Case Name:

Carleton v. Beaverton Hotel

RE: Randy Carleton, Louise Kouba, Judith Avery, Jay Carleton and Mark Carleton, and Beaverton Hotel, Robert James Davis, Re/Max Country Lakes Realty Inc., Ian Burney, Kawartha Credit Union Limited, 1194206 Ontario Inc., Donald Warner, John Doe, The Township of Brock and The Regional Municipality of Durham

[2010] O.J. No. 4769

2010 ONSC 5611

Oshawa Court File No. 23745/03

Ontario Superior Court of Justice

T.J. McEwen J.

October 28, 2010.

(27 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- Procedure -- Motion by plaintiffs for leave to initiate motion for summary judgment dismissed -- Plaintiffs' personal injury action had endured two mistrials due to conduct of plaintiff and former counsel -- They now sought to initiate summary judgment proceedings on issue of liability -- Plaintiffs did not satisfy test for leave -- Mistrials were not an unexpected circumstance given plaintiff's conduct -- Separate trial on issue of liability was unlikely to conserve resources or enhance chances of settlement, as issue of plaintiff's losses was contested.

Motion by the plaintiffs, Carleton and others, for leave to initiate a motion for summary judgment. Carleton claimed he suffered personal injuries while working on premises owned and occupied by the defendants. The defendants denied all liability for the incident. They denied that they owed Carleton a duty of care. They denied that Carleton sustained any damages. The incident occurred in March 2003 and the action was commenced the following month. Two mistrials resulted. The first, in October 2009, followed the jury opening by former counsel for the plaintiffs. The second mistrial occurred in December 2009 based on the conduct of Carleton and the former counsel before the

jury. The plaintiffs submitted that the mistrials constituted unexpected and substantial changes in circumstances that warranted bringing a motion for summary judgment on the issue of liability in order to minimize additional costs. The plaintiffs submitted that they would lose access to justice if forced to pay the costs thrown away by the defendants. The defendants submitted that the mistrials arose from the plaintiffs' behaviour and thus any change was not unexpected and did not relate to facts at issue in the action. The defendants submitted that the plaintiffs were effectively seeking bifurcation, which would delay the issue of damages and result in no cost savings. The defendants submitted that the court lacked jurisdiction to grant leave to bring a motion for summary judgment in an action to be tried by jury.

HELD: Motion dismissed. There was no issue with respect to jurisdiction, as the jurisprudence prohibited bifurcation once a jury notice was served, but was silent with respect to summary judgment. In any event, the plaintiffs did not satisfy the test for leave. The mistrial was not unexpected given that it resulted from the conduct of Carleton and his former solicitor. It was not manifestly unjust to refuse leave given their conduct. No issue arose regarding access to justice, as an award for costs thrown away was not payable until after completion of trial. A separate trial on the issue of liability would be time-consuming, even if affidavits and transcripts were used due to the number of witnesses. It was unclear whether resolution of the issue of liability would enhance the chance of settlement. The remedy sought closely resembled bifurcation and would cause further delay in the event that the plaintiffs were successful.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 20, Rule 48.04(1)

Counsel:

Todd McCarthy, for the Plaintiffs.

Martin Forget, for Robert James Davis, Defendant.

Robert Zochodne, for Re/Max and Ian Burney.

ENDORSEMENT

T.J. McEWEN J.:--

OVERVIEW

1 This action involves a claim for personal injury that arose out of an incident that occurred on March 28, 2003, The plaintiff, Randy Carleton ("Mr. Carleton"), claims that he sustained personal injuries while working on premises owned by the defendant Robert Davis ("Mr. Davis") and occupied by the defendants Ian Burney and Re/Max Country Lakes Realty Inc. ("Mr. Burney" and "Re/Max").

2 The defendants deny all liability for the incident and assert that they owed no duty of care to Mr. Carleton. They also deny that Mr. Carleton has sustained damages.

3 This action has a long and unfortunate history. The action was commenced on June 24, 2003. The parties have been before the court on several occasions. Eleven motions have been heard and two mistrials have resulted. The first mistrial occurred in October 2009 after the jury opening of the plaintiffs' then-solicitor Mr. Gary Neinstein ("Mr. Neinstein"). The second mistrial occurred in December 2009 after approximately six weeks of trial when Ferguson J., the trial judge, declared a mistrial as a result of the conduct of Mr. Neinstein and Mr. Carleton. She concluded that the defendants' right to a fair trial had been compromised.

4 Mr. McCarthy, who now represents the plaintiffs, brings this motion pursuant to rule 48.04(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for leave to initiate a motion for summary judgment pursuant to Rule 20 of the Rules.

5 The defendants oppose this motion.

6 The parties agreed that because I am the case management judge, it would be appropriate to bring this motion before me.

POSITION OF THE PARTIES

The Plaintiffs' Position

7 The plaintiffs submit that leave ought to be granted since the mistrials, particularly the second mistrial, constitute unexpected and substantial changes in circumstances. As such, the plaintiffs argue that this would be a fit and proper circumstance to bring a summary judgement motion with respect to the issue of liability only. Since this matter was set down for trial sometime ago, leave is required.

8 The plaintiffs submit that, given the mistrials and the costs incurred (i.e. the defendants are seeking costs of approximately $350,000 thrown away with respect to the mistrials), the case has grown out of control. They further submit that if they are ordered to pay costs prior to trial, the matter will never proceed to trial since he cannot afford to pay the costs and therefore he will lose access to justice, since the case has not been decided on the merits.

9 The plaintiffs state that if leave is granted, a judge hearing a summary judgment motion could make orders as to how a summary judgment motion on the issue of liability would proceed i.e. whether transcripts from the previous proceedings could be used, whether affidavit evidence could be used, and whether viva voce evidence would be required. They submit that as case management judge, I could make such orders.

10 With respect to the liability evidence, Mr. McCarthy agrees that only Mr. Carleton has been partially cross-examined on liability to date. He anticipates that on behalf of the plaintiffs, three other witnesses would be required with respect to the issue of liability.

11 Mr. McCarthy concluded his argument by stating that the days of unlimited trials are a thing of the past, and that when the court has regard to the theory of proportionality, a summary judgment motion with respect to the issue of liability only makes good sense. It would be brief in nature, minimize additional further costs, wisely employ judicial resources and, once liability has been decided, it would enhance the possibility of settlement one way or the other.

The Defendants' Position

12 Mr. Forget, on behalf of the defendants, makes a number of arguments opposing the motion as follows:

a) The mistrials arose as a result of the behaviour of Mr. Carleton and Mr. Neinstein, and the plaintiffs cannot now argue that this constitutes a change that either unexpected or substantial.
b) In any event, the unexpected and substantial change in these circumstances must relate to facts to an issue in the action.
c) Given the reason for the second mistrial, and the conduct of Mr. Carleton and Mr. Neinstein, the plaintiffs have not established that it would be manifestly unjust if leave is not granted.
d) What the plaintiffs now seek is really bifurcation, and as such, the plaintiffs are seeking to avoid the existing jurisprudence prohibiting bifurcation in a case such as this, as set out by the Ontario Court of Appeal in Kovach (Litigation guardian of) v. Kovach, 2010 ONCA 126, 100 O.R. (3d) 608, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 165.
e) The plaintiffs are seeking a "mini trial" involving a combination of affidavit, transcript and/or oral evidence, which is prohibited: see Valemont Group Ltd. v. Philmor Goldplate Homes Inc., 2010 ONSC 1685, leave to appeal to Div. Ct. refused 2010 ONSC 3195.
f) There is no evidence of a cost savings. In this regard, nine witnesses in total will be testifying on the issue of liability.
g) The summary judgment motion would ultimately delay the trial of the issue of damages and would be thus unfair to the defendants.
h) Lastly, in any event, the court does not have jurisdiction to grant leave to the plaintiffs to bring a motion for summary judgment in an action that is to be tried by a jury, in light of the jurisprudence set out in Kovach, supra.

JURISDICTION

13 With respect to the issue of jurisdiction, I disagree with the defendants' argument that I do not have jurisdiction to grant leave to the plaintiffs to bring a motion for summary judgment based on the authority set out in Kovach, supra. Kovach merely reinforces the practice in Ontario that where a jury notice has been served, the court does not have jurisdiction to bifurcate trials in the absence of consent. It is silent with respect to the issue of summary judgment.

14 Kovach, supra, in my opinion, does not overrule the existing case law which has specifically allowed for summary judgment motions in actions that are to be tried with a jury: see Saint Pierre v. Bernardo (1988), 26 C.P.C. (2d) 97, (H.C.J.) and Mears v. Bobolia (1986), 13 C.P.C. (2d) 164, (H.C.J.).

15 In Saint Pierre, the court dealt with an action for damages arising out of a motor vehicle accident in which a jury notice had been served. The plaintiff moved for summary judgment on the issue of liability. The defendant argued that because a jury notice had been served, a Rule 20 motion could not be brought. Wright L.J.S.C. disagreed, noting at paragraph 4:

> The citizen's right to trial by jury only arises when, in the opinion of a Judge, there are sufficient facts before the tribunal upon which a reasonable jury, properly instructed, might found a verdict. In this particular case there is absolutely no evidence before the tribunal in favour of the defendant. There is a legal onus

> upon the defendant and there is evidence by the plaintiff upon which such a jury could found a verdict for the plaintiff. I do not believe that in defence of a motion for summary judgment a defendant in a jury action must present his entire case by way of evidence on the motion but I do believe that he must present sufficient evidence to show that there is indeed a triable issue. There not being a triable issue the citizen's right to a jury trial does not arise and therefore there is no conflict between that right and the Rules.

16 I find that I do have jurisdiction to grant leave.

THE TEST

17 Over time, different tests for leave have developed.

18 Traditionally, in order to obtain leave, a party must establish an unexpected, substantial change in circumstances, and that it would be manifestly unjust to refuse to grant leave:, see Hill v. Ortho Pharmaceutical (Canada) Ltd. (Ont. Ct. Gen. Div.) (1992), 11 C.P.C. (3d) 236; Kovary v. Heinrich (1974), 5 O.R. (2d) 365 (H.C.J.). This is the test counsel for the plaintiffs has cited in seeking leave.

19 More recently, however, some courts have determined that requiring substantial and unexpected change in circumstances is overly rigid and simplistic: see Tanner v. Clark (1999), 30 C.P.C. (4th) 358 (Ont. Ct. Gen. Div.). In Tanner, supra, Wilson J. stated as follows at paragraphs 25-26:

> In my view, the authorities cited above establish that a single test for leave pursuant to 48.01(1) for all motions requiring substantial and unexpected change in circumstances is overly rigid and simplistic. I adopt the approach of Borins, J. in Gloucester Organization Inc. (supra). The relevant principles to be considered and the weight to be given to leave motions will vary depending upon the nature of the leave requested, and the circumstances of the case.
>
> An interlocutory matter that can be raised before the trial judge, is to be distinguished from serious matters affecting substantive rights. In this case of the former, a higher threshold is appropriate before leave is granted to bring closure to claims in the interest of certainty and predictability. Once a trial date has been set, the test of substantial and unexpected change in circumstances makes sense for routine interlocutory matters. However, where substantive rights are affected, the merits of the requested relief become a fundamental consideration to ensure the case is fully canvassed at trial. At the same time, full consideration shall be given to any prejudice to the party opposing the motion that cannot be compensated for by costs.

20 This more recent approach, was followed by Karakatsanis J., as she then was, in Valemont, supra, where the defendants in that case sought leave for summary judgment motion.

ANALYSIS

21 Notwithstanding which of the two tests for leave should be applied in the within case, I find that the plaintiffs have not satisfied either test.

22 Firstly, with respect to the test, set out in Hill, supra, in my view, an unexpected and substantial change in circumstances must relate to an issue in the action, as opposed to the conduct of a party or counsel as occurred in this case. In any event, it cannot be said that the mistrial was unexpected, given the fact that it resulted from the conduct of Mr. Carleton and his then solicitor Mr. Neinstein. Additionally, I cannot conclude that it would be manifestly unjust to refuse to grant leave in the circumstances of this case, since the mistrials directly resulted from the conduct of Mr. Carleton and Mr. Neinstein.

23 The plaintiffs' expressed concern that they may be ordered to pay costs prior to trial is now not going to materialize, given the decision of Ferguson J. released on September 27, 2010, in which she ordered costs thrown away with respect to the mistrials to be paid to the defendants, but only after the completion of trial.

24 Similarly, even if I were to apply the test for leave adopted by Wilson J. in Tanner, supra, I cannot conclude that the plaintiffs have satisfied the test for leave in this case. When one considers the merits of the requested relief, I do not consider it appropriate to grant leave for the following reasons:

a) As noted above, the plaintiffs find themselves in the current state of affair by virtue of the behaviour of Mr. Carleton and his previous solicitor, Mr. Neinstein.
b) Separately trying the issue of liability in a summary judgment motion would be time-consuming given the number of witnesses, even if affidavits and transcripts could be used.
c) I am sceptical that by resolving the issue of liability at a summary judgment motion, the chances of settlement are enhanced in this case, given the history of the matter.
d) If the plaintiffs are successful at the summary judgment motion concerning liability, a trial concerning damages will have to follow, which will further delay the matter. This would prejudice the defendants and could not be compensated for by costs.
e) The remedy the plaintiffs seek, although arguably practical in the circumstances, which we now face ourselves closely resembles bifurcation.

25 The plaintiffs' motion for leave to initiate a motion for summary judgment is therefore dismissed.

26 With respect to the issue of costs of the motion, I can appreciate that Mr. McCarthy was attempting to bring some order to this action so that it could proceed to trial in a speedy and economical fashion. Unfortunately, for the plaintiffs, the position with respect to seeking summary judgment is unsupportable in law.

27 Accordingly, I award the defendant, Mr. Davis, costs payable by the plaintiffs in the amount of $4,500, inclusive of applicable taxes and disbursements, in the cause. There will be no cost award with respect to the defendants Mr. Burney and Re/Max since they relied on the submissions of counsel for Mr. Davis and did not file materials.

T.J. McEWEN J.

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