COURT OF APPEAL FOR ONTARIO

CITATION: Curtis v. McCague Borlack LLP, 2024 ONCA 729
DATE: 20241007
DOCKET: COA-23-CV-1250

Lauwers, Zarnett and Pomerance JJ.A.

BETWEEN

Gary Curtis and Tanya Rebello

Plaintiffs (Appellants)

and

McCague Borlack LLP, Eric Turkienicz
and Michelle Turkienicz

Defendants (Respondents)

Gary Curtis and Tanya Rebello, acting in person

Michael R. Kestenberg, for the respondents

Heard: September 20, 2024

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated November 1, 2023, with reasons reported at 2023 ONSC 6213, and from the costs order dated December 15, 2023.

REASONS FOR DECISION

[1] The appellants brought this action against McCague Borlack LLP, one of its lawyers, Eric Turkienicz, and his wife, Michelle Turkienicz, pertaining to Mr. Turkienicz's conduct in a prior lawsuit brought by one of the appellants in which he acted for the party adverse in interest.

[2] According to the appellants, Mr. Turkienicz knowingly allowed false statements to be made in an affidavit for the purpose of harming the appellants in action number CV-18-00607758, issued October 29, 2018. In that action, Ms. Rebello sued Del Property Management, Laney Choi, Toronto Standard Condominium No. 2151, Paragon Security, Sam Reza, Ronald Crabb, Tony G. Kamel, Nagib Hanna Kamel, Stephen Chow, Century 21 Atria Realty Inc. Brokerage, and Tridel Group of Companies (the "Rebello action"). The Rebello action was dismissed on January 25, 2024, with reasons at 2024 ONSC 573. The dismissal was not appealed.

[3] The specific allegations against Mr. Turkienicz in this action are set out in paras. 8-11 of the statement of claim:

> On or about May 3, 2021, it came to the plaintiff's attention that Decoyda Larsen who works for Paragon Security filed numerous false reports with Paragon Security as well as with the Toronto Police Service against the plaintiff Gary Curtis, on May 15, 2019, September 9, 2019, and September 26, 2019.
>
> On or about November 22, 2019, Eric Turkienicz commissioned and prepared an affidavit sworn by Larry Scolaro, of Paragon Security (Decoyda Larsen's Director at the time), which Eric deliberately and negligently concealed and failed to disclose these reports filed by Decoyda Larsen mentioned above. Eric did not provide these relevant reports in Larry's sworn affidavit and failed to state they even existed. Eric did this to assist Paragon Security and Decoyda Larsen, to create a number of false reports against Gary Curtis so that they could get him falsely charged and arrest[ed] for crimes for incidents

> that did not occur and he did not commit, which is exactly what Decoyda Larsen did.
>
> Eric Turkienicz knew that these reports filed by Decoyda Larsen existed and was obligated to release all these relevant reports in the court matter with Ms. Rebello but [chose] not to disclose these relevant reports of May 15, 2019, September 9, 2019, and September 26, 2019 against Gary Curtis, which caused the plaintiffs severe damages, suffering and injuries.
>
> On [or] about January 2020, Eric [Turkienicz] deliberately and recklessly filed this inaccurate affidavit of Larry Scolaro for the motion for security costs against Ms. Rebello, which caused the plaintiffs significant damages and losses to date.

[4] Mr. Curtis started another action, CV-22-00688382, on October 7, 2022. He sued some of the same parties to the Rebello action for malicious prosecution and other causes of action. The parties to Mr. Curtis's action include Toronto Standard Condominium No. 2151, Del Property Management Inc., Laney Choi, Paragon Security Ltd., Decoyda Anthony Larsen, Larry Scolaro, and Colin "Doe". However, Mr. Curtis did not name Mr. Turkienicz as a defendant in his action, which is ongoing at the Superior Court of Justice in Toronto.

[5] The respondents moved to strike the appellants' statement of claim as disclosing no cause of action under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellants brought a cross-motion to stay the respondents' motion and to set a hearing date for their own motion for default judgment against the respondents. The motion judge struck the statement of claim without leave to amend and dismissed the appellants' cross-motion.

[6] The motion judge did not err in finding that it was improper for the appellants to have noted the respondents in default in the face of the respondents' pending motion to strike the statement of claim under r. 21.01(1)(b) of the *Rules*. He was right to set aside the noting in default. The appellants were well aware that doing so was improper and have no excuse for failing to follow the usual practice.

[7] The appellants included Mr. Turkienicz's wife, Michelle Turkienicz, as a defendant in this action even though she had no association with McCague Borlack LLP. They included her only because she jointly owns assets with Mr. Turkienicz and wanted to prevent him from transferring his assets to his wife to avoid judgment. The motion judge did not err in finding that the claim against Ms. Turkienicz should be struck because, as he noted, "[t]he simple fact that spouses hold joint title to assets cannot, without anything more, form the basis of a claim against a spouse who is in no way otherwise involved in the allegations on which the action is based."

[8] The motion judge did not err in finding that the claim against Mr. Turkienicz and McCague Borlack in relation to his conduct as counsel for other clients in the Rebello action was barred by absolute privilege. Mr. Turkienicz owed no duty to the appellants in that action. The motion judge was right to strike the statement of claim on the basis of absolute privilege, and he did not err in refusing leave to amend except in one respect. He erred in refusing Mr. Curtis leave to amend against Mr. Turkienicz and McCague Borlack in relation to the tort of malicious

prosecution, which was alluded to, but imperfectly pleaded, in the statement of claim. The usual practice is to grant leave to amend, as many authorities confirm. In *Gagne v. Harrison*, 2024 ONCA 82, this court noted, at para. 13:

> The question is then whether leave should be granted to the appellants to amend the statement of claim. Leave to amend a statement of claim should be denied only in the clearest of cases, when it is plain and obvious there is no tenable cause of action, the proposed pleading is scandalous or vexatious or there is non-compensable prejudice to the defendants. The test applies even where it is determined that the statement of claim, as pleaded, should be struck: *Fernandez Leon v. Bayer*, 2023 ONCA 629, at para. 5.

[9] In refusing leave to amend the claim, the motion judge cited the doctrine of absolute privilege as explained in *Amato v. Welsh,* 2013 ONCA 258, 362 D.L.R. (4th) 38, at para. 34. He quoted, at para. 23, the strong words of LaBrosse J. in *Bluteau v. Griffiths*, 2023 ONSC 1004, who said, at para. 29:

> It is well established that the doctrine of absolute privilege prevents claims based on communications that take place during, incidental to, and in furtherance of a court proceeding. It makes no difference if the words used are knowingly false and spoken with malice: they are subject to immunity from suit.

[10] The motion judge found *Bluteau* to be “particularly salient” because, as he noted at para. 26:

> Mr. Curtis essentially alleges that Mr. Turkienicz knowingly allowed an employee of Paragon Security which provides security guard services in the building in which the plaintiffs live, to swear an affidavit which did not disclose particular security reports that the plaintiffs

> allege were relevant to the affidavit being sworn. As in *Bluteau,* even if that allegation is true, I would question whether that omission is one properly attributable to Mr. Turkienicz as opposed to the person who swore the affidavit.

[11] The doctrine of absolute privilege is deeply rooted in Canadian common law. The policy basis for the doctrine is the protection of vigorous and undistracted advocacy, on which the adversarial system turns. As Brett M.R. said in *Munster v. Lamb* (1883), 11 Q.B.D. 588 (Eng. C.A.), at pp.603-604:

> If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes – judge, witness, and counsel – it seems to me that a counsel has a special need to have his mind clear from all anxiety.

[12] Mr. Curtis argues that the doctrine's limited purpose is to provide counsel with immunity only from defamation actions. As we see it, although the contours of the doctrine are not fixed, as Cronk J.A. observed in *Amato*, at para. 35, it plainly applies beyond defamation. As Levine J.A. stated in *Hamouth v. Edwards & Angell*, 2005 BCCA 172, 253 D.L.R. (4th) 372, at para. 37:

> Granting absolute privilege to lawyers when they act in the course of their duties to their clients is for the public benefit. It frees lawyers from fear that in advocating their client's cause they will be sued if what they say on behalf of a client is found not to be true.

[13] We agree with the motion judge that there is no basis to conclude that an amendment could salvage the claim of Ms. Rebello. What might have some application in this case, but only in connection with one aspect of the claim advanced by Mr. Curtis, is the last sentence of the Halsbury's excerpt quoted in *Amato* and by the motion judge at para. 34: "A separate action for malicious prosecution or the malicious institution or abuse of civil proceedings may lie independently of the law of defamation." The Supreme Court noted in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 199, that: "the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted."

[14] Mr. Curtis did not sue Mr. Turkienicz in his malicious prosecution action. Further, Mr. Curtis's allegations in the statement of claim are not presently sufficient to ground such a claim, which, according to *Nelles*, at pp. 192-93, has four necessary elements:

> (a) the proceedings must have been initiated by the defendant;
>
> (b) the proceedings must have terminated in favour of the plaintiff;
>
> (c) the absence of reasonable and probable cause;
>
> (d) malice, or a primary purpose other than that of carrying the law into effect.

[15] Each of these elements has been glossed in the jurisprudence. Plainly, Mr. Turkienicz did not initiate Mr. Curtis's prosecution, but the test is more

circumstantial, as this court noted in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 117 O.R. (3d) 481. In *Curley v. Taafe*, 2019 ONCA 368, 146 O.R. (3d) 575, this court qualified *Pate Estate*, noting, at para. 26: "while the prosecution would not have been initiated but for the appellant's complaint to the police, 'the evidence shows that the decision to initiate the prosecution was nonetheless within the discretion of, and exercised, by the police in this case,'" citing *Chaudhry v. Khan*, 2015 ONSC 1847, [2015] O.J. No. 1379, at para. 18. In that case, the initiation element was accordingly not met. But on a motion to strike, where the facts alleged (or which by amendment might be alleged) in the pleading must be accepted as true, we are not able to determine that Mr. Curtis's possible malicious prosecution claim against Mr. Turkienicz would be doomed to fail because of this type of consideration.

[16] Accordingly, Mr. Curtis should have the opportunity to amend the statement of claim if he wishes to pursue a malicious prosecution claim against Mr. Turkienicz. There is enough of a factual basis in this statement of claim, in light of Mr. Curtis's other action, to justify granting him leave to amend. He must deliver any amended statement of claim, limited to asserting a claim for malicious prosecution against Mr. Turkienicz and McCague Borlack, within 30 days of the release of these reasons, failing which the appeal will be dismissed. However, in permitting this procedural step, we offer Mr. Curtis no comfort that the amended

statement of claim will survive another pleadings motion by the respondents, or that his claim is destined for success.

[17] The statement of claim also includes the causes of action of negligence and/or gross negligence, conspiracy to injure by lawful and unlawful means, fraudulent misrepresentation, and negligent and/or intentional infliction of emotional distress, mental anguish, psychological suffering, injury to dignity, embarrassment, and humiliation. To be very clear, none of these can be pursued against the respondents in the face of absolute privilege.

[18] Finally, the motion judge did not err in exercising the court's inherent jurisdiction to prevent abuse of the court's process by prohibiting the appellants from bringing further proceedings against the respondents without leave of the court. However, we revise the motion judge's order precluding Mr. Curtis from bringing any further proceedings against the respondents in order to permit him to amend the statement of claim to pursue only a malicious prosecution cause of action as described above.

[19] The appellants also contest the motion judge's costs award, which awarded costs to the respondents on a substantial indemnity basis in the amount of $18,154. The motion judge explained his costs decision in these words:

> It does strike me that actions of this sort ought to be discouraged. The plaintiffs appear to be serial litigators. As noted in my reasons, they were aware that it is improper to note defendants in default after they have

> served a rule 21 motion. They nevertheless did so. After being granted an adjournment to a date that was convenient for them, they then sought a further adjournment. The action here was entirely devoid of any merit. This was not a situation where a party brought what might be perceived as an aggressive claim and failed. This claim was entirely frivolous in that it alleged that opposing counsel owed some sort of duty to the plaintiffs. It became even more frivolous by joining the spouse of opposing counsel simply because they purchased their family home jointly, long before the action began.

[20] Subject to para. 16, we allow the appeal in part; this opens the door a crack to allow Mr. Curtis only to pursue further action on a very limited basis.

[21] Costs awards attract a high degree of appellate deference. The motion judge made no error in principle and his costs award was reasonable; indeed it was justifiable even had he granted Mr. Curtis leave to amend on the limited basis that we have concluded should have been granted. In these circumstances, we leave the motion judge's costs order intact. We order no costs of the appeal, given that while the respondents enjoyed complete success against Ms. Rebello, Mr. Curtis had only limited success on the appeal.

"P. Lauwers J.A."
"B. Zarnett J.A."
"R. Pomerance J.A."