

CANADA / JUDGMENT

Cheal v. Douglass

2012 BCSC 1127

COURT

Supreme Court of British Columbia

DECIDED

27 July 2012

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2012 BCSC 1127 Cheal v. Douglass IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cheal v. Douglass, 2012 BCSC 1127 Date: 20120727 Docket: 12-0166 Registry: Victoria Between: William R. Cheal Plaintiff And: Ethan Peter Douglass, Rochelle Lamonthe, 467174 B.C. Ltd. and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge, Gordon Magee, Bradley Meyer, the Corporation of the City of Victoria Police Department and the Corporation of the City of Victoria Defendants Before: Master Bouck Reasons for Judgment The Plaintiff appearing on his own behalf: Counsel appearing for the defendants Ethan Peter Douglass, Rochelle Lamonthe, 467174 B.C. Ltd. and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge (the "Swiftsure defendants"): W. R. Cheal B. L. Hoffmann Counsel appearing for the defendants Gordon Magee, Bradley Meyer, the Corporation of the City of Victoria Police Department and the Corporation of the City of Victoria (the "Victoria defendants") R. Macquisten Place and Date of Trial/Hearing: Victoria, B.C. May 2, 2012 Place and Date of Judgment: Victoria, B.C. July 27, 2012 THE APPLICATION

[1] The Swiftsure defendants seek the following orders:

1. The plaintiff's claim against the defendants Ethan Peter Douglass, Rochelle Lamothe, 467174 B.C. Ltd, and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge (collectively the "Swiftsure Defendants") be amended to remove a cause of action of:
 - a. defamation, and
 - b. false imprisonment;
2. The plaintiff be barred from proceeding against the defendants Ethan Peter Douglass, Rochelle Lamothe, 467174 B.C. Ltd. and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge for both defamation and false imprisonment;
3. The plaintiff's claim against the defendants Ethan Peter Douglass, Rochelle Lamothe, 467174 B.C. Ltd. and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge be dismissed; and

4. The style of cause be amended to remove the defendants Ethan Peter Douglass, Rochelle Lamothe, 467174 B.C. Ltd. and the said 467174 B.C. Ltd. carrying on business as the Swiftsure Lounge; and
5. Costs.
- [2] The Victoria defendants take no position on the application.
- [3] Not surprisingly, the plaintiff opposes all of the relief sought.

BACKGROUND

- [4] It is necessary to describe the history of this proceeding to put the application in some context.
- [5] Mr. Cheal commenced this action in August 2006. He was then represented by counsel but has acted on his own behalf for much of the proceeding.
- [6] The action concerns events at the Swiftsure Lounge on the evening of August 4, 2004. A patron on that evening, Mr. Cheal alleges that he was defamed and falsely imprisoned by staff of the Lounge which in turn led to an assault and battery by the police officers who had been asked to remove the plaintiff from the premises.
- [7] Mr. Cheal alleges that he was injured during the encounter with the police officers.
- [8] The Swiftsure defendants were added as parties in December 2006.
- [9] The allegations against the Swiftsure staff members are found at paras. 10, 11, 17 and 18 of the further amended statement of claim, specifically:
 10. At that time and place the Defendant, Lamothe falsely and maliciously said the Plaintiff had committed theft, and was refusing to pay his account and the Plaintiff requested that the police be summoned. The words used by the Defendant in their natural and ordinary meaning were meant and were understood to mean that the Plaintiff was a dishonest person. The words were calculated to and they did disparage the Plaintiff in the eyes of those present in the lounge.
 11. At that time and place the Defendants, Douglass and Lamothe maliciously, wrongfully, intentionally or negligently informed the police that the Plaintiff had refused to pay his bill and that the Plaintiff had assaulted one of the female cashiers. ...
 17. Further, on or about the 17th day of August, 2004, the Plaintiff was falsely arrested and imprisoned by the Defendants, Douglass and Lamothe, and the Defendants, Magee and Meyer, and unlawfully confined from approximately 10:50 p.m., August 17, 2004, until approximately 10:00 a.m., August 18, 2004.

18. In acting aforesaid, the Defendants, Douglass and Lamothe, and the Defendants Magee and Meyer, were acting with wanton intention and callous disregard for the Plaintiff's physical and mental wellbeing and inflicted severe injury to the Plaintiff.
- [10] Mr. Cheal, a coast guard employee, alleges various losses as a result of the actions of both the Swiftsure and Victoria defendants, including loss of wages.
- [11] This action has proceeded in fits and starts, moving ahead almost solely on the impetus of the defendants.
- [12] Pleadings were closed by January 2007. Mr. Cheal's counsel withdrew in January 2008. Thereafter, no steps were taken for more than two years.
- [13] In December 2010, the plaintiff delivered a notice of intention to proceed.
- [14] The plaintiff secured new counsel in March 2011.
- [15] That same month, the Swiftsure defendants set down a case planning conference to discuss the steps to be taken to achieve a resolution of the action.
- [16] A case plan order was made on April 20, 2011, requiring the parties to exchange supplemental list of documents, with a further term that: ... the Plaintiff, if choosing to proceed with a cause of action of defamation, provide further and better particulars of the defamation ...
- [17] By the summer of 2011, the plaintiff was again without counsel.
- [18] On March 7, 2012, a second case plan order was made requiring the plaintiff to deliver to the defendants any documents relating to health issues; for the parties to schedule examinations for discovery and a trial date; and for an order that the plaintiff provide further and better particulars of the causes of action for defamation and false imprisonment by March 21, 2012.
- [19] No such particulars have been provided.
- [20] Mr. Cheal told the court that he is in the process of "getting a lawyer" and does not understand the term "particulars". He does intend to proceed with the claim and suggests that there will be "more evidence" once examinations for discovery are completed.
- DISCUSSION
- [21] The Swiftsure defendants rely on the following Supreme Court Civil Rules (the "SCCR"):
- 3-7(22) The court may order a party to serve further and better particulars of a matter stated in a pleading. ... 22-7(2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
- (e) make any other order it considers will further the object of these Supreme Court Civil Rules. ... 9-5(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious, ...
- [22] In essence, these defendants submit that the plaintiff's claim ought to be dismissed for failure to provide particulars as ordered. They submit that without those particulars, the plaintiff's claim against all of the Swiftsure defendants must fail as disclosing no reasonable cause of action: *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636. And, the failure to comply with the case plan orders justifies dismissal of a plaintiff's claim.
- [23] The applicants are correct that particulars of the defamation claim must be provided in order for the plaintiff's claim to succeed. The court has given Mr. Cheal the opportunity to provide those particulars in making the case plan orders.
- [24] However, the authorities also provide that striking a claim pursuant to the SCCR is "a Draconian remedy only to invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence.": see *Farrallon Mining Ltd. v. St. Eloi*, 2012 BCSC 609 at para. 28 citing *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229.
- [25] Even if a party is in breach of a court order, a second chance is invariably given to correct the omissions: *Anderson v. Anderson*, 2011 BCSC 1465. By virtue of the March 21, 2012 case plan order, the plaintiff has probably been given that second chance.
- [26] Mr. Cheal says that he does not have the assistance of counsel and therefore has been unable to comply with some parts of the court orders.
- [27] That is an explanation but does not excuse the plaintiff's omissions. As the court in *Anderson* also observed: An unrepresented litigant is no less bound by orders of the Court than a litigant with counsel. At para. 51.
- [28] For the sake of clarity, I remind Mr. Cheal of the provisions of Rule 3-7(21) regarding particulars in a defamation claim: 3-7(21) In an action for libel or slander,
- (a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense, and
- [29] He is also reminded that pleadings in defamation claims must be "precise and particular": *Reimer v. Dr. A.R. Boyco Optometric Corp. (c.o.b. Coquitlam Cataract Centre)*, 2012 BCSC 860 at para. 21.
- [30] Mr. Cheal is not entitled to wait until he retains a lawyer to provide the particulars.
- [31] Is dismissal of the claim appropriate in these circumstances?
- [32] Evidently, the Lieutenant Governor in Council contemplated scenarios where a claim could be dismissed if a case plan order was not followed: Rule 5-3 (6).

- [33] The question is whether that remedy ought to be granted in this situation.
- [34] I have concluded that the dismissal of the plaintiff's action is indeed too draconian a remedy and will not to be granted at this time.
- [35] Mr. Cheal should not take this ruling to mean that he is excused from compliance with the court's orders. In fact, by these reasons, he should be alerted to the fact that the defendants have other remedies available to them, including contempt proceedings. Furthermore, without the particulars being provided, Mr. Cheal runs a substantial risk that the defamation and false imprisonment claims will be dismissed summarily before or at trial. The ongoing failure to comply with court orders merely strengthens the defendants' chances of having the claim struck or dismissed at a later date.
- [36] The Swiftsure defendants were justified in bringing the application even if the order sought is not granted. In the circumstances, I find that the appropriate remedy is to order Mr. Cheal to pay the Swiftsure defendants their costs of this application, fixed at \$750 payable forthwith and by no later than August 31, 2012. Mr. Cheal's approval as to the form of this order is dispensed with. "C.P. Bouck" Master C.P. Bouck

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