Federal Court  Cour fédérale

Date: 20181127

Docket: T-1965-17

Citation: 2018 FC 1189

Toronto, Ontario, November 27, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

WAEL MAGED BADAWY

Applicant

and

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA AND SOLICITOR GENERAL OF THE PROVINCE OF ALBERTA AND ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA AND CANADIAN BAR ASSOCIATION AND FEDERATION OF LAW SOCIETIES OF CANADA AND LAW SOCIETY OF ALBERTA AND ALBERTA LAWYERS INSURANCE ASSOCIATION AND WALDEMAR A. IGRAS, AND WALDEMAR A. IGRAS PROFESSIONAL CORPORATION, AND MARGARET SOBSTEL AND KIM EMBURY AND KIM WALKER AND RAHIMA SHARIFF

Defendants

JUDGMENT AND REASONS

[1] This is an appeal brought under Rule 51(1) of the *Federal Courts Rules*, SOR/98-106, from Prothonotary Milczynski's order [the Order] dated August 16, 2018 granting the Defendants' motion to strike Mr. Badawy's statement of claim without leave to amend and dismissing the action as against them. Mr. Badawy now appeals that Order, asserting that contrary to the Prothonotary's finding, he has pleaded the requisite material facts to demonstrate that he is the owner of the trade names and copyrighted materials he asserts the Defendants have improperly used without a permit, authorization or licence.

[2] The Attorney General of Canada, Solicitor General of the Province of Alberta, Attorney General of the Province of British Colombia, Canadian Bar Association, Federation of Law Societies of Canada, Law Society of Alberta and Alberta Lawyers Insurance Association [collectively, the Defendants] respond that the appeal ought to be dismissed, with costs awarded to them. They argue that the Prothonotary was correct in finding that the statement of claim fails to plead material facts that disclose a reasonable cause of action as against them.

[3] I agree with the Defendants, and the appeal will accordingly be dismissed with costs for the reasons that follow.

I. Background

[4] The facts and relevant background as detailed in the Order under appeal are not in dispute. In his first, related action (T-1289-14), Mr. Badawy sued the defendants

Waldemar A. Igras and Waldemar A. Igras Professional Corporation for alleged infringement of a trade-mark and for associated passing off under section 7 of the *Trade-marks Act*, RSC 1985, c T-13. Around that time, Mr. Igras was representing Mr. Badawy's wife in divorce proceedings and practicing law under the name and style "Igras Family Law". Mr. Badawy applied for a trade-mark during Mr. Igras' representation of Mr. Badawy's wife. Following a motion for summary judgment brought by the Defendants, Justice Manson summarily dismissed a substantial part of Mr. Badawy's action.

[5] Mr. Badawy appealed Justice Manson's order, adding numerous defendants not involved in the original action, who were subsequently removed by order of Justice Webb of the Federal Court of Appeal as they were not proper parties to the appeal. Those parties were then added as defendants to the within action.

[6] Mr. Badawy states that he launched the within copyright action directly in response to a comment made by Justice Manson during the motion for summary judgment in the related trademark action.

[7] The Order under appeal arose from this copyright infringement action (T-1965-17).

[8] The day before the hearing of the Defendants' motion to strike the statement of claim in this copyright action, Mr. Badawy received two voicemails from the Court advising him that the hearing would take place via videoconference. Mr. Badawy sent a letter to the Prothonotary and the Defendants objecting on various grounds including that: (i) he did not consent to a

videoconference; (ii) he speaks English with an accent; (iii) his submissions could not be transcribed due to "distortion of the electronic manipulation of the audio"; and (iv) a videoconference would cause him stress and anxiety.

[9] Then, at the hearing itself, Mr. Badawy requested an adjournment so that he could have a judge physically present. The Prothonotary denied the adjournment request, and decided that the hearing would indeed proceed via videoconference.

[10] As to the merits of the hearing, the Prothonotary found that there were no material facts indicating what the Defendants were said to have done with any specificity that would give rise to liability, in either the original, or the proposed amended statement of claim. Therefore, both failed to disclose a reasonable cause of action.

[11] Ultimately, the Prothonotary was satisfied that it was plain and obvious that Mr. Badawy's claim against the parties could not succeed. As a result, she ordered that the statement of claim be struck without leave to amend, and that the action be dismissed pursuant to Rule 221(1)(a). She declined to award costs.

II. Issues and Standard of Review

[12] The issues raised in the written materials for this appeal of the Order are (i) whether Mr. Badawy's procedural fairness rights were adversely impacted by holding the hearing via videoconference; and (ii) whether the Prothonotary erred in determining that Mr. Badawy's statement of claim does not disclose a reasonable cause of action as against the Defendants.

[13] A decision to strike a pleading is discretionary (*Naqvi v Canada*, 2017 FC 1092 at para 6). A prothonotary's discretionary order attracts the same standard of review on appeal as do similar orders by motions judges (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 69). Thus, a prothonotary's discretionary order should only be interfered with by this Court when it is incorrect in law, or when it is based on a palpable and overriding error in regard to the facts (*Apotex Inc v Canada (Health)*, 2017 FCA 160 at para 14). Questions of procedural fairness, on the other hand, are reviewable on a standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34).

III. Analysis

A. *Did the Prothonotary breach procedural fairness?*

[14] In his written submissions, Mr. Badawy argues that he learned last minute that the hearing would be held via videoconference, and objected both in writing and at the hearing before the Prothonotary. At the hearing before this Court, however, Mr. Badawy retreated from this argument. And I agree that this is correct: no breach of procedural fairness occurred. After reading the transcript, it is clear that the Prothonotary heard and considered Mr. Badawy's arguments during the videoconference. It is also clear that Mr. Badawy had no problem testifying or responding to any questions. Hearings before the Court may be held by videoconference (*Federal Courts Rules*, Rule 32). The conduct of the hearing by videoconference did not adversely impact the procedural fairness owed to Mr. Badawy.

B. *Did the Prothonotary err in determining that Mr. Badawy's statement of claim does not disclose a reasonable cause of action as against the Defendants?*

(1) *Legal Principles on a Motion to Strike*

[15] To strike, Mr. Badawy's pleading must disclose no reasonable cause of action, or prospect of success (*Whaling v Canada (Attorney General)*, 2018 FC 748 at para 6). Rule 174 stipulates that every pleading must contain a concise statement of material facts relied upon. Sufficient material facts are the foundation of a proper pleading (*Canadian National Railway Company v BNSF Railway Company*, 2018 FC 614 at para 11).

[16] In the ruling under appeal, the Defendants had moved under Rule 221(1)(a), requesting that the Prothonotary strike out Mr. Badawy's claim as disclosing "no reasonable cause of action". The test on such a motion is whether it is "plain and obvious" that the claim cannot succeed (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17). The statement of claim is to be read as generously as possible with a view to accommodate any inadequacies in the allegations (*Condon v Canada*, 2015 FCA 159 at para 21). However, a plaintiff cannot simply plead bare assertions, or conclusions of law without the requisite factual underpinnings (*Meigs v Canada*, 2013 FC 389 at para 7). The bald assertion of a conclusion is not a pleading of material fact (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at paras 16-19, 27).

(2) *Application of Legal Principles to the facts*

[17] Mr. Badawy has now had ample opportunities to plead material facts, including in the original statement of claim, and the proposed amended statement of claim, as well as in prior oral proceedings before the Prothonotary.

[18] Then, at the hearing before this Court, Mr. Badawy spent a significant amount of time in his submissions addressing the impact of Justice Simpson's order that predated Justice Manson's order to strike in action T-1289-14 (referred to above). I note that Justice Simpson's order was part of entirely different action, with different moving parties: that proceeding involved a trade-mark issue and was brought by two of the parties not involved in this motion. Justice Simpson's order simply has no bearing on the Order under appeal.

[19] Mr. Badawy further asserts that paragraphs 1, 15 and 22 of his statement of claim disclose material facts, and that as a result, the Prothonotary erred. Those three paragraphs read as follows:

> 1. The plaintiff claims: (the ownership of the copyright of IGRAS FAMILY, IFL IGRAS FAMILY, RCIM as words and artworks, AND All rights commercial use as corporation, or business names in Canada AND/OR trade names, trademarks or any form with commercial use [)].
>
> 15. The Defendants are using different names owned by the Plaintiff to offer and market legal service without permission from the Law Society of Alberta or the legitimate owner to passing off the value of the name as voluntary [*sic*] submitted by the counsel Mr. Comba about the nature of my claim.
>
> 22. Any or all of the Defendants (Waldemar A. Igras, AND Waldemar A. Igras Professional Corporation, AND Margaret Sobstel AND Kim Embury AND Kim Walker AND Rahima

> Shariff) are believed to be agents and/or affiliated with any or all of the Defendants (Minister of Justice and Attorney General of Canada, AND Solicitor General of the Province of Alberta AND Attorney General of the province of British Colombia AND Canadian Bar Association AND Federation of Law Societies of Canada AND Law Society of Alberta AND Alberta Lawyers Insurance Association).

[20] In addition, Mr. Badawy asserts that both the statement of claim and the proposed amended statement of claim provide the requisite material facts that he is the owner of "registered trademarks, [c]orporations and [c]opyrights and the Defendants that [sic] are using them without permission that interfere with the interest of owner of these intellectual properties" (Mr. Badawy's Written Representation at para 19).

[21] I disagree. The Prothonotary appropriately found an absence of material facts. In *Mancuso*, the Federal Court of Appeal clearly explained the requirement of material facts:

> [16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the [motions] judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."
>
> [17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. <u>If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues</u>. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.
>
> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the

> prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.
>
> [19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.
>
> [Emphasis added]

[22] Looking at the pleadings as a whole, and more specifically at paragraphs 1, 15 and 22 of the statement of claim and paragraphs 27–48 of the proposed amended statement of claim, Mr. Badawy fails to explain the constituent elements of the legal grounds raised, or identify what actually gives rise to the Defendants' alleged liability. Rather, the Prothonotary reasonably only found bald allegations against the Defendants. Neither statement of claim contains material facts or particulars about how any of the Defendants encroached on the intellectual property that Mr. Badawy pleads he owns. I do not see how a statement of defence could be drafted in response.

IV. Conclusion

[23] The Prothonotary did not err in law or fact: I agree that it is plain and obvious that Mr. Badawy's action cannot succeed. As a result, this Court will not intervene, and dismisses Mr. Badawy's appeal.

V. Costs

[24] I will order costs on a reduced basis to that requested by the Defendants, given the fact that Mr. Badawy is self-represented. He shall therefore pay lump sum costs of $4500, payable in equal amounts of $750 to each of the following:

A. Attorney General of Canada;
B. Solicitor General of Alberta;
C. Attorney General of British Colombia;
D. Gowling WLG (Canada) LLP for the Canadian Bar Association;
E. Conway Baxter Wilson LLP for the Federation of Law Societies of Canada;
F. Emery Jamieson LLP for the Law Society of Alberta and the Alberta Lawyers Insurance Association.

JUDGMENT in T-1965-17

THIS COURT'S JUDGMENT is that:

1. Mr. Badawy's appeal is dismissed.

2. Mr. Badawy is to pay lump sum costs of $4,500 which is payable in six equal parts of $750.00 to the Defendants' counsel:

   A. Attorney General of Canada;
   B. Solicitor General of Alberta;
   C. Attorney General of British Colombia;
   D. Gowling WLG (Canada) LLP for the Canadian Bar Association;
   E. Conway Baxter Wilson LLP for the Federation of Law Societies of Canada;
   F. Emery Jamieson LLP for the Law Society of Alberta and the Alberta Lawyers Insurance Association.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1965-17
STYLE OF CAUSE:	WAEL MAGED BADAWY V MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 15, 2018
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 27, 2018

APPEARANCES:

Wael Badawy	FOR THE APPLICANT
Fernando de Lima	FOR THE DEFENDANT ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA
Andrew Lawrence	FOR THE DEFENDANTS MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA
Julie Mouris	FOR THE DEFENDANT FEDERATION OF LAW SOCIETIES OF CANADA
Josh De Groot	FOR THE DEFENDANT SOLICITOR GENERAL OF THE PROVINCE OF ALBERTA
Bruce Comba	FOR THE DEFENDANTS LAW SOCIETY OF ALBERTA AND ALBERTA LAWYERS INSURANCE ASSOCIATION
Graeme Macpherson	FOR THE DEFENDANT CANADIAN BAR ASSOCIATION

SOLICITORS OF RECORD:

Wael Badawy	FOR THE APPLICANT ON HIS OWN BEHALF
British Columbia Ministry of Attorney General Legal Services Branch Victoria, British Columbia	FOR THE DEFENDANT ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA
Attorney General of Canada Edmonton, Alberta	FOR THE DEFENDANTS MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA
Conway Baxter Wilson LLP Barristers and Solicitors Ottawa, Ontario	FOR THE DEFENDANT FEDERATION OF LAW SOCIETIES OF CANADA
Alberta Justice and Solicitor General Legal Services Division Edmonton, Alberta	FOR THE DEFENDANT SOLICITOR GENERAL OF THE PROVINCE OF ALBERTA
Emery Jamieson LLP Barristers and Solicitors Edmonton, Alberta	FOR THE DEFENDANTS LAW SOCIETY OF ALBERTA AND ALBERTA LAWYERS INSURANCE ASSOCIATION
Gowling WLG (Canada) LLP Barristers and Solicitors Ottawa, Ontario	FOR THE DEFENDANT CANADIAN BAR ASSOCIATION