SUPREME COURT OF NOVA SCOTIA

Citation: Cameron v. Maritime Barrel Racing Association, 2011 NSSC 93

Date: 20110304
Docket: Tru. No. 315243
Registry: Halifax

Between:

Edwin Cameron

Plaintiff/Respondents

v.

Maritime Barrel Racing Association, Chris MacLean, Lindsay Hilchie, Scott McLean, Heather Strickland, Adrienne Strowbridge, Wayne Strickland, Tim Parker, Kathryn Swinamer, Roddie Benoit, Cindy Wamboldt, Marion MacDonald

Defendants/Applicants

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	October 5, 2010, in Truro, Nova Scotia
Counsel:	Dennis James, for the Plaintiff/Respondents David A. Graves, Q.C. and Ian Dunbar, for the Defendants/Applicants

By the Court:

[1] This is an application for summary judgment on the evidence pursuant to Rule 13.04 of the Nova Scotia *Civil Procedure Rules*.

Facts

[2] The plaintiff, Edwin Cameron, is an active competitor in horse racing, particularly barrel racing and pole bending events. The defendant, the Maritime Barrel Racing Association, promotes horseracing events in the Maritime Provinces. The plaintiff has been a member of the Association since 1998, and is a past director.

[3] The plaintiff and his girlfriend entered a barrel racing and pole bending competition held on July 31, 2009 in Bridgewater, Nova Scotia. The Association sponsored this event. The plaintiff and his girlfriend competed in the barrel racing competition on the first night, on horses owned by the plaintiff, finishing first, second and third. The plaintiff and his son competed in the pole bending competition on the first night, on horses owned by the plaintiff, finishing first and third.

[4] The Association claimed that on August 1, 2009, a number of its directors who were present at the event received complaints that the plaintiff and his girlfriend had been observed with paraphernalia for administering drugs to horses. One of the complainant reported that she had observed the plaintiff injecting his horses. The Association's drug policy prohibits possession of drug-related paraphernalia at events. All members, including the plaintiff, had agreed to be bound by this policy, which provides as follows:

> **Maritime Barrel Racing Association Drug Policy**
>
> The Maritime Barrel Racing Association (M. B. R. A.) Drug Policy as set out herein is intended to guarantee fairness to all participants in events recognized and sanctioned by the M. B. R. A. and to ensure the welfare of horses and ponies entered in such events; and also to maintain public and sponsor confidence in the fairness of M. B. R. A. sanctioned events.
>
> This policy will be enforced by the Board of Directors of the M. B. R. A. and any other person or persons that the said Board of Directors appoints to do so at any given time.
>
> Under the M. B. R. A. Drug Policy the person responsible is strictly liable whenever a prohibited substance is found in a horse's bodily specimen. This means that a violation occurs whether or not the person responsible intentionally or unintentionally, knowingly or unknowingly, used a prohibited substance.

The person responsible is defined as the person who rides the horse during the event, the owner of record of the animal, and in the case of minor children the parent or guardian listed on the entry form or M. B. R. A. waiver regardless of whether any or all of the above were present at the time of the infraction.

Under this policy unauthorized administration of drugs to horses competing in; or scheduled to compete in; an M. B. R. A. sanctioned event is not allowed.

The M. B. R. A. has agreed to adopt the rules ad regulations of the Canadian Para-Mutual Agency (C. P. M. A.) (Agriculture and Agri-Food Canada) with respect to allowed medications and the levels of medication deemed acceptable in any sample taken. These rules and regulations can be found at www.agr.gc.ca/cpma-acpm/index.

or at your local Agriculture Canada Office. The M. B. R. A. drug policy also includes any amendments and updates to the C. P. M. A. rules and regulations which may be implemented at any time. It is the responsibility of the competitor to ensure that they are familiar with these regulations.

The M. B. R. A. has the right to test for these substances at any time and any animal found to have tested positive within the definition of the C. P. M. A. will be subject to any penalties imposed by the M. B. R. A. Anyone refusing to be tested, or present their animal to be tested will be considered to have been tested with a positive result and will be dealt with accordingly.

The M. B. R. A. also prohibits the presence of any drug related paraphernalia such as; but not limited to; hypodermic needles, used or otherwise, any syringe capable of holding a needle, and vials or containers of injectable drugs, regardless of nature. Any person, in the opinion of the Board of Directors, found to be in possession of such paraphernalia, will also be subject to the penalties imposed by the M. B. R. A.

The penalties of the M. B. R. A., at this time, are as follows

> 1) First offence: Expelled from the remainder of the competition, together with the loss of any monies, placing or points earned at that event. This includes any and all other horses owned by or shown by the person responsible.
>
> 2) Second offence: As above; together with expulsion for the remainder of the show season. This includes any and all other horses owned by or shown by the person responsible.
>
> 3) Third offence: Lifetime expulsion from the M. B. R. A.
>
> The decision of the Board of Directors in all instances will be considered final.
>
> These penalties will be reviewed by the Board of Directors from time to time and will be adjusted as they see fit.

[5] Seven of the Association's directors convened a meeting on August 1, 2009, in response to the complaints and, after some discussion, decided to discipline the plaintiff and his girlfriend for a first offence under the drug policy. There is no indication that the Association took any steps to determine the veracity of the complaints nor did the Association provide the plaintiff an opportunity to be heard. By letter dated August 1, 2009, the Association informed the plaintiff that he had been found guilty of a first offence under the drug policy, and that his points and prize money were being rescinded. Furthermore, he was disqualified from competing in the remainder of the event's two races. The Association says the

letter of disqualification was not made public. The plaintiff alleges that the reasons for his disqualification were made known to event organizers.

[6] On August 11, 2009, the plaintiff filed a Notice of Action and Statement of Claim against the Association and its directors, as individuals, alleging that the disciplinary decision was made improperly and that it had injured his reputation. Subsequent to initiating the lawsuit, the plaintiff made available copies of the Notice of Action to the public and other members of the Association at a different event sponsored by the Association.

[7] On or about September 3, 2009, the majority of the Board of Directors decided to rescind the disciplinary action meted out on August 1, 2009. The plaintiff was informed of this decision by letter dated October 13, 2009.

[8] At a subsequent competition on August 28, 2009, one of the plaintiff's horses tested positive for three prohibited substances. As the Association was involved in these proceedings, it delegated decision-making authority under the drug policy to an independent third party adjudicator, who, after a hearing of which the plaintiff had notice, found the plaintiff in breach of the drug policy The

plaintiff did not attend this hearing, reporting that he was unavailable due to being out of the country. He did not seek an adjournment. He now claims that all of the relevant material was not before the adjudicator.

[9] Although both parties filed affidavits dealing with the circumstances surrounding the events of August 28, 2009, the plaintiff is only seeking a remedy for the damages arising from the discipline of August 1, 2009. It is questionable whether the portions of the affidavits dealing with the August 1 incident are of any relevance. Neither the Statement of Claim nor the Defence plead the alleged positive drug test of August 28, 2009, and the ensuing discipline. I have not struck these portions of the affidavits, but I have not given them any consideration.

[10] On December 21, 2009, the defendants applied for summary judgment on the pleadings pursuant to Rule 13.03. The plaintiff amended the Notice of Action and Statement of Claim, removing the Association's directors as personal defendants. The Court granted an Order on January 18, 2010, approving the amendment, conditional on the defendant withdrawing the application for summary judgment on the pleadings.

Issues

[11] Has the defendant satisfied the test for summary judgment?

[12] Is there a genuine issue for trial, and, if not, does the plaintiff have a real chance of success?

Discussion

[13] The 2009 *Civil Procedure Rules* provide for two types of summary judgment: summary judgment on the pleadings and summary judgment on the evidence. Summary judgment on the pleadings is analogous to a motion to strike pleadings pursuant to Rule 14.25 of the *Civil Procedure Rules 1972*. Summary judgment on the evidence is similar to summary judgment under the previous Rule 13. Rule 13.04 provides, in part, as follows:

> (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant a judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss the claim, or dismiss a defence.

> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.....

[14] The test for summary judgment on the evidence is a two step test, as described in *Selig v.Cooks Oil Co.*, 2005 NSCA 36, at para. 10 "First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success." See also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Dalhousie University v. Aylward*, 2010 NSSC 65; and *Gilbert v. Giffin, Daimler Chrysler Services Canada Inc. and Coseco Insurance Company*, 2010 NSCA 95. The 2009 Rules have not markedly changed the test for summary judgment. The parties agree that each side must put its best foot forward and raise any material disputes of fact on the summary judgment motion: *Canada (Attorney General) v. Lameman*, 2008 SCC 14.

[15] The Association argues that there is no genuine issue for trial for three reasons: First, the Association's decision to discipline is not justiciable; second, the plaintiff has no cause of action for damages, and third, the action is moot because the Association has reversed its decision.

[16] The plaintiff argues that there is a genuine issue for trial on the question of whether the defendant is responsible for damaging the plaintiff's reputation by taking (and reversing) disciplinary action without due process.

[17] I have some reservations as to this motion being made on the evidence. I believe, with respect, that the Association has misconstrued the purpose of summary judgment on the evidence, particularly when the basis for the motion is that there is no genuine issue for trial. Proceeding by way of summary judgment on the pleadings, the Association would have been able to argue that the plaintiff's pleadings raise issues that are not justiciable, or do not disclose a cause of action. Such an argument that the pleadings are defective, if successful, would support summary judgment on the pleadings.

[18] I have decided, however, to rule on the motion as it is before the Court. The Association argues that the Court should be reluctant to exercise jurisdiction over the question of membership in a voluntary association unless property or civil rights are in issue. This view is reinforced when the decision of the voluntary association is said to be final. See *Lakeside Colony of Hutterian Brethren v. Hofer and Weir v. Saskatchewan Amateur Softball Assn.*, [1992] 3 S.C.R. 165, at 173.

[19] The Association also claims that, as a private association with a privative clause in its rules of conduct and drug policy, its decisions are immune from judicial scrutiny. The Association Rules and Drug Policy both contain privative clauses:

> "The decision of the Board of Directors in all instances will be considered final." (Drug Policy)

> "A decision will be made by the majority of the Board of Directors present at that event, and will be final." (Rules)

[20] The cases cited by the defendant arise in situations where members of associations are attempting to obtain *certiorari* from a decision taken by a private society which the member or members are unwilling to accept. Certainly, in such situations, availability of judicial review would be limited. However, although the decision taken by the society may not be subject to judicial scrutiny, the Association may not still be liable in contract, tort or some other cause.

[21] The plaintiff, in initiating the proceeding, sought four remedies:

1. Judgement for liquidated damages for damage caused by the injury resulting from the defendant's decision and the invocation of the penalty;

2. Judgement for special damages in an amount to be determined;

3. A declaration that the suspension was inconsistent with the Association's own policy and not supported by the available information; and

4. An injunction restraining the decision of the Board of Directors of the Association, and reinstating the plaintiff's prize money, placing and points.

[22] I acknowledge that the plaintiff's claim for a declaration and an injunction would force the Court to take jurisdiction over the internal decision – making process of the Association. Hearing an application for an injunction would be analogous to a request for *certiorari.* I do not believe that the Court has jurisdiction to grant such relief. In addition, an injunction, if available, is moot, given that the Association reversed its August 1, 2009, decision.

[23] In seeking a declaration, the plaintiff is attempting a back door approach to seeking *certiorari*, requiring a review of the Association's decision–making process. It does not appear to me that the Court has jurisdiction to issue a

declaration regarding the consistency of the Association's disciplinary decision with its internal rules and policy.

[24] The defendant also argues that the plaintiff's pleadings disclose no cause of action for damages. The defendant argues that if the plaintiff is unable to seek a declaration or an injunction, then damages are no longer a live issue. The defendant also argues that it owed no duty to the plaintiff when disciplining him, because at that time it was an administrative body exercising a quasi–judicial function. The defendant further asserts that the plaintiff has no claim for breach of contract because it followed the rules set out in its constitution, which all members assented to by being bound by the by–laws, rules and policies.

[25] Although I do not pass judgment upon the last two remedies sought by the plaintiff, it is my view that a judgment for liquidated damages and a judgment for special damages would not require the Court to take jurisdiction over the Association's internal decision-making process. To do justice to such a claim, it is necessary for the Court to review the actions of private entities, not from the perspective of granting judicial review remedies, but from the perspective of determining whether one party has caused damages to another party. For instance, if the Association had dismissed an employee, the Court would be required to

determine whether there was a dismissal for cause or dismissal without proper notice. In so doing, the Court would be required to examine the actions of a private Association. Notwithstanding the inability to order *certiorari*, the Court would not decline to award damages if such damage award were appropriate.

[26] It is my view that this Court has the jurisdiction to consider whether the Association's action warrants an award of damages for liquidated or general damages. It appears to me that these aspect of the plaintiff's claim are justiciable.

[27] The defendant's position might be determinative if I were to agree that quasi-judicial administrative agencies cannot be sued in tort when they exercise of their duties. The defendant relies on the following passage from *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, at 969:

> ... [E]ven if the quasi-judicial function be taken in isolation, I cannot agree that the defendant in holding a public hearing as required by statute comes under a private tort duty, in bringing it on and in carrying it to a conclusion, to use due care to see that the dictates of natural justice are observed. Its failure in this respect may make its ultimate decision vulnerable, but no right to damages for negligence flows to any adversely affected person, albeit private property values are diminished or expenses incurred without recoverable benefit....

[28] *Welbridge*, in my opinion, stands for the proposition that an administrative body, exercising its statutory duty to conduct a hearing, would not be subject to a

private tort liability for failing to observe the principles of natural justice. This is not to say that no remedy would be available. As Laskin J. observed, the failure to ensure natural justice may make the decision vulnerable to judicial review.

[29] I am unable to agree with the Association that it is a quasi-judicial administrative body. It is not governed by statute. Its disciplinary decisions are not governed by statute. When it convenes a disciplinary hearing it is not exercising a statutory duty. As such, it cannot be said that it owed no private duty in tort to the plaintiff.

[30] The plaintiff has referred to several decisions where a member of a private association was awarded damages for wrongful expulsion from the association, where the expulsion damaged his reputation. In *Sol Sante Club v. Grenier*, 2006 BCSC 1804, the defendant was a probationary member of a nudist club whose membership was revoked. The club sought an injunction to prevent the defendant from exercising ownership interest in the cabin on its land. The defendant counter-claimed for reinstatement and damages for wrongful expulsion. The Court ordered reinstatement of his membership, as well as compensation for the reputational damage he suffered as a result of the club's revocation of his probationary membership. At para. 58, the Court observed that the plaintiff had "proven that the

effects of the wrongful expulsion have caused or contributed to the damage to his reputation and to his prospects at the Club, including being certified and being able to purchase the ... cabin."

[31] The plaintiff also cites *Senez v. Chambre D'Immeuble de Montreal*, [1980] 2 S.C.R. 555, for the proposition that damages may be awarded for the wrongful expulsion of a member from a private Association. In that case, which arose in the civil law context, the Supreme Court of Canada compared the benefits and obligations of the club's by-laws to a contractual relationship between the member and the club. In reaching its conclusion that such an analogy was appropriate, the Court cited common law decisions where damages were awarded for breach of contract where a member was expelled in a manner not in accordance with club rules. Thus, it appears theoretically possible to claim for breach of contract upon wrongful expulsion from a private club.

[32] In this case, the plaintiff does not claim that the Association's disciplinary decision was not in accordance with the rules. Rather, the plaintiff claims that the Association did not exercise due diligence in disciplining him. Admittedly, the lack of a pleading that the Association failed to follow its rules might make it impossible to claim for breach of contract.

[33] The defendant takes the position that the plaintiff's only loss was the loss of prize money and points, which have already been returned to him, thus responding to any claim for damages. Although the plaintiff has claimed damage to his reputation, the defendant denies that such damage occurred, since it did not publish its decision, but only provided it to the plaintiff privately. The plaintiff claims that he was forced to withdraw in mid–competition, after having had substantial success in the first three of the five events. This suggests that there is a genuine issue of fact that needs to be resolved at a trial respecting whether the defendant is responsible for explicitly or implicitly publishing its disciplinary decision.

[34] In my view, there is a genuine issue of fact for trial to determine whether the Association communicated the reason for the plaintiff's withdrawal from the competition, and how widely the reason was communicated. The Association had received complaints from several participants. There appear to have been rumours in circulation regarding the plaintiff's alleged doping, permitting the public to infer that these were substantiated when the plaintiff withdrew from the remaining races. A trial is necessary to determine whether the defendant is responsible for publishing the substance of the disciplinary decision, even if it did not explicitly publish the decision itself.

[35] Finally, the defendant claims that the plaintiff's claim is moot because the Association reversed its decision and returned his prize money and points. While I agree that part of the plaintiff's claim is moot, that there remains a live issue as to whether the defendant communicated its decision in a manner that improperly damaged the reputation of the plaintiff.

[36] As the defendant has not established that there is no genuine issue for trial, there is no need to consider the second branch of the test, namely, whether there is a real chance of success on the part of the plaintiff.

[37] The Association take the position that there was no need to give the plaintiff an opportunity to be heard before the Board decided on the sanctions and penalties to be imposed, because the relationship between the plaintiff and the defendant arise from the contract, and the bylaws did not require an aggrieved party to be given an opportunity to be heard.

[38] I refer to the *Lakeside* case, *supra*, where the Supreme Court stated at para. 28 that there is a narrow jurisdiction to review decisions of societies where the decision is not in accordance with the society's rules, is not made in a manner that

complies with the appropriate principles of natural justice, or is made in bad faith. The defendant argues that it did not breach the rules and that there is no evidence of bad faith. The applicant argues that he should have been given an opportunity to be heard before a decision was reached.

[39] Admittedly, there may be a basis to argue that the level of procedural fairness required might be less than that expected in a formal hearing. However, the level of fairness owed to the plaintiff is a question to be determined at trial. Likewise, whether there is a basis to claim legally compensable damages is a question for trial.

[40] As a result, the following issues raise questions for trial:

> 1. Whether the Association's procedural fairness obligations to the applicant included the right to be heard prior to a disciplinary decision being taken.
>
> 2. Whether, and to what extent, the Association communicated its discipline decision, directly or indirectly, to the public.
>
> 3. Whether the applicant suffered damages as a result of the Association's communication of its decision.

[41] As to the representation that para. 5 of the plaintiff's affidavit should be struck, I have not struck this paragraph, but I have given it no consideration.

[42] The parties may provide submissions on costs within 30 days of the release of this decision.

J.