IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110511
Docket: S110981
Registry: Vancouver

Between:

City of Powell River

Plaintiff

And

Martin Ernest Sliwinski

Defendant

And

Regina Sadilkova and City of Powell River

Third Parties

Before: The Honourable Mr. Justice Rogers

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S.R. Harcus
Appearing on his own behalf:	M.E. Sliwinski
Counsel for Third Party, Regina Sadilkova:	S.H. Haakonson
Place and Date of Trial/Hearing:	Vancouver, B.C. May 11, 2011
Place and Date of Judgment:	Vancouver, B.C. May 11, 2011

[1] THE COURT: Well, this is a pretty straightforward case. The underlying proceeding was commenced by the City of Powell River against Mr. Sliwinski. It is an effort by the city to enforce its bylaws. That is it; pure and simple. It is simply an effort by the city to require Mr. Sliwinski to comply with land-use bylaws that affect his land.

[2] Mr. Sliwinski has launched a counterclaim, and in that counterclaim, he alleges that Ms. Regina Sadilkova has acted maliciously against him and that, in so doing, she has committed the tort of misfeasance in public office. He seeks general damages and punitive damages against Ms. Sadilkova personally and against the City of Powell River vicariously as her employer.

[3] Ms. Sadilkova has brought on this application pursuant to Rule 9-5 of the new *Rules of Court* to strike the counterclaim as disclosing no cause of action. In the alternative, Ms. Sadilkova says that she is entitled to the protection of s. 287 of the *Local Government Act*, and that the counterclaim ought to be dismissed on that ground.

[4] The City of Powell River, although its counsel attended this hearing, took no position with respect to the arguments advanced by either Mr. Sliwinski or Ms. Sadilkova, although privately I suspect that the City is rooting for Ms. Sadilkova.

[5] The application under Rule 9-5 is, in essence, the same application as would have been brought under the old *Rules*, Rule 19(24). And according to the many, many, many, many, many cases in which that rule was considered, the test for whether or not a particular pleading should be struck as disclosing no cause of action is whether the allegations contained in the pleading, if assumed to be true, disclose a cause of action against the defendant. And if there is any doubt about that, then the doubt should be resolved in favour of the claimant and against the defendant, which is to say, generally speaking, the court should be very slow and reluctant and cautious about denying a party an opportunity to present his case in full at trial. That said, however, Rule 19(24) of the old *Rules of Court* and Rule 9-5 exist for a purpose. They exist in order to protect the process of the court from

useless proceedings. The public is well served by the court taking steps to ensure that only those matters that actually have some merit take up space and resources in the public's courtrooms. The public is equally well served by nipping useless proceedings in the bud. So, those are the criteria for a successful application under Rule 9-5 and my take on the public policy that bottoms that rule.

[6] In the present case, the counterclaim that Mr. Sliwinski has brought against Ms. Sadilkova is, as I said, an allegation that Ms. Sadilkova committed a tort of misfeasance in public office. Both parties agree that the essential elements of that tort were defined by the Supreme Court of Canada in the case of *Odhavji v. Woodhouse*, 2003 SCC 69. In paragraph 23 of the *Odhavji* case, the court said that there are two essential elements to the tort of malfeasance in public office. They are:

> ...First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff...

[7] So, in order for Mr. Sliwinski's counterclaim to describe the tort of public malfeasance, he must allege facts which would establish that Ms. Sadilkova engaged in deliberate and unlawful conduct, that that conduct was engaged in in her capacity as a public officer, and that she was both aware that her conduct was unlawful and that it was likely to harm Mr. Sliwinski. Knowing that those are the things that the counterclaim must allege, the facts that must be alleged in the counterclaim in order to establish the tort of misfeasance in public office, we turn to the counterclaim and we ask ourselves, does the counterclaim in fact do that? The only allegations about Ms. Sadilkova's conduct that are set out in the counterclaim are in paragraph 4 of the counterclaim, and they are in subparagraphs 4(a) and (b). I will quote the relevant portion of para. 4 of the counterclaim for the sake of completeness.

> The Defendant on numerous occasions contacted the Plaintiff in an attempt to resolve the premises advanced by the Plaintiff City of non-conforming use of vacant land and illegal connection of recreational vehicle to the utilities followed by a series of harassments in forms of intimidating letters, trespassing, unwarranted searches and the Plaintiff Statement of Claim.

> (a) for the Plaintiff Sadilkova suggested a costly rezoning of the property to accommodate the placement of the recreational vehicle, advising however that the matter has to go to the council and she will not support the cause in favour of the Defendant.
>
> (b) On another occasion when the Defendant pose[d] the questions to the Plaintiff Sadilkova as to:
>
> > "Why was my neighbour of 4583 Wellington Ave allowed to reside in the very same recreational vehicle for nearly 3 years without any harassment from the Plaintiff? Further why did the Plaintiff at tax-payers expense [conduct] utility connections to the very same recreational vehicle when it was parked on the Defendants neighbour's property, but now that the recreational vehicle is parked on the Property and it is connected to the services the Plaintiff has engaged in a malicious harassment and persecution of the Defendant?"
>
> The Plaintiff Sadilkova answered that at such time the Defendant's neighbours "gutted their house" hence, they had no place to live other than the recreational vehicle and there [were] no [complaints] regarding the recreational vehicle while it was parked at the neighbour's property.

[8] So, the question is, do those allegation of fact having to do with Ms. Sadilkova's alleged conduct comprise allegations of fact which, if true, would indicate that she engaged in deliberate and unlawful conduct in her capacity as a public officer, and did she know that that conduct was unlawful and that it was likely to harm the plaintiff? My answer to those questions is a clear and unequivocal no, clearly not. When I look at subparagraph (a) of paragraph 4 of the counterclaim, for example, I note that Ms. Sadilkova simply said in response to a question about, I assume, how can I regularize things here so that this recreational vehicle will conform, she replied saying, "Well, you can apply to rezone but that will be costly, and by the way, I will not support it if it goes to council." I do not understand that to be unlawful. I do not understand it to be not within her capacity as a public officer. It may well have been deliberate. How that was in any way unlawful completely escapes me on the pleadings here, and I do not see how Ms. Sadilkova could be taken to have known that this would likely harm the plaintiff. It is simply a statement of policy.

[9] As to the allegation in subparagraph 4(b) of the counterclaim, I do not actually see that as being a comment that is directed to Mr. Sliwinski or that is in any way intended to harm him. At most, it is an explanation for why the City of Powell River did not pursue a neighbour with the same kind of complaint that they now pursue Mr. Sliwinski.

[10] I would say, as a proposition of law, that a statutory authority, such as the City of Powell River, is entitled to decide when and under what circumstances it wishes to enforce its bylaws. Except under very unusual circumstances, those decisions are not reviewable. I cannot imagine how this statement by Ms. Sadilkova could bottom an allegation that she committed misfeasance in public office. It simply does not. Now, I understand that Ms. Sadilkova's responses to Mr. Sliwinski's inquiries and demands were not satisfactory to him, but that is not the same as saying that they, in and of themselves, give rise to the tort of malfeasance in public office.

[11] It follows that I must conclude that Mr. Sliwinski's counterclaim does not, in fact, disclose a cause of action against Ms. Sadilkova, and the reason for that is that the counterclaim does not contain the allegation of fact which would be necessary to provide the bones of the essential elements of that tort. I must therefore strike the counterclaim.

[12] Mr. Sliwinski can of course file a new counterclaim, so long as he complies with whatever rules of procedure and time limits might apply here, but this particular counterclaim is defunct. If I am wrong with respect to the application under Rule 9-5, I would nevertheless strike the pleadings because they do not disclose allegations of fact which would tend to, if proven, establish that Ms. Sadilkova acted in a way that would prevent her from enjoying the shield protection of s. 287 of the *Local Government Act*.

[13] Turning to the issue of costs, Ms. Sadilkova is seeking special costs against Mr. Sliwinski. She says that the allegations against her were completely unfounded, that they lacked merit, that they go to her professional reputation in her job, and that they are troublesome, vexatious and unnecessary. She says that these kinds of

allegations, which go to the heart of a person's professional reputation, ought not be brought unless there is at least some merit to them, and that having brought that pleading, Mr. Sliwinski must be seen to have acted in a way that was reprehensible or, at a minimum, in a way that is deserving of rebuke. Ms. Sadilkova relies on the Court of Appeal's decision in *Garcia v. Crestbrook Forest Industries Ltd.*, (1994), 9 B.C.L.R. (3d) 242. (C.A.). In that case, the Court of Appeal laid down the propositions that must be satisfied or met in order for an order of special costs goes. Before I go any further, I would simply say, perhaps for Mr. Sliwenski's edification, special costs amount to indemnification for the winning party's legal fees. They can be very large. An award of special costs is intended to bring home to the unsuccessful litigant the seriousness of the litigation process, the need to act reasonably and responsibly in the course of that process, and also to act as a sort of general deterrent so that the public will know that a member of the public, if they wish to bring forward a suit, had better do so on reasonable and proper grounds, and not throw things out in a fit of pique or anger because they may well get hit by very significant costs by way of penalty for doing so.

[14] All of that said, I see a couple of things here which ameliorate the situation and Mr. Sliwinski's jeopardy for special costs. The first thing is that Mr. Sliwenski's allegations against Ms. Sadilkova were, as these things go, relatively mild. He did not accuse her of lying, he did not accuse her of fraud, and he did not accuse her of seeking to obtain personal benefit. It seems to me that Mr. Sliwinski is simply angry at Ms. Sadilkova for what he took to be her unsatisfactory responses to what he thought were his entirely reasonable propositions and questions, and he vented by way of writing this counterclaim. It turns out to have been an unwise decision, but I do not understand, on the basis of the counterclaim that I have before me, that Mr. Sliwinski was motivated by a desire to cause trouble for Ms. Sadilkova. The other thing that mitigates in favour of Mr. Sliwinski is that the public policy of nipping things in the bud, so to speak, has been well served. This counterclaim was filed March 10, 2011. Today is May 11, 2011. Only two months have gone by with this counterclaim out there in the world. I think that under these circumstances, Mr. Sliwinski has just escaped liability for special costs. Had his counterclaim been

written with more vitriol, or had the matter dragged on and Mr. Sliwinski attempted to pursue it any further on the pleadings as they now stand, my decision on this issue might have been different. That said, Ms. Sadilkova has achieved unqualified success on the substantive relief she seeks, and she is entitled to her costs on Scale B in any event of the cause.

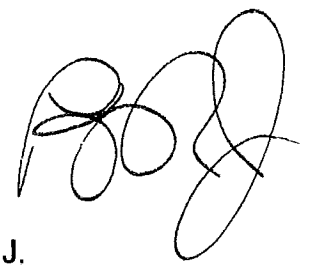
[15] And that concludes my reasons for judgment.

[16] MR. HAAKONSON: My Lord, just to clarify with respect to the form of order that is going to be filed, the counterclaim itself, the counterclaim is against Ms. Sadilkova as well as the City, the City's liability was --

[17] THE COURT: Is vicarious.

[18] MR. HAAKONSON: Is vicarious, so I assume that the entire thing is struck.

[19] THE COURT: Yes.



Rogers J.