

Court of King's Bench of Alberta

Citation: Friesen v Silverberg & Associates Inc 2024 ABKB 518

Date: 20240827
Docket: 2306 00308
Registry: Lethbridge

Between:

Allan Edward Friesen and AEF Services Ltd.

Plaintiff

- and -

Silverberg & Associates Inc., People Corporation and ABC Benefits Corporation

Defendants

**Memorandum of Decision
of the
Honourable Applications Judge M.R. Park**

Introduction:

[1] This is an application by the defendant, ABC Benefits Corporation (“**ABC**”) for summary dismissal. For the reasons that follow, that application is allowed.

Background:

[2] The defendant, Silverberg & Associates Inc. (“**Silverberg**”) was an Alberta corporation. Its business involved the offering of employee benefit consulting services, including employee group insurance benefit plans and employee retirement plans.

[3] In or around September, 2022, there was an amalgamation of Silverberg and the defendant People Corporation (“**People**”).

[4] People is an Ontario corporation which carries on business across Canada providing group benefit, group retirement, wellness and human resources solutions.

[5] ABC is a creature of statute constituted under the *ABC Benefits Corporation Act*, R.S.A. 2000, c. A-1. Essentially, it exists to manage the Alberta Blue Cross Plan.

[6] The plaintiff, Allen Friessen, is the principal of the plaintiff AEF Services Ltd. (“**AEF**”).

[7] AEF was engaged by Silverberg/People to design, promote, sell, and administer group benefit products, life insurance products and related products and services to Silverberg/People’s Alberta clients (the “**Services Agreement**”).

[8] On February 13, 2023, Mr. Friesen posted a video (the “**Video**”) to his personal YouTube channel, on a Facebook page and on a LinkedIn profile. It is alleged that in this video, Mr. Friesen made disparaging remarks about ABC. Silverberg and People say that the posting of the Video constituted a breach of the Services Agreement, which it terminated by way of correspondence sent to Mr. Friesen and AEF on or about February 28, 2023.

[9] This action pertains to the termination of the Services Agreement and the circumstances surrounding that termination. The allegations made against ABC are in conspiracy and inducing breach of contract. ABC says there is no merit to those allegations, hence this application.

Issue:

[10] This is a summary judgment application. I must determine if there is a genuine issue for trial.

Analysis:

a. General:

[11] Rule 7.3 allows for the dismissal of a claim on a summary basis if there is no merit to that claim.

[12] Summary judgment may be awarded upon the applicant establishing that there is no “genuine issue for trial”. There will be no issue requiring a trial when the judge is able to make the necessary findings of fact on the record before them, apply the law to those facts and be satisfied that the process reflects a proportionate, timely and cost-effective means to achieve a just result: *Hyrniak v Mauldin*, 2014 SCC 7.

[13] The analysis to be undertaken by the Court on a summary judgment was set out by the Alberta Court of Appeal in its decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 (“*Weir-Jones*”). The key considerations to be addressed are as follows:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

- b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[14] In *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343, our Court of Appeal provided confirmation and clarity on the summary judgment test set out in *Weir-Jones*. The Court noted that the *Weir-Jones* standard sanctions summary judgment if the presiding judge is left with sufficient confidence in the record such that he or she is prepared to exercise the judicial discretion in to summarily resolve the dispute. More specifically, if the moving party has proved the material facts on the balance of probabilities and advances the law that vindicates their position, summary judgment is appropriate. The outcome does not have to be obvious. Summary judgment cannot be granted if the application presents a genuine issue requiring trial.

[15] The presumption on a summary judgement application is that the best evidence is before the Court: *Canada (AG) v Lameman*, 2008 SCC 14 at para 11.

b. Inducing Breach of Contract:

[16] In order to find that a defendant intentionally induced a breach of contract, which is often bundled with interfering with contractual relations, the following elements must be established:

- a) the existence of a contract;
- b) knowledge or awareness by the defendant of the contract;
- c) a breach of the contract by a contracting party;
- d) the defendant induced the breach;
- e) the defendant, by their conduct, intended to cause the breach;
- f) the defendant acted without justification; and
- g) the plaintiff suffered damages¹.

¹ 369413 *Alberta Ltd. v. Pocklington*, 2000 ABCA 307 at para 13 ("*Pocklington*").

[17] The existence of the Services Agreement is not disputed and there is no doubt that ABC was aware of the existence of contractual arrangements between Silverberg/People and Mr. Friesen/AEF. In my view, assuming (without deciding) that Silverberg/People breached the Services Agreement, ABC's liability largely turns on whether it induced that breach and, if so, whether it intended to cause the breach.

[18] Intent can be established if the breach is the result of wilful, deliberate and direct conduct. Intent can also be inferred when the consequences of the conduct were a necessary or reasonably foreseeable result: *Pocklington at paras 39 and 40*.

[19] Further, it is not necessary that the breach of contract be the primary objective. It is sufficient if the interference is necessarily incidental to attaining the defendant's primary objective: *Pocklington at para 40*.

[20] On December 5, 2023, Jerry Rudelic, who was ABC's Vice-President (Group) at the material time, swore an affidavit in support of this application. Mr. Rudelic deposes that at no time did ABC pressure the other defendants to terminate the Services Agreement, nor did it request, suggest or imply that the agreement should be terminated.

[21] On December 20, 2023, Mr. Friesen swore an affidavit in which he deposed to a telephone conversation he says he had on February 18, 2023 with Scott Silverberg, one of Silverberg's principals. That call was concerning the Video. According to Mr. Friesen, he was advised by Mr. Silverberg that the president of ABC was demanding a termination of the Services Agreement.

[22] On February 15, 2024, Mr. Silverberg swore an affidavit which was responsive to Mr. Friesen's December 20 affidavit. In that affidavit, he deposed as follows:

- a) At no point on February 18, 2023, or otherwise, did he advise Mr. Friesen that ABC's President, or anyone else at ABC, was demanding or requesting the termination of the Services Agreement.
- b) At no point on or before the termination of the Services Agreement did he speak to ABC's President regarding Mr. Friesen and the Video, or the termination of the Services Agreement.
- c) At no point material to the within action was he ever told by anyone at ABC that the ABC's President, or anyone else with ABC, was demanding or requesting the termination the Services Agreement.
- d) At no point material to the within action was he ever told by anyone at People that ABC's President, or anyone else at ABC, was demanding or requesting the termination of the Services Agreement.
- e) At no point material to the within action did anyone at ABC ask him to make any decisions whatsoever with respect to Mr. Friesen and the Services Agreement.

[23] At the time of the events in question, Mark Komlenic was ABC's President and CEO.

[24] On February 1, 2024, Mr. Komlenic swore an affidavit in support of this application, in which he deposed that: (1) at no time did he ask, suggest or imply that the Services Agreement should be terminated and (2) he did not speak directly or indirectly to Mr. Silverberg about the matter prior to or after the termination of the Services Agreement.

[25] Mr. Komlenic was cross-examined on his affidavit.

[26] Much of the questioning pertained to various text messages Mr. Komlenic exchanged with Paul Ingram, a Silverberg executive, on February 13, 2023, after Mr. Komlenic learned of the Video. Those communications can be summarized as follows:

1. In the initial text messages, Mr. Komlenic expressed that the Video constituted a serious brand and legal issue and that it needed to be taken down.
2. It seems that the Video remained posted several hours after the initial exchange of text messages. So, Mr. Komlenic sent a further text to Mr. Ingram which simply read: “5 hours...”, meaning that the Video was still posted many hours after the initial request that it be deleted. Mr. Ingram responded and assured Mr. Komlenic that the Video was being taken seriously and that he had “made it a priority”. Mr. Komlenic then asked what the next steps would be. Mr. Ingram replied by saying there would be “disciplinary actions” and that Jerry (meaning Mr. Rudelic) had asked for an apology. Mr. Komlenic also stated that he wanted to have a discussion with Mr. Ingram and Brevan Canning, a People executive. Mr. Komlenic and Mr. Ingram then exchanged a series of messages pertaining to arranging the requested discussion.

[27] In terms of the promised “disciplinary actions”, Mr. Komlenic testified that: “I really didn’t care about that part of it at all because that’s not what we were asking them to do”.

[28] On February 14, 2023, Mr. Komlenic, Mr. Ingram and Mr. Canning met virtually. Mr. Komlenic says he asked for this meeting because, to his knowledge, the Video had not been deleted, despite assurances that it would be. He testified that his only reason for requesting the meeting was to ensure that People and Silverberg understood that the Video needed to come down.

[29] Mr. Komlenic’s testimony concerning what was discussed at the virtual meeting can be summarized as follows:

1. His primary concern was that the Video contained information about an ABC client/customer, which he viewed as a breach of that persons’ privacy.
2. He reiterated his concerns regarding the impact on the Video on the ABC brand.
3. He reiterated that what he wanted was for the Video to be taken down and that how People and Silverberg chose to address their relationship with Mr. Friesen/AEF was up to them.

[30] In my view, the evidence does not establish that ABC asked or demanded that the Services Agreement be terminated. Mr. Friesen’s evidence concerning Mr. Silverberg’s purported

communications with Mr. Komlenic is hearsay and is directly contradicted by Mr. Silverberg's evidence and, more importantly, by Mr. Komlenic's evidence.

[31] The record before me establishes that ABC's primary, if not sole, objective was to have the Video removed from the platforms to which it was posted. Mr. Komlenic was clearly upset about the Video, and I have no doubt that preserving the relationship with ABC was of the utmost importance to People and Silverberg. It may well be that People and Silverberg considered the termination of the Services Agreement as a necessary maintenance measure. However, in my view, the termination of the Services Agreement was not a necessary or reasonably foreseeable outcome of ABC's request to have the Video deleted, nor was it necessarily incidental to obtaining that objective. The elements necessary to establish inducing breach of contract are not present here.

c. Conspiracy:

[32] The elements of the civil tort of conspiracy were summarized by our Court of Appeal in *Mraiche Investment Corp. v. Paul*, 2012 ABCA 95 ("*Mraiche*"). There must be:

1. An agreement between two or more persons.
2. Concerted action taken pursuant to the agreement. If the action taken is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff. If the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e. constructive intent).
3. Actual damage suffered by the plaintiff².

[33] As our Court of Appeal made clear in *Maguire v. Calgary (City)*, 1983 ABCA 121 ("*Maguire*"), the essence of conspiracy is agreement³.

[34] In the context of a summary judgment application pertaining to allegations of conspiracy, the question is whether there is any triable case of evidence on all the essential ingredients of the tort. It is not enough that there is some evidence of some parts of the tort if there is no evidence of any one or more essential ingredients: *Mraiche* at para 43.

[35] As noted by the Court in *Maguire*:

14 In order to be found to be a party to a conspiracy one must know the facts of the alleged agreement or combination and intend to be a party to the "combining". This principle was adopted by the English Court of Appeal in *Belmont Finance Corp. v. Williams Furniture*, [1980] 1 All E.R. 393, wherein both Buckley L.J. and Waller L.J. referred to *Churchill v. Walton*, [1967] 2 A.C. 224, 51 Cr. App. R. 212, [1967] 1 All E.R. 497, approving the words of Viscount Dilhorne at p. 237:

... I would say that *mens rea* is only an essential ingredient in conspiracy in so far as **there must be an intention to be a party to an agreement** to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on **what was agreed**. [emphasis added].

² *Mraiche* at para 40.

³ *Maguire* at para 24.

[36] The evidence before me on this application does not establish the requisite agreement. The claim in conspiracy must fail.

Conclusion:

[37] The claim as it pertains to ABC is dismissed.

[38] If the relevant parties cannot agree as to costs, they may appear before me in morning Chambers to make submissions.

Heard on the 12th day of April, 2024.

Dated at the City of Lethbridge, Alberta this 27th day of August, 2024.

M.R. Park
A.J.C.K.B.A.

Appearances:

Stephen C. Mogdan, Stringam LLP
for the Plaintiffs

Kevin P. Chapotelle, Bryan & Company LLP
for the Defendant ABC Benefits Corporation

Jody Sutherland, McLennan Ross LLP
for the Defendants Silverberg & Associates Inc. and People Corporation