SUPREME COURT OF YUKON

Citation: *McDiarmid*, v *Yukon (Government of)*, 2014 YKSC 31

Date: 20140619
S.C. No. 13-A0101
Registry: Whitehorse

BETWEEN:

MARK LEE MCDIARMID

PLAINTIFF

AND

YUKON TERRITORIAL GOVERNMENT

DEFENDANT

Before: Mr. Justice J. Z. Vertes

Appearances:

Mark McDiarmid	Appearing on his own behalf
Judith Hartling	Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The defendant applied to dismiss this action for lack of merit, pursuant to Rule 18(6) of the *Supreme Court Rules*, or alternatively to strike the Statement of Claim on the grounds that it disclosed no reasonable claim or that it is frivolous and vexatious, pursuant to Rules 20(26)(a) and (b). At the close of the hearing I declared that the application was dismissed but that reasons would follow.

[2] The plaintiff is an inmate of the Whitehorse Correction Centre ("WCC"). There is no apparent dispute that the defendant government is not responsible for that facility and the actions of the guards and other personnel working there.

[3] The plaintiff was admitted to hospital on October 20, 2011, with gunshot wounds. He was charged with the attempted murder of two R.C.M.P. officers. On October 28 he was transferred to WCC. He has been a remand prisoner at WCC since then awaiting his trial on the criminal charges.

[4] The Statement of Claim was filed on October 31, 2013. It is a hand-written document. The plaintiff has no legal assistance and is representing himself. So, as one can easily imagine, the pleading is not written with the care, clarity and verbiage of one that would have been prepared by a trained legal practitioner. Nevertheless, in my opinion, the basis of the claim can still be discerned.

[5] The plaintiff alleges that he was not given proper or adequate medical treatment for the pain resulting from his injuries. He alleges that staff at WCC deliberately withheld medication or refused to address his concerns. He further alleges that this was done in a demeaning and punitive manner in retaliation for his alleged attempts to murder two police officers. He alleges that he suffered and continues to suffer from insomnia due to the pain. In his prayer for relief, the plaintiff seeks:

(a) payment and provision of medical help to correct his insomnia;

(b) damages for “suffering caused by medical staff of WCC failing to provide adequate care as well as Depts. and organizations within Yukon Government failing to intervene”; and,

(c) a complaint process “created for (the) public that works”.

[6] The defendant argued that the Statement of Claim fails to allege a duty of care, a standard of care or causation for any loss. But counsel acknowledged that it was not necessary to plead those expressly provided the cause of action is still discernible. The

defendant also submitted that it cannot respond to the claim and the relief sought as it lacked specificity. Defendant's counsel, however, conceded that at this point the claim must be read generously. She also informed me that the defendant has not made a demand for further and better particulars of the claim, as is available pursuant to Rule 20(19).

[7] In my opinion, while the Statement of Claim may be defective in parts, it does disclose a cause of action, that being an alleged failure by the staff of WCC to provide the plaintiff, an inmate under their care and control, with adequate or appropriate medical care for the pain arising from his injuries.

[8] The defendant's brief on this motion focussed on the application to strike under Rules 20(26)(a) and (b). Defendant's counsel, however, stated that the relief sought under Rule 18(6) was meshed into that argument. Presumably it was for this reason that the defendant filed an extensive affidavit from the WCC deputy superintendent. It could not be filed in support of the striking out claim under Rule 20(26)(a) since Rule 20(29) expressly prohibits evidence on a motion to strike for disclosing no reasonable claim.

[9] The affidavit has appended to it numerous documents, such as guards' logs, inmate information reports and security and medical observation reports, all in an effort to establish that the plaintiff either refused to take the prescribed medication or chose to take some and not others, that there were legitimate concerns that the plaintiff was "drug seeking" (that he was attempting to obtain drugs he did not need), and that he was adequately monitored and treated. But these are, of course, issues of fact. The plaintiff denies that he quit taking his medication and disputes the accuracy of the entries in the various records.

[10] The defendant's affiant also states that the plaintiff failed to take advantage of the internal complaints procedure available to inmates at WCC. The plaintiff disputes this as well saying that he tried but his complaints were not addressed. In any event, there is no suggestion that a failure to follow some internal procedure precludes an action for damages.

[11] The affidavit also notes how the plaintiff has commenced three other actions. But, of course, this is not an application to declare the plaintiff generally a vexatious litigant, as provided by Rule 20(30).

[12] The tests that the defendant has to meet on these types of applications are well-known.

[13] On a summary judgment application by a defendant under Rule 18(6), the test is whether there is a bona fide triable issue of fact or law. The question is whether the claim is bound to fail. No issues of fact or law can be determined and, if there is a doubt, the application must be dismissed: *Skybridge Investments Ltd. v. Metro Motors Ltd.* (2006), 61 B.C.L.R. (4th) 241 (C.A.).

[14] The test to strike a claim as disclosing no reasonable claim or cause of action was set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and applied by this court in *Dana Naye Ventures v. Canada*, 2011 YKSC 20, and *McClements v. Pike*, 2012 YKSC 84. The essential elements are: (i) that a claim should be struck out only if it is plain and obvious that the claim is bound to fail; (ii) the mere fact that a case is weak or not likely to succeed are not grounds to strike; (iii) if the action involves serious questions of law or fact then the rule should not be applied; and (iv) the court, at this

stage, must read the statement of claim generously, with allowances for inadequacies due to deficient drafting.

[15] With respect to the test for an action being “frivolous” or “vexatious”, that requires the defendant to demonstrate that the pleading is groundless or manifestly futile, or that it is not in an intelligible form, or that it was instituted without any reasonable grounds whatsoever or for an ulterior purpose: *McNutt v. Canada*, 2004 BCSC 1113; *Hartmann v. Amourgis*, [2008] O.J. No. 2388 (S.C.J.).

[16] Under all of these tests, this application fails.

[17] I recognize that the *Rules of Court* are meant to achieve expeditious and inexpensive resolution of litigation. Nevertheless, the authorities establish that, when considering an application to strike a claim in a summary fashion, caution and prudence must be exercised. It is a power which must be used sparingly and only in the clearest of cases. And particularly where, as here, the case depends upon the facts, the court should be loath to determine the case in a summary fashion. Hence, my reason to dismiss this application.

[18] The fact that the application is dismissed does not, however, end this matter. The *Rules* enable me to make such further orders or directions as may be necessary or appropriate.

[19] First, the prayer for relief, in sub-clause (c), asks that a “complaint process” be created for the public “that works”. I indicated at the hearing that this was non-justiciable. The court cannot, in the absence of some recognizable remedy, simply direct the government to do something in a different manner from the way it is already organized. I recognize there are declaratory and other supervisory powers that courts have exercised

in some extraordinary situations, particularly in constitutional litigation, but this claim is a straightforward claim for damages. Therefore, sub-clause (c) of the prayer for relief is struck out.

[20] Second, sub-clause (b) of the prayer for relief is worded as follows: “Damages and remuneration for suffering caused by medical staff of (WCC) failing to provide adequate care as well as Depts. and organizations within Yukon Government failing to intervene.” In the absence of specific allegations identifying which “Depts. and organizations within Yukon Government” failed to intervene, why they should have intervened and how, the portion of that sub-clause after “adequate care” is struck out.

[21] Finally, the plaintiff expressed a desire to amend the statement of claim. I therefore direct that the amended statement of claim be filed and served within sixty (60) days of this judgment.

[22] Costs will be in the cause.

VERTES J.