

Federal Court



Cour fédérale

Date: 20190710

Docket: T-2194-18

Citation: 2019 FC 913

Ottawa, Ontario, July 10, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KASIRYE KABALA

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] By Notice of Motion in writing filed on April 18, 2019, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), Mr. Kasirye Kabala (the “Plaintiff”) seeks an extension of time within which to appeal from the Order of Prothonotary Milczynski, dismissing his Second Amended Statement of Claim without leave to amend.

[2] Her Majesty the Queen (the “Defendant”) opposes the motion, on the grounds that the Plaintiff has failed to meet the test for an extension of time and that it would not be in the interests of justice to grant the motion.

[3] By Order dated March 1, 2019, Prothonotary Milczynski granted a motion brought by the Defendant and struck out the Plaintiff’s Second Amended Statement of Claim without leave to amend. Her Order provides in part as follows:

The Second Statement of Claim sets out the Plaintiff’s concerns regarding how his applications were dealt with and how he was treated by the Human Rights Tribunal of Ontario. There are no material facts alleged against the Government of Canada, the Queen in Right of Canada or any federal body. As the Defendant notes, the claim also appears to be an attempt to re-litigate a dispute already adjudicated by the Human Rights Tribunal and Federal Court (Court File T-1738-18), where the Plaintiff’s claim against the Human Rights Tribunal of Ontario and a named Vice-Chair was dismissed, for the following reasons:

The Federal Court is a statutory court established by section 101 of the *Constitution Act*. For the Federal Court to have jurisdiction, the claim must be founded upon existing and applicable federal law and the Federal Court must have jurisdiction over the parties. The Human Rights Tribunal and its Vice-Chair are not such parties and the subject matter of the claim is not a claim that this Court can adjudicate.

In the within action, simply naming Her Majesty the Queen as defendant, making references to the Canadian Charter of Rights and Freedoms or federal statutes do not bring the action within the jurisdiction of the Federal Court. The substance of the within claim is essentially the same as that in Court File T-1738-18. The Plaintiff seeks to claim for damages for how he was treated by the Human Rights Tribunal of Ontario, its staff and adjudicators, and CanLII for the on-line publication of the Tribunal’s decisions. Accordingly, the action must be dismissed. As for costs, having regard to the circumstances of this motion, I am satisfied that some amount should be awarded to the Defendant.

[4] The Plaintiff filed an affidavit, dated April 18, 2019. He deposed that he only received the Order on April 18, 2019.

[5] For her part, the Defendant filed the affidavit of Ms. Theresa Bennett, dated April 29, 2019. Ms. Bennett deposed that according to the Court records, the Order of March 1, 2019 was sent to the Plaintiff by email on March 1, 2019 and he acknowledged receipt.

[6] In her written submissions, the Defendant argues that the Plaintiff has not met the test for an extension of time as discussed in the decision of the Federal Court of Appeal in *Alberta v. Canada* (2018), 425 D.L.R. (4th) 366 (F.C.A.).

[7] The Defendant further submits that it would not be in the interests of justice to allow an extension of time since there is no merit in the Plaintiff's proposed grounds of appeal in light of the standard of review applicable to an appeal from the decision of a prothonotary as discussed in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology* (2016), 487 N.R. 208 (F.C.A.).

[8] The Defendant argues that the Prothonotary did not err in striking the Second Amended Statement of Claim.

[9] In his Second Amended Statement of Claim, the Plaintiff advanced a claim against the Defendant for allegedly wrongful acts carried out by the Human Rights Tribunal of Ontario. He claimed damages in the amount of \$15,500,500.00.

[10] In *Alberta, supra*, at paragraph 44, the Federal Court of Appeal referred to the test for an extension of time as discussed in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.) as follows:

In *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.) (*Hennelly*), this Court listed four questions relevant to the exercise of discretion to allow extension of time under Rule 8:

- (1) Did the moving party have a continuing intention to pursue the proceeding?
- (2) Is there some merit to the proceeding?
- (3) Has the defendant been prejudiced from the delay?
- (4) Does the moving party have a reasonable explanation for the delay?

[11] I agree with the submissions of the Defendant about the failure of the Plaintiff to show why the time should be extended for filing an appeal from the Order of Prothonotary Milczynski.

[12] The Plaintiff has not provided a reasonable explanation for his delay in filing his Notice of Appeal within the time limited by the Rules.

[13] The evidence shows that the Order was sent to the Plaintiff on March 1, 2019 and further, the Index of Recorded Entries shows that he acknowledged receipt of the Order.

[14] The Plaintiff has not shown that there is any merit to his appeal.

[15] The Prothonotary properly exercised her discretion, pursuant to the Rules, to strike the Second Amended Statement of Claim. The test upon an appeal from the Order of a prothonotary is set out in the decision in *Hospira, supra*.

[16] According to the decision in *Hospira, supra*, an Order of a Prothonotary will not be reversed unless there is palpable and overriding error with respect to factual conclusions or for questions of law or mixed fact and law; and where a legal principle is in issue, the standard of corrections will apply.

[17] The test upon a motion to strike a pleading is set out in the decision in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, that is whether it is plain and obvious that the pleading discloses no reasonable cause of action. According to the decision in *Bérubé v. Canada* (2009), 348 F.T.R. at paragraph 24, a claim must show the following three elements in order to disclose a reasonable cause of action:

- i. Allege facts that are capable of giving rise to a cause of action
- ii. Indicate the nature of the action which is to be founded on those facts, and
- iii. Indicate the relief sought, which must be of a type that the action could produce and that the court has jurisdiction to grant.

[18] The Prothonotary applied the applicable principles of law in striking out the Plaintiff's Second Amended Statement of Claim.

[19] The Prothonotary noted that the Plaintiff appears to be trying to re-litigate a matter that has been heard before the Human Rights Tribunal and by the Federal Court in cause number T-1738-18.

[20] An attempt to re-litigate the same matter is an abuse of process: see the decision in *Oleynik v. Canada (Attorney General)* (2014), 464 F.T.R. 114.

[21] In my opinion, there was no error in the Order made by Prothonotary Milczynski and there is no basis for judicial intervention.

[22] The motion is dismissed with costs to the Defendant in the amount of \$250.00.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the Defendant in the amount of \$250.00.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2194-18

STYLE OF CAUSE: KASIRYE KABALA v HER MAJESTY THE QUEEN

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: HENEGHAN, J.

DATED: JULY 10, 2019

APPEARANCES:

Kasirye Kabala

FOR THE PLAINTIFF
(ON HIS OWN BEHALF)

Marilyn Venney

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE DEFENDANT