
CANADA / JUDGMENT

Rana v. Gill

2018 BCSC 1998

COURT

Supreme Court of British Columbia

DECIDED

13 November 2018

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

2018 BCSC 1998 Rana v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rana v. Gill,

2018 BCSC 1998

Date: 20181113

Docket: S184429

Registry: New Westminster

Between:

Jagmohan Singh Rana

Plaintiff

And

Nirmal Singh Gill and Harbans Singh Gill

Defendants

Before: The Honourable Madam Justice Shergill

On appeal from: An order of the Master of the Supreme Court, dated
August 14, 2018.

Reasons for Judgment

Counsel for Plaintiff:

J. Jaffer

Counsel for Defendants:

D. Gautum

Place and Date of Hearing:

New Westminster, B.C.

September 19, 2018

Place and Date of Judgment:

New Westminster, B.C.

November 13, 2018

Overview

- [1] This is an appeal of an interlocutory order pronounced by a Master on August 14, 2018, dismissing the plaintiff's application filed July 26, 2018 (the "NOA"). In the NOA the plaintiff (defendant by counterclaim), Jagmohan Singh Rana, sought the following orders from the Master:
1. The defendants' counterclaim filed January 20, 2017, is struck out pursuant to subrule 9-5(1)(a) as disclosing no reasonable claim, without leave to amend.
 2. Alternatively, the defendants' counterclaim filed January 20, 2017, is struck out pursuant to subrule 9-5(1)(a) as disclosing no reasonable claim, with leave to amend within fourteen (14) days of the date of this order.
 3. The Plaintiff is awarded the costs of this application in any event of the cause.
- [2] The grounds of appeal, as set out in the Notice of Appeal filed August 27, 2018, are as follows:
1. The master erred in law by failing to apply the correct legal principles.
 2. The master relied on irrelevant factors in arriving at his decision.

Issues on Appeal

- [3] The following issues were raised in this appeal:
1. what is the standard of review on an appeal of an interlocutory order made by a Master;
 2. whether both grounds of appeal are questions of law reviewable on the standard of correctness;
 3. what is the applicable test on applications to strike pleadings for disclosing no reasonable cause of action under rule 9-5(1)(a);
 4. whether the Master applied the applicable test.

Factual Background

- [4] The plaintiff commenced this action by way of Notice of Civil Claim filed on October 14, 2016. The Notice of Civil Claim was amended on November 17, 2016, ("AN OCC") to plead relief under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.
- [5] In this action, the plaintiff seeks damages for an assault and battery which the plaintiff says was committed on October 19, 2014, by the defendants (plaintiffs by counterclaim), Nirmal Singh Gill and Harbans Singh Gill (who I will refer to by their first names to avoid confusion). On that date, the plaintiff alleges that he was walking his dog on a public pathway when the defendant Harbans approached him and began complaining about the plaintiff's dog. As he kept walking, he alleges that Harbans began pursuing him "in an aggressive manner, making threats and physically threatening gestures toward him". The plaintiff was then met by the defendant Nirmal who approached him from the opposite direction and identified Harbans as his father. A verbal confrontation ensued during which Nirmal allegedly struck the plaintiff and his dog with a metal object (the "assault and battery").
- [6] On January 20, 2017, the defendants filed a Response to Amended Civil Claim denying the assault and battery, and in the alternative, pleading self-defence.
- [7] The defendants also filed a Counterclaim on January 20, 2017 ("Counterclaim"), alleging that the plaintiff was the aggressor on October 19, 2014. The relevant portions of the facts alleged under Part 1 of the Counterclaim are:
2. On or about October 19, 2014, the Plaintiff negligently caused loss and damage to the Defendants by committing assault on the Defendants.
 3. The Plaintiff wrongfully and intentionally assaulted the Defendants.
 4. At all material times, the Plaintiff was the aggressor.
 5. The Plaintiff wrongfully and without basis made a false complaint to the police against the Defendant, Nirmal Singh Gill ("Nirmal") resulting in laying of criminal charges and arrest of Nirmal.
 6. The criminal charges laid on Nirmal were solely a result of the Plaintiff's wrong, baseless and false complaint to the police against Nirmal.
 7. As a result of the wrong, baseless, and false complaint of the Plaintiff against the [sic] Nirmal, Nirmal spent [a] considerable amount of money in legal fees to defend himself against the criminal charges. The criminal charges were subsequently dismissed by a court of competent jurisdiction.
- [8] Relief is sought in the form of general damages for malicious prosecution, special damages, aggravated and punitive damages for malicious prosecution and assault, and costs.

[9] Under Part 3 (Legal Basis) of the Counterclaim, the defendants state:

1. The Plaintiff intentionally committed assault on the Defendants resulting in the Defendants sustaining loss and damages.
2. The tort of malicious prosecution requires the defendants prove the following elements:
 - a) they were prosecuted;
 - b) the prosecution concluded in their favour;
 - c) there were no objectively reasonable and probable grounds to believe that proof beyond a reasonable doubt could be made out in a court of law; and
 - d) the prosecution was initiated and/or continued for an improper purpose.

Samaroo v. Canada (Revenue Agency), [2013] B.C.J. No. 5 citing Maizga v. Kvello Estate, 2009 SCC 51, paras. 3; 53-56

3. The Plaintiff made a false and baseless criminal complaint against the Defendants resulting in laying of criminal charges. The false complaint was made intentionally and with malice against the Defendants. The Defendants have suffered loss, damages, [and] expense as a result of the malicious prosecution initiated on the Plaintiff's complaint.

[10] On February 8, 2017, counsel for the plaintiff sent a demand for particulars to the defendants, seeking further particulars of the claims set out in paragraphs 2, 3, and 5 of Part 1 of the Counterclaim.

[11] On June 28, 2017, the defendants provided a response to the demand for particulars, as follows:

1. With respect to paragraph 2, the Plaintiff used profane language and physically aggressive gestures toward the Defendant, Harbans. The Plaintiff attempted to grab the Defendant Harbans's beard and then physically pushed the Defendant Harbans.
2. With respect to paragraph 3, the Plaintiff used profane language and physically aggressive gestures toward the Defendant, Harbans after Mr. Harbans simply asked the Plaintiff to refrain from bring [sic] his dog onto the Defendant's yard. The Plaintiff attempted to grab the Defendant Harbans's beard and then pushed the Defendant Harbans.
3. With respect to paragraph 5, the Defendant Nirmal did not have any altercations with the Plaintiff on October 19, 2014 as alleged or at all. The Plaintiff's description of the person who had allegedly assaulted him did not match that of the Defendant Nirmal and the Defendant Nirmal was acquitted of the assault charges against him.

[12] Subsequently, the plaintiff filed the NOA seeking to strike the Counterclaim pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. In dismissing the application, the Master provided the following oral reasons:

- [2] The parties that were involved were originally also involved in a criminal proceeding wherein there was an acquittal based on lack of identification beyond a reasonable doubt.
- [3] This is not a complicated case. This is a case involving an incident with versions of events that will obviously be fleshed out at discovery.
- [4] I am minded of the directions with respect to proportionality in the rules which are now mandated specifically. This is not a far-reaching multi-party situation. This is not a situation of an incident that went over a long period of time. This is an isolated, simple incident that is referred to by date, by the parties. There is no magic in this.
- [5] An assault is alleged by both of them. There are more details in one of the allegations, that by the plaintiff, than there are in the response and counterclaim, but I see no magic in this situation. The allegations are there. They are perhaps not perfect, but the standard is not perfection. There is no mystery about what the allegations are, and that will be further revealed when the discoveries take place next month.
- [13] This appeal was heard on September 19, 2018. At the time of the appeal hearing, examinations for discovery had not been conducted.
- [14] Subsequent to the appeal hearing, and prior to the issuing of these Reasons, counsel for the defendants sought leave to have the transcript of the proceedings before the Master tendered into evidence. The application, heard on November 2, 2018, was opposed by the plaintiff. I denied the request to have the transcript of the proceedings of the Master put before me.

Standard of Review

- [15] Where the court hears an appeal from an order of a Master on a purely interlocutory matter that involves the exercise of discretion, the standard of review is whether the order was "clearly wrong": 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2012 BCSC 597 [TimberWest] at para. 10.
- [16] However, where the decision under appeal involves a question of law, rather than the exercise of discretion, the standard of review is "correctness": TimberWest at para. 11.
- [17] Defendants' counsel agrees that the first ground of appeal, whether the Master applied the correct legal test, has to be reviewed on the standard of correctness. However, he argues that the second ground of appeal requires an application of the legal test, and thus raises a question of mixed fact and law which must be reviewed on the "clearly wrong" standard.
- [18] The application before the Master was brought pursuant to Rule 9-5(1)(a). That Rule provides:
 - (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.

- [19] Rule 9-5(1)(a) is an attack on the pleadings as they stand, on the grounds that they cannot succeed as a matter of law. Pursuant to Rule 9-5(2), no evidence is admissible on an application under Rule 9-5(1)(a). As such, a determination under Rule 9-5(1)(a) raises a matter of law only, and does not involve discretion on the part of the Master. Rather, it involves a consideration of the law relating to the causes of action pled, and a determination of whether the pleadings disclose sufficient facts to support the causes of action: *TimberWest* at para. 27.
- [20] Consequently, the standard to be applied on a review of a Master's decision made under Rule 9-5(1)(a) is correctness.

Striking of Pleadings

- [21] The test under Rule 9-5(1) to strike a pleading was stated as follows in *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 [*Moses*] at para. 41:
- [41] I turn next to whether the chambers judge erred in striking Mr. Moses' claim for unjust enrichment under Rule 9-5. It is trite law that before a claim may be struck under Rule 9-5, it must have "no reasonable prospect of success". Stated another way, it must be "plain and obvious" that the cause will fail. (See *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42 [*Imperial Tobacco*] at para. 17; *Johnstone v. Gardiner* 2012 BCCA 184 at para. 17.)
- [22] Application of the "plain and obvious" test requires the court to take the pleadings as they are. Assuming that the facts pleaded are true, the question the court must ask is whether there is a reasonable prospect that the claim will succeed: *Imperial Tobacco* at para. 17.
- [23] Where particulars are provided in response to a demand for particulars, the pleadings are to be read as a whole, taking into consideration the response to the demand for particulars.
- [24] As noted by the Court in *Gateway Building Management Ltd. v. Randhawa*, 2013 BCSC 350 [*Gateway*] at para. 16:

- [16] The test to be applied to determine whether an action should be struck out as disclosing no reasonable claim 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 action may succeed, then the Petition and the Action should be allowed to proceed: *Hunt v. Cary Canada Inc.*, [1990] 2 S.C.R. 959.
- [25] When an attack is made on a pleading, the court should consider whether the pleading can be amended and whether the outcome of the trial is beyond a reasonable doubt: see *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 at para. 40; and *Drummond v. Moore*, 2012 BCSC 496 at paras. 16-23.

Analysis

- [26] The plaintiff argues that the learned Master erred because he:
- failed to apply the "plain and obvious" test described in *Imperial Tobacco*;
 - went beyond the pleadings and improperly relied on the complexity of the case and the number of parties involved; and
 - failed to engage in any analysis of whether the causes of action in the Counterclaim - negligence, assault, and malicious prosecution - were disclosed by material facts.
- [27] The oral reasons for judgment of the Master indicate that he turned his mind to the appropriate considerations under Rule 9-5 and as articulated by the court in *Imperial Tobacco*. While he may not have used the words "plain and obvious", comments such as "This is not a complicated case" (para. 3), "This is an isolated, simple incident that is referred to by date, by the parties" (para. 4), and "There is no magic in this" (para. 4), all indicate that the Master was turning his mind to the question of whether it was plain and obvious that the pleadings disclose no reasonable cause of action.
- [28] The Master's reference to lack of complexity in the case relates to clarity and sufficiency of pleadings, which are relevant considerations in a Rule 9-5 application: *Gateway* at paras. 17-18. Here, the focal point of the dispute is an isolated incident which occurred on a specific date known to all parties and at which all parties were present. In that sense, the pleadings are not complex; it is clear from the pleadings that the allegations of assault, negligence and malicious prosecution all flow from this one incident.
- [29] In a multiple party situation, each party should be able to discern from the pleadings the specific causes of action to which he or she must respond. Thus, where the Master notes at para. 4 that "[t]his is not a far-reaching multi-party situation," he is properly having regard to the number of parties and the plaintiff's ability to understand the case he has to meet.

- [30] I turn now to the assertion that the Master did not engage in any analysis of whether the causes of action in the Counterclaim (i.e. negligence, assault, and malicious prosecution) were disclosed by material facts.

Malicious Prosecution

- [31] The elements of a cause of action in malicious prosecution were set out by the Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51 [Miazga] at para. 3 (see also 311165 BC Ltd. v. Canada (A.G.), 2017 BCCA 196, at paras. 57-58):
- [3] 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.
- [32] This legal test was pleaded by the defendants. However, the plaintiff argues that the facts supporting the malicious prosecution claim were not pled, and their absence was not considered by the learned Master.
- [33] Though not explicitly stated, paragraph 2 of the Master's reasons suggests that he was cognizant of the Miazga elements of a cause of action in malicious prosecution, and applied them correctly to the facts as plead. As noted by the Master: "The allegations are there. They are perhaps not perfect, but the standard is not perfection" (para. 5). I see no error in the Master's reasons. It is not plain and obvious that the malicious prosecution claim will not succeed.

Assault

- [34] The allegation of assault flows from the differing versions of the event which occurred on October 19, 2014, where both parties claim that the other was the aggressor.
- [35] The Court in *N.E.T. v. British Columbia (Attorney General)*, 2018 BCCA 380 at para. 27, explained the elements of assault as follows:

An assault "is the intentional creation of the apprehension of imminent harmful or offensive conduct", and battery "is the intentional infliction of unlawful force on another person": *Ward v. City of Vancouver*, 2007 BCSC 3 at para. 48.

- [36] Paragraphs 2 and 3 of the Counterclaim advance a claim for assault on behalf of both defendants. At paragraphs 1 and 2 of the response to the demand for particulars, further particulars are provided for the alleged assault against Harbans. Having regard to the whole of the pleadings, I find that the assault claim made by Harbans is sufficiently plead such that it is not plain and obvious that this claim will not succeed. I see no error in the Master's decision in this regard.

- [37] The assault claim advanced by Nirmal is not particularized in the response to the demand for particulars. However, at paragraph 3 of the response to the demand for particulars, further particulars are provided in relation to the malicious prosecution claim, wherein it is asserted that Nirmal "did not have any altercations with the Plaintiff on October 19, 2014 as alleged or at all."
- [38] Plaintiff's counsel submits that paragraph 3 of the response to the demand for particulars contradicts Nirmal's claim that the plaintiff assaulted him. Counsel for the defendants submits that there is no contradiction, but if there is, that paragraph 3 of the response to the demand for particulars should be read as an alternative pleading.
- [39] I do not see a contradiction in the pleading. The word "altercations" is not defined in the pleadings. It can be used to describe a physical confrontation or a verbal one. In the context of these pleadings and the defendants' response to the demand for particulars, it is reasonable to assume that the term "altercations" references physical contact. There is no contradiction in Nirmal saying that he did not have any altercations with the plaintiff. The elements of assault do not require establishing physical contact. As such, I see no deficiency in the pleadings such that it is plain and obvious that Nirmal's claim for assault cannot succeed.

Negligence

- [40] A cause of action in negligence requires the plaintiff to prove that "(i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach": *Saadati v. Moorhead*, 2017 SCC 28 at para. 13; see also *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 33.
- [41] The only reference to negligence in the Counterclaim is contained at paragraph 2, in connection with the allegation of assault.
- [42] A cause of action for negligence can rely on the same wrongful conduct supporting the allegation of assault. The only factual difference is that the impugned conduct supporting the negligence claim is carelessness as opposed to intent. However, there is a significant difference between a careless act and an intentional act: *Wilkinson v. Connors*, 2008 BCSC 1742 at para. 22.
- [43] Given that assault is an intentional tort and negligence is not, it is unclear how the Plaintiff can "negligently [cause] loss and damage to the Defendants by committing assault". The pleading as worded creates confusion, and requires clarification. However, this deficiency in the pleading can be addressed through an amendment.

[44] As noted by the Court in Moses at para. 41, if a cause of action requires clarification by an amendment, the court should allow the plaintiff to make the amendment as a condition of dismissing the application under Rule 9-5.

[45] The defendants are granted leave to amend their counterclaim to address the concerns noted herein.

Orders Made

[46] The defendants are granted 30 days in which to amend their counterclaim to clarify the claim of negligence. If the defendants do not amend their pleading within 30 days, or if the plaintiff wishes to argue that the amendment fails to disclose a cause of action against the plaintiff, the plaintiff will be at liberty to re-apply to the Supreme Court of British Columbia under Rule 9-5(1)(a).

[47] Costs of this application are in the cause.

"Shergill 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/18/19/2018BCSC1998.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/rana-v-gill-2018>

Prepared on 28 October 2026 · Esheria