

CITATION: Caruso v. DH Professional Corporation, 2022 ONSC 1717
COURT FILE NO.: CV-20-00000051-0000 (Orangeville)
DATE: 2022 03 18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GASPARE CARUSO v. DH PROFESSIONAL CORPORATION,
DOUGLAS HANCOCK and ADAM JARVIS

BEFORE: McSWEENEY J.

COUNSEL: D. Laframboise, for the Plaintiff

J. Van Allen, for the Defendants

HEARD: February 7, 2022 via videoconference

ENDORSEMENT

Overview:

[1] This is a summary judgment motion brought by the defendant lawyers and law firm under Rule 20.01. In this application/action, the Plaintiff, Gaspare Caruso, sues the counsel that represent his frequent litigation adversary, 1947755 Ontario Limited (“194”) and its principal Robert Bortolon.

[2] The Plaintiff has an extensive litigation history with 194 and in particular with one of its principals, one Robert Bortolon. See for example decisions reported at: *Caruso v Bortolon*, 2020 ONSC 7933; *Caruso v Bortolon*, 2021 ONSC 314;

Caruso v Bortolon, 2021 ONCA 892; *1947755 Ontario Ltd. v Caruso et al*, 2020 ONCA 616.

[3] To be clear, neither Bortolon nor 194 is a party to the present action, which Caruso brings against 194 and Bortolon's counsel. The connection with his other litigation is Caruso's allegation that in representing 194 and Bortolon in those other proceedings, the defendants breached the rules of professional conduct, and committed actionable wrongs against Caruso.

[4] In his amended Statement of Claim, Caruso seeks a total of \$1,000,000 in damages. He alleges that counsel committed professional misconduct and an actionable wrong when they accepted funds from their client, 194, to pay its legal bill. The funds accepted by the defendants, in the amount of over \$20,000, had been paid to 194 by lawyer Doug Laframboise personally.

[5] Mr. Laframboise appears for Caruso on this motion. Mr. Laframboise confirms that he was also an individual litigant in another action against 194, and that the cost award he paid to 194 by personal cheque was ordered by a court.

[6] Caruso, through the submissions of Mr. Laframboise on this summary judgment motion, argues that the defendants should have refused to permit 194 to endorse Laframboise's cheque to their own law firm to pay down its legal bill.

[7] Caruso argues that the defendants should have refused the funds, and instead required 194 to pay an outstanding cost award to Caruso in another action. Mr. Laframboise argues for Caruso that the defendants committed an actionable wrong somehow in failing to compel 194 to pay the money to Caruso instead.

[8] Caruso alleges that defendants, as counsel to 194, knew that the corporation had little money, and that its acceptance of funds to pay their clients legal bill, instead of deferring in payment priority to Caruso, amounted to a breach of the Rules of Professional Conduct.

[9] In early 2021 the defendants advised Caruso of their position that his claim discloses no cause of action as the law is settled that a lawyer for one party does not owe a duty of care to the opposing party. Further, alleged breaches by counsel of the Rules of Professional Conduct are matters for the Law Society, not for litigation.

[10] Before me today, Mr. Laframboise appears as Caruso's counsel. He and his client now concede that as a matter of law, no duty of care is owed by counsel for one party to the opposite party. Mr. Laframboise therefore does not argue strenuously against the defendants' entitlement to summary judgment on the original statement of claim.

[11] Rather, he argues on behalf of Caruso that because the court gave him leave to bring a motion to amend his claim and did so after the summary judgment was already scheduled (by order of Trimble J.), and he was then successful on his motion to amend the claim (by ruling of D. Fitzpatrick J.). The amended claim is therefore properly before the court on this motion.

[12] Caruso argues that his amended claim, taken with his most recent evidence, establish the facts on which a court could find that the defendants committed "an actionable wrong" against him. As such, he contends that there is "a genuine issue requiring a trial" such that the summary judgment motion should be dismissed.

[13] The defendants argue that the court should disregard the amended claim because it was filed after the summary judgment was scheduled. They argue further that, regardless of how Caruso's claim is reframed, there is no genuine issue requiring a trial.

Three issues:

[14] There are three issues I must determine on this motion: the first is whether the plaintiffs are permitted to rely on their amended statement of claim in resisting the summary judgment motion. The second is whether to grant summary judgment.

Issue 1: Should the court consider the Plaintiff's Amended Claim in determining this summary judgment motion?

Position of parties:

[15] The Defendants argue that the amended claim is not properly before me because it was amended after the summary judgment motion was filed. They note that Trimble J.'s endorsement stated that "this motion to amend is without prejudice to any position the Defendants wish to take on their summary judgment motion with respect to the use the motion judge can make of the Amended Statement of Claim on the summary judgment motion."

[16] In support of their position, the Defendants rely on the case law precluding a party from amending its pleadings after a motion to strike is filed, and also on a decision in which that reasoning was applied to preclude amendment of pleadings following filing of a summary judgment motion.

[17] The Plaintiff distinguishes the case law relied on by the Defendants because those authorities preclude amendment of a claim without a court order.

In this case, Caruso points out that Fitzpatrick J. expressly granted him leave to amend, serve and file his claim, and ordered a timeline which ensured that he did so several months prior to the return of this summary judgment motion. It is therefore appropriate that the amended claim, and the supplementary record filed by the plaintiff based on that amended claim, be considered on this motion.

[18] Plaintiff counsel concedes that the Defendants are correct in law that there is no duty of care owed by the Defendants to the Plaintiff. He argues, however, that the Plaintiff's claim, as amended, now pleads causes of action and supporting facts sufficient to demonstrate a genuine issue for trial and must therefore be considered on the motion.

[19] In analyzing this first issue, I note that the Plaintiff's concession regarding no duty of care owed to him by the Defendants would have been sufficient to grant summary judgment dismissing his action as pleaded in the original statement of claim.

[20] With respect to the case law cited by the defendants, I find the present circumstances to be distinguishable. I reach that conclusion because this is that unusual case where the claim against which summary judgment was brought was amended and filed by court order with knowledge by all parties, and the court, that a summary judgment motion was scheduled for February 2022.

[21] In the interests of finality and proportionality of procedure, I consider that it is appropriate in these circumstances that I consider all the submissions of the plaintiff, including those based on his amended statement of claim, in determining whether to grant summary judgment.

[22] I will therefore review and consider all the evidence and argument of both parties as they apply to the action as pleaded in the original claim, and additionally in the amended statement of claim. In so doing, I have the benefit of Mr. Laframboise's argument based on the amended claim, and of Defendants' reply submissions.

[23] I am aware, however, that I do not have an amended statement of defence, which the defendants have not filed in view of their position on the inadmissibility of the amended claim on this motion. Nor did Defendants' counsel make particularized submissions with respect to the merits of the amended claim.

[24] In view of my ultimate decision to grant summary judgment, I find that no substantive unfairness to the defendants has occurred as a result of the absence of their submissions on the amended claim. Nor do I find in this case any unfairness to the Plaintiff caused by the absence of an amended statement of defence.

Issue 2: Summary Judgment

Legal Framework:

[25] The availability of summary judgment is governed by Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, O.Reg. 194, and the Supreme Court's guidance in *Hryniak v. Mauldin*, [2014] 1 SCR 87. The law is clear: Summary judgment should be granted where the court is able to determine on the record before it that there is no genuine issue requiring a trial.

[26] This will be the case where the evidence enables the court to (1) make the necessary findings of fact, (2) apply the law to the facts, and (3) where the court determines that summary judgment is a proportionate, more expeditious, and less expensive means to achieve a just result on the merits.

[27] Certainly, if the record enables me to find the necessary facts and apply the law in this case, summary judgment will be a proportionate, more expeditious, and less expensive means to achieve a just result than for this action and counterclaim to proceed to a trial.

[28] At the first step of the motion, the onus is on the moving party to establish a *prima facie* case that there is no genuine issue requiring a trial. On this motion, the defendants have met their onus with respect to the statement of claim as originally filed: the plaintiff agrees in his affidavit that they owed him no duty of care.

[29] In this motion, as noted, the moving parties did not make specific submissions on the amended claim but take the position that there is no evidence on the motion of a genuine issue requiring the trial.

[30] On this motion, as a matter of process, the Court's attention must focus on whether the responding party, Mr. Caruso, has adduced evidence of specific facts from which the court can find a genuine issue requiring a trial.

[31] The law is clear that in order to meet this onus, the responding party may not rest solely on the allegations or denials in their pleadings, but has the obligation to set out, "in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial": Rule 20.0(2).

[32] A court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (ONSC), at paras. 26-27; *aff'd* 2014 ONCA 878 (Ont. C.A.).

[33] This means that a responding party cannot simply advise that further or better evidence of a genuine issue requiring a trial may be available at a future time. At the summary judgment motion, the responding party must “lead trump or risk losing” and put their “best foot forward”. *Whiteman v. lamkhong et al.*, 2013 ONSC 2175, at paras. 29-31 (“*Whiteman*”), aff’d 2015 ONCA 564.

Position of parties

[34] Caruso argues that his amended claim, taken with his most recent evidence, establish the facts on which a court could find that the defendants committed “an actionable wrong” against him. As such, he contents that there is “a genuine issue requiring a trial” such that the summary judgment motion should be dismissed.

[35] The defendants argue that the court should disregard the amended claim because it was filed after the summary judgment was scheduled. They argue further that, regardless of how Caruso’s claim is reframed, there is no genuine issue requiring a trial.

[36] Amended claim: In his Amended Claim, Caruso continues to claim a total of \$1,000,000 in damages from the defendants. His original claim seeks the following:

- a. At sub-para 1(c) - \$407,612.50 for “interference with economic interests of the Plaintiff as well as breach of duty to the Law Society and the courts by enabling a breach of court Orders and concealing documents from the Honourable court” [this amount reduced from the \$500,000 claimed in this category in the original statement of claim]:

- b. At sub-para 1(e) - \$300,000 for “conspiracy to defraud, complicity in proceedings”
- c. At sub-para 1(f) - \$167,387.57 “as punitive damages for conversion” – the amended claim adds the two words “and concealment” following “conversion”
- d. At sub-paras 1(g), (h), (i), (j), and (l), the plaintiff seeks declarations that the defendants ...
 - “... advised and assisted with the breach of court orders for their own benefit”;
 - “... are now a party to all the actions with respect to 1947755 Ontario Limited and therefore removed as counsel of record”;
 - “... intentionally counselled their client to breach two court orders and to the sole benefit of the defendants”;
 - “... conspired as shown by their conduct with the predominant purpose of injuring the plaintiff and that the actions of the defendants are unlawful, to have acted knowingly or having ought to have known that injury to the Plaintiff is likely to result”;
 - and that “the defendants [sic] actions are in breach under [sic] under the Law Society Rules of professional conduct Chapter 2:2.1-1”

[37] When he amended his claim, Caruso deleted a claim for the amount of the cost orders he alleges should have been paid to him with the funds 194

received from Laframboise in satisfaction of his cost obligation, and which Caruso claims the defendants should not have accepted as a payment toward the legal fees owed by 194 to their firm.

[38] To his amended claim Caruso added the following claims:

- a. at sub-para 1(e), a claim for “\$131,000 for legal fees incurred to fight unnecessary lawsuits prolonged by the Defendants due to misleading the court and concealing documents. And prove in court that Caruso was improperly removed from the 1947755 Ontario Ltd. Corp.”;
- b. and at sub-para 1(k) “a declaration that the defendant Jarvis concealed the real directorship and ownership of 1947755 Ontario Limited corporation from the courts to assist with his client’s actions and to the detriment of the Plaintiff Caruso”.

[39] The amended statement of claim also includes allegations that the defendant Mr. Jarvis misled the Court during hearings of other matters between Caruso and 194, that Jarvis commissioned affidavits which he should have known contained false or unsupported statements by his client.

[40] Caruso also alleges that he would not have lost a summary judgment motion in another action if Jarvis had behaved according to the Law Society’s Rules of Professional conduct.

[41] There are other allegations of the above nature in the amended claim.

[42] The amended claim is accompanied on this motion by Caruso’s affidavit of September 29, 2021, which reiterates these allegations and summarizes them

as “I have been continually attacked by the defendants and I now have more information following the OBCA motion I brought forward”. Caruso attaches his amended claim and his factum in a separate action filed in the Court of Appeal.

[43] Caruso’s factum on the summary judgment, and his counsel’s submissions on the motion, put forward the following reasons that the court must find a genuine issue for trial:

- a. “...In the matter before the court there is conflicting evidence and details between the evidence of Mr. Jarvis and Mr. Caruso.” [factum para 25]
- b. “... this summary judgment should not succeed because all of the facts and issues are not in front of the court and a trial is required to accomplish this” [factum para 40]
- c. The defendants “breached a duty toward the court system” [Caruso’s counsel’s argument]
- d. Actions by defendant counsel Jarvis, of noting Caruso in default as a self-represented litigant in a separate proceeding was wrong in law because “a noting in default against a self-represented party is a legal nullity”;
- e. A lawyer should know their client’s financial position at all times and if their client fails to pay a cost award, counsel must come off the record [Caruso’s counsel’s argument]
- f. “I feel that I am due my day in court and this matter should move on to trial” [Caruso affidavit, para 24]

Analysis and Conclusion:

[44] As referenced above, the onus is on the party resisting summary judgment to do more than rest on the assertions in their pleadings, but “must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial”: Rule 20.0(2). Each side must “put its best foot forward”

[45] Caruso’s amended claim is a pleading, it is not evidence. Nor is his factum in another matter in the Court of Appeal evidence, other than evidence of the position taken in that appeal. Assertions of fact and law are not evidence.

[46] This is not a motion to strike a pleading for disclosing no cause of action. It is brought as a summary judgment, which gives the party resisting summary judgment the right to file a record, as Mr. Caruso has done.

[47] Mr Caruso’s assertion in his factum that “all of the facts and issues are not in front of the court” and that “I now have more information following the OBCA motion I brought forward” cannot assist him to meet his onus: the court is entitled to assume that the record contains all the evidence that the Plaintiff would present at trial. Further, deposing that “I feel I am due my day in court” cannot assist the Plaintiff to meet his onus – a feeling cannot ground an entitlement to a trial.

[48] Further, Caruso’s assertion that there are credibility issues or differences in evidence between himself and Mr. Jarvis do not assist him, as the alleged differences do not relate to any “actionable wrong” he has pleaded.

[49] In the result I find that the Plaintiff has failed to meet his onus to prove the existence of a genuine issue requiring a trial.

[50] The defendants' motion for summary judgment is granted.

Issue 3: Costs

[51] The defendants were fully successful and are presumptively entitled to costs of the motion and the action.

[52] At the conclusion of the argument on this motion, the parties filed cost outlines and made submissions.

[53] The defendants seek just over \$4,300 costs for the motion and a further \$6,200 for the action; they ask that costs be awarded on a substantial indemnity basis. The plaintiff argues that a partial indemnity scale is appropriate.

Scale of costs:

[54] For the reasons to follow, I conclude that substantial indemnity costs are appropriate in this case.

[55] The plaintiff's allegations against the defendants include conspiracy to injure, counselling breach of court orders, and breach of the Law Society of Ontario's rules of professional conduct.

[56] In its decision *Caruso v Bortolon*, 2021 ONCA 842 released November 23, 2021, a unanimous Court of Appeal dismissed Caruso's appeal in with costs. This was the appeal for which the appellate factum in the record before me was prepared. The Court of Appeal found with respect to costs that "given the inappropriate allegations of misconduct made against respondents' counsel, both in the appellant's [Caruso's] affidavit and in his Factum, we award costs to the respondent on a substantial indemnity basis in the amount sought by the respondent" [at para. 8].

[57] The same reasoning applies to support substantial indemnity costs in this motion. Caruso's unsubstantiated assertions against the defendants in this action are also "unsubstantiated assertions", made against lawyers in their professional capacity.

[58] I note further, if the above reasoning in support of substantial indemnity costs were not sufficient, that the same "inappropriate allegations" referenced by the Court of Appeal matter were repeated by Mr. Caruso in the motion before me by his attachment of his Court of Appeal factum as an exhibit to his September 29, 2021.

[59] I note further that the Court of Appeal decision rejecting Mr. Caruso's appeal on all grounds was released on November 23, 2021. This motion was not argued before me until February 2022. Mr. Caruso therefore had more than two months to consider whether, in light of the Court of Appeal's decision costs award relating to his "inappropriate allegations", he should remove the appellate factum from the record on this motion. He did not seek to do so, and in fact relied on that factum in his argument before me.

[60] An award of substantial indemnity costs is therefore appropriate in these circumstances.

Reasonableness of costs:

[61] Having reviewed the cost submissions of defendants, I find their hourly rates and hours billed are reasonable. Some reduction is warranted for time spent on "garnishment" which was not an issue on this motion.

[62] Applying the cost factors in the Rules, I consider that the work undertaken was appropriate given that the issues of professional misconduct and the consequences to the defendants of such allegations.

[63] I find that by moving for summary judgment, the defendants obtained a final result by a process that was expedient and proportionate, and reduced the overall cost to all parties.

Costs ordered:

[64] Costs fixed in the amount of \$9,500 are therefore ordered. Costs to be paid by the Plaintiff Gaspare Caruso to the defendants within 30 days.

McSWEENEY J

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COUNSEL: D. Laframboise, for the
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