

CANADA / JUDGMENT

Zinck v. Canada

2004 FC 367

COURT

Federal Court

DECIDED

10 March 2004

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Zinck v. Canada Court (s) Database Federal Court Decisions Date 2004-03-10 Neutral citation 2004 FC 367 File numbers T-2080-99 Decision Content Date: 20040310 Docket: T-2080-99 Citation: 2004 FC 367 Montréal, Quebec, March 10, 2004 Present: RICHARD MORNEAU, ESQ., PROTHONOTARY BETWEEN: THOMAS ZINCK Plaintiff HER MAJESTY THE QUEEN Defendant REASONS FOR ORDER AND ORDER

- [1] This is a motion by the Defendant under Rules 213, 221 and 369 of the Federal Court Rules, 1998 (the Rules) for an Order granting a summary dismissal of the Plaintiff's claim on its merits or an Order striking the Plaintiff's Statement of Claim in its entirety as being frivolous, vexatious and/or prejudicial.

Background

- [2] The Plaintiff, who is self-represented, is a federally incarcerated inmate serving a twelve-year sentence for manslaughter. The Plaintiff has been in federal custody since January 1998.
- [3] Prior to his most recent incarceration, the Plaintiff sustained significant injuries, which resulted in restricted function and chronic pain.
- [4] Shortly after his incarceration, the Plaintiff was gradually taken off the narcotic drug Percocet and prescribed an alternative non-narcotic painkiller.
- [5] The Plaintiff initiated this action by filing a Statement of Claim on November 26, 1999. In his Statement of Claim, the Plaintiff firstly alleges that the Defendant was negligent in failing to treat the Plaintiff with the appropriate medication, namely Percocet. Secondly, the Plaintiff alleges a constitutional tort, in particular, that in failing to treat him with Percocet, the Defendant has subjected him to cruel and unusual punishment.
- [6] The course of the proceedings in this case has been difficult.

- [7] On February 27, 2001, the Court issued a Notice of Status Review requiring the Plaintiff to make submissions to justify the inactivity of the claim. On June 8, 2001, the Plaintiff was allowed to proceed, and by order dated November 27, 2001, the action became a specially managed proceeding.
- [8] Between June 2001 and the motion at bar, the Court has actively imposed deadlines on the Plaintiff. The Court set the filing time for the Plaintiff's list of documents, set limits for scheduling discoveries and indicated a due date for the Plaintiff's pre-trial conference memorandum. More often than not, the Plaintiff has failed to comply with these deadlines and relied on the cooperation and understanding of the Defendant or the Court.
- [9] The pre-trial conference in this case took place on April 2, 2003. Given the past history of this file, the Court took great pains at the pre-trial conference to explain to the Plaintiff that he would have to abide by the substantive requirements of the Rules with respect to the factual and expert evidence needed to be produced by herein Plaintiff.
- [10] On April 8, 2003, following the pre-trial conference, the Court issued an Order which provides in that regard the following: Nature and scope of evidence
2. As indicated and discussed at the pre-trial conference, this is a simplified action and both parties shall abide by the requirements of the Federal Court Rules, 1998 (the Rules).
- (1) In the case of the Plaintiff:
- (a) Save and except for his expert evidence in chief under Rule 279, all his evidence - and that includes the content of any audiocassettes - shall be served and filed pursuant to the requirements of the Rules and pursuant to Rule 299(1)(a). As for Rule 299(1)(a), the deadline is fixed at sixty (60) days prior to trial.
- (b) As to the Plaintiff's expert evidence in chief under Rule 279, the deadline for service of any expert affidavit shall be ninety (90) days prior to trial.
- (c) Should it become apparent that the Plaintiff has not complied in a material way with the deadlines mentioned in (a) or (b) above or with the substantive requirements of Rules 279 and 299(1)(a), the Defendant shall be at liberty to move the Court in writing under Rule 369 with a motion under Rule 221 or 213.
- (2) As for the Defendant, the deadline is fixed at thirty (30) days prior to trial for the purposes of Rule 299(1)(b), and at sixty (60) days prior to trial for the purposes of Rule 281.
- [11] The Plaintiff has not appealed that Order nor has he requested by motion in the past that the above-mentioned requirements be varied.

- [12] By Order dated December 4, 2003 the trial of the Plaintiff's claim has been set for April 14, 2004. This means that the Plaintiff's expert evidence, to which the Plaintiff was alerted as early as April 2, 2003, had to be served at the latest by January 15, 2004. The Plaintiff has failed to do so. Also he has not served and filed any affidavit evidence under Rule 299(1)(a) within the requirements of the Order of this Court dated April 8, 2003.
- [13] Therefore it was apparent in February 2004 that the Plaintiff put himself in the situation contemplated by paragraph 2(1)(c) of the April 8, 2003 Order. Thus the Defendant's motion under study.
- [14] One must note also that the Plaintiff, although duly served with the Defendant Motion Record, has not served and filed any motion record in response to the motion at hand.

Analysis

- [15] The Defendant sustains that since the Plaintiff has not produced any expert evidence to support any material aspects of his claim, said claim is bound to fail.
- [16] I agree with that position.
- [17] The Plaintiff alleges that the Defendant was negligent in failing to treat the Plaintiff with the appropriate medication, namely Percocet. Subsumed under this broad allegation is the assertion that Percocet is the only appropriate treatment for the Plaintiff's condition and that the alternative, non-addictive treatments prescribed by CSC doctors fall below the standard of care. The Plaintiff has no medical training or expertise to substantiate these assertions, nor has he procured the services of an expert that will testify on his behalf.
- [18] It appears also that the Plaintiff has seen at least twelve doctors since 1998, and none have recommended Percocet as a treatment. In that regard, the Defendant has produced for the purpose of this motion the affidavit of Dr. Camille Haddad who is a medical doctor employed by the Defendant and who is currently treating the Plaintiff. At paragraphs 22 and 23, Dr. Haddad concludes as follows:
22. Having reviewed the relevant academic literature and being familiar with the accepted practices in the medical community, it is fair to conclude that the prescription of addictive narcotics, and specifically Percocet, for long-term (non-cancer) pain management is controversial by all accounts. In addition to this general cautionary principle, the circumstances of Mr. Zinck's case militate against undertaking the controversial treatment. Firstly, he has failed to give alternative therapies a fair chance and Percocet is only prescribed as a last resort. Secondly, he has a history of serious alcohol abuse and a demonstrated vulnerability to addictive substances. Neither I nor the eleven other physicians that Mr. Zinck consulted have recommended the use of Percocet in this case.

23. I understand that Mr. Zinck has made significant efforts to find a physician that would prescribe him Percocet. He has never provided me with any medical opinion that has caused me to reconsider my assessment.
- [19] The Plaintiff has not put himself in the position to establish that he needs Percocet or even that it would be appropriate to prescribe it. Without this evidence, it is obvious that the denial of Percocet to the Plaintiff cannot be considered cruel and unusual.
- [20] Not only has the Plaintiff failed to serve and file any factual affidavit evidence under Rule 299(1)(a), but he has failed to serve any expert evidence.
- [21] I agree with the Defendant that without this expert evidence, the Plaintiff cannot support the allegations contained in his Statement of Claim and therefore the Plaintiff's claim as set out in his Statement of Claim is hereby summarily dismissed as I am satisfied under Rule 216 that there is no genuine issue for trial with respect to the Plaintiff's claim.
- [22] If I had not granted the summary dismissal of the Plaintiff's claim, I would have, based on the same reasoning, struck out the Plaintiff's Statement of Claim and dismissed the Plaintiff's action under Rule 221(1)(c) and (d) as being frivolous and prejudicial.
- [23] As for costs, the Defendant is entitled to costs for the action and for the motion at bar. The Court hereby sets them at a total sum of \$750.
- [24] For greater certainty, the parties shall therefore consider that the trial set for April 14, 2004 in this case will not be held at that time or at any other time. Richard Morneau Prothonotary
FEDERAL COURT COUNSEL AND SOLICITORS OF RECORD DOCKET: STYLE OF CAUSE:
T-2080-99 THOMAS ZINCK Plaintiff and HER MAJESTY THE QUEEN Defendant WRITTEN
MOTION EXAMINED IN MONTREAL WITHOUT PERSONAL APPEARANCE OF THE PARTIES
REASONS FOR ORDER: RICHARD MORNEAU, ESQ., PROTHONOTARY DATE OF THE
REASONS:MARCH 10, 2004 WRITTEN OBSERVATIONS: THOMAS ZINCK FOR THE
PLAINTIFF JAKE HARMS FOR THE DEFENDANT SOLICITORS OF RECORD: MORRIS
ROSENBERG DEPUTY ATTORNEY GENERAL OF CANADA FOR THE DEFENDANT

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