

CANADA / JUDGMENT

0976820 B.C. Ltd. v. Leung

2018 BCSC 1725

COURT

Supreme Court of British Columbia

DECIDED

9 October 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1725 0976820 B.C. Ltd. v. Leung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0976820 B.C. Ltd. v. Leung,

2018 BCSC 1725

Date: 20181009

Docket: S196197

Registry: New Westminster

Between:

0976820 B.C. Ltd. d.b.a. Ackroyd Pets & Aquarium

and William Wong

Plaintiffs

And

Lori H. Leung, Melissa Chan and Twining, Short & Haakonson,

Colin Schuss, and Dorset Realty Group Canada Ltd.

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

The Plaintiff, appearing in person and as Representative for the Plaintiff 0976820 B.C. Ltd.:

W. Wong

Representative for the Plaintiff 0976820 B.C. Ltd., appearing in person:

H. Ho

Counsel for the Defendants, Lori H. Leung, Melissa Chan and Twining, Short & Haakonson:

T.C. Hinkson

Counsel for the Defendants, C. Schuss and Dorset Realty Group Canada Ltd:

V. Reakes

C. Leung, Articled Student

Place and Date of Hearing:

New Westminster, B.C.

August 29, 2018

Place and Date of Judgment:

New Westminster, B.C.

October 9, 2018

- [1] The defendants Lori Leung, Melissa Chan and Twining, Short and Haakonson (together the "Law Firm") and Colin Schuss ("Mr. Schuss") and Dorset Realty Group Canada Ltd. ("Dorset") apply pursuant to Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [the Rules], to have the notice of civil claim struck as disclosing no reasonable claim, as being unnecessary or vexatious, and as being an abuse of process. In addition, Mr. Schuss and Dorset apply pursuant to Rule 9-6 to have the action dismissed as not raising a genuine issue for trial.
- [2] The plaintiffs, 0976820 B.C. Ltd. d.b.a. Ackroyd Pets and Aquarium ("Ackroyd") and William Wong ("Mr. Wong"), are self-represented. Ms. Heriatta Ho and Mr. Wong are directors of Ackroyd. Both attended the hearing of these applications and Mr. Wong spoke on behalf of Ackroyd and himself.

Overview and Summary of Disposition

- [3] Ackroyd is involved in ongoing litigation against Dorset and others in B.C. Supreme Court, Action No. 166420, New Westminster Registry (the "Underlying Action"). In that action, Ackroyd alleges that Dorset made negligent misrepresentations that induced it to enter into a lease of premises in Richport Town Centre in Richmond, BC. Ackroyd also alleges that Dorset failed to inform it that two major tenants would be moving out of the shopping centre. The Law Firm represented Dorset in the Underlying Action until they were forced to cease acting because of the allegations in this action.

- [4] Mr. Schuss is not a defendant in the Underlying Action. The only mention of him is in one paragraph of the notice of civil claim where Ackroyd alleges that Mr. Schuss drafted the Offer to Lease and Lease Agreement for the premises, that he facilitated the lease of the premises, and that he was an employee and/or representative of Dorset and an agent of the landlord.
- [5] In this action:
- a) Mr. Wong alleges that Mr. Schuss and Dorset made a defamatory statement about him, and Mr. Schuss made "many additional mislead[ing] statements" in two affidavits he swore in the Underlying Action. The Law Firm is sued as having filed and served materials containing the alleged defamatory statement and the alleged misleading statements; and
 - b) Ackroyd alleges Mr. Schuss made negligent misrepresentations inducing it to enter into the lease of the premises, and failed to inform it that two major tenants would be moving out of the Centre. The same allegations are made against Dorset. These duplicate and expand upon the allegations against Dorset in the Underlying Action. Ackroyd also alleges that Mr. Schuss was in a dual agency relationship, and that Mr. Schuss and Dorset were acting in a fiduciary capacity. The specifics of the dual agency are not alleged, but the final signed Offer to Lease has a clause indicating Mr. Schuss was a representative of Ackroyd and the landlord.
- [6] For the reasons I detail below, those portions of the notice of civil claim relating to Mr. Wong's claims of defamation and misleading statements in affidavits, in a) above, are struck. The remainder of the notice of claim, relating to Ackroyd's claim against Mr. Schuss and Dorset for negligent misrepresentations, failure to disclose, and a breach of fiduciary duty, in b) above, are not struck. As these allegations are closely related to the allegations in the Underlying Action, and as Ackroyd is self-represented, I direct the parties to attend a case planning conference to discuss the possibility of having what remains of this action either consolidated with, or tried at the same time as the Underlying Action.

Chronology

- [7] In November 2014, Ackroyd commenced the Underlying Action against Dorset and three other companies. The three other companies were or are, the landlord and its property manager, and their status is not relevant to these applications. The amended notice of civil claim alleges:
- a) in August 2013, Ackroyd entered into an Offer to Lease and a Lease Agreement for a seven-year lease commencing December 1, 2013;
 - b) the Offer to Lease and Lease Agreement were drafted by Mr. Schuss as an employee or representative of Dorset and the landlord:

- c) the landlord, its property manager, and Dorset made negligent misrepresentations regarding estimated operating costs and property taxes (together the "Additional Rent"). A clause in the Offer to Lease estimated 2013 Additional Rent to be \$12.71 per square foot. However, the Additional Rent in 2013 and subsequent years turned out to be higher; and
 - d) Dorset failed to advise Ackroyd that two major tenants would vacate the Centre within six to nine months.
- [8] On December 15, 2014, Dorset filed a response to civil claim, denying the allegations. The pleading states:
- 5. the Defendant specifically denies that it prepared the Offer to Lease as alleged. The Defendant says that the Offer to Lease was in fact prepared by William Wong, a consultant retained by the Plaintiff.
 - 6. The Defendant says that it was William Wong, acting on behalf of the Plaintiff, who inserted the 2013 operating costs into the Offer to Lease.
- [9] Paragraph 6 of the response to civil claim is the alleged defamatory statement ("Alleged Defamatory Statement") which is the subject of this action.
- [10] At the time Dorset filed the response to civil claim, it was not represented by the Law Firm. The Law Firm subsequently took over the defence of Dorset and was counsel when Dorset brought an application for leave to file a third party notice against Mr. Wong (the "Third Party Application"). This is discussed further below as it is the basis for Mr. Wong's defamation claim against the Law Firm.
- [11] In March 2017, Dorset delivered a notice to admit requesting that Ackroyd admit that Mr. Wong was its agent and that he represented Ackroyd during negotiations of the Offer to Lease. Ackroyd denied this.
- [12] On June 19, 2017, Dorset filed a summary trial application in the Underlying Action. In support of that application, Mr. Schuss swore two affidavits in which he states that he is a commercial real estate broker and a vice-president of Dorset. With respect to dealings with Ackroyd, Mr. Schuss states that all of his substantive contact and negotiations were exclusively with Mr. Wong, whom he understood to be Ackroyd's authorized representative.
- [13] In one of his affidavits, Mr. Schuss sets out the exchange of draft Offers to Lease between Ackroyd and the landlord. I make no findings of fact with respect to what did take place, but I detail Mr. Schuss' affidavit regarding the exchanges because it forms the basis of Mr. Wong's arguments on defamation.
- [14] Mr. Schuss swears that on July 31, 2013 he sent a draft Offer to Lease to Mr. Wong by email. This was on Dorset letterhead. As I understand Mr. Wong, this shows the Offer to Lease could not have been drafted by him, contrary to what is alleged in para. 5 of the response to civil claim in the Underlying Action. Further, this first draft Offer to Lease contains the clause regarding Additional Rent, which shows that Mr. Wong could not have inserted the

operating costs into the Offer to Lease, contrary to what is plead in para. 6 of the response to civil claim.

- [15] Mr. Schuss states that on August 2, 2013, Mr. Wong hand-delivered to him a counter-offer which was in the form of a second draft Offer to Lease. This Offer to Lease is not on Dorset letterhead and it is possible, but I make no finding, that Mr. Wong created this document. It incorporates verbatim the clause regarding Additional Rent in the first draft Offer to Lease.
- [16] On August 9, 2013, Mr. Wong hand-delivered to Mr. Schuss a third Offer to Lease, which was signed by Ackroyd and the landlord. This appears to be the same form as the second draft Offer to Lease except there are numerous hand-written deletions, amendments, and additions. The clause regarding Additional Rent is the same, except for a hand-written change as to the date it was to commence.
- [17] Ms. Ho also swore two affidavits on the summary trial application, disagreeing with Mr. Schuss' evidence, and further alleging that a 15% administration fee was not disclosed to Ackroyd. She states she was involved in the negotiations with Mr. Schuss. Mr. Wong also swore and filed an affidavit corroborating Ms. Ho's evidence.
- [18] A judge was not available to hear the summary trial application, which was set for two days in July 2017. The application has not proceeded further.
- [19] On August 14, 2017, the Law Firm filed the Third Party Application on behalf of Dorset. The notice of application, under a heading titled "The Pleadings", states:
8. On December 15, 2014, Dorset filed a Response to Civil Claim in the action, denying all of the Plaintiff's claims. Among other things, Dorset stated the following fact under Part 1 Division 2 in its Response to the Amended Notice of Civil Claim:
6. The Defendant [Dorset] says that it was William Wong, acting on behalf of the Plaintiff, who inserted the 2013 operating costs into the Offer to Lease.
- [20] The filing of this document containing the Alleged Defamatory Statement forms the basis of Mr. Wong's defamation claim against the Law Firm.
- [21] The Third Party Application was heard in September 2017 and was dismissed, partly because it was brought close to the then January 2018 trial date. That trial date was subsequently adjourned.
- [22] On October 17, 2017, Dorset filed a notice of civil claim in B.C. Supreme Court, Action No. 195407, New Westminster Registry claiming contribution and indemnity against Mr. Wong in relation to the Underlying Action.
- [23] On November 8, 2017, Ackroyd and Mr. Wong filed this action.

Defamation and Misleading Statements Claims

Pleadings

- [24] Paragraphs 6 and 10 of the notice of civil claim identify the Alleged Defamatory Statement as being "William Wong intentionally inserted the 2013 Operating Cost in the Offer [to] Lease on the behalf of the Plaintiff". It is clear from the pleadings that this refers to Dorset's response to civil claim, and its notice of application in the Third Party Application. The actual statement is not exactly as Mr. Wong alleges; the statement is, "The Defendant says that it was William Wong, acting on behalf of the Plaintiff, who inserted the 2013 operating costs into the Offer to Lease." However, the statements are not different in substance.
- [25] Mr. Wong pleads that Mr. Schuss and Dorset filed the Alleged Defamatory Statement knowing that it was untrue and with intent to damage his character. Mr. Schuss is not a party to the Underlying Action, so it was only Dorset that filed the Alleged Defamatory Statement. Mr. Schuss' two affidavits filed in the summary trial application in the Underlying Action do not repeat the Alleged Defamatory Statement, but do set out the exchange of the draft Offers to Lease discussed earlier in these reasons.
- [26] Mr. Wong pleads that the Law Firm filed and distributed the Alleged Defamatory Statement by mail, email and affidavit to the parties and their lawyers. Mr. Wong pleads that the Law Firm should have known the Alleged Defamatory Statement was untrue based on Mr. Schuss' first affidavit which indicates that it was Mr. Schuss who delivered the first draft Offer to Lease containing the clause concerning Additional Rent. Mr. Wong pleads the Law Firm misled the court by filing the Third Party Application with false information and with the intention to damage Mr. Wong's character.
- [27] In paragraphs 16 through 18 of the notice of civil claim, Mr. Wong pleads that Mr. Schuss' affidavits contain "many additional mislead[ing] statements" (not identified) and that the Law Firm should have recognized those statements were false. He pleads that the Law Firm used this information in the Third Party Application.

Submissions of the Parties

- [28] The Law Firm submits that:
- a) the Alleged Defamatory Statement would not tend to lower the reputation of Mr. Wong in the community in the estimation of reasonable persons on an objective basis;
 - b) even if the Alleged Defamatory Statement would tend to lower Mr. Wong's reputation, it was made in the Underlying Action, and was therefore made on an occasion of absolute privilege;
 - c) a notice of civil claim alleging defamation on an occasion of absolute privilege is vexatious;
 - d) the allegation that Mr. Schuss' two affidavits made "many additional mislead[ing] statements" does not establish a cause of action and does not meet the requirements for properly pleading a claim of defamation;

- e) the Law Firm does not owe Mr. Wong a duty of care; and
 - f) the notice of civil claim is an abuse of process.
- [29] Dorset and Mr. Schuss adopt the Law Firm's submissions on the defamation claims. They further say they do not owe a duty to Mr. Wong with respect to the manner in which Dorset conducts its defence in the Underlying Action.
- [30] Mr. Wong submits that the Alleged Defamatory Statement is defamatory because it is not true. He argues that the statement lowers his reputation because the position of Dorset is different from his evidence. Because he says it is untrue, he alleges it is unethical and legally actionable for Dorset, Mr. Schuss and the Law Firm to file and rely upon such evidence.

Analysis

Rule 9-5(1)(a)

- [31] The test for striking a claim under Rule 9-5(1)(a) is whether it is plain and obvious, assuming the facts pleaded are true, that the claim has no reasonable prospect of success. If there is a realistic chance the plaintiff might succeed, then the application should be dismissed: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980; *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61, at para. 41. No evidence is admissible on an application under Rule 9-5(1)(a): Rule 9-5(2).
- [32] To establish a claim of defamation, a plaintiff must prove that: (1) the impugned words would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) the words referred to the plaintiff; and (3) the words were communicated to someone other than the plaintiff: *Grant v. Torstar Corp.* 2009 SCC 61, para. 28.
- [33] Statements made in the course of judicial proceedings are made on an occasion of absolute privilege. The privilege extends to pleadings, statements made in documents used in the proceeding, and statements contained in affidavits: *Bernstein v. Stoytcheva-Todorova*, 2007 BCSC 14 at para. 66; *Hamouth v. Edwards & Angell*, 2005 BCCA 172 [Hamouth] at paras. 2-3; *Schut v. Magee*, 2003 BCCA 417 at para. 15; *McDaniel v. McDaniel*, 2009 BCCA 53.
- [34] The Alleged Defamatory Statement was made in Dorset's response to civil claim and in its notice of application on the Third Party Application. The pleading does not specifically identify the first Alleged Defamatory Statement as being in the response to civil claim, but it is clear that is what is being referred to, as the pleading states the Alleged Defamatory Statement was made on December 15, 2014, which is the date of the response to civil claim. The pleading specifically identifies the second occasion of the Alleged Defamatory Statement as being in the Third Party Application materials.

[35] I find that the Alleged Defamatory Statement was made in the course of judicial proceedings and was therefore made on occasions of absolute privilege. As a result, Mr. Wong's defamation allegations do not disclose a reasonable claim. It is plain and obvious that such claims would fail, and I therefore strike those claims pursuant to Rule 9-5(1)(a).

[36] As stated in Hamouth at para. 3:

There is also no dispute that absolute privilege provides immunity against suit. If the alleged defamatory statement was made on an occasion of absolute privilege, the statement of claim may be struck out under Rule 19(24)(a), as it "discloses no reasonable claim":[citations omitted].

[37] Further, the ordinary meaning of the Alleged Defamatory Statement would not tend to lower the reputation of Mr. Wong in the eyes of a reasonable person. Mr. Wong has not pled particulars of how the words were used in a derogatory sense as required by Rule 3-7(21)(a) of the Rules. Nor am I persuaded by his submissions at the hearing that the words were used in a derogatory sense. A reasonable person reading Dorset's response to civil claim and the Third Party Application materials would conclude only that there is a contested issue of fact as to what took place in the negotiations leading up to the lease of the premises.

[38] Mr. Wong further alleges that the Law Firm filed and relied upon the Alleged Defamatory Statement and the "many additional mislead[ing] statements" in Mr. Schuss' two affidavits, knowing that they were untrue. Although this allegation appears to relate to the defamation claim, reading the notice of civil claim as liberally as possible, it could be read as alleging a duty to Mr. Wong to not submit what he says is untrue evidence.

[39] Counsel for the Law Firm submits that, generally, counsel do not owe a duty of care to opposing litigants. In *Awad v. Salna*, 2017 BCSC 429, the Court stated:

[22] There is an absolute privilege extended to counsel for all communications made in the course of or incidental to their representation of clients in the judicial or quasi-judicial proceedings. In *Lawrence et al v. Sandilands et al*, 2003 BCSC 211, Madam Justice Wedge stated at paras. 77-80:

[77] It is well established that in the course of counsel's representation of his or her clients interests, it is to be expected that "much may be done that is intentionally and necessarily directed toward injuring the opposing party's interests." (*Crooks v. Manolescu*, [1995] B.C.J. No. 17 (BCSC) at paragraph 10).

[78] In *Kamahap Enterprises Ltd. V. Chu's Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288 (C.A.), the Court of Appeal said at page 291 and 292:

The cause of action asserted, were it to be upheld, would be one imposing on the solicitors for one party an obligation of care to all others involved in the transaction to see the transaction properly carried into effect, even though the solicitors were retained and paid only by one of them.

.where the only damage foreseeable is damage to another's pocket or estate--where there is no foreseeable risk of personal injury or physical property damage-foreseeability of such economic loss, while essential to the existence of a duty of care, cannot, it now seems clear, generally be regarded as sufficient to create proximity and thus impose such a duty.

- [79] While a solicitor may owe an ethical duty to the court to be candid and fair, the only party to whom a solicitor owes an actionable duty is his or her client (*Jensen v. MacGregor* (1992), 65 B.C.L.R. (2d) 224 at p. 228 (BCSC)).
- [80] The court in *Jensen* found that in the absence of a contractual obligation and any duty of care owed between counsel for one party and the party adverse in interest, there was no recognizable cause of action, no plausible argument and no triable issue raised on the pleadings.
- [23] In *Pearlman v. Critchley*, 2012 BCSC 1830, Mr. Justice Crawford stated at paras. 44 and 48:
- [44] I start with the settled law that Mr. Critchley, acting for an opposing party, owed no duty to Mr. Pearlman. No tort action could lie against him. As well, all communications made by a lawyer in the course of, or incidental to, judicial proceedings are protected by actual privilege: *Lawrence v. Sandilands*, 2003 BCSC 211.
- [48] I find Mr. Pearlman's claims in this regard are bound to fail in law, and furthermore are frivolous and vexatious.
- [40] In *Singh v. Nielsen*, 2016 BCSC 2420 the Court stated:
- [20] In particular, allegations that counsel for the opposing party has misled or intentionally deceived the court resulting in decisions or rulings unfavourable to the claimant do not found actionable breaches of any private duty owed to the claimant: *Gateway Building Management Limited v. Manjit Singh Randhawa*, 2013 BCSC 350, at paras. 23 - 26. If it were otherwise, there would be no end to such litigation.
- [41] In *Young v. Borzoni*, 2007 BCCA 16, para. 52, the Court cited with approval a decision of Master Bolton on a similar argument as is advanced by Mr. Wong in this action:
- [52] An application was brought to strike out portions of the statement of claim as disclosing no reasonable claim. In a well written judgment Master Bolton said:
- [8] The existence of a fiduciary duty or duty of care is not an allegation of fact, however, but a conclusion of law which must depend on proof (or for present purposes, allegations) of fact. And particulars of the breach of a duty are not relevant to the question of the existence of the duty. Thus, while I accept as a fact, for example, for the purposes of this hearing, that [solicitor B] filed affidavits which she ought to have known were false, that fact is of absolutely no significance to the question of the existence of a duty of care to the plaintiffs.

- [10] the plaintiff's position is tantamount to an assertion that all counsel who represent litigants owe a fiduciary duty or a duty of care to the other party to the litigation. This is patently absurd, as in the course of counsel's representation of her own client, much may be done that is intentionally and necessarily directed toward injuring the opposing party's interest. On the facts as pleaded here, it is, to borrow the emphatic language of Taylor, J.A. in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1990), 40 B.C.L.R. (2d) 288, impossible that [solicitor B] could owe a duty of care to Ms. Crooks.
- [11] The impossibility arises out of the very nature of a solicitor's duty to her own client.
- [12] The impossibility of the existence of a duty of care that I referred to in paragraph 10 above is an impossibility on these pleadings. Clearly, a solicitor will in some circumstances be held to owe a duty to persons other than her own client, and so may be a barrister. I do not intend to say that [solicitor B] could in no circumstances be held to owe a duty of care to Ms. Crooks. But I do say that before such a duty can be found to exist, facts must be proved in evidence - and alleged in pleadings - which describe the relationship and the circumstances from which the duty arose.
- [42] Mr. Wong must plead facts that would establish a duty of care owed by the Law Firm to him. He has not done so. Simply alleging that the Law Firm filed affidavits or a notice of application which contained statements that they ought to have known were false because there is conflicting evidence between the parties, does not establish a duty of care. By filing the Third Party Application, the Law Firm was taking steps in furtherance of its client's position in the Underlying Action. Mr. Wong has not pled any facts which could found a duty of care owed by the Law Firm to him.
- [43] I therefore find that to the extent that Mr. Wong's claim may be interpreted more broadly as alleging a duty of care owed to him by the Law Firm, it is plain and obvious that it does not disclose a reasonable claim. This claim is therefore struck pursuant to Rule 9-5(1)(a).
- [44] I also find that the allegation that Mr. Schuss' affidavits contain misleading statements does not establish a cause of action against Mr. Schuss or Dorset. This allegation simply amounts to a statement that Mr. Wong disagrees with Mr. Schuss' evidence. It is plain and obvious such an allegation would also fail, and I therefore strike this allegation pursuant to Rule 9-5(1)(a).
- [45] I have also considered whether Mr. Wong's defamation claims could be amended to advance a reasonable claim, and have concluded that they cannot. The foundation of the defamation claims is the Alleged Defamatory Statement which was made in the course of judicial proceedings and therefore made on occasions of absolute privilege. The claim is without legal foundation regardless of how it is pleaded. A claim for defamation on an occasion of absolute privilege cannot be cured by amendment: *Leger v. Metro Vancouver YWCA*, 2013 BCSC 2021 at para. 51, citing *Geyer v. Merritt and Gouge* (1979), 16 B.C.L.R. 27 at 32 (S.C.) aff'd (1980), 26 B.C.L.R. 374 (C.A.).

Rule 9-5(1)(b)

- [46] I turn now to the submission that Mr. Wong's claims should be struck as being unnecessary and vexatious under Rule 9-5(1)(b).
- [47] A claim is "unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources ": *Willow v. Chong*, 2013 BCSC 1083 [*Willow*] at para. 20.
- [48] A vexatious action can also include an action brought for an improper purpose: *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at para. 97, *aff'd* 2016 BCCA 52.
- [49] The Law Firm also submits that the defamation claim is vexatious because it "is duplicative and is intended to drive a wedge between Dorset and their counsel in the Underlying Action, to delay the Underlying action, and to increase expense". Having heard the submissions of Mr. Wong, who is self-represented, I am not satisfied on the evidence filed on this application that Mr. Wong harboured such an intention. No evidence was filed by the Law Firm which would specifically support such a conclusion.
- [50] Nonetheless, the defamation and misleading statement claims are vexatious because it is obvious they cannot succeed, and they are therefore also struck pursuant to Rule 9-5(1)(b).

Rule 9-5(1)(d)

- [51] Finally, I turn to the submission that the defamation claims are an abuse of process and should be dismissed pursuant to Rule 9-5(1)(d).
- [52] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, at para. 40, the Court stated:
- [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 .

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.

[Emphasis added in Behn.]

[53] Again, I am not persuaded on the evidence before me and Mr. Wong's submissions that he intended to misuse the process of the Court, as alleged by the Law Firm. However, I find that it would be an abuse of the process of the courts to permit the defamation claims to continue as it would permit litigants to make allegations against opposing counsel, which have no prospect of success, and which in this case had the effect of preventing counsel from continuing to act. Not only is counsel's ability to act curtailed, counsel may be prevented from fully and freely defending such a claim because of solicitor-client privilege. I therefore also dismiss the defamation and misleading statements claims pursuant to Rule 9-5(1)(d).

Rule 9-6

[54] Mr. Schuss and Dorsett also bring their application pursuant to Rule 9-6, the summary judgment rule, submitting there is no genuine issue to be tried in the defamation claims. They rely upon the same arguments made in the application under Rule 9-5(1).

[55] In Willow, the Court reviewed the law with respect to Rule 9-6:

[25] The test to be applied for summary judgment is whether there is a bona fide triable issue to be determined: see *Pitt v Holt*, 2007 BCSC 1555 at para. 10, citing *Serup v. Board of School Trustees* (1989), 54 BCLR (2d) 258 (CA), and *Skybridge Investments Ltd. v Metro Motors Ltd.*, 2006 BCCA 500. The court must be satisfied that it is "plain and obvious" or "beyond a doubt" the action will not succeed: *Saxton v Credit Union Deposit Guarantee Corporation*, 2006 ABCA 175. The application should be dismissed if the court is left in doubt as to whether there is a triable issue: *Progressive Construction Ltd. v. Newton* (1980), 25 BCLR 330 (SC).

[26] In *Skybridge*, Thackray J.A. held (at para. 10), that a judge hearing an application under this rule must "examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action."

[27] In determining whether there is a bona fide issue, the judge is to assume that uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v Naudi*, [1997] BCJ No. 1649 (CA).

[56] I find that it is plain and obvious that there is no triable issue with respect to the defamation claims. There is no factual dispute that the claims are based on statements made in the course of judicial proceedings. For the reasons given previously under the applications pursuant to Rule 9-5(1), those claims are bound to fail as the statements were made on occasions of absolute privilege. These claims are therefore dismissed against Mr. Schuss and Dorsett.

Disposition

- [57] The applications of the Law Firm, Mr. Schuss and Dorset with respect to the defamation and misleading statements in affidavits claims are granted. Specifically, the following paragraphs of the notice of civil claim are struck: Part 1, paras. 1-3 and 6-20; Part 2, the first three lines of para. 2; and Part 3, the last half of the second line (starting "Colin Schuss ") to and including the seventh line of para. 36. The style of cause will also be amended to reflect that the Law Firm (which includes the individuals named) are no longer defendants.

Misrepresentation and Failure to Disclose Claims

Pleadings

- [58] Paragraphs 21 to 35 of the notice of civil claim set out Mr. Wong's claims that Dorset and Mr. Schuss made negligent misrepresentations regarding the Additional Rent, and failed to disclose that two major tenants were going to vacate the shopping centre. These are the same facts alleged against Dorset in the Underlying Action. There is an additional factual allegation in this action that Mr. Schuss and Dorset did not advise Ackroyd of a 15% administration fee. This is not raised in the pleadings in the Underlying Action; however, it is raised in an affidavit filed by Ms. Ho in the summary trial application in the Underlying Action.
- [59] Ackroyd also alleges in this action that Mr. Schuss acted as a dual agent and that he and Dorset acted in a fiduciary capacity. These claims are not specifically pled in the Underlying Action.
- [60] The most significant difference between this action and the Underlying Action is that Mr. Schuss is not a defendant in the Underlying Action.

Submissions of the Parties

- [61] Counsel for Dorset and Mr. Schuss argue that the allegations against them are duplicative of the allegations against Dorset in the Underlying Action and that this amounts to an abuse of process under Rule 9-5(1)(d).
- [62] I understand the essence of Mr. Wong's argument to be that Mr. Schuss is not a defendant in the Underlying Action and that it is necessary to have him as a defendant to have all issues determined.

Analysis

- [63] I find that the factual allegations against Dorset and Mr. Schuss are largely but not completely duplicative of the allegations against Dorset in the Underlying Action.

- [64] I do not find that this makes this action an abuse of process. Mr. Schuss is not a defendant in the Underlying Action. The dual agency and fiduciary duty are not alleged in that action. Significantly, the issues in the Underlying Action have yet to be tried. This is not a situation where a party is attempting to relitigate issues already decided. It is not a collateral attack on a previous decision. Rather, it is a self-represented party who wants to expand its allegations to another party. An alternative course may have been to apply to add Mr. Schuss as a defendant to the Underlying Action and amend the pleadings in that action.
- [65] Dorset has not admitted that it is vicariously responsible for any act or omission on the part of Mr. Schuss. If a claim were established against Mr. Schuss, and Dorset is not found to be vicariously responsible for Mr. Schuss, then Ackroyd would be without a remedy in the Underlying Action as Mr. Schuss is not a party to that action.

Disposition

- [66] I find that the claims are not an abuse of process, and I therefore dismiss Dorset's and Mr. Schuss' application to have the negligent misrepresentation, failure to disclose and fiduciary claims dismissed. Specifically: Part 1, paras. 4-5 and 21-35; Part 2, para. 1 and the last three lines under para. 2; and Part 3, the first one and a half lines of para. 36, of the notice of civil claim remain and are not struck out.
- [67] The allegations against Mr. Schuss in this action are closely related to the allegations in the Underlying Action. Ackroyd and Mr. Wong are self-represented. Consideration should be given to whether this action should be consolidated with or tried at the same time as the Underlying Action. I direct the parties to attend a further case planning conference to discuss this issue.
- [68] Counsel has asked that I defer the issue of costs as they wish to make further submissions dependant on my ruling. If necessary, the parties can make arrangements through the registry to speak to costs.

"Norell J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/16/2018BCSC1725.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/0976820-b-c-ltd-v-leung-2018>

Prepared on 28 October 2026 · Esheria