

CANADA / JUDGMENT

Durkin v. Crease Harman LLP

2020 BCSC 642

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 642 Durkin v. Crease Harman LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Durkin v. Crease Harman LLP,

2020 BCSC 642

Date: 20200313

Docket: S195631

Registry: Victoria

Between:

Timothy Durkin, Andrea Durkin and Rodger Gregory

Plaintiffs

And

Crease Harman LLP, Josh Bloomenthal, Leslie Barrie, Catherine McCoy Schlenker, Peter W. Klassen, Frederique Philip, Sinclair Philip, The Philip Family Trust and Sooke Harbour House Inc.

Defendants

Before: The Honourable Mr. Justice Basran

Oral Ruling Re Application for an Order

Striking the Notice of Civil Claim

In Chambers

The Plaintiff, appearing in person:

T. Durkin

The Plaintiff , appearing in person:

R. Gregory

Counsel for the Defendants, Crease Harman LLP, Josh Bloomenthal, Catharine McCoy Schlenker and Peter W. Klassen:

P. Arvisais

Place and Date of Hearing:

Victoria, B.C.

March 13, 2020

Place and Date of Ruling:

Victoria, B.C.

March 13, 2020

- [1] THE COURT: This is an application for an order striking the notice of civil claim filed December 19, 2019, (the "Defamation Action"), without leave to amend and dismissing the claim against the lawyer defendants pursuant to R. 9-5(1) of the Supreme Court Civil Rules.
- [2] The defendants, Catharine Schlenker and Peter Klassen are barristers and solicitors and the defendant, Josh Bloomenthal, is an articulated student, all of whom were at all material times authorized to practise law in the Province of British Columbia and did so at the law firm of Crease Harman LLP. The defendant, Leslie Barrie is a legal assistant employed by Crease Harman LLP. Crease Harman LLP commenced acting as counsel for the defendants, Frederique Philip, Sinclair Philip, the Philip Family Trust and Sooke Harbour House Inc. in Victoria British Columbia Supreme Court Action No. S173277 (the "SHH Action").
- [3] The plaintiffs in the Defamation Action are Timothy Durkin, Andrea Durkin, and Rodger Gregory. On December 6, 2019, the plaintiffs applied for and obtained an adjournment of the trial of the SHH Action to January 13, 2020. In doing so, the plaintiffs placed before the Court, and relied on a letter from a Dr. Kluge outlining Mr. Durkin's alleged medical condition. The January 13, 2020 trial date was made peremptory on the plaintiffs.
- [4] The lawyer defendants had an assistant in their firm, Ms. Barrie, witness a conversation with Dr. Kluge and swear an affidavit attesting to what Dr. Kluge said about the letter. I refer to paragraph six of this affidavit, and I am going to set it out because in my view this is the central issue in this claim of defamation. That paragraph reads:

On December 9, 2019, at 1:40 p.m. I was present during a phone call between Dr. Kluge and Mr. Bloomenthal. During this phone call Mr. Bloomenthal asked Dr. Kluge whether he signed or affixed his stamp to Ms. Durkin's letter dated December 4, 2019, as alleged by the plaintiffs. In response Dr. Kluge advised Mr. Bloomenthal that had had...

[5] And I note here parenthetically I am assuming he meant "he had"

... never seen Ms. Durkin's letter prior to December 9, 2019, and that he did not sign nor affix his stamp to the letter. Further, Dr. Kluge advised that the signature on Ms. Durkin's letter appeared to be consistent with his electronic signature and that it was reproduced on Ms. Durkin's letter without his knowledge or consent. Mr. Bloomenthal also asked Dr. Kluge whether he met with Ms. Durkin on December 4, 2019, when he purportedly endorsed her letter. Dr. Kluge confirmed that he did not meet with Ms. Durkin as alleged by the plaintiffs.

Lastly, Mr. Bloomenthal asked Dr. Kluge whether he examined Mr. Durkin as alleged by the plaintiffs. Once again, Dr. Kluge confirmed that he did not examine Mr. Durkin as alleged by the plaintiffs and had not personally seen Mr. Durkin at the clinic "in months".

[6] The next relevant piece of evidence that I am going to refer to is a letter written by Dr. Kluge on January 23, 2020. This letter is Exhibit "C" in the affidavit of Mr. Durkin. The second paragraph is relevant to these proceedings because it refers to what appears to be the same issue and series of events described by Ms. Barrie in her affidavit. The second paragraph of Dr. Kluge's letter reads as follows:

On December 9, 2019, one of my medical office assistants advised me that one of my patients (Patient X) had forged my signature on a document he had produced and that a lawyer was on the phone asking to speak with me about the matter. She presented me with a letter dated December 6, 2019, purportedly pertaining to Patient X. I recognized my electronic signature on the letter, along with a copy of the Westcoast Family Medical Clinic letterhead. However, Patient X had not been seen in our clinic in over two years. The letter appeared to be a forgery.

[7] I note that there is a distinction between Ms. Barrie's affidavit, which she refers to a letter dated December 4, and the letter now signed by Dr. Kluge in which he refers to a letter dated December 6. I appreciate that that is a distinction in the evidence, but it does appear to me that both parties are taking about the same event.

[8] Ms. Barrie's affidavit did not assert that Dr. Kluge had never seen the letter, nor that Dr. Kluge did not sign or affix his stamp. The affidavit merely states that Dr. Kluge so advised in a December 9, 2019 telephone call.

[9] On December 11, 2019, the lawyer defendants filed Ms. Barrie's affidavit in the SHH Action.

[10] On December 18, 2019, the plaintiffs commenced the Defamation Action naming all of the opposing parties in the SHH Action along with their counsel as defendants. They alleged that the affidavit and its publication to the Court in the SHH Action was defamatory.

[11] The plaintiffs' position on this matter is that the defendants in the Defamation Action acted recklessly, negligently, and with malicious intent by publishing and making public untrue, libelous, and defamatory allegations contained in Ms. Barrie's affidavit. In so doing, the plaintiffs submit that the lawyer defendants have violated their Code of Professional Conduct obligations and have inflicted intentional harm and damage to the professional reputation and economic interests of the plaintiffs.

[12] Rule 9-5(1) of the Rules provides:

Scandalous, frivolous or vexatious matters

- (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,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[13] It is important to note that the notice of civil claim pleads that the lawyer defendants are counsel for the adverse parties in the SHH Action. The law is that because counsel owes no duty to an adverse party, allegations that counsel for the opposing party have 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: *Pearlman v. Critchley*, 2012 BCSC 1830; *Singh v. Nielsen*, 2016 BCSC 2420; and *Awad v. Salna*, 2017 BCSC 429.

[14] I also note that in *0976820 B.C. Ltd. v. Leung*, 2018 BCSC 1725, Justice Norell reviewed the relevant law in respect of this issue at paras 33, 36, 39-42 and 45. I have taken into consideration the summary of the law set out in those paragraphs and concur that this is the relevant law that applies in these circumstances:

[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.

...

[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].

...

[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.

- [15] Furthermore, any communications by lawyers in the course of or incidental to the action on behalf of their clients are protected by absolute privilege: *Hamouth v. Edwards & Angell*, 2005 BCCA 172; *M.A. (Guardian ad Litem of) v. I.A.S.M.A.* (1992), 69 B.C.L.R. (2d) 99; *Lawrence v. Sandilands*, 2003 BCSC 211; *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115.
- [16] The principle of witness immunity extends beyond the cases of defamation to enjoin analogous actions against prospective witnesses whether in civil conspiracy, negligence, breach of confidentiality or in some other form. This immunity extends to all forms and causes of actions arising from the privileged act: *Workum v. Olnick et al*, 2005 BCSC 1262 and *Hung v. Gardiner*, 2003 BCCA 257.
- [17] The effect of the principle is to provide immunity against suit. Thus any pleading directed at a privileged communication, even if it did allege the elements of some cause of action, may nevertheless be struck as disclosing no reasonable claim. I refer here again to *Hamouth* and *Workum*.
- [18] In my view, none of the plaintiffs' allegations against the lawyer defendants can give rise to any reasonable claim against them. While I appreciate Mr. Durkin's view that there should be some general prohibition against lawyers being able to file this action, the law is clear that there is an absolute privilege that protects counsel from this kind of suit in these circumstances.
- [19] Having decided that there is no reasonable claim that can be pursued pursuant to R. 9-5(1) (a), it is not necessary to consider R. 9-5(1)(b) and (d). Rule 9-5(b) deals with frivolous or vexatious matters and R. 9-5(1)(d) deals with abuse of process. I will, however, note that when it comes to frivolous and vexatious matters, there is a cumulative effect of ongoing litigation that results in certain matters eventually reaching a tipping point where they may become frivolous and vexatious matters. In my view, we have not reached that point in respect of this matter, and there is no purpose or basis to further consider either Rule 9-5(1) (b) or Rule 9-5(1)(d).
- [20] I am granting the order striking the notice of civil claim without leave to amend and dismissing the claim against the defendants. The applicants are entitled to their costs of this application.

(SUBMISSIONS ON COSTS)

[21] THE COURT: I do not find that there is a basis for special costs on this application. Costs will be at Scale B. The reason is that in my view Mr. Durkin, a self-represented litigant, felt that he had some basis upon which to bring this suit based on his general understanding of the nature of defamation. Although his understanding was incorrect, I do not think the filing of the notice of civil claim justifies a finding of special costs.

"Basran J."

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