COURT OF APPEAL FOR ONTARIO

CITATION: Coulson v. Ojha, 2024 ONCA 538
DATE: 20240708
DOCKET: COA-23-CV-1241

Sossin, Monahan and Madsen JJ.A.

BETWEEN

Eleanor Coulson and Patrick Coulson

Plaintiffs/Defendants
by counterclaim (Appellants)

and

Leonard Alexander Ojha, 1964856 Ontario Inc.,
Alexander Muskoka (Gravenhurst) Inc.*, and
Alexander Muskoka Operations (Gravenhurst) GP Inc.

Defendants/Plaintiff
by counterclaim (Respondent*)

Mark Vernon and Jonathan Friedman, for the appellants

Michael Lesage, for the respondent

Heard: June 19, 2024

On appeal from the order of Justice Susan E. Healey of the Superior Court of Justice, dated October 17, 2023.

REASONS FOR DECISION

[1] The appellants appeal the dismissal of their motion under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in which they sought the dismissal of a counterclaim brought against them by the defendants below. The motion judge found that the appellants had not met the threshold under s. 137.1(3) to show on a balance of probabilities that their expression related to a matter of public interest.

[2] The appellants own a home overlooking Muskoka Bay and have lived there for 19 years. Some of the defendants below purchased the adjacent property, and subsequently obtained zoning approval for the construction of a retirement facility. The appellants have been concerned about various aspects of that development, including the impact on shared trees on the boundary line, trees on their side of the boundary line, fencing, the construction of a retaining wall, and sightlines.

[3] Conflict between the parties about these issues ultimately led to a proceeding before the Ontario Municipal Board. The conflict was resolved by the signing of Minutes of Settlement in February 2017 (the “Minutes”). Those Minutes required the defendants below to take certain steps to protect the trees on the appellants’ lot and required the appellants to not oppose, directly or indirectly, the terms of the development, on certain conditions.

[4] The appellants have been dissatisfied with the respondent’s level of compliance with the requirements of the Minutes and started proceedings in November 2022. Their claim is focused on damage to their trees caused by

excavation and construction work being done without a tree preservation plan, which the appellants say was required under the Minutes. They seek damages for breach of contract as well as declaratory and injunctive relief.

[5] The respondent counterclaimed, seeking damages for breach of contract in relation to allegations of wrongful conduct by the appellants in opposing the development through various ongoing objections, including a complaint to the Chief Building Official, which they say is in breach of the Minutes.

[6] The appellants' reply and defence to the counterclaim pleads that any submissions made by them with respect to the development were to ensure compliance with the Minutes and to protect their private property rights. They stated that a primary concern was the maintenance of buffer trees between their house and the development.

[7] The appellants brought a motion under s.137.1 of the *Courts of Justice Act*, seeking to have the respondent's counterclaim dismissed, alleging that it was brought to silence their opposition to the development of the retirement residence on property adjacent to their own. They say the counterclaim is a strategic lawsuit against public participation ("SLAPP").

[8] The motion judge dismissed the motion at the first stage of the s. 137.1 analysis, finding that the appellants' "expression", as defined in that section, related to the interactions between the appellants and the respondent as private,

neighbouring landowners. The motion judge held that a contextual review of the pleadings and the record did not support the conclusion that the expression related to a matter of public interest; rather, that they were made in the context of the appellants' main goal of ensuring that the tree preservation plan was in place and that their trees were protected, "interests that were not specifically part of the larger public concerns surrounding this development." The threshold not having been met under s. 137.1(3), the motion judge did not proceed to the analysis under s. 137.1(4).

[9] The heart of the appellants' argument on appeal is that the motion judge erred in her determination that the expression of the appellants did not "relate to" matters of public interest. The appellants stress that the threshold is low, that the concept of public interest is to be given a large and liberal interpretation, and that the burden at the first stage of the analysis is not intended to be onerous. They emphasize that the expression(s) under consideration need not exclusively relate to the public interest and may relate to more than one matter: *Ontario College of Teachers v. Bouragba*, 2019 ONCA 1028, at paras. 31-33, leave to appeal refused, [2020] S.C.C.A. No. 254, citing *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, at para. 65, (*"Pointes Protection (ONCA)"*) aff'd, 2020 SCC 22, [2020] 2 S.C.R. 587 ("*Pointes Protection (SCC*)").

[10] The appellants assert that in referring to the appellants' "goals", the motion judge erred in assessing their "motivations," which is expressly not part of the

analysis at the threshold stage: *Pointes Protection (ONCA),* at paras. 65, 94; *Bouragba*, at para. 19. Further, they argue that in several paragraphs the motion judge in fact confirmed that certain aspects of the alleged expressions were in the public interest and that this contradicts her ultimate conclusion on the motion.

[11] We do not accept these submissions.

[12] While the determination of what constitutes the public interest is a question of law reviewable on a standard of correctness, whether a particular expression relates to a matter of public interest attracts a deferential standard of review, absent an extricable question of law: *Pointes Protection (SCC),* at para. 97; *Echelon Environmental Inc. v. Glassdoor Inc*., 2022 ONCA 391, at para. 6, leave to appeal requested but application for leave discontinued, [2022] S.C.C.A. No. 274; *2110120 Ontario Inc. v. Buttar*, 2023 ONCA 539, 485 D.L.R. (4th) 551, at para. 35, leave to appeal refused, [2023] S.C.C.A. No. 432.

[13] The motion judge correctly identified the applicable law to be applied under s. 137.1(3), in the manner outlined by the Supreme Court in the leading decision, *Pointes Protection*. She undertook a thorough and detailed contextual review of the pleadings and the record. She reviewed each of the expressions alleged by the respondent to be in breach of the Minutes. She fairly and reasonably concluded that, understood in its context, what the impugned expressions were “really about” were private matters between adjacent landowners, in particular, the protection of

the appellants' private property interests: see *Echelon*, at para. 5. The motion judge distinguished the facts from *Pointes Protection*, and we concur in that distinction, on this record.

[14] The motion judge recognized in her decision that certain aspects of the development of the retirement home would be matters of public interest. She stated, for example, that "[w]ith certainty, the public has an interest in the development of a retirement home within this community, especially a publicly funded development" and that "environmental and aesthetic impact of tree removal is most certainly a topic of public interest and debate." Elsewhere she commented, "[t]here is always a public interest in ensuring that erection of barriers such as a retaining wall in an area of parking that will be accessible to residents and visitors be constructed safely and in compliance with *Ontario Building Code* requirements".

[15] We do not agree with the appellants that these statements "contradict" the conclusions of the motion judge. To the contrary, they illustrate that the motion judge was keenly aware, as a matter of law, of the breadth of what may be in the public interest. However, on the evidence in this case, and taking a broad and liberal approach as required, she found that the appellants' expressions were not "related to" those aspects. The appellants' expressions were "really about" their trees on their property and other private concerns, something that – on the record before the motion judge – was not a matter of public interest. The appellants' expression was not "mixed" as found in *Bouragba*, at para. 33.

[16] Finally, we also do not agree that the motion judge impermissibly considered the “motivations” of the appellants at the threshold stage of the analysis, the “why and how” of their expressions, *Buttar*, at para. 46. The motion judge considered, among other things, the pleadings, in which the appellants stated what they seek in the litigation. She considered their impugned expressions in context. She was entitled to review, on an objective basis, the appellants’ stated claims to understand, contextually, what their expressions were about, and she did not embark on an impermissible enquiry into “motive, merit, and manner”: See *Buttar*, at para. 46.

[17] Given our conclusions above, it is unnecessary to consider the appellants’ arguments under s. 137.1(4), or the request that this Court undertake that analysis.

[18] This decision should not be taken to impart any view on the underlying claim or counterclaim.

[19] The appeal is dismissed. Costs for the appeal are set at $15,000 as agreed between the parties in advance of argument, payable to the respondent. Given the appeal’s ultimate disposition, it is unnecessary to canvass further submissions on the costs of the underlying action.

“L. Sossin J.A.”

“P.J. Monahan J.A.”

“L. Madsen J.A.”