

COURT OF APPEAL FOR ONTARIO

CITATION: Burns v. RBC Life Insurance Company, 2020 ONCA 347

DATE: 20200604

DOCKET: C67837

Gillese, Brown and Jamal JJ.A.

BETWEEN

Randolph Burns

Plaintiff (Appellant)

and

RBC Life Insurance Company, Lauren McLean and Anna Oslizlok

Defendants (Respondents)

Sloan H. Mandel and Deanna S. Gilbert, for the appellant

Barry G. Marta, for the respondents

Heard: In-writing

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated December 3, 2019, with reasons reported at 2019 ONSC 6977.

REASONS FOR DECISION

OVERVIEW

[1] This appeal concerns the adequacy of the claims pleaded against corporate employees for torts allegedly committed in the course of their employment.

[2] The appellant, Randolph Burns, brought an action seeking the payment of long-term disability (“LTD”) benefits under a policy of insurance issued by the

respondent, RBC Life Insurance Company (“RBC Life”), as well as damages against RBC Life and two of its employees, the respondents, Lauren McLean and Anna Oslizlok.

[3] After the defendants delivered a joint statement of defence, Ms. McLean and Ms. Oslizlok moved pursuant to r. 21.01(1)(b) of the *Rules of Civil Procedure* to strike out the statement of claim as disclosing no reasonable cause of action as against them. At the same time, RBC Life moved for an order requiring Mr. Burns’ examination for discovery to proceed before that of RBC Life’s representative witness. The motion judge granted both motions. He struck out the statement of claim as against Ms. McLean and Ms. Oslizlok, without leave to amend, and granted RBC Life the relief it sought in respect of the examinations for discovery. The same law firm represented all the defendants. The motion judge awarded costs for both motions in the combined amount of \$6,000.

[4] Mr. Burns appeals that part of the order of the motion judge that struck out his statement of claim. Although he has not formally sought leave to appeal the costs order, Mr. Burns requests that the \$6,000 award of costs against him be set aside.

[5] For the reasons set out below, we allow the appeal in part, to the extent of granting Mr. Burns leave to amend his statement of claim.

THE STATEMENT OF CLAIM

[6] The RBC Life policy of disability benefits (the “Policy”) purchased by Mr. Burns provides for the payment of LTD benefits in the event of a “total disability”. According to the statement of claim, in June 2012, Mr. Burns stopped working as a result of pain in or around his lumbar spine, waist, and right lower extremity. In September 2012, RBC Life accepted that Mr. Burns was suffering from a total disability and approved the payment of LTD benefits to him.

[7] RBC Life terminated Mr. Burns’ LTD benefits in October 2017. The statement of claim identifies Ms. McLean and Ms. Oslizlok as employees involved in the termination process. Mr. Burns pleads:

24. On or about October 30, 2017, on behalf of the Insurer, Lauren McLean advised Mr. Burns that his LTD benefits were being terminated.

...

26. On or about May 4, 2018, on behalf of the Insurer, Anna Oslizlok denied Mr. Burns' appeal of the termination of his LTD benefits.

27. On or about August 2, 2018, on behalf of the Insurer, Anna Oslizlok denied Mr. Burns' further appeal of the termination of his LTD benefits.

[8] Mr. Burns advances two claims in his pleading. First, he alleges that the failure of RBC Life to pay his LTD benefits amounted to a breach of contract.

[9] Second, he advances claims against RBC Life and the two individual defendants based in bad faith, negligence, and/or negligent misrepresentation. In paras. 29 and 30 of his statement of claim, Mr. Burns pleads that:

29. At all material times, the Defendants owed to Mr. Burns a duty of the utmost good faith.

30. At all material times, the Defendants represented to Mr. Burns that, in exchange for the premiums he paid, Mr. Burns would receive the benefits offered by the Policy in keeping with the terms, conditions, and definitions expressly set out therein.

[10] In para. 31 of his statement of claim, Mr. Burns lists 45 particulars of his allegation that “the Defendants engaged in conduct that, jointly and/or severally, amounted to bad faith, negligence, and/or negligent misrepresentation conduct”. Eight of the particulars refer only to the conduct of RBC Life. The remaining particulars refer to conduct that the pleading attributes to the defendants collectively, without differentiating which of them engaged in any particular act. By way of illustration, the first five particulars pleaded in para. 31 of the statement of claim allege:

31. Mr. Burns pleads that in the course of the adjustment and appeals of his LTD claims, the Defendants engaged in conduct that, jointly and/or severally, amounted to bad faith, negligence, and/or negligent misrepresentation conduct including, but not limited to:

(a) they terminated Mr. Burns' LTD benefits on the basis of an erroneous, extra-contractual, reckless, misleading, and/or bad faith interpretation of the language of the Policy;

(b) they terminated Mr. Burns' LTD benefits on the basis of language, criteria, terms, and/or conditions that were not prescribed in the Policy and which they, instead, elected to import into the Policy;

(c) they terminated Mr. Burns' LTD benefits on the basis of their unilateral interpretation of the phrase "gainful occupation" in the Policy and despite the Insurer's written admission of May 4, 2018 that "the term gainful occupation is not defined in the policy";

(d) they terminated Mr. Burns' LTD benefits on the basis of a single, 16 year old, extra-provincial case involving a different type of insurance policy and different type of benefits;

(e) they "cherry picked" case law when interpreting the Policy and terminating Mr. Burns' LTD benefits;

...

[11] Mr. Burns seeks payment of the LTD benefits under the Policy and special damages for expenses he has incurred. In addition, he seeks to recover against all the defendants \$1 million in punitive, aggravated, and/or exemplary damages, in part on the basis of the following undifferentiated allegations contained in paras. 34 and 35 of the statement of claim:

34. Mr. Burns pleads that the Defendants knew or ought to have known that at or around the time that it terminated his LTD benefits and/or denied his appeal(s), Mr. Burns was under financial strain and was financially dependent upon the receipt of his LTD benefits. The Defendants nevertheless embarked upon a course of conduct that caused and/or aggravated Mr. Burns' vulnerable psycho-emotional state.

35. Mr. Burns pleads that in terminating his LTD benefits when it did, and without any material change since the Insurer had found him totally disabled for over five years, the Defendants engaged in bad faith, high handed, reckless, wilfully ignorant, and/or grossly arbitrary conduct. So as to condemn this conduct, to modify the Defendants' behaviour, and/or to deter the Defendants from engaging in such conduct in future, Mr. Burns pleads that an award of punitive, aggravated, and/or exemplary damages are warranted.

[12] The motion judge held that Mr. Burns had not pleaded a viable cause against Ms. McLean and Ms. Oslizlok that would attach liability to them in their personal capacities because the allegations advanced against them did not manifest an identity or interest separate from RBC Life: at para. 36. Accordingly, he struck out the claim as against them without leave to amend: at para. 37.

ANALYSIS

[13] Mr. Burns submits that the motion judge erred by failing to follow the well-established jurisprudence that a cause of action in tort can lie against the employee of a corporate employer for conduct carried out in the usual course of employment: *Sataur v. Starbucks Coffee Canada Inc.*, 2017 ONCA 1017, 140 O.R. (3d) 307, at para. 4. According to Mr. Burns, had the motion judge given proper effect to that jurisprudence he could not have concluded that it was plain and obvious that Mr. Burns' statement of claim disclosed no reasonable cause of action against Ms. McLean and Ms. Oslizlok.

[14] We read the motion judge's reasons in a different way. The motion judge referred to the well-established jurisprudence at several points in his reasons: at paras. 22-25 and 33. The crux of his reasons focused not on legal principles, but on whether Mr. Burns had properly pleaded the material facts to support separate tort and bad faith claims against the individual defendants.

[15] We see no error in the motion judge's statement, at para. 26, that "[w]here an employee is sued for his or her acts, the material facts giving rise to personal liability must be specifically pleaded". That led him to conclude, at para. 35, that Mr. Burns "has not" pleaded such a claim against the respondent employees. We agree.

[16] Rule 25.06(1) requires a statement of claim to contain a concise statement of the material facts on which the party relies for its claim. Each defendant named in a statement of claim should be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?

[17] Mr. Burns' statement of claim does not provide either Ms. McLean or Ms. Oslizlok with an individualized answer to that question. The heart of Mr. Burns' claim against Ms. McLean and Ms. Oslizlok is found in paras. 29 through to 35 of his statement claim, much of which is reproduced above. None of those paragraphs of the statement of claim inform Ms. McLean or Ms. Oslizlok what each

did individually that Mr. Burns alleges constitutes actionable wrongs against him for which he seeks a remedy, and when did they do it. Instead, his pleading lumps the defendants together, without providing the necessary separate, differentiating material facts that could support a claim against each individual.

[18] Mr. Burns relies on some comments made in *Moynihhan v. Rowe*, 2018 ONSC 502, at paras. 37-38, that a statement of claim need not draw a distinction between the conduct of employees and that of the employer, and where it does not, it is always open to the defendant to seek particulars.

[19] Those comments were made in *obiter*. The requirement for a proper pleading remains that set out in r. 25.06(1). As applied to a tort claim, the rule requires a plaintiff to set out the material facts specific to each defendant that support a claim against the defendant that it owed a duty of care to the plaintiff, and by reason of specified conduct, breached that duty and caused injury or harm to the plaintiff. As this court noted in *Sataur*, at para. 5, in re-instating the statement of claim that had been struck out, in that case the plaintiff had pleaded “specific acts of negligence against each individual defendant for which each may be personally liable”: see also, *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999] O.J. No. 27 (C.A.), at para. 39.

[20] Since Mr. Burns’ statement of claim failed to plead specific acts of bad faith, negligence or negligent misrepresentation by Ms. McLean or Ms. Oslizlok, the

motion judge did not err in concluding that Mr. Burns “has not” pleaded a claim against the individual employee defendants that complied with the jurisprudence governing personal liability in tort for the acts of an employee done in the course of employment: at para. 35.

[21] However, the motion judge did err in concluding that Mr. Burns “cannot plead such a claim against the employees”: at para. 35. That conclusion was premature. The deficiencies in Mr. Burns’ pleading might well be cured by an appropriate amendment had the motion judge granted him leave to amend.

[22] The motion judge denied Mr. Burns leave to amend but gave no reasons for doing so. As this court has stated, leave to amend should be denied only in the clearest of cases, especially where the deficiencies in the pleading can be cured by an appropriate amendment and the other party would not suffer any prejudice if leave to amend was granted: *Tran v. University of Western Ontario*, 2015 ONCA 295, at para. 26; *South Holly Holdings Limited v. The Toronto-Dominion Bank*, 2007 ONCA 456, at para. 6.

[23] In the absence of reasons explaining why he denied leave to amend, the discretionary order of the motion judge is not entitled to deference.

[24] Here, there was no reason to deny Mr. Burns leave to amend his statement of claim as an appropriate amendment might cure the pleading’s deficiency and there is no suggestion that the respondents would suffer litigation prejudice by

granting leave to amend. Although we do not interfere with that part of the order of the motion judge striking out the statement of claim as against Ms. McLean and Ms. Oslizlok, we grant Mr. Burns leave to amend.

[25] Given the deficiencies in Mr. Burns' statement of claim, it is not necessary to resolve the dispute between the parties as to whether alleged bad faith conduct by the employees of an insurance company constitutes a distinct actionable legal wrong that can be pleaded against the employees in their personal capacities. The resolution of that dispute, if required, must await Mr. Burns amending his statement of claim to properly plead individualized claims against Ms. McLean and Ms. Oslizlok.

DISPOSITION

[26] Accordingly, we allow the appeal to the extent of varying para. 1 of the order to read:

THIS COURT ORDERS that the Statement of Claim shall be struck as against the Defendants, Lauren McLean and Anna Oslizlok, with leave to amend.

[27] If the parties are unable to resolve the matter of costs of this appeal and Mr. Burns wishes to pursue that matter, he shall file written cost submissions to a maximum of three pages, with the Court, within seven days of the date of release of these reasons. The respondents shall have a further seven days within which to

file responding submissions, such submissions not to exceed three pages in length.

W. B. Sweeney J.A.

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