

CANADA / JUDGMENT

Oreck v. Tremblett

2014 BCSC 2333

COURT

Supreme Court of British Columbia

DECIDED

10 December 2014

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2014 BCSC 2333 Oreck v. Tremblett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Oreck v. Tremblett,

2014 BCSC 2333

Date: 20141210

Docket: S145851

Registry: Vancouver

Between:

Harvey Oreck

Plaintiff

And

Kenneth Tremblett

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:

H. Oreck

Counsel for the Defendant:

R. Millar

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 4, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2014

- [1] The defendant applies for summary dismissal of this action, which alleges defamation, perjury and assault. In the alternative, the defendant seeks a series of orders that together would strike out the entire the notice of civil claim.
- [2] The plaintiff concedes that portions of the notice of civil claim should be struck out, but opposes dismissal of the action, which he argues is not properly before the court on this application.
- [3] The plaintiff, Mr. Oreck, is a lawyer who acted for an unsecured creditor, Mr. Clifford, in a receivership proceeding. The defendant, Mr. Tremblett, was the receiver. The matter was hotly contested and it appears that a poisonous relationship developed not only between Mr. Oreck and Mr. Tremblett but also between Mr. Oreck and Mr. Tremblett's counsel, Mr. Millar. I understand the receivership proceeding has been largely concluded, although an application relating to costs is to be heard by Fitzpatrick J. later this month.
- [4] Meanwhile, the plaintiff has brought this action. The notice of civil claim contains more than 100 paragraphs, most of which set out the history of the receivership proceeding. The plaintiff alleges that an affidavit, sworn by the defendant on October 29, 2012, was perjured and defamatory. He also alleges at para. 97:

Further, on November 19, 2012, Tremblett, immediately after court adjourned for the afternoon recess, physically assaulted Oreck, threatened him by saying that "if you take another step towards me I will take your head off", and called Oreck a "Monkey", in the presence of Millar, the court clerk and Clifford. All of this transpired inside the counsel area in the courtroom.

- [5] The notice of civil claim seeks general, aggravated, punitive and exemplary damages. However, it also is stated to be subject to R. 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, indicating that the total claim will not exceed \$100,000. The legal basis for the claim is stated to be "the law of libel, defamation and injurious falsehood, assault."
- [6] The defendant says that any allegedly defamatory or false statements in an affidavit are protected by absolute privilege and no action can arise from them: *McDaniel v. McDaniel*, 2009 BCCA 53 at para. 43. He also says there is no civil action based on perjury, denies the alleged assault and contends that any reference to a monkey was not defamatory.

- [7] When this application came before Sigurdson J. on October 23, 2014, the plaintiff said he wanted time to consider his position on the privilege and perjury issues. Counsel for the defendant suggested that resolution of those issues would likely dispose of the entire case. Sigurdson J. said:

I would like to make an order that allows this matter to be resolved promptly and not blown further out of control. I'd like you to address if I grant an adjournment why this case will simply be able to be resolved in a straightforward fashion. I understand if there is an issue like an assault, perhaps that can't be resolved. But this question of absolute privilege, Mr. Millar suggests to me that the law is absolutely clear that there is no claim for -- no matter if it's malicious or not -- in an affidavit.

- [8] The matter was adjourned to December 4, 2014, on the basis that it could be argued in 90 minutes. Sigurdson J. said:

I don't see any reason at this stage apart from this issue of the assault -- and your friend doesn't think it's going to go anywhere. You may have a different view. But I don't see any reason why this matter couldn't be resolved in 90 minutes.

- [9] When the application came before me on December 4, 2014, the plaintiff conceded that there can be no claim arising from statements in an affidavit or from the alleged perjury and he was prepared to consent to an order striking portions of the notice of civil claim. However, he said he was not abandoning other aspects of the claim, particularly claims arising from the incident alleged in para. 97 of the notice of civil claim, and had not expected the defendant to proceed with the application for dismissal of the action. Counsel for the defendant said the application before me to dismiss the action was the same application that was adjourned by Sigurdson J. and the plaintiff must have understood that.

- [10] The plaintiff has not filed an affidavit in response to the summary trial application. That is where he would need to give evidence of the alleged assault and what he says was a further defamatory statement that accompanied it. He says, and I agree, that it would not be appropriate for him, as a member of the bar, to present contested evidence and argument on his own behalf.

- [11] I do not intend to analyse the exchange of emails that took place between Mr. Oreck and counsel for the defendant in the weeks that followed their appearance before Sigurdson J. On reviewing the transcript of that hearing, it appears Sigurdson J. intended to adjourn the application for the purpose of dealing with the issues relating the affidavit of October 29, 2012, and not necessarily the incident that is alleged to have occurred three weeks later. In any event, I find that is a conclusion the plaintiff could reasonably have come to and I accept his statement, made as an officer of the court, to the effect that was his understanding.

- [12] In those circumstances, I am not prepared to dismiss the entire action at this stage. However, it is clear that the notice of civil claim, as presently drafted, cannot stand. Much of it, including the lengthy recitation of facts, is intertwined with the claims that the plaintiff now concedes cannot succeed. Paragraph 97, which is separate from those claims, clearly requires particularization. There may be other passages that can be identified as surviving, but I have not reviewed the notice of civil claim for the purpose of rewriting it.
- [13] The defendant's alternate application to strike portions of the notice of civil claim must be based on Rule 9-5 (1), which reads:
- (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.
- [14] Pleadings may be struck out if they are so prolix and confusing that it is difficult to understand the case to be met: *Gateway Building Management Limited v. Manjit Singh Randhawa*, 2013 BCSC 350 at para. 18
- [15] Where a pleading is inadequately drafted, a party will generally be given the opportunity to redraft it, unless it is plain and obvious that even a redrafted pleading would fail to raise an arguable issue: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 40, varied 2012 BCCA 196. The court may order the filing of an amended pleading: *Woolsey v. Dawson Creek (City)*, 2011 BCSC 751 at para. 32
- [16] I therefore order that the plaintiff file an amended notice of civil claim no later than January 9, 2015, with a concise statement of the material facts and the legal basis for a claim that is not based on any statements made by the defendant in affidavits. The defendant's application for judgment pursuant to R. 9-7 is dismissed, with liberty to bring a further application after the plaintiff has filed an amended notice of civil claim or if the plaintiff fails to file an amended notice of civil claim by January 9, 2015.
- [17] The defendant sought special costs, alleging that the commencement of this action is a continuation of conduct for which he is seeking special costs in the receivership proceeding. The claim for special costs in the receivership proceeding will be before Fitzpatrick J. In the context of this action, the plaintiff has properly conceded that much of his notice of civil claim cannot stand. The matter is not one for special costs, but the defendant is entitled to party and party costs, payable forthwith, of this application, including the appearance

before Sigurdson J.

"N. Smith, J."

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