Federal Court  Cour fédérale

Date: 20140922

Docket: T-1891-13

Citation: 2014 FC 906

Vancouver, British Columbia, September 22, 2014

PRESENT: Case Management Judge Roger R. Lafrenière

Docket: T-1891-13

BETWEEN:

COASTAL FLOAT CAMPS LTD.

Plaintiff

and

JARDINE LLOYD THOMPSON CANADA INC. AND PETER PRINGLE

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion to strike the Plaintiff's pleading.

Background Facts

[2] On November 18, 2013, the Plaintiff commenced an action in damages against the Defendants, Jardine Lloyd Thompson Canada Inc. ("Jardine Lloyd") and Peter Pringle ("Pringle"), for negligence and/or breach of contract. The Statement of Claim was amended on April 15, 2014.

[3] The allegations in the Amended Statement of Claim may be summarized as follows. Jardine Lloyd is a company that provided marine insurance brokerage services to the Plaintiff. Pringle was an employee of Jardine Lloyd in charge of managing the Plaintiff's brokerage account. The Plaintiff alleges that the Defendants failed to properly communicate with the Plaintiff to ensure adequate disclosure to the insurer, Lombard General Insurance Company ("Lombard"), at the time of placement of a policy of marine insurance in June 2008 on two of the Plaintiff's accommodations barges, including the barge "SNG", as well as at the time of renewal of the policy in March 2009. The Plaintiff further alleges that the Defendants failed to inform Lombard about relevant information, including that re-plating of the hull of the "SNG" along the waterline, which had been recommended, had not been completed and that a flotation cradle had not been installed on the barge.

[4] The "SNG" capsized and sank on November 5, 2009. On September 2, 2012, Lombard (which changed its name to Northbridge General Insurance Corporation ("Northbridge") on March 1, 2012) denied the Plaintiff's claims for a constructive total loss of the "SNG" and for confirmation of protection and indemnity for wreck removal.

[5] The Plaintiff commenced an action against Northbridge in this Court (File No. T-1863-12) seeking recovery under the policy of insurance. Northbridge has denied liability, claiming that the policy is void *ab initio* on the grounds of material non-disclosure and misrepresentation. By this action, the Plaintiff seeks damages against the Defendants to recover the value of the "SNG" and the cost of wreck removal in the event the insurance policy is held to be void. The Plaintiff has also filed, but not served, a Notice of Civil Claim seeking the same relief against the Defendants in the British Columbia Supreme Court.

Motion to Strike

[6] The Defendants have moved to strike the Amended Statement of Claim under Rule 221 of the *Federal Courts Rules* [*FCR*] on the grounds that the pleading does not disclose a reasonable cause of action (Rule 221(1)(a)), or is otherwise an abuse of process of the Court (Rule 221(1)(f)). The two grounds are inextricably linked - both going to the jurisdiction of this Court to entertain the Plaintiff's claim.

[7] The Defendants maintain that the issue of their potential liability arises under the principles of contract, tort and equity, which are not part of the recognized principles of Canadian maritime law. The Defendants rely on the long-standing decision of Mr. Justice Hugh Gibson in *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co,* [1978] 2 FC 691 [*Intermunicipal Realty*] for the proposition that this Court does not have jurisdiction over a marine insurance broker in agency and misrepresentation.

[8] The facts in *Intermunicipal Realty* are very similar to the facts in this case. The plaintiff had sued the insurers on two contracts of marine insurance claiming to be entitled to reimbursement in the amount of approximately $700,000.00 for items alleged to be matters within the coverage terms of contract policies. The insurers considered the policy void from the inception of the risk due to alleged false information given to the insurers by the plaintiff's broker and denied the claim. The plaintiff had also sued the broker claiming that, in the event the policy was held to be void, the insurance broker should be held liable for damages equal to all sums for which the underwriters would have been liable to the plaintiff if the policy had been in force.

[9] The insurers and the broker moved to dismiss the action on the grounds that the Federal Court was without jurisdiction to consider the plaintiff's suit against the insurers for recovery within the terms of the contract policies or against the insurance broker for negligent misrepresentation of facts. After undertaking an extensive analysis of Canadian maritime law, the Court upheld the Federal Court's jurisdiction to hear the claims against the insurers on the contract policies of marine insurance. Mr. Justice Gibson concluded, however, that the Federal Court had no jurisdiction to hear the claim against the broker, reasoning as follows at para 39:

> As to the second motion by the insurance broker defendant, Reed, Shaw, Stenhouse Limited, the claim against them is set out in paragraphs 26 to 29 of the statement of claim. The claim appears to be based on allegations that this insurance broker defendant negligently misrepresented certain facts. The allegations are not allegations of negligence under the subject contract policies of marine insurance, but instead are founded on the agency relationship generally. In any event, and in short for the purpose of this action, the allegations are not in respect to any maritime or admiralty matter that is part of "Canadian maritime law".

[10] The Defendants argue that *Intermunicipal Realty* is directly on point and is dispositive of this motion. The Plaintiff counters that in light of the integral connection between policies of marine insurance and the critical role of brokers that place the insurance, and the evolution of the jurisdiction of the Federal Court over the past 35 years, *Intermunicipal Realty* is no longer good law.

Analysis

[11] The fundamental rule on a motion to strike pursuant to Rule 221(1)(a) is that the Court is narrowly limited to assessing a threshold issue. The applicable test is whether it is "plain and obvious" that the claim discloses no reasonable cause of action: see *Hunt v Carey*, 1990 CanLII

90 (SCC), [1990] 2 SCR 959, [1990] SCJ No 93 (*Hunt v Carey)* at paragraph 32 (QL). The fact that the claim is a novel or difficult one is not a sufficient ground to strike the claim. The burden on the defendant is very high and the Court should exercise its discretion to strike only in the clearest of cases. The pleading should be read generously with allowance for inadequacies due to drafting deficiencies. Further, those allegations that are capable of being proved must be taken as true. Rule 221(2) of the *FCR* provides that no evidence shall be heard on a motion for an order under paragraph (1)(a).

[12] It is common ground that the decision in *Intermunicipal Realty* has not been overruled or otherwise distinguished with respect to the relevant proposition for which it stands in any subsequent decision of this Court. The Plaintiff submits that the decision can be distinguished in this case because its claim against the Defendants is not based on negligent misrepresentation, but rather contract and tort. The Plaintiff submits, in the alternative, that the court's conclusion in *Intermunicipal Realty* is no longer good law because the law with respect to the jurisdiction of the Federal Court has evolved significantly since it was decided in 1978.

[13] The Plaintiff cites a number of decisions that have since been rendered by the Supreme Court of Canada that confirm that the Federal Court has broad jurisdiction in the area of marine insurance: *Zavarovalna Skupnost (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc,* [1983] 1 SCR 283 (which upheld the constitutional validity of section 22(2)(r) of the *FCR* and confirmed that marine insurance is part of the maritime law over which the Federal Court has jurisdiction); *ITO-Int'l Terminal Operators v Miida Electronics,* [1986] 1 SCR 752 (which held that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment); *QNS Paper Co v Chartwell Shipping Ltd,* [1989]

2 SCR 683 (which clarifies that tortious liability which arises in a maritime context is governed by a body of maritime law within the exclusive legislative jurisdiction of Parliament); and *Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779 (where the Court concluded that "there is no doubt that any claim ensuing from such (marine) insurance would be governed by Canadian maritime law."

[14] The above decisions require that section 22(1) of the *Federal Courts Act* [*FCA*] be interpreted broadly - not confined to a traditional or historic approach, but rather interpreted in a modern and relevant context. Mr. Justice Gibson obviously did not have the benefit of the Supreme Court's reasons when he rendered his decision.

[15] The Plaintiff's view that *Intermunicipal Realty* may no longer be good law is shared by others. The late Prothonotary John Hargrave expressed similar reservations in *Royal & Sun Insurance Co of Canada v RENEGADE III (The)*, 2001 FCT 1050 at para 23, albeit in obiter. Further, in Strathy and Moore, *The Law and Practice of Marine Insurance in Canada* (Markham: LexisNexis Butterworths, 2003), at pages 352, the authors write that the *Intermunicipal Realty* case was decided "at what might be described as the 'low-water mark' of the case law" with respect to the jurisdiction of the Federal Court in admiralty matters and that there have been a number of decisions expanding the scope of the Court's jurisdiction since that time. The authors add that since the marine insurance broker is an integral part of the process of procuring marine insurance, "one would hope that in future cases the court would consider either distinguishing or overruling *Intermunicipal Realty*."

[16] Moreover, it appears that *Intermunicipal Realty*, although not specifically overruled, has been treated as overtaken by later authority. By way of example, in *Mcintosh v Royal & Sun Alliance Insurance Company of Canada*, 2007 FC 23 (CanLII), the plaintiff sought damages for breach of contract and negligence from the insurance brokerage firm that had assisted him in obtaining the insurance on the boat. No motion to strike was brought by the brokerage firm and the matter proceeded to trial without any objection being raised with respect to the Federal Court's jurisdiction of the subject matter.

[17] The Defendants respond that the cases cited by the Plaintiff in support of the Federal Court's jurisdiction do not include any case favourable to the Plaintiff's position regarding claims against insurance brokers. While that may be, the only question I need to decide on this motion is whether it is "plain and obvious" that this Court has no jurisdiction to entertain the Plaintiff's action.

[18] In applying the "plain and obvious" standard, the Supreme Court of Canada has cautioned that the court's approach should be generous and err on the side of permitting novel or arguable claims to proceed to trial: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 19-21. The Supreme Court's caution against unduly impeding evolution of the law is not new. In *Hunt v Carey*, the Supreme Court permitted a plea of conspiracy that extended to a non-commercial context, notwithstanding that the Supreme Court had declined to extend the tort to a non-commercial context but three years earlier.

[19] The fact that the Plaintiff might face an uphill battle in proving its claim should not deprive it of the opportunity to do so. Complex matters that disclose substantive questions of law are most appropriately addressed in the context of a motion for summary judgment or at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

CONCLUSION

[20] For the above reasons, I find that the Defendants have not met their heavy onus. It is not plain and obvious that the Plaintiff's claim cannot succeed in this Court.

[21] For the sake of completeness, I would add that the Plaintiff's decision to bring a similar action against the Defendants in the British Columbia Supreme Court does not constitute an abuse of process. Protective actions in provincial Courts are not uncommon when there is an issue regarding this Court's jurisdiction. The Plaintiff has done nothing out of the ordinary. It was not only prudent to file the claim, but necessary to guard against a limitation period which was about to expire. There may come a time where the Plaintiff is required to make an election, but that time has not yet come.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs of the motion, hereby fixed in the amount of $1,500.00, inclusive of disbursements and taxes, shall be paid by the Defendants to Plaintiff in the cause.

"Roger R. Lafrenière"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1891-13
STYLE OF CAUSE:	COASTAL FLOAT CAMPS LTD. v JARDINE LLOYD THOMPSON CANADA INC., AND PETER PRINGLE
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 13, 2014
REASONS FOR ORDER AND ORDER:	LAFRENIÈRE P.
DATED:	SEPTEMBER 22, 2014

APPEARANCES:

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