

CANADA / JUDGMENT

Stanford v. CPA Professional Liability Plan Inc. et al.

2023 BCSC 2158

COURT

Supreme Court of British Columbia

DECIDED

6 November 2023

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2023 BCSC 2158 Stanford v. CPA Professional Liability Plan Inc. et al.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stanford v. CPA Professional Liability Plan Inc. et al.,

2023 BCSC 2158

Date: 20231106

Docket: S210968

Registry: Victoria

Between:

Peter J. Stanford

Plaintiff

And:

CPA Professional Liability Plan Inc., Malcolm D'Souza, Royal & Sun Alliance Insurance Company of Canada, Chubb Insurance Company of Canada, Northbridge General Insurance Corporation, Berkley Insurance Company, GCAN Insurance Company, Aspen Insurance UK LTD Canadian Branch, Lloyd's Aspen Syndicate 4711, Lloyd's Chaucer Syndicate 1084, Lloyd's Renaissance Re Syndicate 1458, Robert Staley, Nathan Shaheen,

and Bennett Jones LLP

Defendants

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Judgment

Self-represented Plaintiff:

P. Stanford

Counsel for the Defendants CPA Professional Liability Plan Inc. and Malcolm D'Souza:

L. Robinson

Counsel for the Defendants Royal & Sun Alliance Insurance Company of Canada:

T. Lawson

Counsel for the Defendants Chubb Insurance Company of Canada, Northbridge General Insurance Corporation, Berkley Insurance Company, Aspen Insurance UK LTD Canadian Branch, Lloyd's Aspen Syndicate 4711, Lloyd's Chaucer Syndicate 1084, Lloyd's Renaissance Re Syndicate 1458:

T. Urquhart

Counsel for the Defendants Robert Staley, Nathan Shaheen, and Bennett Jones LLP:

C. Elrick

Place and Date of Hearing:

Victoria, B.C.

October 11 and

12, 2023

Place and Date of Judgment:

Victoria, B.C.

November 6, 2023

- [1] THE COURT: The defendants bring applications to strike the notice of civil claim under Supreme Court Civil Rule 9-5(1) on the basis that it is scandalous, frivolous, and vexatious, is an abuse of process, and discloses no reasonable claim; and, to have the plaintiff declared a vexatious litigant.
- [2] The action arose, broadly speaking, out of the breakdown in the relationship between the plaintiff, who is now a retired member of the British Columbia bar, and his now-former client, the defendant CPA Professional Liability Plan Inc. (the "Plan"), which was the plaintiff's main client for a number of years. The circumstances of the dissolution of that relationship have directly or indirectly led the plaintiff to commence three actions in this court. The present applications are brought in the second of those actions (the "Second Action").

- [3] Referring to the three actions chronologically in the order in which they were filed, I summarize them as follows.

The First Action

- [4] In the First Action, VIC184433, the plaintiff claims against the Plan, the Plan's underwriters (the "Underwriters"), and the Plan's vice-president of claims, Mr. De Souza. There is no application before me in the First Action. As I will explain momentarily, the First Action has been stayed, but it is necessary to review the claims advanced in the First Action in determining whether the Second Action is an abuse of process.
- [5] In a very general sense, the plaintiff's claims in the First Action are contractual, in respect of allegations of breach of the terms of his retainer, and are in tort, in respect of allegations of misrepresentation leading to an alleged loss of opportunity.
- [6] The notice of civil claim in the First Action was filed October 12, 2018. A year later, on October 3, 2019, the plaintiff filed an amended notice of civil claim, advancing additional allegations that the defendants had failed to litigate in good faith, including, in particular, by responding to the plaintiff having sent the defendants a draft notice of civil claim with a letter dated December 27, 2018. The plaintiff refers to that correspondence as the "Intimidation Letter". I adopt that nomenclature in these reasons but putting it in quotation marks throughout, to denote it as being the plaintiff's characterization of the letter, not mine. The "Intimidation Letter" was signed by Robert Staley, a lawyer with the law firm of Bennett Jones, who were acting for the Plan. (Mr. Staley and Bennett Jones are now defendants in the Second Action.)
- [7] The amended notice of civil claim in the First Action alleges that the "Intimidation Letter" contained "multiple, undeserved, ad hominem attacks, and diverse, unwarranted accusations" made "for the purpose of intimidating, mocking, and demeaning" the plaintiff. The amended notice of civil claim further, as an example of the Plan and the Underwriters' allegedly aggressive litigation tactics and failure to litigate in good faith, alleges those defendants have failed to have the plaintiff's claims against them dealt with through mediation. The plaintiff alleges in the First Action that the defendants' conduct caused him financial loss and aggravated his pre-existing depression. He claims compensatory damages for his losses, aggravated damages for acute stress, anxiety, and mental suffering, and punitive and exemplary damages. In respect of the punitive damages claims against Mr. De Souza in particular, he alleges having suffered both financial and psychological harm.
- [8] In respect of both the allegations of the defendants litigating in bad faith and his claim for punitive damages, the plaintiff cites in the amended notice of civil claim the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, [2002] 1 SCR 595.
- [9] As I have mentioned, the First Action has been stayed. The stay came about through the defendants filing a notice of application to have the First Action dismissed. The application was returnable March 4, 2020. The plaintiff sought to have the defendants' application

adjourned for up to 90 days, on the basis of suffering an acute deterioration of his anxiety and depression. When the parties attended at court for the hearing of the application, one of the Plan's lawyers, Mr. Shaheen of Bennett Jones LLP--who is now also a defendant in the Second Action--approached the plaintiff and, it is alleged, persuaded him that his case was on all fours with that of the plaintiff in *Walker v. Manufacturers Life*, 2015 BCCA 473 [Walker].

- [10] In *Walker*, the plaintiff's claims had been dismissed on applications made without notice, and the plaintiff applied to set the dismissal orders aside on the basis that she had been designated a person with disabilities and had been unable to conduct the litigation. The chambers judge hearing her application found that there was a real question of the plaintiff's ability to "exercise judgment relating to the claims that you are making against Manulife as a reasonable person would be expected to do" and ordered the action stayed, pending receipt of a letter from her doctor advising whether the plaintiff was capable of managing the litigation.
- [11] The plaintiff now alleges in the Second Action that having been wrongfully persuaded by Mr. Shaheen that *Walker* was governing authority, he consented to the First Action being stayed.
- [12] Following that conversation between the plaintiff and Mr. Shaheen, the parties appeared before Justice Gaul. They discussed the terms of a stay pending the plaintiff obtaining a mental health assessment relating to his mental capacity to continue as a litigant in the matter, and whether the stay should be indefinite or for the 90-day period of the adjournment originally sought by the plaintiff. Ultimately, the plaintiff consented to an indefinite stay on those terms.
- [13] The plaintiff did not go on to obtain a health assessment. He now submits that his doctor was unable to provide one, as the doctor did not know how to assess mental capacity needed to conduct litigation. Nor did the plaintiff further take steps to advise the court of the difficulty he says he encountered obtaining a medical report. He has taken no steps to have the stay order set aside. Instead, the plaintiff withheld his consent to the stay order being entered in the form drafted by counsel, and the form of the stay order had to be settled by Justice Gaul on September 29, 2020. The order was ultimately filed with the registry on February 4, 2021.

The Second Action

- [14] Seven weeks after the stay order was entered, in March 2021, the plaintiff commenced the Second Action, naming as defendants the Plan, the Underwriters, and Mr. De Souza--all of whom were already defendants in the First Action--and, in addition, Mr. Staley, Mr. Shaheen, and their firm Bennett Jones LLP (collectively, the "Bennett Jones Defendants").
- [15] The notice of civil claim in the Second Action repeats the allegations made in the First Action that the defendants have failed to litigate in good faith. The plaintiff pleads that the Plan and the Underwriters have failed to dialogue with him, have failed to explore the

potential for a negotiated settlement, and have failed to entertain the possibility of mediation or to "propose any action or process based on discussion and compromise". He further pleads that the "Intimidation Letter" was a form of malicious bullying that has caused significant worsening of his depression, with debilitating surges of anxiety and other adverse effects on his physical health.

- [16] As a new allegation, the plaintiff pleads in the Second Action that he was lied to by Mr. Shaheen as to the applicability of Walker. He submits that in fact the case authorities as revealed by his own research conducted after the stay was pronounced do not support a litigant being found mentally incompetent because of depression and surging anxiety. The plaintiff pleads that as a consequence of that deceit, which he says all the defendants are responsible for, he has suffered "significant losses including the delay of meaningful proceedings" in the First Action for more than one year, and in addition, "the further worsening of his depression".
- [17] Again, as in the amended notice of civil claim in the First Action, the plaintiff pleads the *Whiten v. Pilot Insurance* case. The plaintiff seeks, again, compensatory, aggravated, exemplary, and punitive damages, and also an order that the trial of the First Action and the Second Action be heard at the same time.

The Third Action

- [18] The present strike applications were originally set to be heard the week of June 26, 2023. Three days beforehand, on June 23, 2023, the plaintiff commenced the Third Action, naming as defendants counsel representing the defendants in the Second Action, and repeating the allegation that the Plan and the other defendants have not been litigating in good faith.
- [19] The Third Action was dismissed by order of Justice Power made November 3, 2023.

Discussion

- [20] For the reasons I am about to state, I find that the Second Action is also to be dismissed.
- [21] As regards the Bennett Jones Defendants, the action violates the absolute privilege afforded to counsel when acting in the course of their duties to their clients in judicial proceedings, including the privilege that attaches to preparatory steps taken with a view to such proceedings. The "Intimidation Letter" falls within the latter: see *Hamouth v. Edwards & Angell*, 2005 BCCA 172 and *Hamburger et al. v. Fung et al.*, 2015 BCCA 444. I have read the "Intimidation Letter". It was strongly worded. It is understandable that its contents may have come as a shock to the plaintiff, but I find nothing in the content of the "Intimidation Letter" that would negate the absolute immunity granted to Mr. Staley as its author.
- [22] Similarly, there is nothing in the circumstances of Mr. Shaheen's communications with the plaintiff concerning the Walker decision leading to the stay order, either as pleaded or as described by the plaintiff in his submissions, that could negate the privilege that blanketed Mr. Shaheen's statements. Whether the case authority Mr. Shaheen provided was on all fours

with the parties' circumstances was a matter of interpretation. The Walker decision was obviously distinguishable in some respects, and in other respects provided a precedent for a stay being granted. Mr. Shaheen could have been under no duty to advise the plaintiff of the nuances. He owed no duty of care to the plaintiff, and no duty of care is alleged.

- [23] For these reasons, I find there is no reasonable claim against Staley, Shaheen, and Bennett Jones disclosed by the notice of civil claim, and the action as against them is dismissed.
- [24] Further, and in respect of the other defendants--the Plan, Mr. De Souza, and the Underwriters--I find as follows.
- [25] First, commencement of the Second Action in the face of this court having stayed the First Action due to concerns around the plaintiff's ability to conduct the litigation in his psychological state, and in the circumstances of the plaintiff having failed to provide the court with any evidence of his psychological state, was plainly an abuse of process.
- [26] Second, the Second Action was vexatious and an abuse of process by reason of it substantially duplicating causes of action pleaded in the First Action. I appreciate the plaintiff's submission that he advanced the First Action primarily in respect of his financial losses, while he intended the Second Action was to focus on his personal injuries; nevertheless, both actions are predicated on the plaintiff's allegation that the Plan and Underwriters have been litigating in bad faith. Further, as I have described, the amended notice of civil claim in the First Action, though it may have been intended to focus on the plaintiff's financial losses, sets out numerous allegations as to how the plaintiff's health is alleged to have suffered due to the defendants' conduct. The overlap between the two actions is further implicit in the plaintiff's own request in his prayer for relief in the Second Action that the two actions be tried together. The proper course would have been for the plaintiff to amend his pleadings in the First Action to claim personal injury. Commencing a new action was an abuse of process.
- [27] Third, the plaintiff's allegation of the defendants not having litigated in good faith is not a reasonable claim within the meaning of Rule 9-5(1). There is no generalized duty to litigate in good faith. Litigation must be conducted within the parameters of the Supreme Court Civil Rules, the canons of legal ethics, and the common law of practice and procedure. Nothing more. The plaintiff's claim of feeling bullied by the defendants' litigation stance does not give rise to a claim for damages. The plaintiff's reliance on *Whiten v. Pilot Insurance* is misguided. The defendant insurer in that case was as a matter of contract obliged to act towards its insured with *uberrimae fidei*, utmost good faith. That duty of utmost good faith is a characteristic of aleatory contracts of indemnity. It stems from the information asymmetries between the parties: the insured will have unique knowledge of the circumstances of the risk and the loss, placing the insured under an obligation to exercise utmost good faith in disclosing those circumstances; the corollary to that in the relationship is that the insurer, owing the insured indemnity, has a duty of utmost good faith in adjusting and settling the loss. In *Whiten*, the insurer was liable for punitive damages

because of its breach of that duty: its bad faith in failing to pay the claim, and then in contriving an arson defence.

[28] Here, the plaintiff does not plead that his relationship with the Plan was one of utmost good faith, nor does he plead any factual basis for finding the defendants were under a duty to litigate in good faith. The plea that the defendants were under a legal duty to negotiate, mediate, or compromise is unsupported and unsustainable.

[29] Finally, with respect to the specific allegations made by the plaintiff with respect to the "Intimidation Letter" and the circumstances leading to the stay of the First Action, I repeat what I said in relation to the claims against counsel, and I add three further observations.

- a) Any claim based on the stay order having been improperly obtained is an impermissible collateral attack on the stay order, and therefore an abuse of process. If the plaintiff believes the stay order was improperly obtained, his remedy is to apply to have it set aside.
- b) The plaintiff appears to have completely misconstrued the stay order and the circumstances that led up to it, as well as the consequences of it. His narrative that the stay was founded on what he calls the "Big Lie" is evidently based on him having confused the legal test for having a person declared to be suffering from a disability, with the court's own discretionary power to decide that that issue would have to be determined before litigation could proceed. The Court of Appeal acknowledged this distinction in *Walker* where it said, at paragraph 34:

... it was entirely within the Court's discretion to request the assistance of a current medical report addressing Ms. Walker's capacity before the matter could proceed further. This step is required for the Court to protect its own process and thus comes within its inherent jurisdiction.

There can be no doubt that in the circumstances before Gaul J, even if the plaintiff had not consented, that stay order would have appropriately followed from the court's exercise of its discretion.

- c) The stay of proceedings, in any event, was for the plaintiff's own benefit. It prevented the defendants from proceeding with their application to strike so long as there was an issue as to the plaintiff's psychological state. There has never been a determination that the plaintiff was under a disability. It has always been open to the plaintiff to apply to have the stay order set aside or terminated. Instead of doing so, he has, regrettably, chosen to weave the circumstances of the stay order into his narrative of having been bullied and abused. But the circumstances cannot have given rise to a cause of action.

[30] For these reasons, this action is dismissed. The dismissal is without prejudice to any right the plaintiff may have to amend his notice of civil claim in the First Action to plead physical or psychological injury as a result of the Plan's alleged breach of the terms of his retainer.

[31] The Bennett Jones Defendants further sought an order declaring the plaintiff to be a vexatious litigant and enjoining him from amending his pleadings or commencing further proceedings without leave of the court. Both the Second Action and the Third Action do have

features characteristic of vexatious litigation, particularly in the "grounds and issues raised" in the First Action being "rolled forward into subsequent actions and repeated and supplemented": *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685 (Ont. H.C.J.), and including the naming of counsel as defendants in the subsequent proceedings. However, the Third Action has been dismissed, and I have dismissed the Second Action as against the Bennett Jones Defendants, in part on the basis of their immunity from suit, and I do not consider it likely that the plaintiff will engage in further attempted litigation against counsel. In addition, as he has previously amended his notice of civil claim in the First Action, any further amendment would require leave of the court in any event.

[32] As to costs, I have found the Second Action to be an abuse of process. As stated by Justice MacKenzie in *Hollander v. Mooney*, 2017 BCCA 238 at paragraph 79:

Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke.

I award special costs to the defendants on that basis.

[33] Finally, as I noted at the conclusion of the hearing, I saw in the plaintiff no reason for concern as to his psychological capacity to conduct litigation. The only thing standing in the way of my vacating the stay order on my own motion is that the order was entered into by consent. I urge the parties to move quickly to have the stay order set aside so that the First Action can be resolved on its merits. To be clear, I am not giving a direction or order to that effect.

[SUBMISSIONS]

[34] The endorsement of Mr. Stanford of the draft form of order prior to entry will be dispensed with.

"A. Saunders J."

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