Federal Court Cour fédérale

Date: 20240216

Docket: T-398-23

Citation: 2024 FC 261

Toronto, Ontario, February 16, 2024

PRESENT: Associate Judge John C. Cotter

BETWEEN:

XING ZHAO-JIE

Plaintiff

and

TD WATERHOUSE CANADA INC.

Defendant

JUDGMENT AND REASONS

UPON MOTION by the defendant, dated and filed August 31, 2023, made in writing pursuant to Rule 369 of the *Federal Courts Rules* for:

a) an order striking the plaintiff's statement of claim without leave to amend;

b) costs of the motion and the proceeding together with applicable HST; and

c) such further and other relief as this Honourable Court may deem just;

AND UPON noting that that the plaintiff has not filed a respondent's record as provided for in Rule 369 (2), although the plaintiff was served with the "motion record of the moving party, TD Waterhouse Canada Inc." dated August 31, 2023 ("Defendant's Motion Record") as evidenced by the affidavit of service affirmed and filed on August 31, 2023; and although the plaintiff has attempted to inappropriately file various other documents as seen in the Directions of the Court dated December 15, 2023, and January 23, 2024;

AND UPON reviewing and considering the statement of claim in this action ("Claim"), and the Defendant's Motion Record;

AND UPON considering:

I. Applicable Rules

[1] The defendant has brought this motion to strike under Rules 221 (1)(a), (c) and (f) of the *Federal Courts Rules* which provide:

Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable ;
[…]	[…]

(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire ;
[…]	[…]
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

II. The Claim

[2] Although portions of the Claim are incomprehensible, it is apparent that:

a. The "victim" identified in the Claim is not the plaintiff, rather, it is an individual identified as "Chen Zhe" (paragraphs 1, 2, 10, 14, 15 and 18).

b. The Claim alleges the plaintiff is "the Plenipotentiary of the victim Chen Zhe to deal with the matter with TD from Feb. 2, 2010" (paragraph 2), with "TD" referring to the defendant, TD Waterhouse Canada Inc. (paragraph 1).

c. Although the Claim does not allege what relationship, if any, there was between Chen Zhe and the defendant, there is a reference to Chen Zhe and TD Waterhouse Direct Investing trading accounts (paragraph 9).

d. There is reference to other litigation prior to the Claim and steps in that other litigation, including "case No. is CV-11-419585" (paragraph 10), "Supplementary Affidavit of Documents" (paragraph 12); and " "Cross-Exam" on Oct. 29, 2019" (paragraph 13).

e. The plaintiff alleges that "TD's conducts above violate "Bank of Canada Act" (R.S., 1985, c. B-2, s.32 2001, c.9, 2001 and R.S., 1985, c. B-2, s.33 2001, c. 9, s. 201) and "Income Tax Act" 238 (1) and comply with the provisions of securities fraud code (R.S.C., 1985, c. C-46)" (paragraph 16).

f. The plaintiff is claiming:

i. "TD should be fined $500000" (paragraph 16);

ii. "In order to thoroughly find out every detail of TD's three false accounts in the plaintiff's securities trading, I spent 100000 CAD for lawyer's fees. This fee shall be fully borne by the TD and refunded to me." (paragraph 17).

iii. "TD must return 140,800 CAD plus 13 years interest back to me" (paragraph 18).

iv. "TD should pay all the litigation fee of the Federal Court." (paragraph 19).

III. Principles on a Motion to Strike

[3] The applicable principles on a motion to strike are aptly set out by Justice Pentney in *Fitzpatrick v Codiac Regional RCMP Force, District 12, and Her Majesty the Queen*, 2019 FC 1040:

> [14] As noted above, the law governing a motion to strike seeks to protect the interests of the plaintiff in having his or her "day in court," while also taking into account the important interests in

avoiding burdening the parties and the court system with claims that are doomed from the outset. In order to achieve this, the courts have developed an analytical approach and a series of tests that apply in considering a motion to strike.

[15] The test for a motion to strike sets a high bar for defendants, and the onus is on the defendant to satisfy the Court that it is plain and obvious that the pleading discloses no reasonable cause of action, even assuming the facts alleged in the statement of claim to be true: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 980. Rule 221 (2) reinforces this by providing that no evidence shall be heard on a motion. In view of this Rule, the further evidence submitted by the Plaintiff in his response to the motion to strike cannot be considered.

[16] The facts set out in the statement of claim must be accepted as true unless they are clearly not capable of proof or amount to mere speculation. The statement of claim must be read generously, and mere drafting deficiencies or using the wrong label for a cause of action will not be grounds to strike a statement of claim, particularly when it is drafted by a self-represented party.

[17] Further, the statement of claim must set out facts that support a cause of action – either a cause of action previously recognized in law, or one that the courts are prepared to consider. The mere fact that a cause of action may be novel or difficult to establish is not, in itself, a basis to strike a statement of claim. Related to this, the claim must set out facts that support each and every element of a statement of claim.

[18] As explained by Justice Roy in *Al Omani v Canada*, 2017 FC 786 at para 17 [*Al Omani*], "[a] modicum of story-telling is required." The law requires, however, a very particular type of story to be set out in a statement of claim – one which describes the events which are alleged to have harmed the plaintiff, focused only on the "material facts," and set out in sufficient detail that the defendant (and the Court) will know what the specific allegations are based on, and that they support the specific elements of the various causes of action alleged to be the basis of the claim.

[19] The Court generally shows flexibility when a party is self-represented, but this does not exempt the party from complying with the rules set out above: *Barkley v Canada*, 2014 FC 39 at para 17. The reason for this is simple – it is not fair to a defendant to have to respond to claims that are not explained in sufficient detail for them to understand what the claim is based on, or to have

> to deal with claims based on unsupported assumptions or speculation. Neither is it fair to the Court that will have to ensure that the hearing is done in a fair and efficient manner. A court would have difficulty ruling that a particular piece of evidence was or was not relevant, for example, if the claim is speculative or not clear. This will inevitably lead to "fishing expeditions" by a party seeking to discover the facts needed to support their claims, as well as to unmanageable trials that continue far longer than is appropriate as both sides try to deal with a vague or ever-changing set of assertions.
>
> [20] A degree of flexibility is needed to allow parties to represent themselves and to have access to the justice system; but flexibility cannot trump the ultimate demands of justice and fairness for all parties, and that is what the *Rules* and the principles set out in the cases seek to ensure.

[4] Justice Gleeson addressed exceptions to the rule that allegations in the pleading are taken as true in *Bounpraseuth v Canada*, 2023 FC 1220 ("*Bounpraseuth*"), paragraph 11 E:

> Allegations based on assumptions and speculation, bare allegations, factual allegations that are scandalous, frivolous or vexatious, or legal submissions dressed up as factual allegations need not be accepted as true or accepted at face value (*Templanza v Canada*, 2021 FC 689, at para 14, citing *Carten v Canada*, 2009 FC 1233 at para 31)

[5] Although Rule 221 (2) provides that no evidence shall be heard on a motion for an order under paragraph (1)(a), there are exceptions. As explained in *Bouchard v Canada*, 2016 FC 983:

> [18] Rule 221 (2) provides that no evidence shall be heard on a motion for an order under paragraph (1)(a). […] Documents referred to in a statement of claim were admitted and taken into account because they are incorporated by reference and are deemed to be part of the pleadings: *Cremco Supply Ltd. v. Canada Pipe Company*, 1998 CanLII 7616 (FC) at par. 22.

[6] In addition, evidence may also be considered for the purposes of Rule 221 (1)(a) if the issue concerns a jurisdictional question (*Berenguer v Sata Internacional - Azores Airlines, S.A.*, 2023 FCA 176 ("*Berenguer*") at para 26).

[7] Regarding Rule 221 (1)(c), in *Steiner v Canada*, 1996 CanLII 3869 (FC) the Court provides guidance on the types of pleading that are scandalous, frivolous and vexatious:

> A scandalous pleading includes one which improperly casts a derogatory light on someone, with respect to their moral character. A claim is a frivolous one where it is of little weight or importance or for which there is no rational argument based upon the evidence or law in support of the claim. A vexatious proceeding is one that is begun maliciously or without a probable cause, or one which will not lead to any practical result.

[8] In addition, a proceeding which attempts to relitigate issues is vexatious (see *Lavigne v Pare*, 2015 FC 631, at para 5; aff'd, 2016 FCA 153; leave to appeal to SCC refused, 2017 CanLII 1346). Relitigating the same dispute is also an abuse of process (*Quinn v Canada*, 2021 FC 1302, at paras 18 and 19). As stated by Justice Gleeson in *Bounpraseuth*:

> [24] To the extent that the Current Claim also seeks to set aside or challenge prior court orders striking the Prior Claim, it will be struck as an abuse of process pursuant to Rule 221 (1)(f). Seeking to overturn or challenge a prior court order by way of a separate proceeding amounts to an improper collateral attack that is an abuse of process (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 33, 35, 46).

[9] Regarding a motion to strike under Rule 221 (1)(f), in *Lill v Canada*, 2023 FC 752, Justice Rochester (as she then was) explained the doctrine of abuse of process:

> [9] The doctrine of abuse of process is contained in Rule 221(1)(f). Pursuant to paragraph (f), this Court may, at any time, order that, a pleading, or anything contained therein, be struck out, with or

> without leave to amend, on the ground that it is otherwise an abuse of the process of the Court. Under Rule 221(1)(f), the Court has a wider discretion to decide whether the claim is an abuse of process and may receive evidence in this regard (*Quinn v Canada*, 2021 FC 1302 at para 16).
>
> [10] Repeated attempts to litigate essentially the same dispute constitutes an abuse of the process of the Court. In *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paragraph 37 [*CUPE*], the Supreme Court of Canada explains the use of the abuse of process doctrine to preclude relitigation:
>
> > Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> [11] The Federal Court of Appeal has described the doctrine of abuse of process as follows in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*]:
>
> > [40] Abuse of process, in contrast, is a residual and discretionary doctrine of broad application and scope, which bars the relitigation of issues. It is directed to preventing relitigation of the same issues and the attendant mischief of inconsistent decisions by different courts which, in turn, would undermine the doctrines of finality and respect for the administration of justice. It is thus a more flexible doctrine than collateral attack. It permits a judge to bar relitigation of a criminal conviction in a different forum, as was the case in *CUPE*.

[10] In *Badawy v 1038482 Alberta Ltd.*, 2018 FC 807, at paragraph 26**,** Justice McVeigh explains the importance to have an evidentiary foundation before being subject to the costly trial process:

> An abuse of process arises from allegations without an evidentiary foundation (*Astrazeneca Canada Inc v Novopharm Ltd*, 2010 FCA

> 112 at para 5; *Apotex Inc v Allergan*, 2011 FCA 134 at para 4). In *Mancuso,* Justice Rennie said that "a defendant has the right to have the abusive claim struck before being subjected to an intrusive and costly discovery process" (at para 43).

[11] In *Boily v Canada,* 2019 FC 323 at paragraph 70, Justice Gascon reiterated the principle from the Supreme Court of Canada that the doctrine of abuse of process should only be invoked in the clearest cases.

> I am mindful of the fact that the abuse of process doctrine has been construed restrictively and should only be invoked in the clearest cases (*Blencoe v. British Columbia (Human Rights Commission*), 2000 SCC 44 (S.C.C.) at para 120).

IV. Analysis—Rule 221 (1)(a)—Jurisdiction

[12] Rule 221 (1)(a) may be applied if it is plain and obvious that the Federal Court lacks jurisdiction to hear a matter (*Berenguer v Sata Internacional - Azores Airlines, S.A.* , 2023 FCA 176 ("*Berenguer*"), at para 26). Further, "[t]he jurisdiction of the Federal Court is statutory. As such, the statutory basis for jurisdiction must be identified." (*Berenguer*, at para 34).

[13] As the plaintiff did not file a responding motion record, the plaintiff has not made any submissions on the statutory basis for jurisdiction in this case. In any event, reading the Claim generously, and considering the applicable principles regarding the jurisdiction of the Federal Court discussed in *Berenguer* at paragraphs 29 to 32, I am unable to identify any basis for jurisdiction. Further, I incorporate and adopt the second and third sentences of paragraph 37, and paragraph 38, of the defendant's written representations.

V. Analysis—Rule 221 (1)(a)—Standing

[14] In addition to the jurisdictional issue, the Claim fails to disclose a cause of action because the plaintiff lacks standing. Not only does the Claim not allege what relationship, if any, there was between Chen Zhe and the defendant, the Claim does not allege any relationship between the plaintiff and the defendant, other than a bald assertion in paragraph 2 in the context of the plaintiff obtaining from the defendant certain forms concerning Chen Zhe: "As the Plenipotentiary of the victim Chen Zhe to deal with the matter with TD from Feb. 2, 2010, I obtained his first 128 pages 2009 T5008 forms (i.e., the second version of Chen Zhe's 2009 T5008 forms), named "Trading Summary", (called "TS" hereafter) from a TD branch in Toronto in 2010." Accordingly, the Claim does not disclose any reasonable cause of action by the plaintiff against the defendant.

VI. Analysis—Rule 221 (1)(f)

[15] As explained above, evidence can be considered to the extent the motion to strike is brought under Rule 221 (1)(f).

[16] It is apparent from the affidavit of Neesa Craven sworn August 18, 2023, that this action is an attempt to relitigate the issues determined by Justice Myers in Ontario Superior Court file number CV-11-419585 ("Ontario Action"), an action by where Justice Myers granted summary judgment on March 9, 2020, dismissing a claim by Zhe Chen against TD Waterhouse Canada Inc. ("Summary Judgement Decision," see Reasons for Judgement at Defendant's Motion Record, PDF pages 111 to 126 and Judgement at PDF pages 131 to 133).

[17] In addition, although the Claim is somewhat incomprehensible, the overlap between the Claim and the Ontario Action can be seen in the following examples:

a. paragraph 10 of the Claim refers to "case No. […] CV-11-419585," which as noted above, is the Ontario Superior Court file number in which Justice Myers granted summary judgment dismissing the claim of Zhe Chen against TD Waterhouse Canada Inc.;

b. paragraph 2 of the Claim states: "But Chen Zhe told me his 140,800 CAD was converted to his USD account by TD without his agreement on May 8, 2009," which are the same facts referred to in the Summary Judgment Decision at paragraph 12; and

c. paragraph 3 of the Claim states: "Chen Zhe got CRA's letter, which told him that his total income was $5,219,671 in 2009," which facts are referred to in the Summary Judgment Decision at paragraph 19.

[18] Relitigation of issues finally decided in previous judicial proceedings is an abuse of process (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 ("*Toronto*"), paragraphs 37, 38 and 51). As the Claim is an attempt to relitigate the issues decided by Summary Judgment Decision, the Claim is an abuse of process. It is of no consequence that the plaintiff in the Ontario action was Zhe Chen, and in this action the plaintiff is Xing Zhaojie with the alleged "victim" identified in the Claim being "Chen Zhe." As stated by the Supreme Court in *Toronto*:

> 47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the

> relitigation. The designation of the parties to the second litigation may mask the reality of the situation. […]
>
> (see also *Quinn v Canada*, 2021 FC 1302, at para 19).

[19] Accordingly, the Claim should be struck pursuant to Rule 221 (1)(f) as an abuse of process.

VII. Analysis—Rule 221 (1)(c)

[20] The prohibition in Rule 221 (2) against the use of evidence on a motion to strike is limited to a motion under (1)(a), namely a motion to strike out a pleading on the ground that it "discloses no reasonable cause of action, or defence, as the case may be." As a result, like the situation under Rule 221 (1)(f), on a motion under Rule 221 (1)(c) evidence can be considered.

[21] A proceeding which attempts to relitigate issues is vexatious (see *Lavigne v Pare*, 2015 FC 631, at para 5; aff'd, 2016 FCA 153; leave to appeal to SCC refused, 2017 CanLII 1346).

[22] For the reasons set out above in connection with Rule 221 (1)(f), the Claim is an attempt to relitigate issues decided in the Ontario Action. As a result, it is vexatious.

VIII. Conclusion

[23] In conclusion, the Claim shall be struck because it disclosed no reasonable cause of action, is vexatious and is an abuse of process, any one of which is a sufficient basis to strike the Claim.

[24] In order to strike pleading without leave to amend, the defect must be one that cannot be cured by amendment (*Collins v Canada*, 2011 FCA 140, at para 26; *Simon v Canada*, 2011 FCA 6 at para 8). The defects in the Claim which have resulted in it being struck are not ones that can be cured by amendment.

[25] As a result, the Claim shall be struck without leave to amend.

[26] Regarding costs, the defendant in its notice of motion, and in its written representations, requests costs of the motion and the proceeding. The defendant did not request a specific amount, or that costs be awarded based on a particular column of the table to Tariff B.

[27] Having regard to Rules 400 and 401 (1), including the factors articulated in Rule 400 (3), and having regard to the issues raised, and the Claim being vexatious and an abuse of process, costs of this motion and the action are awarded to the defendant, to be paid by the plaintiff, fixed in the amount of $2,500.

JUDGMENT in T-398-23

THIS COURT'S JUDGMENT is that:

1. The statement of claim is struck out, without leave to amend, and this action is dismissed.
2. Costs of the motion shall be paid by the plaintiff, to the defendant, fixed in the amount of $2,500.

"John C. Cotter"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-398-23
STYLE OF CAUSE:	XING ZHAO-JIE v TD WATERHOUSE CANADA INC.

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS:	COTTER A.J.
DATED:	FEBRUARY 16, 2024

WRITTEN SUBMISSIONS BY:

Scott K. Gfeller	FOR THE DEFENDANT

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