejudice or delay the fair trial of the action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of process.

[5] As set out in *Savary v. Tarion*, 2021 ONSC 2409, at para. 11, a claim is frivolous, vexatious or an abuse of process, "when it asserts untenable pleas, is argumentative, contains insufficient material facts to support the allegations made, contains prolix, vague, repetitive or redundant allegations, or allegations simply inserted for color or to impugn the behavior or character of the other party, unrelated to the issues in the litigation."

Rule 21

[6] Under Rule 21.01(1)(b), a party may move to strike out a pleading on the ground that it does not disclose a cause of action. To succeed, the defendant must show that it is plain and obvious and beyond doubt that the plaintiff cannot succeed on the claim. If the claim has some chance of success, it must be permitted to proceed: *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at paras. 30-31; *MacKinnon v. Ontario (Municipal Employees Retirement Board)*, 2007 ONCA 874, 88 O.R. (3d) 269, at paras. 19-21; *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 30.

[7] Leave to amend will only be denied in the clearest of cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment: *Mitchell v. Lewis*, 2016 ONCA 903, 134 O.R. (3d) 524, at para. 21; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100, at para. 16; *Adelaide Capital Corp. v. The Toronto-Dominion Bank*, 2007 ONCA 456, at para. 6.

Brief outline of the facts and impugned pleadings

[8] The plaintiff pleads that he began working with the defendant in August 2007 as a welder. He was terminated on January 17, 2023

[9] The plaintiff issued his Statement of Claim on April 6, 2023, claiming the following:

> (i) A Declaration that the Plaintiff was wrongfully dismissed from his employment with the Defendant.
>
> (ii) Damages for wrongful dismissal and breach of contract.

[10] In the original Statement of Claim the plaintiff did not advance a claim for aggravated or punitive damages arising from his alleged wrongful termination.

[11] On June 15, 2023, the defendant filed a Statement of Defence and Counterclaim where it claimed damages arising for the appropriation and conversion of confidential information.

[12] On August 31, 2023, the plaintiff amended his Statement of Claim without consent or leave pursuant to r. 26.02(a).

[13] In the Amended Statement of Claim, the plaintiff alleges that the defendant's counterclaim is without merit and is an intentional attempt on the part of the defendant to bully the plaintiff into withdrawing his claim. He now claims damages of $150,000 for breach of the duty of good faith and $500,000 in aggravated and/or punitive damages.

[14] These are the impugned paragraphs to which this motion relates:

> 1. The plaintiff claims against the defendant….(c) $150,000 representing damages for breach of the duty of good faith; (d) $500,000 in aggravated and/or punitive damages.
>
> 17. It was an implied term of Martynenko's employment contract with INKAS that he be treated fairly, with civility and in good faith during the term of his employment, in the manner of his termination, and thereafter.

> 18. On or about July 15, 2023, in response to Martynenko's Statement of Claim, INKAS served its Statement of Defence and Counterclaim (the "Counterclaim"), INKAS claims, without particulars, that Martynenko has misappropriated INKAS' confidential information. INKAS claims, inter alia, $1,000,000,00 in damages.
>
> 19. Martynenko denies the Counterclaim, and pleads that the Counterclaim is without merit, frivolous, and an intentional attempt on INKAS' part to bully him into withdrawing his Claim.
>
> 20. Martynenko submits that he is entitled to an award of bad faith/aggravated/punitive damages, Martynenko pleads that INKAS' outrageous and deplorable conduct merits censure by this Honourable Court, so that INKAS and other employers will be deterred from acting in such a manner towards its employees.

The defendant's theory

[15] The defendant says that these paragraphs are untenable at law, and an abuse of process in that they arise solely from allegations made by the defendant in the Statement of Defence and Counterclaim and do not disclose an independent cause of action.

[16] The defendant's chain of reasoning begins with the proposition that pleadings enjoy absolute privilege, regardless of whether there is any factual foundation to the allegations made: *Wickham v. Hamdy*, 2019 ONSC 1960; *Big Pond Communications 2000 Inc., v. Kennedy* (2004), 70 O.R. (3d) 115 (S.C.), at para. 12; *Web Offset Publications Ltd. v. Vickery* (1998), 40 O.R. (3d) 526 (S.C.), aff'd 43 O.R. (3d) 802 (C.A.).

[17] *Wickham v. Hamdy* was a lawsuit brought by a lawyer, Donich, against his former client, Hamdy, and his former client's new lawyer, Wickham. Wickham had represented Hamdy in a matrimonial dispute. Wickham retained Donich to assist him address issues related to accounts for services rendered by Wickham. In furtherance of these efforts Donich and Hamdy signed a direction to send to Hamdy's ex-wife directing her to forward any further funds owing as a result of the trial directly to Hamdy and not to Wickman.

[18] Wickham objected to the language used in the direction sent to the ex-wife and commenced an action for defamation. The court held that statements published within the context of absolute privilege are not actionable, at para. 35:

> The privilege seeks to create a zone of protection for lawyers acting in pursuit of their clients' interests. Lawyers are to be free to present their clients' cases without fear of a lawsuit. The privilege is not simply confined to statements made in court. It also extends to all preparatory steps taken with a view to judicial proceedings so long as the step in question is directly concerned with actual or contemplated proceedings.

[19] *Big Pond* was a claim for breach of confidence against the plaintiff's former accountant and employee. The employer claimed that the employee had obtained confidential information during the course of employment and released this information to its competitor. The employee counterclaimed for defamation and issued a proceeding against the law firm that issued the employer's Statement of Claim.

[20] Absolute privilege is a defence to defamation, and thus, *Big Pond* and *Wickham* could be read as limiting the finding to defamation cases, e.g. that you cannot sue in defamation for things said in a pleading. However, the court in *Big Pond* adopted the decision in *Dooley v. C.N. Weber Ltd.* (1992), 19 O.R. (3d) 779 (Gen. Div.), which was not a defamation claim related to statements made in a pleading. *Dooley* involved an employer who pleaded unfounded allegations of sexual harassment as grounds for dismissal in defence to a wrongful dismissal claim. After the plaintiff won the action, he and the witnesses from the wrongful dismissal claim brought a separate proceeding against the former employer and their counsel for intentional infliction of mental suffering, intentional interference with his economic interests, abuse of process, and invasion of privacy.

[21] At p. 788, Reilly J. stated:

> In my view, the same principles apply to the case at bar. It matters not whether the action is framed in libel or slander, in defamation, intentional infliction of mental suffering, intentional interference with economic interest or abuse of process. To the extent that any action is based upon statements in a pleading, the claim will disclose no reasonable cause of action. Otherwise expressed, the action has no reasonable chance of success in law, and to permit it to continue would constitute an abuse of the process of the court.

[22] The court in *Big Pond* outlined the policy underlying this principle, at para. 18:

> The sensibilities of one litigant ought not to override centuries of a principle developed to enable those before the courts, and indeed the courts themselves, to speak freely, often of disagreeable matters. Full and impartial adjudication of disputes demands it. There is as much need for free speech in the courts now as there was in the time of the First Elizabeth.

[23] *Web Offset Publications Limited et al. v. Vickery* involved a lawsuit against counsel who swore an affidavit in a motion for security for costs. The affidavit in support referred to an American action against the plaintiffs based on an anti-racketeering statute. The plaintiff then sued the lawyers for defamation, abuse of process, and intentional interference with economic relations for referring to the American proceeding. The court held that the solicitors were protected by absolute privilege for statements made in the course of judicial proceedings.

The Problem with the Defendant's Theory

[24] The main difficulty with the defendant's theory is that all of the above cases involve new causes of action brought based upon statements made in a pleading.

[25] In this case, the amendment in question does not raise a new cause of action. The cause of action was and still is wrongful dismissal. What the amendment does is claim additional damages for the same cause of action based upon the counterclaim.

[26] Further, the plaintiff has amply set out numerous cases where courts have awarded punitive/aggravated damages where it has found that a counterclaim was brought by an employer to intimidate an employee.

Cases in Support of the Plaintiff's Position

[27] In *Griffon Integrated Security Technologies et al. v. Valley Associates Inc. et al*, 2023 ONSC 2200, at paras 6-7, 9 and 19-21, the plaintiff was terminated without cause. He commenced a wrongful dismissal claim. In response, the defendant employer accused the former employee of financial irregularities and alleged after-acquired cause. The defendant also launched a counterclaim for, *inter alia*, breach of contract, fraud and defamation, even though it was apparent from the discoveries and subsequent conduct that there was never any substance to the counterclaim and no basis to the defence. The defendants failed to honour production and discovery obligations. Then the defendants advised that they did not wish to go any further in the litigation and consented to an order striking their defence and dismissing the counterclaim.

[28] The plaintiff then moved for default judgment and sought $75,000 in punitive damages which were awarded. Although the court did not provide specific analysis of the basis, in another part of the decision, Justice Macleod was highly critical of the defendant's "scorched earth" litigation strategy, at para. 6:

> It is apparent from the discoveries and from the subsequent conduct of the defendants in the litigation that there was never any substance to the counterclaim and no basis to any defence.

[29] *Koshman v. Controlex Corporation*, 2023 ONSC 7045, at paras 6, 8, 24-25, was another wrongful dismissal action that proceeded on a default basis. Mr. Koshman served as Vice President for Controlex Corporation for over 18 years, until his without cause termination. Mr. Koshman commenced a wrongful dismissal action. In response, Controlex took the position that it had just cause for termination and commenced a counterclaim for breach of fiduciary duty.

[30] Hackland J. awarded $50,000 in punitive damages for a number of reasons that had to do with the way the employer had treated him during the employment, which included making bizarre and defamatory statements, accusing him of criminality and dishonesty, without any justification. He also included in the list of reasons why punitive damages should be awarded:

> [Controlex] then pursued a baseless counterclaim in this action and maintained [its] position that the plaintiff was dismissed for cause and sought repayment of the eight weeks' severance the defendant paid out at the time of termination.

[31] In *Huber v. Way*, 2014 ONSC 4426, at paras 45-46 and 49-53, Mr. Huber was terminated without cause. He commenced a wrongful dismissal action. The Court's discussion of why the plaintiff was entitled to both exemplary damages and punitive damages made reference to a frivolous counterclaim for $400,000 initiated by the Defendants, which they admitted they did not have any evidence to support.

[32] With respect to the punitive damage claim, which Justice Flynn assessed at $25,000, there were no facts related to the manner of termination at all:

> The claim for punitive damages doesn't deal exactly with the manner of termination, but it does deal with immediately post-termination conduct and the egregious attempts by [the Defendant] to intimidate the Plaintiff into withdrawing his claim.
>
> Way pressed the Counterclaim right to the very end, without evidence to support it. [Emphasis added.]

[33] In *Ruston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919, at paras 142, 144-145 and 150, aff'd 2019 ONCA 125, Mr. Ruston was terminated for cause based on allegations of fraud. In response to Mr. Ruston's wrongful dismissal action, the employer Keddco issued a counterclaim for unjust enrichment, breach of fiduciary duty and fraud. Keddco claimed damages of $1,700,000. The trial judge found that the counterclaim had been a tactic to intimidate the employee and that the employer had breached its obligation of good faith and fair dealing in the manner of the employee's dismissal. She awarded moral damages in the amount of $25,000.

[34] On appeal, the Court of Appeal indicated that employers have an obligation of good faith and fair dealing in the manner of dismissal and also that an employer's pre- and post-termination conduct may be relevant to the moral damage analysis if such conduct is a component of the manner of dismissal. The conduct that the Court pointed to as supporting the trial judge's award of aggravated damages was threatening the employee not to make a claim and instituting a counterclaim that was calculated to and did cause him stress. The Court accepted that this manner of dismissal was devastating and caused the employee stress and concluded there was no error of law: at para. 14.

[35] The award of $100,000 in punitive damages was also upheld. The court again referenced the threat by the employer during the termination meeting that if the employee sued, it would counterclaim. This threat was carried out when the employer alleged fraud. The court also referred to the fact that the employer had claimed $1,700,000 and then reduced its damage claim to $1 on the seventh day of trial. The trial judge concluded that it did not appear that the employer had intended to prove damages but was using the $1,700,000 claim to intimidate the employee.

[36] The defendant attempts to distinguish the cases referenced above by saying that in these cases there were also other reasons why exemplary or punitive damages were awarded. It argues that a proper interpretation of the current state of the law is that a court may take into account an improperly or maliciously brought counterclaim designed to intimidate an employee as long as there are also other grounds for an exemplary or punitive damage award. It says that here, the claim for punitive and exemplary damages is a standalone claim that relates to the mere bringing of an allegedly meritless counterclaim designed to intimidate; this is not permissible because it amounts to suing for being sued.

[37] I find this distinction unpersuasive. If a counterclaim brought to intimidate an employee can be part of the reason for punitive damages or exemplary damages, it is unclear why it could not be the sole basis, in an appropriate case.

[38] The plaintiff also points out that courts have repeatedly recognized that employment relationships are governed by a set of principles that differ from commercial agreements because of the inherent power imbalance between employers and individual employees, and that this inherent power imbalance informs all facets of the employment relationship, including an employer's conduct in the litigation: *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, 134 O.R. (3d) 481, at paras. 25-28; *Wallace v. United Grain Growers*, 11997| S.C.R. 701 at paras. 20-95 (SCC); *Huber*, at para. 51.

[39] The unique principles that govern the employment relationship are, thus, an important consideration.

[40] As noted, there are also some important other distinctions between the employment cases cited by the plaintiff and the cases relied upon by the defendant. In the defendant's cases, a party has brought a separate lawsuit seeking damages for specific new torts (defamation, intentional infliction of mental suffering, intentional interference with economic relations, abuse of process) because of "statements" made in the former action that the party alleges caused it harm.

[41] The primary focus of the inquiry in employment cases cited by the plaintiff is not the statements made in the pleading and whether they caused harm, but whether the counterclaim itself was a tactic to intimidate the employee. This is very much in line with the significant power imbalance recognized in employment law. As well, as noted, in these employment cases, there is no separate cause of action alleged where damages are claimed. The claims for exemplary and punitive damages are claimed as part of the wrongful dismissal claim and as part of the manner of dismissal. This, too, is an important distinction.

[42] The case of *McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto*, 2019 ONCA 213, 433 D.L.R. (4th) 91, does not assist the defendant. The question before the Court in that case was the narrow issue of whether an inaction, specifically, the failure to admit liability before trial, is grounds for a punitive damages award. In that case, the Court of Appeal held that the trial judge erred in instructing the jury that the Diocese's delay in admitting liability could form the basis of a punitive damages award. These are not the facts pleaded or the facts before me.

While I agree that the defendant is entitled to assert a counterclaim, it does not follow that this decision has overruled the caselaw that has awarded punitive/exemplary damages in the employment context for a counterclaim that was launched to intimidate an employee.

Conclusion

[43] It is not plain and obvious that the claim for punitive/exemplary damages based upon the launching of a counterclaim to allegedly intimidate an employee is bound to fail given: i) the body of caselaw that takes such conduct into account as part of an exemplary or punitive damages award; ii) caselaw that sets out that employment cases are governed by a different set of principles because of the inherent power imbalance between employers and individual employees, which power imbalance informs all facets of the case including the employer's conduct in the litigation; iii) appellate authority that says that an employer's post-termination conduct can be taken into account in determining moral damages and that a frivolous and tactical counterclaim could be considered actionable post-termination conduct: *Rushton*; and iv) the high bar for striking out a claim.

[44] At this stage it is simply unknown what evidence may emerge as to the plaintiff's claim that the counterclaim was a tactic to intimidate him. It is unknown whether the defendant had any facts at all upon which to base the counterclaim when it initiated it. Consider the possibility of some evidence that could emerge during discovery or at trial and how that might impact this issue. What if the plaintiff obtains evidence that the defendant had specific discussions with others (not its lawyers) that it knew the counterclaim was frivolous and that it was using it for leverage? What if the plaintiff obtains evidence that prior to the termination, the employer told other employees that it intended to bring a counterclaim if it was sued as leverage and to intimidate the employee? What if facts emerged that the employer routinely does this when defending wrongful dismissal claims? If any of these facts emerged, how would that be materially different from the employee's perspective from cases where the threat was made at the time of termination and then carried out afterwards?

[45] I agree with the plaintiff that this issue should be left to the trial judge to decide on the basis of a complete trial record, not at the pleadings stage.

[46] I add that leaving this claim in the pleading until trial will not increase the costs or complexity of this matter. Even if the claim was struck, the defendant would still have to prove its counterclaim, and the plaintiff would still have to investigate it and defend against it by probing the evidence the defendant has in support.

[47] The only thing that will be different if the pleading is struck at this time is that if it turns out that the defendant did bring the claim to intimidate the employee without any evidence, the court will not be able to consider whether or not the plaintiff should have a remedy. I see no reason to preclude a court from considering the legal issue on a full record.

[48] I also reject the defendant's argument that because the drafting of pleadings engages with matters of confidentiality and solicitor client privilege, the type of pleading here would necessarily

engage issues of instructions to and advice from counsel and encroach on matters of solicitor and client privilege. Permitting this claim to proceed would not result in any legal basis for the plaintiff to seek to go behind solicitor and client privilege and they acknowledged as much before me. The cases referenced above where courts made exemplary and punitive damage awards because of meritless, tactical counterclaims, do not demonstrate that this ever resulted in the abrogation of solicitor and client privilege for the defendant.

[49] If there is no basis for the counterclaim at the end of the day, this will be the factor that a court will consider, not the advice given by the lawyer, which remains protected.

[50] I dismiss the motion.

[51] Thus, there is no need to consider Issue 2.

[52] The parties may make cost submissions no longer than 5 pages, the plaintiff within 5 days and the defendant within 5 days thereafter.

Papageorgiou J.

Released: July 11, 2024

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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Plaintiff

– and –

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Defendant

REASONS FOR JUDGMENT

Papageorgiou J.

Released: July 11, 2024