

SUPREME COURT OF NOVA SCOTIA

Citation: Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd. 2010 NSSC 25

Date: January 21, 2010

Docket: Hfx No. 306885

Registry: Halifax

Between:

THE BODY SHOP CANADA LIMITED

Plaintiff/Defendant
by Counterclaim

and

**DAWN CARSON ENTERPRISES LIMITED
and DAWN CARSON**

Defendants/Plaintiffs
by Counterclaim

and

**OPB REALTY (Halifax Centre) Inc. and
20 VIC MANAGEMENT INC.**

Third Parties

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: Halifax, Nova Scotia

Date Heard: September 10 , 2009

Counsel: Geoffrey A. Saunders for the Plaintiff/Defendant
by Counterclaim
Kevin A. MacDonald for the Defendants/Plaintiff
by Counterclaim
Jeff Aucoin for the Third Parties

By the Court:

INTRODUCTION

[1] Both the Plaintiff, The Body Shop Canada Limited (hereinafter "BSC") and the Third Parties, OPB Realty (Halifax Centre) Inc. and 20 VIC Management Inc. (hereinafter collectively "OPB") have brought motions pursuant to Civil Procedure Rule 13.03 against the Defendants Dawn Carson Enterprises Limited and Dawn Carson (hereinafter collectively "Carson"). BSC is seeking that two causes of action contained in Carson's Counterclaim be struck. OPB is seeking that Carson's Third party claim against it be struck in its entirety.

Factual Background

[2] The background of this matter is outlined in the pleadings filed with the Court, as well as the written submissions filed by

BSC and OPB. Borrowing liberally from the written submissions of OPB's Counsel, the relevant factual background, for the purpose of the present motions, are as follows:

- a) OPB leased retail space at the Halifax Shopping Centre to BSC, by virtue of a head lease;
- b) 20 VIC acts as the property manager of the Halifax Shopping Centre, and acts on behalf of OPB in relation to leasehold issues;
- c) Rent under the head lease was calculated, in part, on the basis of gross revenue;
- d) Carson, at all material times, operated and managed a franchise of the Body Shop Canada, and entered into a sublease with BSC for the retail space, which incorporated all the terms of the head lease, including the requirement that a portion of the rent be calculated on the basis of gross revenue;
- e) The sublease further provided that Carson was to make all rental payments directly to OPB;

f) At some point OPB undertook an analysis and reached a conclusion that Carson had allegedly failed to make complete payment, based upon the gross revenue component of the rental;

g) OPB brought an action in this Court, against both BSC and Carson seeking payment of the rent it had calculated as outstanding;

h) BSC reached an agreement with OPB and it paid a sum, accepted by OPB as full and final settlement of its claim against BSC and OPB;

i) Given the payment of settlement funds by BSC, OPB discontinued the claim against both BSC and Carson.

[3] The present action was commenced by BSC against Carson seeking recovery of the amounts paid by it to OPB due to the alleged failure of Carson to accurately calculate and pay the amounts owing under the headlease. In response, Carson has

filed a Defence and Counterclaim in which it makes claim against BSC for breach of contract, tortious interference with its contractual relations with OPB, abuse of process and in defamation.

[4] Carson also brought a Third Party Action against OPB claiming its alleged actions constituted tortious interference with its contractual relations with BSC, defamation, and abuse of process.

Position of the Parties

a) BSC

[5] BSC brought a motion pursuant to Rule 13.03, having filed a Notice with the Court on May 12, 2009. The motion for summary judgment sought to set aside only two aspects of Carson's Counterclaim, namely the allegations of defamation and tortious interference with economic relations. It was alleged that

the pleadings disclosed no cause of action and that Carson's claims in that regard were clearly unsustainable. The position of BSC, the authorities relied upon and its argument was outlined in the pre-Chambers memorandum filed with the Court, as well as in Counsel's oral submissions.

b) OPB

[6] OPB also brought a similar motion against Carson, having filed its Notice on August 25, 2009. Both motions were scheduled to be heard together. Unlike BSC, OPB is seeking summary judgment by way of a complete striking of Carson's Third Party claim, arguing that there are no sustainable causes of action on the face of the pleadings. Specifically, OPB asserts that Carson has failed to establish on the face of the pleadings causes of action relating to tortious interference with contractual relations, defamation and abuse of process, as alleged. Counsel for OPB also thoroughly put forward its position, and supporting authorities by virtue of written and oral submissions.

c) Carson

[7] In its brief written submissions, Carson submits that the pleadings are sufficient, if the allegations are proven, to establish the causes of action plead, and seeks dismissal of the motions.

In oral submissions, Counsel for Carson conceded that the pleadings as it related to the allegations of defamation made against BSC should be struck. In all other respects, it was asserted that the pleadings were sufficient to support the causes of action contained therein.

Summary judgment

[8] As noted above, both motions are brought pursuant to Civil Procedure Rule 13.03 - Summary Judgment on pleadings, which reads:

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

(a) it discloses no cause of action or basis for a defence or contest;

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[9] Pursuant to Rule 13.02, "statement of claim" in the above provision, also includes "all or part of a third party statement of claim". It should also be noted that Rule 13.03(4) provides that "a judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for the amendment to the pleadings". No such motion, or intention

to seek to amend the pleadings, was brought to the Court's attention.

[10] A motion pursuant to Rule 13.03, on the pleadings, is analogous to the "application to strike" under Rule 14.25 of the former 1972 Civil Procedure Rules. Both Applicants have put forward the well established test for an application to strike in their written submissions, the applicability of which was not challenged by Carson. They assert, and I agree, that the implementation of the current Civil Procedure Rules on January 1, 2009, has not eroded the applicability of earlier case authorities. This approach has been recently endorsed by this Court in **Murphy v. Murphy** 2009 NSSC 138, where Warner, J. writes at para. 26 as follows:

The test in new CPR 13.03 (old CPR 14.25) - summary judgment on pleadings, is that the pleading discloses no cause of action [13.03(1)(a)], or the claim is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]. In **Hunt v. Carey**

Canada Inc., [1990] 2 S.C.R. 959, the Supreme Court wrote that the question was: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of claim disclosed no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck.

[11] The Court of Appeal has recently re-affirmed the rule for the striking of pleadings, which I find is still applicable to motions under new Rule 13.03. Writing for the Court in **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44, MacDonald, C.J.N.S. writes at para. 17 as follows:

[17] Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.

[12] The Court further, reaffirms the standard as articulated by the Supreme Court of Canada in **Hunt v. Carey Canada Inc.**,

[1990] 2 S.C.R. 259, writing at para. 18 as follows:

[18] In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1) (a), they must appear to be either "certain to fail" (2007 NSCA 70 at para.13) or "absolutely unsustainable" (*CGU Insurance Co. of Canada v. Noble*, 2003 NSCA 102 at para. 13).

Law and Analysis

a) Defamation

[13] As is readily determined by a review of the case authorities, special attention to the drafting of pleadings relating to claims of defamation is warranted. A failure to carefully craft the pleadings, may result in a claim being struck. In *The Law of Defamation in Canada*, 2nd ed, vol. 3, (Toronto: Thomson Canada Limited, 1999), Raymond Brown summarizes the specific requirements, at page 19-18, as follows:

The plaintiff must set out with some particularity all those material facts

necessary to support a cause of action for defamation. This includes the defamatory words, their publication, the fact that they were spoken of and concerning the plaintiff, and any additional material facts necessary to support an action, including special damages, where appropriate. The time, place, content, publisher and recipient of the publication should be included in the pleading.

[14] As explained further by the author at page 19-19, the above requirements allow a defendant to be fully apprised of the case being made against him, in order for a full and knowledgeable defense to be made:

There must be clarity in the pleadings; they must be sufficiently particularized to enable the defendant to plead to them. The material facts alleged should be sufficiently clear, certain and specific so that the defendant can be apprised of the nature of the claim to which he or she must respond, and be able to prepare his or her defense.

[15] Both applicants rely upon **Wallace v. Lawrence** 2002 NSCA 36 as an illustrative authority of the importance of

particularity of pleading in defamation. In that instance, the Court of Appeal found the claim to be insufficiently drafted, notwithstanding the degree of specificity contained in the pleadings, which read in part:

4. Since the death of Grace May Wallace the Defendant has communicated and published to third parties and persons the following comments, or made innuendos with respect to the following allegations:

(a) that the Plaintiff physically abused their mother, Grace May Wallace;

(b) that the Plaintiff stole money from their mother, Grace May Wallace;

(c) that the Plaintiff was subject to a criminal investigation by the RCMP and/or was subject to charges as a result of the above mentioned physical abuse and theft;

(d) that the Plaintiff was generally neglectful of their mother, Grace May Wallace, and thereby caused her physical and mental harm;

(e) that the Plaintiff caused their mother, Grace May Wallace, to be unfairly and unjustifiably admitted to a nursing home;

(f) that as a result of the above the Plaintiff was going to prison.

[16] In addition to the above pleadings, the plaintiff responding to demanded particulars, identified named individuals to whom the words contained in the above pleadings were spoken, but was unaware of the dates on which the communications were made.

In writing for the Court, Cromwell, J.A. (as he then was) stated as follows:

[6] We accept that in cases of slander in which the plaintiff is not aware of the specific words or precise occasions on which the allegedly defamatory words were published, the usual requirements of very precise pleading of the claim may be somewhat relaxed: see for example *Paquette v. Cruji* (1979), 26 O.R. (2d) 294 (Ont. H.C.) and Raymond E. Brown, *The Law of Defamation in Canada* (2nd, updated to 2001 release 1) at volume 3, section 20.3(5). However, with great respect to the learned chambers judge, the statement of claim in this case is so wanting in particulars that it would be unjust to require the defendant to plead to it.

[7] The statement of claim does not specify whether the statements were made orally or in writing and provides no time frame in which the statements were allegedly made. The particulars appear to limit the allegations to those made in paragraph 4(a) of the

statement of claim, but in the plaintiff's factum on appeal and in oral submissions to this Court, the plaintiff takes the position that all of the allegations in paragraph 4 are still relied upon. There is no proper pleading of innuendo and no particulars are given of the special damages claimed.

[17] In **Paquette v. Cruji** (1979), 26 O.R. (2d) 294, the Ontario High Court declined to strike pleadings, which had been previously amended to provide further particulars, notwithstanding a continued lack of information in the pleadings. In reaching its decision, it appears relevant that the plaintiff in that instance provided all information available to him. The Court writes:

The plaintiff maintains he was slandered by the defendant by communication to persons unknown (but association with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. **He has stated everything he knows**. If he proves the facts pleaded he will have established a prima facie case. (Emphasis added)

[18] Turning to the present application, a review of the pleadings relating to the alleged defamation is required.

Contained in paragraphs 45 and 46 of the Statement of Defence and paragraph 64(c) and (d) of the Statement of Counterclaim, the allegations are as follows:

45. OPB declined both procedures and made defamatory public statements to BS Can. Representatives and others that DCEL and Carson had intentionally misstated the percentage rent - amounting to fraud.

46. These allegations were made known to BS Can. representatives, who repeated these concerns to DCEL.

64. DCEL repeats the foregoing and claims against BS Can. For breach of contract, tortious interference with its contractual relations with HSC, abuse of process and in defamation; the particulars of which are best known to BS. Can. but include:

(c) Made defamatory statements in writing and orally to third parties, including representatives of OPB, 20 VIC and agents and servants retained on their behalf to conduct the audit and other reviews;

(d) Such other acts of defamation as may appear.

[19] The Notice of Claim Against the Third Party did not specifically contain any additional pleadings relating to the claim

of defamation, but did rely "upon the statements of facts contained in its Defence and Counter Claim".

[20] In addition to the pleadings, Carson in response to a Demand for Particulars filed by OPB states:

The Defendants/Plaintiffs by Counterclaim say that the defamatory words used and the time and place made are matters of evidence and in any event are best known to the Third Parties and Plaintiff/Defendant by Counterclaim. But notwithstanding that it is not necessary to disclose evidence now, to assist the parties the Defendants/Plaintiffs by Counterclaim advise that on or about September 29, 2008 there was a meeting that took place in Toronto between representatives of the Plaintiff/Defendant by Counterclaim and the Third parties, wherein representatives for the Third Parties stated that Dawn Carson and her company had wilfully understated it's revenues and knowingly underpaid the amount due and owing as a result of fraudulent activity on the part of Dawn Carson and Dawn Carson Enterprises Limited.

[21] As noted above, Counsel for Carson conceded in his oral submissions that the claim of defamation relating to BSC should be struck. In considering the remaining motion of OPB, it is

noted that Carson did by way of the Answer, provide a time frame and location of the alleged oral defamation. It is of concern however that the identity of the persons speaking the words, as well as the identity of those hearing them, have not been plead, nor subsequently provided. Further, the exact words used, alleged to be defamatory, have not been provided by Carson, although the purported intent or conclusion to be drawn by the listener, was asserted. Innuendo was not specifically plead.

[22] In my view, it is particularly relevant that Carson has more information pertaining to the alleged defamation than what it has chosen to provide. Specifically, as made clear by paragraphs 45 and 46 of the Statement of Defence, Carson was advised of the defamatory statements allegedly made by OPB representatives by representatives of BSC "who repeated these concerns". From this, it is clear that Carson knows not only the identity of the individuals who heard the defamatory statements, but was in a position to make further inquiry as to the exact words used, and who may have uttered them. This is not a situation, as in

Paquette, supra, where the party "has stated everything he knows."

[23] As established by the above authorities, in order for OPB to properly defend against an allegation of defamation, it is entitled to know the words used and the identity of the individuals involved. This is information which has not been included in the pleadings. As in **Wallace, supra** notwithstanding some specificity being contained in the pleadings, they are inadequate to properly establish a claim of defamation. Given the deficiency in the pleadings, I would have reached the same conclusion regarding the claim against BSC, should Counsel not have conceded that point.

b) Tortious Inference with Contractual relations

[24] Carson has asserted in its Counterclaim and Third Party claim, allegations that both Applicants wrongfully interfered with its contractual relations with the other. Both Applicants are seeking that aspect of Carson's claim be set aside.

[25] In both their written and oral submissions to the Court, the Applicants submitted that the elements required to successfully advance a claim of tortious interference with contractual relations were well established in the case law, and that on the face of Carson's pleadings, essential elements were absent. It was argued that the cause of action was unsustainable on the face of the pleadings, and should be struck.

[26] I reviewed with interest the case authorities submitted by the Applicants, in particular **Daishowa Inc. v. Friends of the Lubicon** 1996 CarswellOnt 1620 (Gen. Div.), where the court addresses the necessary elements as follows:

51. The tort of intentional interference with contractual relations requires the plaintiff to prove:

- (1) an intention to injure the plaintiff;
- (2) interference with another's method of gaining his or her living or business by illegal means; (See I.B.T., *Local 213 v. Therien*, [1960] S.C.R. 265 at 280.) and
- (3) economic loss caused thereby.

[27] The Court was encouraged to seek out the above elements in the pleadings in this instance, and conclude that, given the absence of relevant allegations, the cause of action could not be established. Neither Applicant presented case authorities from this Province, nor did Carson attempt to argue with the applicability of the extra-provincial authorities provided.

[28] I am unable to agree with the Applicants' submissions that Carson has failed to plead the necessary elements to establish tortious interference with contractual relations, and thus the claim is "clearly unsustainable" on its face. Specifically, I cannot agree that the elements of this tort are as well defined and certain as suggested by the Applicants. The law, at least in Nova Scotia, is still in a state of development regarding economic torts, and the authorities relied upon by the Applicants are not particularly helpful, in light of two recent decisions of the Nova Scotia Court of Appeal.

[29] The comments of Saunders J.A. in **2703203 Manitoba Inc. v. Parks**, 2007 NSCA 36, make it very clear that it is not a

"given" that the elements required for the successful advancement of a claim for interference with contractual relations have been solidified. He writes as paragraph 66:

It will not be necessary for me to list and define the specific elements of the tort of inducing breach of contract, or the tort of intentional interference with contractual relations, or to embark upon an analysis as to whether each action is the same in all cases. Suffice it to say that the law in this area continues to evolve. See for example **Allister Harlow Construction Ltd. v. Shelburne Shopping Centre Ltd.** (1981), 45 N.S.R. (2d) 271; **Matsushita Electric of Canada Ltd. v. Central Trust Co.** (1986), 73 N.S.R. (2d) 250; **M.A. Hanna Co. v. Nova Scotia (Premier)** (1990), 97 N.S.R. (2d) 281; **Industrial Union of Marine & Shipbuilding Workers of Canada Local 1 v. I.B.E.W., Local 625** (2001), 198 N.S.R. (2d) 60 (N.S.S.C.); and [2002] N.S.J. No. 188 (C.A.); **Daishowa Inc. v. Friends of the Lubicon et al** (1996), 27 O.R. (3d) 215; **Waxman v. Waxman**, [2004] O.J. No. 1765 (C.A.), [2004] S.C.C.A. No. 291; **Verchere v. Greenpeace Canada**, [2004] B.C.J. No. 864, 2004 BCCA 242; **Super-Save Enterprises Ltd. v. 249513 B.C. Ltd.**, [2004] B.C.J. No. 715, 2004 BCCA 183; **39413 Alberta Ltd. v. Pocklington**, [2000] A.J. No. 1350, 2000 ABCA 307; and **Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Department Store Union, Local 558** (1998), 172 Sask. R. 40 (C.A.), [2002] 1 S.C.R. 156.

[30] Further, in **Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1 v. International Brotherhood of Electrical Workers, Local 625**, 2002 NSCA 56, Cromwell, J.A. (as he then was) acknowledged the "highly controversial issues regarding the elements of the economic torts" (para. 42), and further addressed the function of a motion judge in determining the scope of a plead tort at paragraph 41 as follows:

This case raises difficult, controversial and important questions of law concerning the scope of some of the economic torts. In my view, however, at the threshold stage of an application for an interlocutory injunction, the court is not obliged to pronounce on such questions other than to be satisfied that there is an apparently sound legal basis for the applicants' claims. As Lord Diplock said in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 ALL E.R. 504 (h.l.) at 510, "It is no part of the court's function at this stage of the litigation...to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." This statement was approved by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stors (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 130.

[31] Turning to the pleadings in the present case, Carson has made a number of specific allegations as to how each of the

Applicants have interfered with contractual relations with the other. Whether or not those allegations, at the end of a trial, if established by the evidence, would satisfy the elements of tortious interference with contractual relations, is a determination best left to the trial judge. I cannot find that it is "plain and obvious" that the pleadings disclose no reasonable cause of action, and the Applicants' request to strike this aspect of Carson's claim and the Third Party Claim is therefore denied.

c) Abuse of Process

[32] Although Carson has plead abuse of process against both Applicants, only OPB sought to have that claim struck. Similar to the argument advanced above, OPB asserts that there are necessary elements to successfully establish abuse of process, and that these are lacking on the face of the Carson's pleadings.

[33] "Abuse of process" is a term utilized in several fashions, by way of example, as in the present case, as a tortious act, or alternately, as a defence where a proceeding has been commenced which is contrary to the principles of fundamental

justice - most often in criminal or quasi-criminal settings. This distinction has been concisely articulated by the Federal Court of Appeal in **Levi Strauss & Co. v. Roadrunner Apparel Inc.**, [1997] F.C.J. No. 1432, where Letourneau, J.A., writes:

9 The concept of abuse of process has developed both in substantive and procedural law. It is well settled law, from the point of view of substantive law, that an abuse of process is an actionable tort. As Henry J. stated in *Tsiopoulous v. Commercial Union Assurance Co.* when dealing with a counterclaim for damages for abuse of process:

"This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate. It occurs when the process of the court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose."

10 In Fleming's *The Law of Torts*, the learned author distinguishes between certain forms of abuse of legal procedure such as malicious arrest and execution and the concept of abuse of process:

"Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted for some extraneous purpose, such as extortion or oppression. Here an action will lie at the suit of the injured party for what has come to be called "abuse of process"."

11 A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser

must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions.

12 Abuse of process has also been invoked as a procedural defence, especially in criminal law when the proceedings were oppressive or vexatious or offensive to the principles of fundamental justice and fair play. When successful, the defence has resulted in a stay of the proceedings.

[34] What constitutes tortious abuse of process? There does appear to be consensus regarding the required elements. As set out in **Amirault v. Westminer Canada Ltd.** (1994), 127 N.S.R. (2d) 241 the Court of Appeal quotes the trial judge at paragraph 123 as follows:

Though the tort of abuse of process is also alleged it is unnecessary for me to deal with it other than to say it is a separate tort distinct from the tort of malicious prosecution with its own list of essential requirements, namely:

1. The Defendant must have used the legal process;
2. He must have done so for a purpose other than that which the process in question was designed to serve, that is, for a collateral and illicit purpose.

3. He must have done some definite act or made some definite threat in furtherance of the purpose; and
4. Some measure of special damages must be shown.

[35] In the present instance, Carson has included in the pleadings, a variety of allegations as to why it asserts that the actions of OPB singularly, or in concert with BSC were "abusive". Abusive conduct, does not however, necessarily amount to conduct which would establish tortious abuse of process.

[36] Here, Carson clearly takes issue with OPB having taken previous legal action against it, and further, settling said action with BSC without providing it with an opportunity to address the allegations of fraud contained therein, or the quantification of the monetary claim. What is missing however, on the face of the pleadings, is any assertions, if proven, to satisfy the second and third elements outlined above. There is nothing in the pleadings which indicate or allege that OPB had a collateral and illicit purpose in bringing the earlier action against Carson. It brought

an action to collect a debt. The fact that Carson was not heard on that action prior to it being settled, does not establish a collateral or illicit purpose. To do so, the Respondent would have to allege that OPB brought the earlier action solely for some purpose, other than the collection of rent it viewed as being owed.

[37] The pleadings do not, on their face, disclose allegations, if established, that would meet the necessary elements for abuse of process. Accordingly, I find there is no sustainable cause of action in that regard.

Conclusion

[38] In summary, the motions brought by the Applicants are determined as follows:

- a) The claim of defamation against OPB is clearly unsustainable on the pleadings, and it shall be struck;
- b) The claim of defamation against BSC , with the consent of Carson, shall be struck;

c) The motions made by BSC and OPB that Carson's claims relating to tortious interference with contractual relations, are dismissed; and

d) The claim of abuse of process against OPB is clearly unsustainable on the pleadings, and it shall be struck.

[39] Given the divided success in relation to the motions before the Court, all parties shall bear their own costs.

J.