

Federal Court



Cour fédérale

Date: 20240625

Docket: T-2018-23

Citation: 2024 FC 983

Ottawa, Ontario, June 25, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**KAREN BUTT, AVA KELLY, by her litigation guardian, KAREN BUTT,
CLAIRE KELLY, by her litigation guardian, KAREN BUTT,
and GRACE KELLY, by her litigation guardian, KAREN BUTT**

PLAINTIFFS

and

HIS MAJESTY THE KING

DEFENDANT

ORDER AND REASONS

Overview

[1] This Order and Reasons address a motion filed by the Defendant on May 1, 2024, seeking an order: (a) under Rule 221 of the *Federal Courts Rules*, SOR/98-106 [Rules], striking out portions of the Plaintiffs' claims in this action; and (b) under section 50.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act], staying the remaining proceeding. The Plaintiffs consent to a

portion of the relief claimed under Rule 221, although opposing other portions of that relief, and take no position on the Defendant's request for a stay.

[2] For the reasons explained in more detail below, I am granting in part the Defendant's motion under Rule 221 and am granting the Defendant's motion for stay under section 50.1 of the Act.

Background

[3] The Plaintiffs have commenced the within action against the Defendant, His Majesty the King, claiming damages for alleged breach of fiduciary duty, negligence, negligent misrepresentation, and negligent infliction of mental distress, and asserting entitlement to various categories of damages including punitive damages. The Plaintiffs are the former spouse and children of a deceased Canadian Armed Forces [CAF] member [Member]. When these Reasons refer to the Plaintiff, in singular, this refers to the Member's spouse.

[4] As noted by the Defendant, for purposes of its motion to strike, facts pleaded by the Plaintiffs in their Statement of Claim [SOC] are assumed to be true. As such, many of the facts set out below are taken from the allegations in the SOC.

[5] The Plaintiff and the Member were married in September 2010, legally separated in October 2013, and divorced in May 2021. The Member was employed with the CAF from April 2000 until his death in August 2021.

[6] On March 17, 2014, the Plaintiff obtained an order from the Québec Superior Court (Family Division) [Québec Court] giving effect to an Interim Separation Agreement [Separation Agreement] that imposed a number of support obligations upon the Member including (among other things) child support, spousal support, and a requirement to make mortgage payments on the matrimonial home. The Member did not comply with these obligations, and in or around July 2014, Revenue Québec authorized the garnishment of the Member's personal bank account for his monthly child support payments.

[7] Commencing in May 2015, the Member ceased making mortgage payments on the home. After receiving foreclosure notices from the mortgagee in August 2015, the Plaintiff decided to sell the home to repurpose the equity therein, but the Member refused to cooperate by signing the necessary documentation.

[8] In September and October 2015, the Plaintiff contacted the Member's superior officers within the CAF to inquire if there was any recourse against the Member. On October 20, 2015, the Plaintiff wrote an email to an individual she believed to be the Member's superior officer [Plaintiff Email]. Shortly thereafter she received an email from a Lieutenant Colonel who described himself as the Member's superior officer [Lieutenant Colonel], advising that neither he nor the Department of National Defence [DND] could assist, as this was a personal matter between the Plaintiff and the Member [LC Email].

[9] On September 17, 2019, the Plaintiff obtained another order from the Québec Court, increasing the Member's child support obligation for a period of six months [September 2019

Order]. The Member did not pay these adjusted child support amounts. On May 19, 2021, the Plaintiff obtained a divorce judgment from the Québec Court and an order for the Member's unpaid support obligations [May 2021 Judgment].

[10] Between 2016 and January 2021, the Member was in a common-law relationship with a new partner [New Partner], who the Plaintiff alleges took surreptitious steps prior to the Member's death to become the executor and trustee of the Member's estate [Estate] for the purpose of seizing assets of the Estate, produced a suspicious will on behalf of the Member [Will], and made representations to Veterans Affairs Canada [VAC] that resulted in the New Partner and her children becoming the beneficiaries of the Member's employment benefits and pension.

[11] On May 18, 2023, the Plaintiff commenced an action in the Ontario Superior Court of Justice [Ontario Court] against the Estate and the New Partner [Ontario Action], claiming the sum of payments ordered to be paid by the Member in the May 2021 Judgment, including the partition of the value of the pension plan accrued to the Member, and alleging contestation of the validity of the Will.

[12] On September 19, 2023, the Plaintiffs filed the SOC to initiate the within Federal Court action against the Defendant.

[13] On May 1, 2024, the Defendant, represented by the Attorney General of Canada, filed its motion record in support of the motion presently before the Court. On May 31, 2024, the

Plaintiffs filed a responding motion record, and on June 14, 2024, the Defendant filed reply written representations.

Issues

[14] As articulated by the Defendant, the issues to be determined by the Court in this motion are:

- A. Whether the Plaintiffs' claim for breach of fiduciary duty, negligent misrepresentation, and punitive, aggravated and exemplary damages should be struck for disclosing no reasonable cause of action; and
- B. Whether the Federal Court should stay the surviving proceeding pursuant to section 50.1 of the Act.

Analysis

Whether the Plaintiffs' claim for breach of fiduciary duty, negligent misrepresentation, and punitive, aggravated and exemplary damages should be struck for disclosing no reasonable cause of action

Claim for breach of fiduciary duty

[15] Rule 221(1)(a) provides that, on motion, the Court may order that a pleading or anything contained therein be struck out, with or without leave to amend, on the ground that it discloses no reasonable cause of action. The test for striking a claim under this Rule is whether, assuming the facts pleaded are true, it is plain and obvious that the claim discloses no reasonable cause of action and has no reasonable prospect of success (*Hunt v Carey*, [1990] 2 SCR 959 at 980).

[16] Among the causes of action raised in their SOC, the Plaintiffs plead that the Government of Canada [GOC] (which the SOC defines as CAF, VAC, DND and other federal government employees) owed a fiduciary duty of care to the Plaintiffs. Relying on authorities that explain how to identify whether a fiduciary duty exists in a particular case, the Defendant asserts that the Plaintiffs have failed to plead the requisite elements and material facts capable of supporting the existence of a fiduciary duty in the circumstances of the case at hand. Relying on Rule 221(1)(a), the Defendant therefore argues that the Plaintiffs' claim for breach of fiduciary duty discloses no reasonable cause of action and should be struck out.

[17] In their motion record, the Plaintiffs consent to the Defendant's request to strike out the portions of their claim that plead the Defendant owes the Plaintiffs a duty of care as a fiduciary. As such, the Court need not engage with the Defendant's detailed arguments in support of this portion of the relief requested, other than to state that I am satisfied based on those arguments that such relief is warranted. My Order will provide that the Plaintiffs' claim for breach of fiduciary duty be struck out without leave to amend.

Claim for negligent misrepresentation

[18] The Plaintiffs' SOC also asserts the cause of action of negligent misrepresentation. These allegations rely principally upon the October 2015 email correspondence between the Plaintiff and CAF's representatives and in particular the LC Email from the Lieutenant Colonel, which the Plaintiffs claim constituted a negligent misrepresentation, in that CAF, DND, and by extension the GOC did in fact have authority and power to assist her with the Member's failure to comply with his obligations.

[19] Again relying on Rule 221(1)(a), the Defendant argues that the Plaintiffs' claim for negligent misrepresentation discloses no reasonable cause of action and should be struck out.

[20] The Defendant notes that, to make out a claim for negligent misrepresentation, a plaintiff must plead the required legal elements and material facts to support the essential elements of the claim, namely that: (a) the defendant owed the plaintiff a duty of care based on a special relationship between them; (b) the defendant made an untrue, inaccurate or misleading misrepresentation; (c) the defendant acted negligently in making the misrepresentation; (d) the plaintiff relied, in a reasonable manner, on the representation; and (e) the plaintiff suffered some detriment as a direct result of relying on the representation (*Queen v Cognos Inc*, [1993] 1 SCR 87).

[21] Referencing the email correspondence of October 2015, the Defendant argues that the Plaintiffs have failed to plead material facts capable of supporting the above essential elements of a claim for negligent misrepresentation and that, as such, the claim has no reasonable prospect of success. While Rule 221(2) provides that no evidence can be heard on a motion for an order under Rule 221(1)(a), the Defendant argues that the pleadings must be read in conjunction with the documents incorporated by reference therein, including the October 2015 correspondence. Citing *Abdulle v Canada (Attorney General)*, 2022 FC 1307 at para 9, the Plaintiffs concur with that proposition.

[22] Referencing that correspondence, the Defendant argues that the Plaintiff Email to which the Lieutenant Colonel was responding in the LC Email was requesting assistance with the fact

that the Member was refusing to sign documentation necessary for the sale of the matrimonial home. The Defendant submits that the Lieutenant Colonel's response, that there was nothing he or DND could do to assist the Plaintiff in relation to a real estate transaction, was accurate. The Defendant notes the SOC's reliance on the *Queen's Regulation and Orders, Volume III, Chapter 207, Pay Allotments and Compulsory Payments* [the Queen's Regulation], as authorizing the CAF and DND to arrange compulsory payments or wage garnishments from CAF officers who fail to comply with certain financial obligations. However, the Defendant argues that the Queen's Regulation do not authorize DND to intervene in disputes over matrimonial real property or empower DND to order a CAF member to sell his private property. As such, the Defendant submits that the SOC fails to plead a factual basis to support the essential elements of a cause of action for negligent representation.

[23] In response, the Plaintiffs argue that the Plaintiff Email raised not only the Member's refusal to assist in selling the home but also his failure to make mortgage payments pursuant to the Separation Agreement. The Plaintiffs further argue that, in stating that neither the Lieutenant Colonel nor DND could assist, the LC Email referred not only to the real estate transaction but more generally to the circumstances that existed between the Plaintiff and the Member. The Plaintiffs acknowledge that DND cannot assist with private real estate sales but submit that the LC Email was inaccurate in effectively asserting that nothing could be done with respect to the Member's obligation to make mortgage payments pursuant to the Separation Agreement. Acknowledging that it is at least possible that the representation in the LC Email is capable of multiple interpretations, the Plaintiffs submit that it is not plain and obvious that their claim for negligent misrepresentation has no reasonable chance of success.

[24] In its reply submissions, the Defendant argues that the Plaintiffs' position asserts, without a supporting factual foundation, an elevated standard of care inconsistent with the jurisprudence and tantamount to requiring the Lieutenant Colonel to provide legal advice. The Defendant urges the Court to find that the Plaintiffs' interpretation of the October 2015 email correspondence is not reasonable and that it is therefore plain and obvious that the SOC fails to disclose a reasonable cause of action in negligent misrepresentation.

[25] The Defendant correctly emphasizes that motions to strike serve an important screening or gatekeeping function to assess the viability of a plea and "to separate the wheat from the chaff" (*Mohr v National Hockey League*, 2022 FCA 145 at paras 49, 53). However, in my view, the Defendant is asking the Court to engage in a level of analysis that is inappropriate on a motion to strike.

[26] The SOC expressly pleads that the Plaintiff contacted CAF to inquire if there was any recourse against the Member with respect to his deliberate refusal to abide by his financial support obligations as well as his ongoing efforts to stifle the sale of the house. The SOC further pleads that the Plaintiff believed and reasonably relied on a response by the Lieutenant Colonel that there was nothing that he or DND could do to assist her with respect to the Plaintiff's failure to abide by his court-ordered support obligations, and the SOC pleads the basis for the Plaintiffs' assertion that such response was inaccurate. It is not plain and obvious to me that these pleadings present a claim that discloses no reasonable cause of action and has no reasonable prospect of success.

[27] Rather, the Defendant's arguments amount to a request that the Court conclude the evidence upon which the Plaintiffs wish to rely do not support their allegations. While the October 2015 email correspondence is referenced in the SOC and, based on the parties' joint position, is being taken into account in the Court's analysis, ultimately that correspondence represents evidence the interpretation of which the Court will be required to adjudicate when considering the Plaintiffs' claim on its merits. I do not consider it the Court's role to perform that adjudication at this juncture. Nor should the Court on this motion adjudicate the Defendant's position that the Plaintiffs' claim is premised on a standard of care unsupported by the jurisprudence.

[28] I therefore decline to grant the portion of the Defendant's motion seeking to strike the Plaintiffs' claim for negligent misrepresentation.

Claim for punitive, aggravated and exemplary damages

[29] The Defendant notes that the SOC asserts a claim for punitive, aggravated and exemplary damages and argues that this claim should be struck as the SOC is devoid of material facts capable of supporting a claim for these categories of damages. The Defendant seeks this relief under Rule 221(1)(c), which allows the Court to strike a pleading, or anything contained therein, with or without leave to amend, on the ground that it is scandalous, frivolous or vexatious.

[30] The Defendant submits that, in order to be eligible for punitive damages, a claimant must show that the impugned conduct departed markedly from ordinary standards of decency or that it was malicious, oppressive or high-handed and offends the Court's sense of decency (*Fidler v*

Sun Life Assurance Co. of Canada, 2006 SCC 30 at para 62). In relation to the pleadings, a bald claim for punitive damages is insufficient. Rather, the facts said to justify punitive damages should be pleaded with enough particularity to permit a defendant know the case it must meet. Failure to plead such material facts can result in a claim for punitive damages being struck (*Brauer v Canada*, 2020 FC 828 at para 9, *aff'd Brauer v Canada*, 2021 FCA 198).

[31] In response, the Plaintiffs argue that the material facts supporting the claim for punitive damages are particularized throughout the SOC. They reference allegations that: (a) the Lieutenant Colonel's representation was made negligently, with reckless or careless regard for accuracy, and with knowledge that the representation would be relied upon by the Plaintiff; (b) the Defendant failed to take the Plaintiff seriously and took no steps to address her concerns in an appropriate manner; (c) the Defendant designed, maintained, operated and utilized a flawed system for processing the substitution of beneficiaries and for the release of pensions and other benefits; (d) the Plaintiff followed up with CAF and DND but received no answers with respect to the status of the September 2019 Order; (e) there is no reasonable explanation as to why the GOC failed to action the September 2019 Order; and (f) the Defendant knew that there were significant deficiencies in the system for receiving, processing and auctioning support orders but failed to take steps to remedy these issues.

[32] I note that the Plaintiff has not raised any arguments distinguishing between the categories of punitive, exemplary, and aggravated damages. I will therefore address this portion of the motion based on the arguments and authorities the parties have presented, without recourse to any distinctions between the categories.

[33] I agree with the Defendant's argument in reply that the Plaintiffs' allegations, while capable of supporting a claim in negligence, do not include material facts capable of establishing that the Defendant's conduct was malicious, oppressive, high-handed, or departed from common standards of decency.

[34] The Plaintiffs also note that they pleaded that the Lieutenant Colonel acted with malice. However, it is insufficient for a pleading to assert as a basis for claiming punitive damages simply that the defendant's conduct was harsh, vindictive, reprehensible or malicious (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para 87). The Plaintiffs argue that their pleading represents an allegation that the Lieutenant Colonel deliberately refused to assist the Plaintiff for malicious reasons and without just cause, which allegation they submit is supported by the fact that there appears to be no valid reason for his conduct. I again find the SOC wanting in material facts supporting the Plaintiffs' claim for damages of a punitive or comparable nature.

[35] I also note that the Plaintiffs have not identified any basis for an amendment to the SOC that would support a claim for such damages.

[36] As such, my Order will strike the Plaintiffs' claims for punitive, aggravated and exemplary damage, without leave to amend.

Stay pursuant to section 50.1 of the Act

[37] Finally, following the adjudication of the Defendant's arguments to strike portions of the pleadings under Rule 221, the Defendant's motion requests that any remaining components of

the action be stayed pursuant to section 50.1 of the Act. As previously noted, the Plaintiffs take no position on the Defendant's request for this relief.

[38] Section 50.1 of the Act provides, in part, as follows:

Stay of proceedings

50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.

Recommence in provincial court

(2) If the Federal Court stays proceedings under subsection (1), the party who instituted them may recommence the proceedings in a court constituted or established by or under a law of a province and otherwise having jurisdiction with respect to the subject-matter of the proceedings.

Suspension des procédures

50.1 (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

Reprise devant un tribunal provincial

(2) Le demandeur dans l'action principale peut, après le prononcé de la suspension des procédures, reprendre celles-ci devant le tribunal compétent institué par loi provinciale ou sous le régime de celle-ci.

[39] The purpose of section 50.1 is to ensure that issues in a claim against the Crown are not split between the Federal Court and Provincial Courts. Prohibiting this from happening (when the requirements of section 50.1 are met) is mandatory (*Stoney Band v Canada (Minister of Indian and Northern Affairs)*, 2006 FC 553 at paras 14, 26). To succeed in a motion under section 50.1, the Crown must demonstrate that: (a) it genuinely desires to institute a third party claim; and (b) the third party claim is outside the jurisdiction of the Federal Court (*Dobbie v Canada (Attorney General)*, 2006 FC 552 at [*Dobbie*] para 8).

[40] *744185 Ontario Inc. v. Canada*, 2020 FCA 1, endorsed three factors to be considered when determining whether the desire to bring a third party claim is genuine: (a) the evidence of a genuine desire to commence a third party proceeding; (b) whether the information provided about the proposed third party claim is clear, or if it is vague and un-particularized; and (c) whether the third party claim has any possible likelihood of success (see para 16).

[41] In relation to these factors, the Defendant relies on a draft Third Party Claim attached to its written representations. In that pleading, the Crown asserts that the Member was responsible for complying with his court-ordered support obligations and that, to the extent that he did not comply with his obligations, the Plaintiffs' first recourse should be to the Estate. The Crown adopts the allegations by the Plaintiffs in the present action and claims that, in the event it is found liable to the Plaintiffs, it is entitled to contribution or indemnity from the Estate and the New Partner. This claim include reliance on the *Negligence Act* of Ontario.

[42] The Defendant submits that the Crown's desire to commence a third party proceeding against the Estate and the New Partner is evidenced by the draft Third Party Claim. It further submits that the drafting is clear and that the claim has some possibility of success. The Defendant refers the Court to *Dobbie* at paragraph 18, which explains that a third-party claim will be found to be disingenuous only if it plainly has no possibility of success.

[43] The draft third party pleading is brief, but it explains the basis of the Crown's intent to claim against the Estate and the New Partner. Particularly in the absence of any opposition from the Plaintiffs, I am satisfied that the Crown's intent is genuine, in that there is evidence of that

intention, the claim is sufficiently particularized for purposes of the section 50.1 analysis, and it has a possibility of success.

[44] Turning to whether the third party claim is outside this Court's jurisdiction, the Defendant relies on the three-part test established by the Supreme Court of Canada in *ITO-International Terminal Operators v Miida Electronics*, [1986] 1 SCR 752, for identifying when a proceeding is within the jurisdiction of the Federal Court: (a) there must be a statutory grant of jurisdiction by the federal Parliament; (b) there must be an existing body of federal law that is essential to the disposition of the case and that nourishes the statutory grant of jurisdiction; and (c) the law on which the case is based must be a "law of Canada" as that phrase is used in section 101 of the *Constitution Act, 1867*.

[45] I agree that this test is met. There is no statutory grant of jurisdiction applicable to the third party claim, and the claim relies upon provincial law, not federal law.

[46] As the Defendant has satisfied the requirements for application of section 50.1 of the Act, my Order will grant the relief requested under that section.

Costs

[47] Each of the parties claims costs of this motion. On the portions of the motion that were contested, the parties have met with divided success. As such, I will make no order as to costs.

ORDER IN T-2018-23

THIS COURT'S ORDER is that:

1. The Plaintiffs' claim for breach of fiduciary is struck out without leave to amend.
2. The Plaintiffs' claims for punitive, aggravated and exemplary damages are struck out without leave to amend.
3. The Defendant's motion to strike the Plaintiffs' claims is otherwise dismissed.
4. The Plaintiffs' surviving action is stayed pursuant to section 50.1 of the *Federal Courts Act*, RSC 1985, c F-7.
5. There is no order as to costs.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-2018-23

STYLE OF CAUSE: KAREN BUTT, AVA KELLY, by her litigation guardian,
KAREN BUTT, CLAIRE KELLY, by her litigation guardian,
KAREN BUTT, and GRACE KELLY, by her litigation
guardian, KAREN BUTT v HIS MAJESTY THE KING

ADJUDICATED BASED ON WRITTEN SUBMISSIONS

ORDER AND REASONS: SOUTHCOTT J.

DATED: JUNE 25, 2024

WRITTEN SUBMISSIONS BY:

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