

Federal Court



Cour fédérale

Date: 20181003

Docket: T-274-12

Citation: 2018 FC 983

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Mr. Justice Bell

Docket: T-274-12

BETWEEN:

KEVIN RICE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] On August 22, 2018, the Court heard a motion brought by the Defendant pursuant to Rule 215(1) of the *Federal Courts Rules*, SOR/98-106, for an order to grant summary judgment in favour of the Defendant, with costs. The action concerns a medical malpractice claim brought by the Plaintiff, who was at all relevant times an inmate at a federal institution where he received treatment from medical professionals and hospital staff. Essentially, the Plaintiff claims his right

leg was amputated above the knee as a result of the Defendant's negligence. The Defendant responds that it was not negligent in any way, there was no negligence in the treatment received by the Plaintiff, and, if there was any negligence, which is denied, the Defendant is not liable since the medical practitioners, who are not named as Defendants, were independent contractors. On the date of the hearing I granted the motion for summary judgment and costs of \$15,000, with reasons to follow. These are my reasons.

II. Curial Background

[2] On November 2, 2016, Chief Justice Crampton ordered the action be set down for trial for seven (7) days commencing September 5, 2017. On August 24, 2017, Justice St-Louis ordered that the Plaintiff was precluded from calling any witnesses, other than him, to support his claim. No appeal was taken from that Order made by Justice St-Louis. As a result, the Plaintiff was unable to call any expert witnesses on the eventual trial of the action. Regardless, the Plaintiff did not deliver any expert reports either before or after the scheduled start of the trial.

[3] On August 31, 2017, Justice St-Louis ordered that "the trial will open as scheduled on Tuesday, September 5, 2017, at 9:30 a.m." and "if the Plaintiff fails to present himself, or if he is not fully prepared and ready to proceed, his action will be dismissed forthwith without further notice". The Plaintiff filed no appeal from that Order. On September 5, 2017, following a last-minute request for an adjournment by the Plaintiff, Justice St-Louis issued a direction which reads in part "[...] the Court adjourns the hearing scheduled for [...] September 6, 2017, and will further instruct the parties after the Judicial Administrator will have had the opportunity to

examine and assess the request”. On September 12, 2017, Justice St-Louis ordered, inter alia, “[...] 1. The trial is adjourned sine die; 2. Subject to the Defendant’s rights to move in order to advance this file in another manner, the Court will only contemplate rescheduling the trial once and if the Plaintiff clearly and unequivocally demonstrates that he is medically fit and fully prepared and ready to proceed”. On January 25, 2018, the Defendant was granted leave to bring a motion for summary judgment.

[4] On March 9, 2018, Prothonotary Tabib issued an Order setting out the timeline for the Defendant’s summary judgment motion. Unfortunately, the Plaintiff, having been released for a time, was re-incarcerated after March 9, 2018. It is important, however, to note that the Defendant successfully served the Plaintiff with Prothonotary Tabib’s Order before he was re-incarcerated. Following his re-incarceration, the Plaintiff requested relief from the summary judgment timeline fixed by Prothonotary Tabib. On July 26, 2018, Prothonotary Tabib issued a direction which stated, in part “[...] the date on which the Plaintiff is reported to have been incarcerated falls after the date on which the Order of March 9, 2018, was issued, and after the Defendant’s motion for summary judgment was served upon him. The Plaintiff has not communicated with the Court or with the Defendant to request an amendment to the schedule set out in the Order of March 9, 2018, to take his situation into account. His delays to serve and file materials in response to the motion for summary judgment have accordingly expired and the Defendant is therefore entitled to proceed with its motion by default. It is the Plaintiff’s responsibility to ensure that his contact information is kept updated with the Court and with the Defendant if he wishes to be kept informed of the proceedings. Should the Plaintiff wish to attend at the hearing of August 22, 2018, by telephone (although he would be unable to

participate given that he has not filed responding material) he may contact the Court to make appropriate arrangements”.

III. The test for summary judgment

[5] The test for the granting of summary judgment is set out in *Oriji v. Canada*, 2006 FC 1539, 154 A.C.W.S. (3d) 353; *Burns Bog Conservatory Society v. Canada (Attorney General)*, 2014 CAF 170, 242 A.C.W.S. (3d) 109; and *Manitoba v. Canada*, 2015 CAF 57, 250 A.C.W.S. (3d) 240 [*Manitoba v. Canada*]. The test has been variously described as there being no genuine issue for trial or that the action has no prospect of success. In my view, whichever term is employed, both mean exactly the same. Moreover, it has been established that there is no genuine issue for trial if there is no legal basis to the claim based on the law or the evidence [*Manitoba v. Canada*, at para 15].

IV. Analysis

[6] Upon reviewing the voluminous material before me, I am satisfied the within action has no prospect of success for the following reasons:

- 1) The expert evidence available to be presented at trial demonstrates that the medical treatment provided to the Plaintiff met or exceeded the relevant standard of care;
- 2) The expert evidence and the medical records demonstrate that the Plaintiff consistently refused to comply with recommended medical treatment; namely, antibiotics administered intravenously. This refusal was a significant factor in the unfortunate outcome;

- 3) The Plaintiff was warned that his refusal to follow recommended medical treatment could result in the amputation of his leg, which, sadly, was the eventual outcome;
- 4) There is no evidence whatsoever justifying the refusal of medical treatment by the Plaintiff;
- 5) The sole Defendant, being Her Majesty the Queen, bears no liability for the actions of the doctors in this instance, as they were providing their services under a contract and thus were neither Crown servants nor agents for the purposes of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

V. Costs

[7] The Defendant incurred significant costs in its defence of the within action. Those costs include filing of a defence, preparing a lengthy affidavit of documents, attending Discovery, engaging experts and obtaining expert reports for purposes of trial, participating in pre-trial motions and pre-summary judgment proceedings, and, of course, the amassing of affidavits and material necessary to convince the Court that summary judgment is appropriate in the circumstances.

[8] At the hearing of the summary judgment motion the Defendant filed a Bill of Costs assessed on column 3 of the Tariff which totalled \$15,880.27, including disbursements. In the circumstances, I am satisfied that a fair and reasonable assessment of costs in this case is \$15,000.00 (*Nova Chemicals Corp. v. Dow Chemical Co*, 2017 F.C.A. 25, 276 A.C.W.S. (3d) 298; *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 F.C.A. 417, [2003] 2 F.C. 451).

JUDGMENT in T-274-12

THIS COURT'S JUDGMENT is that the motion for summary judgment is allowed and the action is dismissed with costs in the all-inclusive amount of \$15,000.00.

IT IS FURTHER ORDERED that a copy of these Reasons and Judgment are to be served on the Plaintiff, within 10 days of the filing of the within Judgment and Reasons, at the Plaintiff's last known address provided to the Registry and at a place where he is incarcerated, if he is currently being incarcerated in a federal institution.

"B. Richard Bell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-274-12

STYLE OF CAUSE: KEVIN RICE v HER MAJESTY THE QUEEN

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: AUGUST 22, 2018

**REASONS FOR JUDGMENT
AND JUDGMENT:** BELL J.

DATED: OCTOBER 3, 2018

APPEARANCES:

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