

CANADA / JUDGMENT

Bajwa v. Workers Compensation Board

2022 BCSC 1926

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1926 Bajwa v. Workers Compensation Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bajwa v. Workers Compensation Board,

2022 BCSC 1926

Date: 20221103

Docket: S212371

Registry: New Westminster

Between:

Khalid Mahmood Bajwa

Plaintiff

And

Workers Compensation Board and His Majesty the King in Right of the Province of British Columbia

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

P. Sahota

Counsel for the Defendant, Workers Compensation Board:

S. Armstrong

Counsel for the Defendant, His Majesty the King in Right of the Province of British Columbia:

K. Reilly

Place and Dates of Hearing:

New Westminster, B.C.

August 25 and 26, 2022

Place and Date of Judgment:

New Westminster, B.C.

November 3, 2022

- [1] The defendant, Workers Compensation Board (the "WCB"), seeks an order dismissing the plaintiff's claims pursuant to Rule 9-6(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. In the alternative, both of the defendants, the Attorney General of British Columbia (the "AGBC") and WCB seek an order striking the plaintiff's claim pursuant to Rule 9-5(1)(a).
- [2] The AGBC also sought an order correcting the reference to the defendant as AGBC and substituting it with a style of cause reflecting the proper reference Her Majesty in the right of the province of British Columbia pursuant to the Crown Proceedings Act, R.S.B.C. 1996, c. 89. On August 25, 2022, at the beginning of the hearing, I ordered that correction. In the passage of time, the style of cause now reflects the new sovereign.
- [3] For the reasons that follow, I grant the applications. The plaintiff's claim against WCB is dismissed, and his claims against both defendants are struck.

Background

- [4] The plaintiff and Mr. Hardilpreet Singh Sidhu, owned and operated Khaira Enterprises Ltd. ("Khaira"), a company that provided silviculture services, including tree planting, tree spacing and weeding or brushing of recently forested lands. The plaintiff at all material times was the president of Khaira and a co-director along with Mr. Sidhu.
- [5] On July 22, 2010, a provincial conservation officer attended at one of Khaira's worksites and asked that Khaira remove its employees' tents and equipment from public land. Following his attendance, the officer informed WCB of questionable working conditions at the worksite.
- [6] WCB began investigating Khaira's compliance with safety standards. As part of that process, WCB obtained various records from Khaira, including certificates for fire suppression courses allegedly taken by Khaira's employees (the "Certificates").

- [7] Following further investigation and review by its criminal investigation division, WCB concluded that the Certificates had been forged and that Khaira had provided the Certificates to BC Timber Sales ("BCTS") and Louisiana Pacifica Canada Ltd. ("LP") in order to secure contracts with these entities.
- [8] On March 8, 2011, WCB submitted a lengthy report to crown counsel, followed by a March 31, 2011 addendum, recommending that the AGBC charge the plaintiff (the "Crown Report").
- [9] On October 9, 2011, the Plaintiff was formally charged with:
- a) two counts of uttering forged documents pursuant to section 368(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46; and
 - b) two counts of having used deceit, falsehood or other fraudulent means to defraud BCTS, LP and their representatives by using the forged certificates to obtain contracts pursuant to section 380(1)(a) of the Criminal Code (collectively, the "Charges").
- [10] The Charges were tried by the Honourable Judge Cohen in the Provincial Court of British Columbia (Surrey Registry). The trial took place over thirteen days between March 2016 and March 2017. The plaintiff was acquitted of the Charges by Judge Cohen on March 17, 2017. Judge Cohen concluded that the Certificates were forged, but that the Crown had not proven beyond a reasonable doubt that the plaintiff had forged them, or knew that they were forged.
- [11] On March 15, 2019, the plaintiff filed the notice of civil claim against the defendants. The claim is framed in defamation. While not well articulated, it appears that the plaintiff's claim also lies in malicious prosecution.
- [12] The claims are connected to the actions of the defendants, the Charges mentioned above, and the release of certain information to the press.
- [13] On April 10, 2019, WCB filed its response to civil claim. On June 14, 2019, the AGBC filed its response to civil claim.
- [14] On February 14, 2020, WCB served and demanded particulars from the plaintiff. On July 8, 2020, the plaintiff produced a letter setting out their responses to the demand for particulars.
- [15] Document production is completed.
- [16] The claim is scheduled for 15 days of trial commencing April 23, 2023.

Should summary judgment be granted against the plaintiff pursuant to Rule 9-6(5)(a)?

- [17] Rule 9-6 provides, in relevant part:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

[]

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- [18] Rule 9-6(5)(a) is mandatory. If the court is satisfied that there is no genuine issue for trial, then it must dismiss the claim. However, the court may make an order for summary judgment in favour of a defendant dismissing the claim only where a plaintiff is "bound to lose" or where there is no bona fide triable issue: *Drummond v. Moore*, 2012 BCSC 496 at para. 25.
- [19] In an application for dismissal under Rule 9-6, a defendant should present sworn evidence establishing that the claim is without merit: *Drummond* at para. 26; *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para. 14.
- [20] Rule 9-6 provides for a summary judgment procedure designed to "weed out" claims that have no chance of success at any early stage: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.
- [21] WCB submits that the plaintiff's claims are bound to fail because:
- a) They are clearly statute-barred by the expiration of a limitation period; and/or
- b) WCB did not make any defamatory statements; and
- c) The notice of civil claim does support a claim against WCB in malicious prosecution.

The claim in defamation

- [22] WCB's submissions regarding the application of limitation periods are meritorious but I will focus on the crux of the issue at play. There is no genuine issue for trial in respect of the plaintiff's defamation claim due to the simple fact that the allegedly defamatory statements which the plaintiff attributes to WCB, and as I will set out below, AGBC, are not defamatory.

- [23] To succeed in a cause of action in defamation, a plaintiff must prove: (1) that the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one other person other than the plaintiff: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28; *Lougheed Estate v. Wilson*, 2017 BCSC 1366 at para. 155.
- [24] Stating or suggesting that a person has committed fraud or forgery would likely be defamatory. However, merely stating in a press release that a person has been charged with a criminal offence is not in itself defamatory, since a reasonably thoughtful and informed person would be mindful of the presumption of innocence: *M.D. Mineralsearch v. East Kootenay Newspapers*, 2000 BCSC 1456 at para. 16; *Miguna v. Toronto (City) Police Services Board*, [2004] O.J. No. 2455 (SC) at paras. 4-5, *aff'd* [2005] O.J. No. 107 (CA) at para. 1; and *Guergis v. Novak*, 2013 ONCA 449 at para. 57.
- [25] The plaintiff, in his response to WCB's demand for particulars of the allegedly defamatory statements, identifies the news items and releases he alleges were defamatory. He concedes that the items and releases indicated that he had been charged with offences, not convicted of those offences.
- [26] Moreover, of the news items and releases identified by the plaintiff, only one of them references the WCB. None of them indicate that they are statements provided by the WCB or are based on information provided by the WCB. More importantly, all of the articles identified by the plaintiff indicate that the plaintiff was "charged with fraud" or "allegedly used forged documents". None of them say unequivocally that he did these things. I note that none of the publishers of these statements were named as defendants.
- [27] The information to charge and the news items contain truthful statements and information. The plaintiff in his oral submissions conceded that other news items for which he is seeking translation contain similar statements. He has no additional facts to plead with respect to the alleged defamatory statements, if he is granted leave to amend his pleading.
- [28] There is also no genuine issue for trial with respect to the plaintiff's defamation claim. Even if WCB made the statements claimed by the plaintiff, they are not defamatory.

The claim in malicious prosecution

- [29] 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.

- [30] Malice has been described by the BC Supreme Court as an "improper purpose", such as a "predominant wish or motive other than vindication of the law"; it is not proven by "recklessness or gross negligence", but requires an "intentional abuse of the prosecuting person's proper role". Deliberately ignoring exculpatory evidence in order to secure a conviction "at all costs" would constitute malice: *Arsenovski v. Bodin*, 2016 BCSC 359 at paras. 26-30.
- [31] WCB submits there is no evidence of malice nor has malice been pleaded. Furthermore, they submit WCB was acting within its jurisdiction and fulfilling its statutory mandate.
- [32] The plaintiff alleges that WCB should have determined that the Certificates were not forged and with that finding they should not have recommended the Charges. He does not plead that WCB acted maliciously, or had any improper motive in recommending the Charges. At most, he alleges negligent investigation and raises in his oral submissions the suspiciousness of WCB only recommending charges against the plaintiff, and not Mr. Sidhu.
- [33] The only particular of such negligence, failing to determine that the Certificates were genuine, has been nullified by the Provincial Court's conclusion that they were forged. In concluding the Certificates were forged, the court has clearly evinced the reasonableness of WCB's investigatory finding.
- [34] There is no evidence of malice on the part of the applicant. The "suspiciousness" of only recommending charges against the plaintiff is eliminated when, on the evidence, the plaintiff was the president of Khaira as well as the officer who signed the contracts referenced in the charges.
- [35] WCB's statutory mandate (as it then was) is set out in the Workers Compensation Act, R.S.B.C. 1996, c. 492 (the "WCA") at s. 111(1):
- 111 (1) In accordance with the purposes of this Part, the Board has the mandate to be concerned with occupational health and safety generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in British Columbia and the occupational environment in which they work.
- [36] In carrying out its mandate, WCB had the duty and power "to undertake inspections, investigations and inquiries on matters of occupational health and safety and occupational environment": WCA, s. 111(2)(b).
- [37] The Crown Report details the investigation of the Certificates undertaken by WCB. The investigation resulted in WCB recommending the Charges against the plaintiff. There is nothing in the Crown Report that indicates malice on the part of WCB. The Crown Report chronicles an investigation motivated by WCB's desire to fulfil its statutory mandate - i.e., to protect the health and safety of workers in British Columbia.

[38] There is further evidence to the lack of malice on the part of WCB. These are contained in affidavits provided by WCB's occupational safety officer and former investigator within the Field Investigations Department.

[39] WCB also submits that the plaintiff's claim of malicious prosecution is bound to fail because the WCA provides immunity to the applicant. This immunity extends to acts within WCB's jurisdiction (which, as set out above, includes investigating matters of occupational health and safety).

[40] In this regard, section 113(4) of the WCA provides:

113(4) An action may not be maintained or brought against the Board or a director, an officer or an employee of the Board in respect of any act, omission or decision

- (a) that was within the jurisdiction of the Board under this Part, or
- (b) that the Board, director, officer or employee believed was within the jurisdiction of the Board under this Part.

[41] In summary, the Crown Report and the affidavit evidence indicates that WCB had reasonable and probable grounds for recommending the prosecution against the plaintiff. The WCB acted within its statutory mandate and without malice. The uncontroverted affidavit evidence of WCB confirms the writer of the Crown Report believed he was acting under the statutory mandate of WCB.

[42] Simply put, there is no genuine issue for trial with respect to the plaintiff's malicious prosecution claim against WCB for one or both of the following reasons: a) the applicant was acting without malice; and b) the applicant is protected from such claims by virtue of s. 113(4) of the WCA.

Should the plaintiff's claim be struck pursuant to Rule 9-5?

[43] The defendant, AGBC, applies for an order striking the plaintiff's claims in defamation and malicious prosecution against it pursuant to Rule 9-5(1)(a). The defendant, WCB, also seeks an order striking the claim in malicious prosecution against it under the same rule, in the alternative to its Rule 9-6 application.

[44] Rule 9-5(1)(a) provides that:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,

[45] The test to be applied to determine whether an action should be struck out as disclosing no reasonable cause of action requires a conclusion that, assuming that the facts as stated or even if amended are true, those facts disclose no cause of action, the pleadings disclose no arguable issue, and it is plain and obvious that the claim cannot succeed. If there is a chance

that the plaintiff might succeed, then he should not be "driven from the judgment seat". The facts as stated in the notice of civil claim are taken as proven: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15; *Young v. Borzoni*, 2007 BCCA 16 at para. 19; *Gateway Building Management v. Manjit Singh Randhawa*, 2013 BCSC 350 at paras. 16-18.

- [46] Pursuant to Rule 9-5, a notice of civil claim will be struck out if the pleadings do not establish a cause of action and do not advance a claim known in law: *Dempsey v. Envision Credit Union*, 2006 BCSC 750 at para. 17.
- [47] The test under Rule 9-5 is well settled following *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22:
- a) It is incumbent on a claimant to clearly plead the facts upon which it relies in making its claim.
 - b) A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses.
 - c) The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them, "but plead them it must".
 - d) The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.
- [48] A judge's decision whether to permit an amendment is an exercise of discretion: *Watchel v. British Columbia*, 2020 BCCA 100 at para. 29.
- [49] In order to prove a *prima facie* case in defamation, a plaintiff must establish the elements set out above in my reasons regarding WCB's Rule 9-6 application.
- [50] The importance of carefully crafted pleadings in support of claims in defamation is set out in *Weaver v. Corcoran*, 2017 BCCA 160 at paras. 64-65:
- a) Pleadings are exceptionally important in defamation actions, due in part to the serious nature of defamation allegations and the significance of context in assessing them appropriately.
 - b) Defamation pleadings require a more critical evaluation and are held to a higher standard regarding the precision with which material facts must be pleaded. This is justified in order to prevent fishing expeditions and because of the critical importance of knowing the case to be met.
 - c) Even though courts have applied greater flexibility when analyzing defamation pleadings, given the fundamental values at stake in a defamation action it remains particularly important for parties to plead and adhere to clearly defined issues of fact and law.

- [51] In his notice of civil claim, the plaintiff does not identified any statements made by Crown counsel that are alleged to be defamatory. In his responses to particulars, he refers to published articles as I set out above. In his counsel's oral submissions, the plaintiff submits that the charges laid by Crown counsel are defamatory because the plaintiff did not obtain the contracts referred to by submitting the Certificates. He further submits that, although it was truthful at the time the charges were laid to refer to them as allegations of criminal conduct, this changed from being truthful to false at the time of the plaintiff's acquittal. I do not accept the plaintiff's submission because it is nonsensical. Since the day the charges were approved until today, the plaintiff remains a person who was charged as described in the information and news articles. He would ask the court to find that every person acquitted of criminal charges is defamed by the past publication of content of the charges laid against them. There is no basis in law for this absurd proposition.
- [52] Further, any statements made by Crown counsel, in the course of the criminal proceedings, are protected by absolute privilege. Indeed, no action lies against counsel for words spoken in the ordinary course of any proceedings before the courts. The doctrine of absolute privilege affords complete immunity to counsel for statements made by them in the course of judicial proceedings: *Caron v. A.*, 2015 BCCA 47 at para. 16; *Amato v. Welsh*, 2013 ONCA 258 at paras. 1, 34 and 38.
- [53] The claim in defamation against WCB, as set out above, is similarly flawed on the facts as pleaded.
- [54] The plaintiff did not provide evidence or make submissions as to how he would amend his pleading in defamation to save it from being struck.
- [55] I have set out the legal test for malicious prosecution above.
- [56] The malice standard is stringent and will only be met in exceptional circumstances: *Watchel* at para. 22; *Arsenovski* at paras. 17-22.
- [57] There is reference in the pleadings to the fact that Crown counsel sent the full version of the Report to Crown in its first disclosure package to the plaintiff. This report contained supporting documents which include copies of some certificates which did were not provided by the plaintiff's company to contractors. Later versions of the disclosure did not include those particular certificates. The trial judge found that this was likely due to the fact that they were not relevant to the charges against the plaintiff, and found their disclosure was likely inadvertent.
- [58] In oral submissions, plaintiff's counsel stated this was the basis for the malicious prosecution claim against the Crown. This is "suspicious" behaviour which somehow shows malice on the part of Crown counsel. There is no basis in these facts, if pleaded, which would support a claim of malicious prosecution.

- [59] Again, in oral submissions, counsel for the plaintiff also explained that the Crown only charged the plaintiff and not Mr. Sidhu, which is evidence of malice. The decision as to who to charge is one of prosecutorial discretion and the plaintiff alleges no material facts to support a claim that the decision to charge the plaintiff and not his business partner was made maliciously.
- [60] The same applies to the WCB employees who recommended the charges against the plaintiff.
- [61] As I have set out above, on those facts as presented, this does not support a claim in malicious prosecution.
- [62] The plaintiff concedes he does not use the word "malice" anywhere in his pleading. His counsel argued that if the defendants and the Court read between the lines it is "obvious" that malicious prosecution is pleaded. I believe plaintiff's counsel means that if read generously, the pleadings disclose a malicious prosecution claim being pleaded. To this point, the plaintiff submits that the only amendment he would make to his pleadings is the insertion of the word "malice" or phrase "with malice" somewhere in the notice of civil claim. These changes alone are wholly insufficient.
- [63] It is plain and obvious that the plaintiff has failed to articulate the necessary material facts to give rise to a reasonable cause of action against the defendants.
- [64] The plaintiff will not be able to amend his pleading in a manner which could save his ill-considered claims. No leave to amend is granted.

Conclusion

- [65] The plaintiff's notice of civil claim against the WCB is dismissed under Rule 9-6. The claims against both defendants are struck under Rule 9-5 with no leave to amend.

Costs

- [66] The defendants were wholly successful on their applications. The AGBC does not seek its costs. WCB will have its costs at Scale B.

"Wilkinson J."

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