Court of King's Bench of Alberta

Citation: Otiti v Har-Par Investments Ltd, 2023 ABKB 732

Date: 20231221
Docket: 1901 01577
Registry: Calgary

Between:

Ayodeji Otiti and Augusta Otiti (also known as Augusta Innocent)

Plaintiffs/Appellants

- and -

Har-Par Investments Ltd

Defendant/Respondent

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] Does a creditor owe a duty not to negligently register or file an order against a debtor, or to report the order to credit reporting agencies, after the debtor has already paid the amount owing under the order? If an order is registered, does a creditor owe a duty to take steps to update the court or credit reporting agency records to reflect that the order is satisfied? If there are duties owed by the creditor, what is the standard of care and can the debtor avoid summary dismissal of a claim based on bare assertions that the creditor harmed the debtor's credit score and caused resulting damages?

[2] These are some of the issues raised by this appeal of an applications judge decision to summarily dismiss a claim by the Plaintiffs (**Otitis**) against their former landlord, Har-Par Investments Ltd (**HPIL**).

[3] The Otitis were tenants of, and rented Calgary premises (**Premises**) from HPIL.

[4] In October 2013, on HPIL's application, a dispute officer granted an order (**RTDRS Order**) under the *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006 (*Regulation*) against the Otitis granting judgment against them for $1,350 for unpaid rent up to

September 2013, and providing that the Otitis' tenancy would not be terminated if they made payments of $2,700 by October 17, 2013 and $1,350 by November 1, 2013.

[5] The RTDRS Order was not appealed. The Otitis paid HPIL $4,050 by mid-October, following which, on October 16, 2013, a process server on behalf of HPIL filed the RTDRS Order with the Court of Queen's Bench and it became an order of court (**Court Order**). A copy of the Court Order was posted on the Otitis' door at the Premises that same day, although the Otitis deny being aware of it until 2018.

[6] Neither party took steps to have the court clerk include a memorandum on the court file that the Court Order was satisfied (**Satisfaction Memorandum**) for several years. According to Mr. Otiti, the Otitis found out about the Court Order in May 2018 when they were advised by a potential mortgage lender that the Court Order was referenced in an Equifax credit report and was hurting their credit score. After unsuccessful attempts to have HPIL address the matter to the Otitis' satisfaction, in February 2019 the Otitis commenced this action.

[7] The Otitis claim negligence, misrepresentation, fraud, "ill-will driven malicious conduct", and abuse of process. In summary, the claim is, in effect, based on certain key alleged factual allegations, namely HPIL's: (1) filing of the RTDRS Order with the court to create the Court Order; (2) alleged filing of a false affidavit of service respecting the service of the Court Order; (3) alleged provision of information about the RTDRS Order or the Court Order to Equifax; (4) failing to file a discontinuance of the court action (which I interpret as including failing to effect the filing of a Satisfaction Memorandum) or to take steps to remove the Otitis' names from the court system; and (5) failing to take steps to have the Court Order or the Otitis' names removed from the Equifax credit reporting system.

[8] The Otitis seek declarations, mandatory injunctive relief, and damages ($18,900 for general damages, $50,000 for special damages, and $150,000 for punitive and exemplary damages).

[9] HPIL filed its Statement of Defence on February 25, 2019. It denies reporting anything to Equifax, owing or breaching any duty of care, or acting maliciously, illegally, unjustifiably, fraudulently or negligently. It denies the Otitis have suffered damages or reasonably foreseeable damages, or states that the Otitis caused their own damages. It further pleads that the Otitis seek relief that the Court cannot grant and relies on the *Limitations Act*, RSA 2000, c L-12.[1]

[10] On March 5, 2019, the Otitis applied for an order that the Court Order had been satisfied, which was granted by way of Consent Order on March 13, 2019 (**Consent Order**). Following that, the action continued. The parties exchanged (and filed) Affidavits of Records and HPIL conducted questioning for discovery of the Otitis. The Otitis never conducted questioning for discovery of HPIL's corporate representative or anyone else.

[1] HPIL did not rely on any limitations defence in its summary dismissal submissions before Applications Judge Mason or on the appeal, and so whether the *Limitations Act* provided another ground for summary dismissal is not addressed in these Reasons.

[11] In April 2022, HPIL filed an application for summary dismissal of the action, which was granted by Applications Judge Mason on December 7, 2022 (**Mason Order**) with costs payable by the Otitis to HPIL. The Otitis appeal the Mason Order.

[12] On December 14, 2023, I heard the appeal. On December 15, 2023, Mr. Otiti provided supplemental submissions. On December 19, 2023, HPIL provided a response to Mr. Otiti's supplemental submissions and, then, Mr. Otiti provided a further reply to HPIL's response submissions. I have considered the supplemental submissions.

[13] For the reasons set out below, the appeal is denied and the Mason Order is confirmed.

II. The Record

[14] Rule 6.14(3) provides that an appeal from an applications judge's judgment or order is "an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material."

[15] The evidentiary record on this appeal, including based on the file materials before the Applications Judge, includes:

(a) an affidavit of Augusta Otiti sworn March 2, 2019 and filed March 5, 2019 in support of the Otitis' March 2019 application;

(b) an affidavit of records of Ayodeji Otiti affirmed July 16, 2019 (filed July 17, 2019), which appends copies of the disclosed records;

(c) an affidavit of records of HPIL sworn August 22, 2019 (filed August 22, 2019);

(d) an affidavit of Kathleen McKay sworn September 23, 2021 (filed September 27, 2021) in support of HPIL's application to compel answers and undertakings refused on questioning for discovery;

(e) an affidavit of Val Gill, HPIL's General Manager and corporate representative, sworn and filed April 1, 2022;

(f) a response affidavit of Ayodeji Otiti sworn on April 18, 2022 (filed April 28, 2022);

(g) the transcript of the proceedings before Applications Judge Mason on December 7, 2022; and

(h) an affidavit of Ayodeji Otiti sworn February 2, 2023 (filed April 18, 2023) in support of an unsuccessful application for a stay of Applications Judge Mason's cost award pending this appeal.

[16] HPIL relies on some excerpts from the Otitis' questioning for discovery pursuant to *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), rule 5.31. There was no questioning conducted on any of the affidavits pursuant to rule 6.7.

III. Standard of Review

[17] An appeal from an applications judge is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

IV. Issues

[18] Rule 7.3(1)(b) provides that a defendant may apply for summary judgment in respect of all or part of a claim on the basis that there is no merit to a claim or part of it.

[19] Summary judgment cannot be granted if the application presents a genuine issue for trial: ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 13; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2023 ABCA 96 at para 5.

[20] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: ***Hryniak v Mauldin***, 2014 SCC 7 at para 49; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 21.

[21] The proper approach to summary dispositions in Alberta has been laid out by the Court of Appeal in ***Weir-Jones*** at para 47 (emphasis in original):

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> (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.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[22] Accordingly, the issues in this appeal are:

(a) Has HPIL met the burden to show that there is no merit to some or all of the Otitis' claims, and that there is no genuine issue requiring a trial?

(b) If HPIL has met its burden, have the Otitis demonstrated from the record that there is a genuine issue requiring a trial?

(c) Is it possible to fairly resolve the claims against HPIL on a summary basis and, if so, is the Court prepared to exercise its judicial discretion to do so?

V. Analysis

A. Has HPIL Met the Burden to Show that there is No Merit to Some or all of the Otitis' Claims, and that there is No Genuine Issue Requiring a Trial?

[23] In ***Weir-Jones***, the Court of Appeal described the threshold burden upon an applicant for summary judgment at paras 32–33 (emphasis added):

> [32] A notable aspect of summary judgment applications is that there is no symmetry of burdens. **The party moving for summary judgment must, at the threshold stage, prove the factual elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial**. If the plaintiff is the moving party, it must prove "no defence". **If the defendant is the moving party, it must prove "no merit".** The resisting party need not prove the opposite in order to send the matter to trial. **The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial**: see para. 35, *infra*.
>
> [33] **The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities. If the moving party cannot meet that standard, summary**

> **judgment is simply not available.** On the other hand, merely establishing the factual record on a balance of probabilities is not sufficient to obtain summary judgment, because proof of the facts does not determine whether the moving party has also proven that there is no "genuine issue requiring a trial". Imposing standards like "high likelihood of success", "obvious", or "unassailable" is, however, unjustified. A disposition does not have to be "obvious", "beyond doubt" or "highly likely" to be fair.

[24] In this case, the Statement of Claim expressly refers to negligence, misrepresentation, fraud, malice and ill-will. Interpreting it most generously, the Statement of Claim engages or potentially engages negligence, fraud, the tort of unlawful means (which could include the misrepresentations HPIL allegedly made to the Court and Equifax), and malicious prosecution in respect of the filing of the RTDRS Order with the court. I address these in turn.

1. Is There No Merit to the Negligence Claim against HPIL?

[25] The Statement of Claim alleges both personal injury (alleged in the form of mental injury) and economic loss.

[26] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach: ***1688782 Ontario Inc v Maple Leaf Foods Inc***, 2020 SCC 35 at para 18 [***Maple Leaf Foods***]; ***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 at para 3.

a. Duty of Care

[27] The foundation of the modern law of negligence is the neighbour principle established in ***Donoghue v Stevenson***, 1932 CanLII 536 (FOREP), [1932] AC 562 (HL), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act": ***Nelson (City) v Marchi***, 2021 SCC 41 at para 15; ***Rankin (Rankin's Garage & Sales) v JJ***, 2018 SCC 19 at para 16.

[28] In many cases, the relationship between the plaintiff and defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In those cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis: ***Rankin*** at para 18; ***Mustapha*** at para 5.

[29] If it is necessary to determine whether a novel duty of care exists, courts apply the two stage "*Anns/Cooper*" test: ***Rankin*** at para 18.

[30] Neither party has provided me with case authorities addressing whether there is a recognized duty of care owed by a landlord to a tenant in respect of a landlord's handling of orders or judgments obtained against tenants. HPIL points to ***Holmes v Edmund***, 2017 ABCA 28, at para 14, which noted that, historically, almost no duty of care at common law was owed by a landlord to a tenant. That case is instructive of a potentially limited duty of care at common law, but doesn't address the specific type of alleged duty before me in this case.

[31] In this case, the relationship was more than a landlord-tenant relationship. At the relevant times following the RTDRS Order, there was a judgment creditor – judgment debtor relationship (or something akin to it). Neither party provided me any case authorities where courts have recognized or rejected a duty of care owed between creditors and debtors in respect of the filing, registration and satisfaction of orders and judgments, either before or after actual satisfaction of by the debtor. An *Anns/Cooper* analysis would be required to recognize a duty of care.

[32] The first stage of the *Anns/Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at para 39; ***Rankin*** at para 18. Proximity is assessed by examining the nature of the relationship itself: ***Maple Leaf Foods*** at para 84. The onus is on the plaintiff to establish a *prima facie* duty of care by providing a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship: ***Rankin*** at para 19. Once foreseeability and proximity are made out a *prima facie* duty of care is established, following which the burden shifts to the defendant to establish that there are residual policy reasons why the duty should not be recognized: ***Rankin*** at paras 18 and 20; ***Imperial Tobacco*** at para 39.

[33] In my view, the relationship between a creditor and debtor can be quite proximate. For example, a secured creditor can enforce and realize on its security, which will have a direct impact on the debtor's ownership of its property. As a result, a creditor has been held to owe a duty of care to a debtor in respect of the enforcement of security or disposing of the debtor's property: ***Alberta Opportunity Company v Moulton***, 1990 ABCA 359 at para 31; ***Toronto Dominion Bank v Leffler***, 2017 ABQB 154 at para 44.

[34] The same proximity could arguably apply to an unsecured creditor-debtor relationship where the creditor has obtained judgment and wishes to record it on the court file or realize on the debtor's assets under the *Civil Enforcement Act*, RSA 2000 c C-15. Part of realizing on assets includes registering or filing a judgment with the Court to obtain a writ of enforcement.

[35] In my view, an existing landlord-tenant relationship in this context increases the proximity because the tenant's personal residence is potentially impacted.

[36] In considering the proximity analysis, I have also considered the type of damages alleged. In this case, I find that it is not reasonably foreseeable that a debtor would suffer mental injury if a creditor negligently registered an already satisfied order, negligently failed to ensure a Satisfaction Memorandum, or negligently provided credit reporting agencies inaccurate information. However, in my view, such steps, could reasonably cause foreseeable damage to a debtor's credit rating. In ***Haskett v Equifax Canada Inc***, 2003 CanLII 32896 (ONCA), the Ontario Court of Appeal confirmed that there was sufficient proximity and foreseeability to give rise to a *prima facie* duty of care between a credit reporting agency and the subject of the credit report by which the credit reporting agency owed a duty to ensure that credit information was accurately recorded. See also the *Consumer Protection Act*, RSA 2000, c C-26.3 (formerly the *Fair Trading Act*) (*CPA*) at section 45, which requires a reporting agency to "adopt all reasonable procedures to ensure accuracy and fairness in the contents of its reports".

[37] In these circumstances, on the record before me I find that there was a sufficient relationship of proximity between HPIL and the Otitis once they paid the amount required under the order, that could give rise to a *prima facie* duty of care not to negligently handle the registration the RTDRS Order, the update of the court records, or the reporting of information to credit reporting agencies.

[38] With respect to the second part of the test, as noted, this engages policy concerns. In another case, ***Kudzin v APM Construction Services Inc***, 2023 ABKB 425, at para 157, I noted that unresolved policy issues in a negligence claim can make summary judgment of negligence claims inappropriate, relying on: ***Condominium Corporation No 0321365 v Cuthbert***, 2016 ABCA 46 at para 29; ***Weir-Jones*** at para 45; ***Dasilva v McLean***, 2011 ABQB 618 at para 24; ***Milne v Alberta (Workers' Compensation Board)***, 2008 ABQB 710 at para 54; ***Ernst v EnCana Corporation***, 2014 ABQB 672 at paras 94, 96.

[39] HPIL argues that, even if there is a *prima facie* duty of care, any such duty of care should be rejected on policy grounds. It argues that the proposed duty of care poses substantial indeterminate liability concerns for businesses like HPIL who have many tenants.

[40] In my view, finding a duty of care in these circumstances could affect every judgment creditor, and so its potential implications are broad. While HPIL's policy argument is compelling *before* a debtor pays the amount of the order, it is less *compelling* once the debtor has satisfied the judgment. However, I am concerned that the parties have not fully engaged on or argued the potential policy issues at play on the question of the duty of care. In the circumstances, I do not believe that determining whether a duty of care exists is appropriate to be determined summarily on the record and submissions before the court.

[41] If the duty of care question was the only one relevant to whether summary dismissal is appropriate in this case, it might have warranted directing the matter to trial. However, summary dismissal may nonetheless be appropriate if the applicant establishes no merit because other required claim elements are missing. That is, even if it is assumed that HPIL owed the Otitis a duty of care, the Otitis' claim may nonetheless have no merit.

[42] Accordingly, I will briefly review the other elements of the Otitis' negligence claim, on the assumption that a duty of care exists, to assess whether it nonetheless has no merit.

b. Standard of Care

[43] In ***Ryan v Victoria (City)***, [1999] 1 SCR 201, 1999 CanLII 706 (and confirmed again more recently in ***Nelson (City)*** at para 91) the Supreme Court of Canada has described the standard of care analysis as follows, at para 28:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external

> indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[44] I consider the merit of the Otitis' claim that HPIL breached a standard of care in the context of the Otitis' specific factual allegations of HPIL omissions or misconduct.

i. Registration of the RTDRS Order at the Court

[45] As noted, the Otitis claim that HPIL was negligent in causing the RTDRS Order to be filed at the court when HPIL knew or should have known that the Otitis had already paid any amounts owing, as reflected in HPIL's undisputed tenant ledger.

[46] HPIL argues that "it is inconceivable that any duty or standard of care would be breached by the registration of a valid and enforceable judgment".

[47] Section 22 of the *Regulation*, as it existed in 2013, provided:

> 22(1) An order made by a tenancy dispute officer may be entered in the Court of Queen's Bench and on being so entered is enforceable in the same manner as an order of the Court of Queen's Bench.
>
> (2) An order made by a tenancy dispute officer does not take effect until it is entered under subsection (1) and served.

[48] Contrary to HPIL's suggestion otherwise, the fact that an order "may" be entered (or filed) at the Court does not mean HPIL was *legally required* to file it. The *Regulation* simply permitted HPIL to do so. So, in this respect, I agree with Mr. Otiti that there was no legal requirement to file the RTDRS Order at the Court.

[49] The undisputed record is that Otitis paid $4,050 by October 15, 2013. On HPIL's tenant ledger, this reflected an overpayment and left a negative amount owing of $1,350. On November 1, 2013, a $1,350 charge is reflected in the HPIL tenant ledger, which then netted out the negative $1,350 amount owing and left the net balance owing at zero.

[50] Therefore, I agree with Mr. Otiti that, when the RTDRS Order was filed on October 16, 2013, there is no evidence its registration was needed for enforcement and there was no evidence of any intention by the Otitis to appeal the order. Further, under the *Regulation* at that time, there was also no need for HPIL to file the RTDRS Order for the purposes of an appeal of the RTDRS Order. Section 23(1) of the *Regulation*, at that time, provided that the time to file an appeal started running from the day the RTDRS Order was given. Once a notice of appeal was filed, the Dispute Resolution Service was mandated to provide to the court all documents and exhibits it had in relation to the matters under appeal (which would include any RTDRS order): *Regulation* section 27.

[51] I note that, under the current version of the *Regulation*, the successful party obtaining an RTDRS order likely *is required* to file it with the court. While section 22 of the *Regulation* is the same now as it was in 2013, the commencement of the appeal period under the current *Regulation* requires the filing of the RTDRS order at the Court of King's Bench: ***Afolabi v Wexcel Realty***

Management Ltd, 2023 ABKB 68 at para 17, citing ***Scarlett v Wang***, 2019 ABCA 72 at para 37. This means that, even where a tenant debtor has paid an amount under the RTDRS order, the landlord is reasonably required to file the RTDRS order with the court to start the appeal period. But that was not the applicable provision when HPIL filed the RTDRS Order in this case.

[52] HPIL argues there may be other reasons to file a satisfied RTDRS order. It has not filed any evidence of HPIL's practice or industry practice in 2013 relating to registering RTDRS orders at the court, including when the underlying order had already been complied with and amounts paid. Further, HPIL has not provided evidence to show why it sent the RTDRS Order for filing, or allowed it to be filed, after it had already been paid. In the circumstances, I decline to draw the inference that Applications Judge Mason drew or that HPIL invites the Court to draw – that HPIL had already sent the RTDRS Order for court filing before HPIL had registered the Otitis' October 15, 2013 payment. There was no evidence about whether, even if that were true, HPIL could not have reasonably cancelled the request for filing before the RTDRS Order was filed. HPIL could likely have adduced more evidence about the process server's filing process in this case (or more generally) but failed to do so.

[53] In the circumstances, I find that, assuming a duty of care existed, HPIL did not discharge its onus to show there is no merit to the claim that HPIL breached a standard of care by filing the RTDRS Order when and how it did.

ii. Error in the Court Order

[54] The Otitis argue that the form of RTDRS Order registered was fraudulent and in error because it referenced $1,350 instead of a different amount. In oral argument, when asked what he was referring to, Mr. Otiti referred to an Exhibit attaching the court's "Procedure Record Print" (often referred to as a procedure card), which referenced $1,350 under the "Amount/Result" heading. The procedure card also noted "Pending Payments" under the "Explanation/Application" hearing.

[55] Procedure cards are a printout from the court's filing database system, and they reflect information inputted by the court based on the filed records. HPIL cannot be held responsible for how the court enters information into its system.

[56] HPIL has discharged the onus to show there is no merit to this aspect of the claim, whether considering it as a matter of an alleged breach of a standard of care or as causing any damages to the Otitis. The record shows that HPIL simply filed the exact RTDRS Order that was granted, as it was permitted to do under the *Regulation*.

iii. Affidavit of Service

[57] The Otitis argue that HPIL filed a fraudulent affidavit of service. They deny service was effected. I find that this is potentially a conflict in the evidence but, even if it is, it is not one that is a barrier to summary dismissal because it is not material to the outcome of the question of whether there is merit to a claim that HPIL breached a standard of care by filing the affidavit: ***McDonald v Sproule***, 2023 ABKB 587 [***McDonald v Sproule***] at para 100(c), citing ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101 at para 81; ***Minex Minerals Ltd v Walker***, 2019 ABQB 460 at para 147; ***Seymour Resources Ltd v Hofer***, 2004 ABQB 303 at para

20; ***Lydian Properties Inc v Chambers***, 2009 ABCA 21 at para 22-23; ***Malhotra v 1743134 Alberta Ltd***, 2017 ABQB 34 at para 31.

[58] In 2013, section 22(2) of the *Regulation* provided that a tenancy dispute officer order did not take effect until it was entered and served. Section 31 of the *Regulation* addressed service and provided:

> Service
>
> 31(1) Any notice or other document required to be served under this Regulation must be served
>
> (a) in accordance with section 57, except subsection (5), of the Act, or
>
> (b) in any other manner as directed by the Administrator or a tenancy dispute officer.
>
> (2) The service of a notice or other document must be proved to the satisfaction of the tenancy dispute officer hearing the matter.

[59] The reference to the "Act" is to the *Residential Tenancies Act*, SA 2004 c R 17.1. In 2013, section 57 of the Act provided (emphasis added):

> Service of notices, etc.
>
> 57(1) **Subject to this section, a notice, order or document under this Act must be served personally, by registered mail or by certified mail**.
>
> (2) For the purpose of service by registered mail or certified mail,
>
> (a) **a tenant's address is the address of the residential premises rented by the tenant**, and
>
> (b) a landlord's address is the address at which rent is payable or the address in the notice of landlord served or posted under section 18 or 47(2).
>
> (3) **If a landlord is unable to effect service on a tenant by reason of the tenant's absence from the premises** or by reason of the tenant's evading service, service may be effected
>
> (a) on any adult person who apparently resides with the tenant, or
>
> (b) **by posting the notice, order or document in a conspicuous place on some part of the premises**.

[60] HPIL's affidavit of service shows that it complied with service requirements under the *Regulation*. The affidavit says that the Otitis were absent from the Premises and the process server left the Court Order in a conspicuous place: the door to their Premises.

[61] The Otitis have not suggested what other standard of care applied. Even if the Otitis did not find the Court Order on their door for some reason, that unfortunate event is not something that shows a breach of a standard of care or for which HPIL can be held responsible. I find there is no merit to an argument that HPIL breached any standard of care when HPIL followed the mode of service set out in the *Regulation*. HPIL discharged its onus to show there is no merit the Otitis' claim that HPIL breached a standard of care in the way it served the Court Order or followed the notorious standard practice of filing the affidavit of service with the court.

iv. Failing to Ensure Satisfaction Memorandum Filed or Court Records Updated

[62] The Otitis argue that HPIL negligently failed to effect the filing of a Satisfaction Memorandum or to take other steps to have court records updated to remove the Court Order.

[63] Rule 9.22 provides:

> Application that judgment or order has been satisfied
>
> 9.22(1) On application, the Court may make an order that a judgment or order has been satisfied.
>
> (2) The application must
>
> (a) be in Form 41,
>
> (b) be filed, and
>
> (c) be served on the affected parties by the same method by which a commencement document must be served.
>
> (3) The court clerk must include in the court file a memorandum that a judgment or order has been satisfied if
>
> (a) the Court so orders, or
>
> (b) the judgment creditor or the judgment creditor's lawyer acknowledges in writing that the judgment or order has been satisfied.

[64] I agree with Applications Judge Mason that the *Rules* do not put any positive duty on a creditor to acknowledge satisfaction of an order to the court (which, if done, mandates that the clerk file a Satisfaction Memorandum on the court file).

[65] Further, rule 9.22(1) does not limit who can file an application for a declaration of satisfaction of a judgment or order. In my view, one of the purposes of rule 9.22 is to allow a debtor to bring the application to update the court records in the event a creditor fails or refuses to do so. In this respect, I disagree with Mr. Otiti's suggestion that the Otitis needed HPIL's cooperation to file an application under rule 9.22. In my view, the overall purpose of rule 9.22 puts the obligation

on debtors to monitor their affairs and obligations and, if necessary, bring the application for a satisfaction order. This reflects the fact that, in the vast majority of cases, it is the debtor's failure to pay its debts that required the court's processes to be engaged and the debtor should bear the responsibility to ensure the court records are updated.

[66] The Applications Judge stated this:

> Nor do the rules impose a positive obligation on a creditor to file a notice of satisfaction on payment. The option is available, but it is not a requirement. In the big picture, this makes sense, as rather than requiring a creditor, who has already spent money to recover a debt, to take further steps upon receiving payment, the rules instead permit an application to be made to have the court order – that the order has been satisfied. These applications are routinely brought in our morning chambers by debtors.

[67] I agree with these statements. Further, in most cases, ensuring court records are updated can also be accomplished without a court application through the use of appropriate trust conditions or undertakings requiring the creditor to file the written satisfaction acknowledgment upon final payment and satisfaction. Ultimately, if a creditor unreasonably refuses to do that or objects to an application brought by a debtor, such an approach could be a relevant costs consideration upon granting an order under rule 9.22. In this case, the Consent Order made no order as to costs related to obtaining the Consent Order.

[68] It would run counter to the purpose and policy behind rule 9.22 to put the onus on judgment creditors to ensure the court records are updated upon satisfaction of judgment. If the legislature intended to do that, it could have easily expressly done so as it has in other areas, for example with respect to caveats or certificates of *lis pendens* filed or continued without reasonable cause: *Land Titles Act*, RSA 2000, c L-4, sections 144 and 149. In my view, there is no merit to an argument that a creditor's standard of care would require a creditor to take steps beyond what is required by the *Rules*.

[69] With respect to the Otitis' additional argument that HPIL owed a positive duty to have the Court Order and filed RTDRS Order somehow removed from the court record altogether, I agree with Applications Judge Mason that this is not something that is even possible, let alone appropriate. Orders and judgments are not erased from all existence when they are satisfied, they are simply noted as being satisfied. There is no legal or other principle that a debtor is entitled to have history erased once a debt is paid.

[70] HPIL discharged its onus to show there is no merit to this aspect of the Otitis' claim based on an alleged breach of a standard of care.

v. Providing Information to Equifax and/or Failing to Update It

[71] The Otitis argue that HPIL breached a standard of care in providing information to Equifax about the Court Order. They do not expressly rely on sections 49 or 50 of the *CPA*, which together provide a statutory remedy against a person for loss, damage or inconvenience suffered as a result of a someone providing false or misleading information to a reporting agency. That statutory

provision does not restrict, limit or derogate from any legal, equitable or statutory rights or remedies (including a potential common law duty of care): *CPA*, section 3. However, the *CPA* might nonetheless inform any common law standard of care: ***Ryan*** at para 28.

[72] Assuming a duty of care exists, if a creditor negligently provides incorrect information about the status of a debtor's debt or the creditor's judgment, this could very well be a breach of the standard of care.

[73] In this case, HPIL did not provide any evidence about its or industry practice, or whether it communicated information to Equifax about the RTDRS Order, the Court Order, or the Otitis. However, I agree with Applications Judge Mason that there is no evidence that HPIL provided any information directly to Equifax. The Otitis did not question HPIL's affiant about this. Based on the record adduced by HPIL, on a balance of probabilities, it is likely Equifax obtained the information from public records, not HPIL. The amount referenced in the Equifax information, and by the potential mortgage lender in its May 2018 email, is the very same $1,350 amount referenced in the procedure card, which indicates that the court records are likely the source of Equifax's information. I do not need to go as far as taking judicial notice of the fact that Equifax is notoriously known to pull information from public court records. I also do not rely on the statements made by the court clerk during oral argument about the court's processes respecting reporting agencies – the clerk's unsolicited statements are not evidence that the court can or should rely on in this case.

[74] In these circumstances, HPIL has discharged its onus to show there is no merit to this aspect of the Otitis' claim based on a breach of any standard of care.

vi. Conclusion re Standard of Care

[75] In conclusion, the only potential claim that potentially survives the standard of care analysis, and assuming a duty of care, is the registering of the RTDRS Order at the court when it was already paid and satisfied.

[76] That still does not end the matter. I turn now to damages and causation.

c. Damages

[77] The Otitis claim mental damages and economic damages. In support of its position that there is no merit to the Otitis' claim, HPIL relies on questioning for discovery excerpts and Mr. Otiti's undertaking responses on the issue of damages.

i. Mental Damages

[78] With respect to mental damages, I have reviewed ***Mustapha*** and ***Saadati v Moorhead***, 2017 SCC 28. The Otitis' evidence on this point involves bare allegations or assertions. There is insufficient evidence, expert or otherwise, to support a claim for mental damages. For example, no medical records have been produced in the action.

[79] HPIL met the burden to show no merit to, or a genuine issue requiring a trial respecting, a claim for mental damages. The Otitis were obligated to put their best foot forward. There is simply

no meaningful evidentiary foundation to create a genuine issue for trial on the question of mental damages.

[80] I turn now to the economic damages claimed.

ii. Time Spent Rectifying the Situation and Attempting to get a Mortgage

[81] Mr. Otiti's evidence is that he spent at least 200 hours trying to rectify the situation caused by the registration of the RTDRS Order and it, or the Court Order, appearing on Equifax' credit reports. This included time spent trying to convince HPIL to update the court records and attempting to secure a mortgage.

[82] Mr. Otiti argues that this was time he could have been working on his law practice. In questioning for discovery under Part 5 of the *Rules*, he was asked by way of undertaking to provide the details of his claim. In his response, and in the Otitis' affidavits, only bare or conclusory statements are made without any details provided to support this claim. In his undertaking answers, Mr. Otiti stated he spent "hundred of hours of otherwise economically profitable time to mourn unjustifiable infliction of hurt" on him and his "many unsuccessful bouts of chase after the Defendant to remove [his] name from Equifax Canada". He also referenced his "many hours of unsuccessful struggle to persuade" a mortgage lender to give them a mortgage.

[83] It is difficult to parse out the time he spent doing what, as he has provided no details, and it appears some of this time related to clearly non-compensable time spent relating to alleged emotional suffering.

[84] Mr. Otiti has disclosed and filed all of the Otitis' relevant and material records in his affidavit of records. The records produced or in the record on this appeal related to Mr. Otiti's attempts to rectify the situation are not numerous and it would be difficult to imagine these efforts taking anywhere near the hundreds of hours alleged. Mr. Otiti has not provided any evidence about his legal practice to establish that it was sufficiently busy such that any time he spent on rectifying the situation was actually time he could have or would have been billing to clients. As earlier noted, recovery of Mr. Otiti's costs were not included as part of the Consent Order.

[85] Ultimately, Mr. Otiti's evidence on this point consists of conclusory statements repeated numerous times in various ways.

[86] As I noted in ***McDonald v Sproule*** at para 96 (emphasis added):

> Fourth, **bald, conclusory, argumentative or self-serving statements**, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, **in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring a trial**: [***Fitzpatrick v The College of Physical Therapists of Alberta***, 2020 ABCA 164] at para 23; ***Wetaskiwin Animal Clinic Ltd v Hartley***, 2021 ABQB 144 at para 41; ***Murray v Ford Motor Company of Canada***, 2020 ABQB 729 at para 103; [***Rudichuk v Genesis Land Development Corp***, 2019 ABQB 133] ***Rudichuk QB*** at paras 16-17 and 21; [***Clark Builders and Stantec Consulting Ltd***

> ***v GO Community Centre***, 2019 ABQB 706] at para 157; [***County of Vulcan v Genesis Reciprocal Insurance Exchange***, 2020 ABQB 93] at para 81; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 46; [***ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)***, 2019 ABQB 653] at paras 32 and 98; [***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365, leave to appeal ref'd [2018] SCCA No 1] at paras 38-45; [***Malhotra***] at para 32; ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 113; [***McDonald v Brookfield Asset Management Inc***, 2016 ABCA 375 at para 18, leave to appeal to SCC refused 37438 (1 June 2017)] at para 18; ***Rau v Edmonton (City)***, 2015 ABCA 5 at para 19; ***R Floden Services Ltd v Solomon***, 2015 ABQB 450 at para 23; ***Guarantee Co of North America v Gordon Capital Corp***, 1999 CanLII 664 (SCC), [1999] 3 SCR 423 at para 31; [***Attila Dogan Construction v AMEC Americas Limited***, 2015 ABQB 120 at para 52 affirmed 2015 ABCA 406] at para 52; [***Minex Minerals***] at para 148; ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12 at para 22; [***Kudzin***] at para 121; [***Spady v Spady Estate***, 2022 ABQB 591] at para 57

[87] In the circumstances, I agree with Applications Judge Mason that HPIL showed there was no merit to a damage claim based on lost income, and no genuine issue to be tried on that question.

iii. Inability to Obtain Mortgage

[88] The Otitis did not obtain a mortgage in 2018 despite Mr. Otiti's efforts.

[89] When asked to provide details about this alleged loss in questioning, and by way of undertaking, the Otitis failed to provide evidence to support any compensable loss arising out of the inability to obtain a mortgage in 2018, even if it is assumed or accepted that this was caused by the existence of the Court Order and/or incorrect information at Equifax. The Otitis provided no evidence of the type of mortgage they would have received in 2018, or at what rate and on what terms, but-for the alleged breaches by HPIL, or why a delay in obtaining the mortgage caused them anything other than non-compensable emotional distress.

[90] As I will address further later, in any event, the delay in obtaining the mortgage appears to have been caused by the Otitis' 8-month delay in filing an application for a court order declaring the RTDRS Order / Court Order satisfied.

iv. Increased Mortgage Interest Paid

[91] The Otitis allege that when they did get a mortgage in 2019 after the Consent Order was filed and the Court Order recorded as satisfied, they paid more in mortgage interest than they should have paid. In Mr. Otiti's questioning for discovery, he confirmed that by the time he obtained the mortgage in April 2019, he "had no any issue with credit". It appears, then, that the claim for increased mortgage interest payments does not include a claim that HPIL's conduct caused the 2019 mortgage rate to be higher than it otherwise could have been – because the Court Order satisfaction was cleared up by that time.

[92] Rather, the issue Mr. Otiti is raising again appears to relate to the passage of time – that he should have been able to get a mortgage at a better rate in 2018 than in 2019. Mr. Otiti deposed (emphasis added):

> I lost opportunity to secure a timely mortgage, and I also had to pay more interest (3.5%) instead of rate of 2.2 or 2.5%, which I finally secured a mortgage after the removal of the judgment debt Order from the Court-records and reporting same to Equifax.
>
> [...]
>
> ...the rate that I eventually got, charged me 3.5% instead of 2.5 or lower (**per the research that I conducted regarding what would have been my mortgage rate absent any credit rating issues**).

[93] Mr. Otiti is not qualified to give opinion evidence about what mortgage rate he would have received absent credit rating issues – he is not a witness with that expertise qualified to give opinion evidence. See ***Kon Construction Ltd. v Terranova Developments Ltd***, 2015 ABCA 249. Even if he were so qualified, the Otitis provided no foundation for this bald statement of opinion. He has not established what his credit score would have been without the Court Order being registered. He has not provided the details of his personal research, of what mortgage rates were in 2018 versus 2019, of any credit report at the time the Court Order was discovered in 2018, of any mortgage proposal documents in 2018 or 2019, or even of the terms of his 2019 mortgage. The Otitis' affidavit of records discloses no relevant and material records relating to mortgage terms or mortgage rates that would support his statements.

[94] The court will assume that each party has put their best foot forward and presented all the evidence for the application: ***McDonald v Sproule*** at para 97. Parties have an ongoing duty to disclose relevant and material records: rule 5.10 Again, bald, conclusory statements or personal opinions cannot establish a genuine issue requiring a trial: ***McDonald v Sproule*** at para 96.

[95] I agree with the Applications Judge that there "is no meaningful support" for the assertion that the Otitis had to pay higher interest as a result of the RTDRS Order or the Court Order. HPIL met the onus to establish there is no merit to the Otitis' negligence claim based on alleged damages of increased mortgage interest.

v. Conclusion Re Damages

[96] In conclusion on damages, I find that HPIL met its onus to show there is no merit to the negligence claim, and no genuine issue requiring a trial, on the basis of a lack of any compensable damages.

d. Causation

[97] Because of my finding on damages, I need not consider whether there is no merit to the claim based on a lack of causation. In case I am wrong, and in any event, I make a few brief comments about causation.

[98] As per ***Nelson (City)***, at paras 96–97:

> It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., Canadian Tort Law (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
>
> Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[99] If I am wrong on the question of damages, and HPIL failed to show no merit to the claim based on damages, HPIL nonetheless discharged its onus and showed there was no merit to the claim for damages for mental injury because it is too remote and not reasonably foreseeable. As per ***Saadait*** at para 20, and applying it to this case: the occurrence of mental harm in a person of ordinary fortitude was not the reasonably foreseeable result of any of the HPIL conduct as alleged. There is no merit to a claim suggesting that HPIL caused any mental injury from a legal causation perspective.

[100] With respect to the economic loss claims, it is undisputed that the issue of the filed Court Order became known to the Otitis at least in May 2018. Both the potential mortgage lender and Equifax communicated to Mr. Otiti about it. The disclosed records indicate that HPIL communicated its confirmation that the RTDRS Order had been satisfied. Mr. Otiti attempted to have HPIL deal with it, but no Satisfaction Memorandum was voluntarily filed by HPIL. He did not immediately bring an application under rule 9.22 to update the court record, as was entitled to do. Rather, he waited eight months to do that while, in his own words, he ran "helter-skelter for many months begging Har-Par to do the right thing...".

[101] The type of injury the Otitis claim was not the reasonably foreseeable result of HPIL's alleged negligence. That is, it is not reasonably foreseeable that a debtor will spend hundreds of hours, wait many months, lose mortgage opportunities, and pay higher mortgage rates as a result, when the *Rules* provide a simple and efficient method for a debtor to update the court record to reflect that an order has been satisfied. It is reasonably foreseeable that a debtor, once made aware that court records do not reflect the satisfaction of an order or judgment, will take expeditious steps to have the court record updated (with or without the creditor's participation).

[102] Mr. Otiti is a lawyer, and is well aware, or deemed to be aware, of the law and our *Rules*. Perhaps he misapprehended the *Rules*, and believed he needed HPIL to participate in or initiate the court application. Perhaps something else was going on during that period that is not in evidence, but the court cannot speculate about that. Ultimately, Mr. Otitis' misapprehension or delay, or any ensuing alleged damages suffered in this case, is not something that HPIL can be said to have legally caused. The evidence shows that, once the rule 9.22 court application was filed, and HPIL had legal counsel, the Consent Order was granted updating the court records within just eight days. Even if it is assumed the Otitis are correct that the filed Court Order was a barrier to getting a mortgage, they could likely have had that issued resolved by June 2018 had they reasonably filed a court application.

[103] Any damages claimed are simply too remote and HPIL discharged its onus to show no merit to the claim.

e. Conclusion re Negligence

[104] Based on the foregoing, HPIL discharged its onus to establish there is no merit to, and no genuine issue requiring a trial of, the Otitis' negligence claim.

2. Is There No Merit to the Fraud or Misrepresentation Claim against HPIL?

[105] As noted earlier, the Otitis claim that the filing of the Court Order was fraudulent. I specifically asked Mr. Otiti if this was a claim they intended to continue to pursue on the appeal, given the potential for enhanced costs against them if they were unsuccessful. Mr. Otiti confirmed that it was and he continued to vigorously argue fraud orally and in his supplemental written submissions.

[106] As summarized by the Supreme Court of Canada in ***Bruno Appliance and Furniture, Inc, v Hryniak***, 2014 SCC 8, at para 21, the elements of civil fraud are: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[107] Based on the record, HPIL has discharged its burden to show there is no merit to this claim. First, there was no false representation made when the RTDRS Order was filed – it was simply the filing of an order. The correct order was filed as permitted under the *Regulation*.

[108] Further, as noted by HPIL and the Applications Judge, the fact of filing an order is not a representation of the payment status of the order – orders are filed for enforcement, records and appeal purposes.

[109] The answer might be different with respect the allegation that HPIL provided information to Equifax, if such information was provided to Equifax with the express or implied representation that the RTDRS Order or Court Order remained unpaid (assuming this could be proven). But ultimately that does not matter. HPIL has adduced sufficient evidence to show no merit to the civil fraud claim based on the third and fourth elements of the civil fraud test.

[110] HPIL has adduced sufficient evidence to establish that, on a balance of probabilities, any provision of information by HPIL to the Court or Equifax did not cause the Otitis to act in any particular way. There is no evidence of reliance by the Otitis on anything represented to the Court or Equifax. That is fatal to this claim against HPIL. Further, as previously addressed, there is no merit to a claim that HPIL's actions legally caused any compensable loss to the Otitis.

[111] HPIL discharged its onus to establish there is no merit to, and no genuine issue requiring a trial of, the Otitis' fraud claim.

3. Is there No Merit to a Claim Based on the Tort of Unlawful Means?

[112] As noted, although not expressly pleaded, it is arguable that the Otitis' Statement of Claim intended to plead, or in fact pleads, the elements of the tort of unlawful means.

[113] The tort of unlawful means is available in three-party situations where the following elements are present: (1) the defendant commits an act against a third party; (2) the act is unlawful in the sense that it would be actionable by the third party if the third party had suffered loss as a result of it; and (3) the act intentionally causes economic harm to the plaintiff: ***AI Enterprises Ltd v Bram Enterprises Ltd***, 2014 SCC 12 at para 5.

[114] With respect to the filing of the RTDRS Order and the Affidavit of Service with the Court, these steps were not unlawful and not would be actionable by the court against HPIL.

[115] With respect to the any dealings HPIL may have had with Equifax, if HPIL provided Equifax inaccurate information it may very well have exposed Equifax to liability based on the ***Haskett*** and possibly the *CPA*.

[116] However, the record adduced by HPIL shows no evidence of any intention to cause harm to the Otitis – the evidence shows that HPIL obtained the RTDRS Order and sent it for filing as it was permitted to do.

[117] The Otitis did not provide evidence of HPIL intentionally causing them harm. The Otitis remained as a tenant for years following the registration of the Court Order. When it was brought to HPIL's attention in 2018, HPIL communicated confirmation that the Otitis did not owe anything to HPIL. Those records from the Otitis' affidavit of records are admissible on this application as evidence that the records were true copies, that they are what they purport to be, and they were transmitted and received as they purport to have been: rules 5.15 and 6.11(1)(d); ***Kudzin*** at paras 61-68; ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)***, 2017 ABQB 106 at para 446, rev'd in part 2018 ABCA 305.

[118] None of this correspondence produced by the Otitis suggests any intention by HPIL to harm the Otitis. Further, the Otitis chose not to do any questioning for discovery or any questioning on the HPIL Affidavit of Records. While a party is not required to question on affidavits, and while the court is not bound to accept evidence that has not been the subject of cross-examination, a party's failing to question on admissible evidence runs the risk that the evidence will be effectively unchallenged or uncontradicted for the purposes of the application: ***McDonald v Sproule*** at para 98; ***Spady*** at para 67; ***R v Hobbs***, 2020 ABCA 156 at para 25; ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386 at para 33; ***Sticks and Stones Communications Inc v***

Hole's Greenhouses & Gardens Ltd, 2015 ABQB 774 at paras 58-61; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at paras 73-77; ***Drummond v Cadillac Fairview***, 2019 ONCA 447 at para 24.

[119] In all the circumstances, it can be inferred from the record adduced by HPIL that there was no intention to cause the Otitis harm, but rather ordinary business processes which were permitted by the *Regulation* and the *Rules*. It is not enough for the Otitis to point to the fact of the registration or that the landlord-tenant relationship had soured (the latter of which is not sufficiently in the evidentiary record in any event).

[120] Further, and in any event, HPIL met the burden of showing that there was no merit to the claim that HPIL's conduct caused the Otitis economic harm, and there is no genuine issue requiring a trial on that issue.

[121] HPIL discharged its onus to establish there is no merit to, and no genuine issue requiring a trial of, an unlawful means claim.

4. Is there No Merit to a Claim Based on the Tort of Malicious Prosecution?

[122] To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect: ***Miazga v Kvello Estate***, 2009 SCC 51 at para 3.

[123] Any dealings HPIL had with Equifax cannot found a malicious prosecution claim as they do not involve court proceedings.

[124] With respect to the filing of the RTDRS Order, even if it is assumed that this constituted a "prosecution" of a claim against the Otitis, which is doubtful and for which I have not been provided any authority, HPIL has established that there is no merit to this claim and no genuine issue requiring a trial, based on at least a lack of element (4) for the reasons I have already given. There is insufficient evidence of any malice or a purpose collateral to effecting the law. Also, again, there is no merit and no issue requiring a trial in respect of whether HPIL's conduct caused the Otitis compensable damages.

[125] HPIL discharged its onus to establish there is no merit to, and no genuine issue requiring a trial of, a malicious prosecution claim.

5. Is there No Merit to the Other Relief Sought?

[126] As noted earlier, the Otitis seek what is effectively a mandatory injunction requiring HPIL to take steps with the Court and Equifax, and directing an apology. It appears that any steps requiring HPIL to take steps with the Court and Equifax are moot, given the Consent Order. In any event, I agree with Applications Judge Mason that this was not relief the Court could or should give.

[127] HPIL met the onus to establish that there is no merit to a claim based on the non-damages based relief sought by the Otitis.

[128] The Otitis also claim $150,000 in punitive or exemplary damages. I recently addressed punitive damages in ***Serinus Energy PLC v SysGen Solutions Group Ltd***, 2023 ABKB 625. At para 238, I discussed when punitive damages are available, as follows:

> [238] Punitive damages are very much the exception, not the rule: ***Whiten v Pilot Insurance Co***, 2002 SCC 18 at para 94. They are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour: ***Whiten*** at para 94; ***Jonasson v Nexen Energy ULC***, 2019 ABCA 428 at para 2. They are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation: ***Whiten*** at para 94; ***321665 Alberta Ltd v Husky Oil Operations Ltd***, 2013 ABCA 221 at para 48. Their purpose is not to compensate the plaintiff, but to "give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened": ***Whiten*** at para 94.

[129] For the reasons I have already given, HPIL met the onus to establish that there is no merit to a claim for punitive damages. HPIL met the burden to show that there is no merit to the allegation that punitive damages are appropriate in this case. There is no merit to the allegation that HPIL's conduct was high-handed, malicious, arbitrary or highly reprehensible misconduct that departs from the ordinary standards of decent behaviour. The HPIL evidence, on the balance of probabilities, shows an ordinary business process in registering the Court Order, with at best some carelessness, followed by the parties moving forward and continuing the landlord-tenant relationship. The Otitis did not question HPIL on its affidavits. Even if some intentional aspect could be proven or assumed, the record does not suggest conduct even remotely approaching that which might warrant punitive damages.

6. Conclusion re Whether HPIL Met its Onus

[130] In conclusion, HPIL met its onus to establish there is no merit to the claim and no genuine issue requiring trial.

B. If HPIL Met its Burden, have the Otitis Demonstrated from the Record that there is a Genuine Issue Requiring a Trial?

[131] The Otitis did not discharge, and have not discharged, their onus to establish there is a genuine issue requiring trial. I agree with Application Judge Mason's conclusion and adopt my analysis above to this question as well.

C. Is it Possible to Fairly Resolve the Claims against HPIL on a Summary Basis and, if so, is the Court Prepared to Exercise its Judicial Discretion?

[132] I am satisfied that it was, and continues to be, possible to fairly resolve the Otitis' claim against HPIL summarily. I agree with Applications Judge Mason's decision to summarily dismiss the claim, and find that it continues to be just and appropriate on appeal. Again, the Otitis have had ample opportunity to question HPIL and test its evidence, and to disclose and produce records or otherwise adduce evidence. There are insufficient records, or other evidence, to support any actual compensable loss legally caused by HPIL. The parties and the court should not have to expend further resources and energy on this matter. Summary dismissal is appropriate.

VI. Conclusion

[133] The appeal is dismissed and the Mason Order is confirmed. In the event the parties are unable to reach agreement on costs of the appeal, the following process shall apply:

(a) within 30 days of this decision, HPIL shall file and serve on the Otitis and submit to my office a written cost submission setting out its costs position;

(b) within 45 days of this decision, the Otitis shall file and serve on HPIL and submit to my office a written costs submission setting out their costs position;

(c) each party's costs submission will be a maximum of 2 pages (excepting attachments, including authorities, draft proposed bill of costs, or reasonable and proper costs summary), single spaced in letter format, and shall provide:

  (i) their position with respect to the factors set out in rule 10.33;

  (ii) any formal offer under the *Rules* or other offer they wish considered;

  (iii) a draft proposed bill of costs pursuant to Schedule C; and

  (iv) a summary of their actual reasonable and proper costs that the party incurred in respect of the appeal and the action.

[134] If no submissions are received pursuant to this direction, there shall be no order as to costs of the appeal.

Heard on the 14th day of December, 2023.
Supplemental written submissions received on December 15, 2023 and December 19, 2023.
Dated at the City of Calgary, Alberta this 21st day of December 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

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