

2015 ONSC 6649
Ontario Superior Court of Justice

Mitchell v. Forestwood Co-Operative Homes Inc.

2015 CarswellOnt 16540, 2015 ONSC 6649, [2015] O.J. No. 5642, 125 W.C.B. (2d) 454, 260 A.C.W.S. (3d) 52

**Rev. Richard Steven Mitchell, Plaintiff/Moving Party and
Forestwood Co-Operative Homes Inc., Defendant/Responding Party**

Hambly J.

Heard: October 26, 2015
Judgment: October 28, 2015
Docket: 2969/14

Counsel: Rev. Richard Mitchell, for himself
Safia J. Lakhani, for Defendant / Responding Party

Subject: Civil Practice and Procedure; Criminal; Property; Torts

Headnote

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious

Plaintiff was member and resident of building owned by non-profit cooperative housing provider (co-op) — Co-op terminated plaintiff's membership and occupancy, and, after giving him notice, removed certain personal items from his unit at building — Plaintiff commenced action against co-op — Co-op brought motion for order striking statement of claim without leave to amend — Motion granted — There was nothing in statement of claim to link allegations of breach of Criminal Code (Code) and Residential Tenancies Act (RTA) to negligence alleged against co-op — Breach of statute alone does not give rise to cause of action — Robbery and theft claims based on termination of plaintiff's occupancy rights could not possibly succeed when evidence was that co-op followed procedure in its bylaws — Evidence was that termination of plaintiff's occupancy rights and removal of his personal possessions from his unit was all done by co-op carefully following procedure in its bylaws — With respect to RTA claim, RTA had no application in case at bar — Termination of membership and occupancy rights of member of cooperative housing corporation is governed by CCA and bylaws of corporation — Plaintiff pleaded no facts on which court could find that co-op owed him duty of care — Absent duty of care court could not find that co-op's conduct caused plaintiff to suffer damages for which it was liable — Bias claim had already been decided against plaintiff by Human Rights Tribunal of Ontario.

Civil practice and procedure --- Limitation of actions — Actions in tort — Specific actions — Trespass to goods and conversion

MOTION by cooperative housing provider for order striking statement of claim filed by resident whose occupancy had been terminated.

Hambly J.:

Introduction

1 I granted this motion from the bench and reserved my right to provide written reasons. These are my reasons.

2 Rev. Richard Steve Mitchell ("Mitchell") commenced an action against Forestwood Co-Operative Homes Inc. ("Forestwood") on May 28, 2014. Forestwood has brought a motion for an order striking the statement of claim without leave to amend and dismissing the action on the grounds that it was commenced after the limitation period had expired, that it discloses

no reasonable cause of action pursuant to Rule 21.01 (1) and that it is frivolous and vexatious and an abuse of process pursuant to Rule 25.11 of the Rules of Civil Procedure.

Background

3 The facts are set out in the affidavit of Romuald Paszkiewicz ("Romuald"), a member of the Board of Directors of Forestwood, sworn September 30, 2015. Forestwood is a non-profit cooperative housing provider located at 1180 Forestwood Drive in the City of Mississauga. It is governed by its bylaws. It has a Board of Directors ("Board"). Mitchell was a member and resident of Forestwood from June, 2000. He resided in unit 1115. As at May 29, 2008, he was in arrears of housing charges in the amount of \$3,589. On that date the Board caused to be delivered to Mitchell a Notice to Consider Termination in accordance with its bylaws. It invited him to attend a meeting of the Board on June 10, 2008. He did not attend the meeting. The Board made a decision to terminate his membership and occupancy at Forestwood. On October 27, 2008, the Board caused to be issued a Notice of Application for a writ of possession returnable before the Registrar of the Superior Court at the Brampton Courthouse on November 28, 2008, at 9:30 a.m. The notice was served on Mitchell on October 29, 2008. Mitchell did not attend. The registrar issued a judgment against Mitchell which ordered a writ of possession against him for his unit in favor of Forestwood, that Mitchell pay housing charges to Forestwood in the amount of \$6,328.52 and that he pay compensation to Forestwood in the amount of \$27.09 per day from the date of the judgment to the day of vacant possession. On January 15, 2009, the sheriff posted a notice on Mitchell's unit to vacate the unit by January 22, 2009. On January 22, 2009, the sheriff posted a notice on Mitchell's unit that Forestwood had taken possession of his unit. The notice advised him that he had until January 26, 2009 at 2:00 p.m. to contact the Forestwood Coop office to retrieve items from the unit failing which Forestwood would discard the items. He did not do so. Forestwood delivered another notice to Mitchell on February 6, 2009, that if he failed to pick up his items by February 9, 2009, that Forestwood would discard the items. He did not do so. Romuald attended at the unit on that date. He observed nothing of value in the unit. There were certificates and diplomas in the unit that he thought might be of personal or sentimental value. He gave these items to Kumail Kubicki who was the property manager for safe keeping. Mr. Kubicki sent them by mail to Mitchell on May 5, 2010.

4 On February 6, 2009, Mitchell filed an application with the Human Rights Tribunal of Ontario ("HRTO") in which he alleged that Forestwood had discriminated against him on the basis of race, colour, place of origin, disability, family status and receipt of public assistance. On July 15, 2009, he amended his application to include an allegation of discrimination by Forestwood in failing to employ him on the same grounds. Mediation failed. The matter proceeded to a hearing on January 11, 2011. The HRTO dismissed the application. The HRTO stated in the decision of Vice-Chair Brennenstuhl the following:

In my view, there is no foundation for the claim that any of the grounds of discrimination as alleged by the applicant were factors in the respondent's dealing with the applicant with respect to housing or employment. The applicant merely asserts that those grounds were factors in the respondent's treatment of him, and other than these bald allegations, there are no specifics before the Tribunal upon which the applicant connects his allegations to those prohibited grounds. *In my view, the applicant's allegations, even if accepted as true, could not support a finding or inference that he was subjected to discrimination on the basis of any of the prohibited ground raised by the applicant.*

[emphasis added]

The Statement of Claim

5 The statement of claim consists of six and a half pages single spaced with 18 paragraphs. Mitchell alleges breaches of the *Criminal Code* and of the *Residential Tenancies Act*. He states that Forestwood committed robbery and theft contrary to the *Criminal Code* in terminating his residency and seizing items in his unit between January 21 and January 26, 2009. In paragraph one he states that the robbery occurred on January 21, 2009. In paragraph seven he states that Forestwood took from his unit items which included text books from various Universities, Private Colleges and Community Colleges, property of sentimental value, computers, furniture and a stereo set. In paragraph nine he states that Forestwood posted a notice on the door of his unit to remove his possessions from the unit by January 26, 2009. In paragraph 14 he states that on May 11, 2011 he provided an itemized list of documents to the Ontario Superior Court pursuant to a request by a justice to assess his loss. He also alleges in

paragraph 3 that Forestwood breached s. 40 of the *Landlord and Tenant Act* in seizing his property and terminating his tenancy. He states that Forestwood showed bias against him in refusing to hire him. He alleges that Forestwood was negligent by reason of its unprofessional conduct, that the *Negligence Act* applies and as a result of its negligence he suffered extreme anxiety and physical and psychological trauma. The statement of claim is imprecise and disjointed. However this is the essence of his claim. He is self-represented. Mitchell claims \$1,000,000.

The Limitations Issue

6 The relevant Rule of Civil Procedure is as follows;

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs;

7 The *Limitations Act 2002*, S.O. 2992 c. 24 states the following:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

8 In my view the statement of claim makes allegation from which it can be inferred that he knew that he was the victim of a robbery and theft, if he was, on January 21, 2009 or at the latest on May 11, 2011. This is the date that he states in the Statement of Claim that he sent a list of documents to the Ontario Superior Court pursuant to a request by a justice to assess his loss. He also brought a companion motion for summary judgment. He filed a number of documents in support of this motion. Included in these documents was a list of documents dated May 11, 2011 which he states that he filed with a Justice of the Peace in a failed attempt to lay criminal charges against Kumail Kubicki. This is likely the significance of this date. He certainly knew that he was the victim of a theft, again if he was, by this time. The statement of claim was issued on May 28, 2014. I agree with Forestwood that the claim is statute barred.

Discloses No Reasonable Cause of Action

9 The relevant Rule of Civil Procedure states the following:

21.01 (1) A party may move before a judge,

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order accordingly.

10 In considering a motion under this rule to strike out a statement of claim, the judge must assume that the facts pleaded are true. He must read the statement of claim generously allowing for inadequacies due to drafting deficiencies. Because a cause of action is novel it should not be struck out on this basis. The statement of claim should only be struck out if it is "plain and obvious" and "certain" that the claim will fail. (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) and *Falloncrest Financial Corp. v. Ontario*, [1995] O.J. No. 4043 (Ont. C.A.).

Alleged Breaches of the Criminal Code and the Landlord and Tenant Act

11 Breach of a statute alone does not give rise to a cause of action. In *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.) the Supreme Court of Canada in the judgment of Justice Dickson said the following:

... I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

12 There is nothing in the statement of claim to link the allegations of breach of the *Criminal Code* and the *Residential Tenancies Act* to negligence alleged against Forestwood.

Breach of Residential Tenancies Act

13 Mitchell alleges in paragraph three of the Statement of Claim that the following provision of *The Residential Tenancies Act*, 2006 S.O. 2006, c. 17 ("RTA") applies:

40. No landlord shall, without legal process, seize a tenant's property for default in the payment of rent or for the breach of any other obligation of the tenant.

14 Forestwood is a cooperative housing provider. It is governed by the *Cooperative Corporations Act*, R.S.O. 1990, c.35 ("CCA") and its own bylaws. The termination of the membership and occupancy rights of a member of a cooperative housing cooperation is governed by the CCA and the bylaws of the corporation. The RTA has no application as the following section of the RTA makes clear:

94.9 In an application to the Board made under section 94.7 or 94.8, the Board shall not inquire into or make any determination as to whether the member's membership and occupancy rights were properly terminated under section 171.8 of the *Co-operative Corporations Act*.

Negligence

15 In *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) the Supreme Court of Canada in the judgment of Chief Justice McLachlin set out what a plaintiff must prove to establish negligence of a defendant as follows:

3 A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. In other words, his damage are too remote to allow recovery.

16 Mitchell pleads no facts on which a court could find that Forestwood owed him a duty of care. Absent a duty of care a court could not find that Forestwood's conduct caused him to suffer damages for which it is liable.

Breaches of the Criminal Code and Bias

17 Mitchell alleges that by terminating his occupancy rights in Forestwood and by removing his personal possessions from his unit that Forestwood committed robbery and theft which gives him a cause of action against Forestwood. These allegations are bizarre as the evidence before me is that Mitchell's occupancy rights in the unit in Forestwood and the removal of his personal possessions from his unit was all done by Forestwood carefully following the procedure in its bylaws.

18 The relevant Rule of Civil Procedure is as follows:

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document ...

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

19 In *Currie v. Halton Regional Police Services Board*, [2003] O.J. No. 4516 (Ont. C.A.) the Court of Appeal in the judgment of Justice Armstrong set out what a defendant must establish to convince a court that an action should be dismissed as being frivolous, vexatious or an abuse of process as follows:

13 I turn to a consideration of whether there is a basis on the record before the court upon which the motions judge could conclude that the action is frivolous, vexatious or an abuse of process. A review of the case law under rule 21.01(3)(d) does not provide precise definitions of the terms frivolous, vexatious or abuse of process. The majority of the cases cited by the editors of Ontario Annual Practice and Ontario Civil Practice either refer to abuse of process alone or to all three terms together.

14 Black's Law Dictionary defines "frivolous" as: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".

15 In *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 at 226, Howland, C.J.O. considered the meaning of "vexatious" under the Vexatious Proceedings Act, R.S.O. 1970, c. 481:

The word "vexatious" has not been clearly defined. Under the Act, the legal proceedings must be vexatious and must also have been instituted without reasonable ground. In many of the reported decisions the legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction: *Stevenson v. Garnett*, [1898] 1 Q.B. 677 at pp. 680-1; *Re Langton*, [1966] 3 All. E.R. 576.

16 In discussing the inherent power of the court to invoke the doctrine of abuse of process, apart from rule 21.01(3)(d), Finlayson J.A. for the majority in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), rev'd on other grounds (2002), 220 D.L.R. (4th) 466, [2002] S.C.C. 63 at para. 31 stated:

The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy.

Goudge J.A. for the minority in the same case, stated at paras. 55 and 56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration

of justice into disrepute. It is a flexible doctrine un-encumbered by the specific requirement of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All. E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

It is obvious that Finlayson and Goudge J.J.A. were *ad idem* in respect to the nature of the doctrine of abuse of process. The majority judgment was reversed in the Supreme Court of Canada but not in respect to the discretionary nature of the doctrine.

17 It is apparent that there is a degree of overlap in the meaning of the terms frivolous, vexatious and abuse of process. What I take from the authorities is that any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process. The common example appears to be the situation where a plaintiff seeks to relitigate a cause which has already been decided by a court of competent jurisdiction.

18 I am mindful that when the court invokes its authority under rule 21.01(3)(d) or pursuant to its inherent jurisdiction to dismiss or stay an action, it does so only in the clearest of cases. See *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (Gen. Div.) at paragraph 21. (note the relief available in Rule 21.01(3)(d) is now available in Rule 25.11)

20 The allegations of bias have already been decided against Mitchell by the HRTO. The allegations of robbery and theft based on Forestwood terminating Mitchell's occupancy rights when the evidence is that Forestwood followed the procedure in its bylaws cannot possibly succeed.

Result

21 The action is statute barred. The statement of claim does not allege a cause of action. It is an abuse of the process of the court. It could not possibly be revived by an amendment. (see decision of Borins J. in *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada*, [1993] O.J. No. 1340 (Ont. Gen. Div.) at para. 21) The statement of claim is struck out without leave to amend.

Costs

22 Ms. Lakhani on behalf of Forestwood submitted a bill of costs in which she claims costs on a substantial basis in the amount of \$14,252.57. She filed a factum that was very thorough and useful. The hours spent are reasonable and the rates claimed are modest. In *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) the Court of Appeal in the judgment of Justice Armstrong stated that an assessment of costs should reflect the principles of access to justice, reasonableness and proportionality. He also stated the following:

[37] ...There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. ...

In my view this is such a case. Mitchell shall pay costs to Forestwood on a substantial indemnity basis in the amount claimed of \$14, 252.57.

Judgment

Forestwood may take out the judgment without approval as to form by Mitchell.

Motion granted.