Federal Court  Cour fédérale

Date: 20150330

Docket: T-2126-14

Citation: 2015 FC 402

Ottawa, Ontario, March 30, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

STANLEY HOWARD TOMCHIN

Plaintiff

and

HER MAJESTY THE QUEEN AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendants

ORDER AND REASONS

[1] This is a motion by the Defendants for an order pursuant to Rules 8, 221 and 359 of the *Federal Courts Rules*, SOR/98-106:

a. striking out the Statement of Claim, filed October 16, 2014 herein, in its entirety without leave to amend, on the basis that it does not disclose a reasonable cause of action, that it is frivolous and vexatious and amounts to an abuse of this Court's process;

b. in the alternative, an order extending the time allowed for service and filing of the Statement of Defence herein for a period of 30 days from the date of the Court's order in the within motion;
c. amending the style of cause to remove "The Minister of Public Safety and Emergency Preparedness" as a Defendant; and
d. such further and other relief as to this Honourable Court may seem just.

[2] The Plaintiff seeks damages from the Defendants for alleged breaches of his rights under sections 7, 8, 13, and 24 of the *Canadian Charter of Rights and Freedom*s [the Charter].

[3] This motion is granted, for the reasons that follow.

I. Background Facts

[4] The Plaintiff is a citizen of the United States. He has no status in Canada.

[5] In October 2011, the Plaintiff was criminally indicted in New York State on numerous felony counts, including making illicit gains and money laundering, in relation to the Plaintiff's involvement in an organized on-line gambling (bookmaking) enterprise. The Plaintiff entered into a plea deal on July 29, 2014.

[6] On June 1, 2014, the Plaintiff came to Vancouver International Airport and sought to enter Canada as a visitor. On June 1 and 2, 2014, Canada Border Services Agency [CBSA] officers interviewed the Plaintiff about whether he is inadmissible to Canada on the basis of criminality and/or organized criminality [Admissibility Interview]. The Plaintiff has not been interviewed by CBSA since.

[7] The Plaintiff subsequently filed a verbatim transcript of the Admissibility Interview in open court, in Federal Court action T-1510-14.

[8] On June 20, 2014, the Plaintiff left Canada.

[9] On June 30, 2014, the Plaintiff filed a Statement of Claim under Federal Court registry file number T-1510-14.

[10] On September 4, 2014, Prothonotary Lafrenière ordered the motion for document disclosure adjourned pending a decision on the Defendants' motion to strike.

[11] On October 2, 2014, the Honourable Justice Mactavish allowed the Defendants' motion to strike, without leave to amend, with costs. Justice Mactavish decided, *inter alia*, that this action appears to be in its very early stages, and the Plaintiff has not identified any limitation period or other impediment that would preclude him from commencing a fresh action against the proper Defendants, and that little prejudice would be suffered by the Plaintiff if the claim were struck, without leave to amend, as he would be at liberty to renew his request for interlocutory relief in the context of a properly constituted action.

[12] On October 16, 2014, the Plaintiff filed the within Statement of Claim, under Federal Court number T-2126-14.

[13] A side by side review of the Statements of Claim in T-1510-14 and T-2126-14 reveals that they are virtually verbatim copies of one another. While the Defendants' names have changed and the Plaintiff's new claim omits extracts from case law and some evidentiary issues included in T-1510-14, the claim contains essentially the same facts in support of the alleged causes of action, and seeks the same relief.

II. Preliminary Objections

[14] The Plaintiff argues the motion should be dismissed because, in her October 2, 2014 Order, Justice Mactavish in striking the Plaintiff's original Statement of Claim filed, "necessarily and implicitly" denied striking the pleadings now asserted in the Statement of Claim in this action.

[15] I disagree with the Plaintiff, as nowhere in Justice Mactavish's October 2nd Order did she indicate, directly or implicitly, that she considered the causes of action then pleaded as proper or improper. The pleading improperly named defendants and was struck in its entirety, without leave to amend. The door was simply left open for the Plaintiff to file a new action, if it could be properly pleaded, naming the correct defendant and pleading material facts in support of alleged causes of action, in accordance with Rule 174 of the *Federal Courts Rules*.

[16] The Defendants also take issue with the naming of "The Minister of Public Safety and Emergency Preparedness" as a defendant. The proper defendant in an action against the federal crown is Her Majesty the Queen. I agree, the Minister of Public Safety and Emergency Preparedness is not a proper party in this case and should be deleted as a defendant.

III. Current Pleading

[17] The Plaintiff seeks damages under subsection 24(1) of the Charter for a breach of his section 7 and 13 Charter rights, to be free from self-incrimination; his section 8 Charter rights, not to be subjected to an unreasonable search and seizure by CBSA, and for permanent injunctive relief prohibiting the Defendants from sharing any information compelled from or seized from the Plaintiff under the compulsion powers of subsection 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], with law enforcement agencies in Canada or abroad, including the Queen County District Attorney in New York State and the New York Police Department [NYPD].

[18] The Plaintiff also seeks:

- an Order requiring the Defendants and their agents to disclose to the Plaintiff's counsel the extent to which their investigation of the Plaintiff was commenced as a result of information received from foreign law enforcement agencies, including the Queens County District Attorney and the NYPD, and what information compelled or evidence seized from the Plaintiff has already been shared with these law enforcement authorities;
- an Order requiring the Defendants and their agents, including the CBSA, from disclosing to any law enforcement authority in Canada, or abroad, including the Queens County District Attorney in New York State and the NYPD, any evidence or information acquired as a result of the CBSA's search of the Plaintiff and his personal property, including but not limited to, his luggage, his iphone or his ipad;
- costs on a solicitor/own client basis.

[19] In support of an interlocutory motion, the Plaintiff filed a transcript from a June 10, 2014 hearing before the New York State Court in his United States criminal proceeding. The transcript discloses that:

- the New York State District Attorney has not received any incriminating compelled information from the CBSA, and will not seek to reply on such against the Plaintiff in any criminal proceedings; and

- the New York State Court will not permit reliance on such information in the criminal proceedings against the Plaintiff, in any event.

[20] The Defendants' motion to strike is based on the facts that:

a. the Statement of Claim is incurably deficient and not a proper pleading in form or function;
b. the Statement of Claim lacks particulars and fails to prove a breach of Charter rights against self-incrimination and/or unreasonable search and seizure;
c. the Statement of Claim is comprised largely of opinion, argument, and unsupported allegations of "ulterior motives" and bad faith by the Defendants.

IV. Principles on Motions to Strike

[21] In order to strike a pleading on the ground that it does not disclose a reasonable cause of action, those allegations that are properly pleaded as concise material facts and are capable of being proved must be taken as true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Federal Court Rules*, Rule 174). However, that rule does not apply to allegations based on assumptions and speculation (*Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at para 27).

[22] As well, any pleading of misrepresentation, fraud, malice or fraudulent intent must provide particulars of each and every allegation; bald allegations of bad faith, ulterior motives or *ultra vires* activities is both "scandalous, frivolous and vexatious", and an abuse of process of this Court (*Federal Court Rules*, Rule 191; *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at paras 34-35).

[23] Rule 221(2) of the *Federal Court Rules* provides that no evidence shall be heard on a motion for an order under subparagraph (1)(a). However, evidence may be admitted in support of a motion to strike based on the other subparagraphs of Rule 221.

V. Alleged violations of the Plaintiff's right to not self-incriminate: Section 7 and 13 Charter rights

[24] The Defendants argue that paragraphs 29 to 44 of the Statement of Claim – comprising the Plaintiff's claims for breach of his alleged section 7 and 13 Charter "right not to self-incriminate" – should be struck in their entirety, without leave to amend. It is argued that they do not disclose a reasonable cause of action, and are frivolous and vexatious.

[25] The Plaintiff submits that the Defendants' position fails for a number of reasons. First, the Defendants fail to address the Plaintiff's primary position, which is that the CBSA is *ultra vires* of their governing legislation, in compelling the Plaintiff to give a statement. Secondly, with respect to the Plaintiff's claim that the extra-territorial dissemination of his evidence also violates his section 7 Charter rights, the Defendants' position in its Motion to Strike rests on a misunderstanding of the principles that underlie the right to be free from self-incrimination. Further, even if the Defendants' position on the latter point was accurate, as it pertains to the extra-territorial dissemination of compelled evidence, the Defendants' position in law has never been recognized by a Canadian court and as such could never be said to establish that it is plain and obvious that the Plaintiff's claim discloses no reasonable cause of action.

[26] Protection against self-incrimination applies only in respect of incriminating evidence. It does not apply in respect of any and all compelled information. Evidence is only incriminating if it can be used "to prove or assist in proving one or more of the essential elements of the offence for which the witness is being [subsequently] tried" (*R v Nedelcu*, 2012 SCC 59 at para 9 [*Nedelcu*]).

[27] Moreover, neither section 7 nor section 13 of the Charter operates as an absolute bar on sharing with law enforcement officials information (incriminating or otherwise) obtained during an administrative investigation. Information may be properly shared by an administrative agency with criminal law enforcement in appropriate circumstances. The Charter "right against self-incrimination" only constrains the use that may be made of information in a subsequent proceeding against the person concerned, and not the collection or sharing of that information (*R v Jarvis*, 2002 SCC 73 at paras 95-98; *Nedelcu*, above at paras 5-7).

[28] As well, courts have recognized that Canadian immigration officials necessarily communicate information obtained during immigration examinations to law enforcement in the course of assessing whether a foreign national may be inadmissible to Canada, including on security grounds and/or as a result of serious criminality or organized criminality. As the Ontario Superior Court noted in *United States of America v Kissel*, 2006 CanLII 47314 (ON SC) at para 152:

> [C]ooperation and communication between Canadian and American authorities with respect to a certain individual who is sought for prosecution in the United States also does not, by itself, suggest bad faith or improper motive. Indeed, such communication and cooperation is necessary in order for Canadian authorities to successfully pursue the objectives of Canadian immigration law.
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> See also: *Froom v Canada (MCI)*, 2003 FC 1127 at paras 150-152; *Halm v Canada (MCI)*, [1996] 1 FC 547 at p 13; *R v Nagle*, 2012 BCCA 373 at paras 34-36.

[29] The Plaintiff's alleged cause of action rests on the allegation that CBSA officers were constitutionally prohibited from communicating what the Plaintiff told them to foreign law enforcement authorities.

[30] This position is contrary to the explicit role and jurisdiction of CBSA officers under the IRPA (sections 15, 18, 36, 37 and 44) and the *Customs Act*, RSC, 1985, c 1 (2nd Supp.) (section 107).

[31] The IRPA mandates that foreign nationals seeking to enter Canada cannot do so until after, *inter alia*, a CBSA officer has determined that they are not inadmissible. Relevant IRPA inadmissibility provisions to the case at bar include inadmissibility for criminality under section 36, as a result of having committed an act that would be a crime in Canada, and inadmissibility under section 27, for organized criminality as a result of having engaged in money laundering.

[32] Accordingly, I find no cause of action for "sharing information obtained from a foreign national during an immigration examination", and paragraphs 29 to 44 of the Statement of Claim should be struck.

[33] Moreover, as pointed out by the Defendants, to support the Plaintiff's claim to his right against "self-incrimination", he bears the burden of proving, *inter alia*:

- he has provided some incriminating evidence in a proceeding in which he could not refuse to answer; and
- that information has been used to incriminate the Plaintiff in another proceeding.

[34] The Statement of Claim does not plead material facts to support this claim; it does not identify any incriminating evidence which the Plaintiff claims to have provided to CBSA during their examination of the Plaintiff under the IRPA and *Customs Act*, nor does the Statement of Claim plead material facts to show that any information the Plaintiff has provided to CBSA has been used, or even could be used, to incriminate the Plaintiff in another proceeding.

VI. Alleged allegations of compulsion for *ultra vires* purposes and bad faith

[35] The Plaintiff states that the facts pleaded support his claim that his section 7 Charter rights were violated by CBSA officers on June 1, 2014, and in the days following, because those officers were acting *ultra vires* of their statutory mandate. The Plaintiff was detained at the Vancouver airport by CBSA, as a result of his outstanding US indictment, by virtue of which he was inadmissible to Canada. While he could have been allowed to withdraw his application to enter Canada, he was detained by CBSA and interrogated about matters that were provided by foreign law enforcement, and the CBSA then disseminated the evidence they compelled from the Plaintiff to foreign law enforcement. It is the Plaintiff's position that the allegations of improper purpose are not speculative.

[36] Further, the Plaintiff argues that in any event, and even in the unlikely event that the CBSA was acting solely for valid immigration purposes when they compelled the Plaintiff to answer their questions about criminal allegations, they violated the Plaintiff's section 7 Charter rights when they disseminated his compelled evidence to foreign law enforcement agencies.

[37] While it is certainly open to this Court to inquire whether the purpose of a government agency was lawful, and to determine if the purpose to surrender a person as a fugitive criminal to a foreign state may not be a legitimate exercise of the power of deportation, that is not supported in the facts as pleaded in this case. Moreover, this is not an extradition case, but a deportation matter and there is a fundamental difference :

> …Deportation occurs when a state wishes to expel a person. Extradition occurs when a state wishes to retrieve a person, and can only be carried out when a request for extradition has been

> received. Canada cannot be precluded from taking steps to deport an individual merely because the effect of deportation may be that the individual faces greater sanctions in the country to which he is deported than if he is extradited. Canada has no control over whether a foreign state wishes a person extradited, and the Government of Canada cannot be precluded from acting in the public interest to deport undesirable aliens.
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> *Halm v Canada (Minister of Citizenship and Immigration)*, [1996] 1 FC 547 at pp 10-12

[38] Throughout the Statement of Claim, the Plaintiff alleges bad faith and ulterior motives on the part of the Defendants. However, I agree with the Defendants that the allegations are purely speculative and none of the statements are supported by the facts as pleaded. What the facts show is nothing other than legitimate, *intra vires* reasons for the Plaintiff's interview, investigation and detention by CBSA.

[39] As the Federal Court of Appeal held in *Merchant Law Group*, these unsupported conclusions and speculative accusations are an abusive and impermissible "fishing expedition":

> **34** …When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process":

> *Kastner v Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).

[40] The paragraphs relating to allegations of bad faith in the Plaintiff's Statement of Claim, paragraphs 3, 27, 44 and 47, should be struck.

VII. Alleged violation of the Plaintiff's right to be free from unreasonable search and seizure: section 8 Charter rights

[41] Paragraphs 45-47 of the Statement of Claim assert a claim for "violation of the right to be free from unreasonable search and seizure". This claim should be struck without leave to amend, as it is based solely on speculation and is conclusory, without any material facts pleaded in support.

[42] The Plaintiff makes the following assertion, to the effect that any search or seizure must necessarily have been *ultra vires*:

> In the case at bar, the CBSA was acting *ultra vires* this mandate in conducting searches for the purposes of assisting US law enforcement. Accordingly, the search of the Plaintiff's luggage, his phone and computer were not authorized by law and the search was not conducted in a reasonable matter having due regard to the circumstances in this case.

[43] The Supreme Court of Canada has decided that routine searches of a foreign national seeking entry to Canada and/or of his luggage do not breach section 8 of the Charter. This principle extends to (non-destructive) searches of the foreign-national's computers and cell phones (*R v Simmons*, [1988] 2 SCR 495; *R v Nagle*, 2012 BCCA 373; *R v Leask*, [2008] ONCJ 25; *R v Saikaley*, [2012] ONSC 6794).

[44] Paragraphs 45 to 47 of the Statement of Claim are struck.

VIII. The right to section 24(1) Charter damages

[45] In order to establish a valid claim for section 24(1) Charter damages, a plaintiff must establish that:

a. there is a breach of his rights under the Charter; and
b. there is a functional justification for an award of damages for breach of those rights in the specific facts of the case (*Vancouver (City) v Ward*, 2010 SCC 27).

[46] Paragraph 48 of the Statement of Claim is the plea in support of the Plaintiff's functional justification for Charter damages. Given my finding of no material facts pleaded that support a breach of the Plaintiff's rights, and the conclusory nature of paragraph 48 without material facts necessary to support the subsection 24(1) claim, this paragraph is also struck.

[47] The pleading as a whole is replete with opinion and conclusory statements, devoid of the concise, material facts needed to support a viable cause of action. I agree with the Defendants that the Statement of Claim appears to have been filed for collateral purposes, in the hopes that a fishing expedition may yield some claim of substance that may somehow support the Plaintiff's desire for a remedy against the Defendants. His position is simply wrong (*Kastner v Painblanc*, [1994] FCJ No 1671 at para 4 (FCA)).

ORDER

THIS COURT ORDERS that:

1. The Statement of Claim is struck, without leave to amend;
2. The Defendant "The Minister of Public Safety and Emergency Preparedness" is hereby removed as a party to this proceeding.
3. Costs to the Defendants.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2126-14
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