

SUPREME COURT OF NOVA SCOTIA

Citation: *Gerrard v. Metropolitan Housing Authority*, 2018 NSSC 316

Date: 20181212

Docket: Hfx No. 477257

Registry: Halifax

Between:

Darrell Gerrard

Plaintiff

v.

Metropolitan Housing Authority, Halifax Regional Police
and Nova Scotia Health Authority

Defendants

Judge: The Honourable Justice Joshua M. Arnold

Heard: November 19, 2018, in Halifax, Nova Scotia

Counsel: Darrell Gerrard, Self-represented Plaintiff
Adam Norton, for the Defendant MHA
Duncan Read, for the Defendant HRP
Lesley Sawers, for the Defendant NSHA

By the Court:

Overview

[1] In his Statement of Claim dated June 12, 2018, Darrell Gerrard alleges a violation of his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* by various defendants, including the Metro Housing Authority (MHA), the Halifax Regional Police (HRP) and the Nova Scotia Health Authority (NSHA).

[2] At Part X of his Statement of Claim, Mr. Gerrard states:

The legislation relied upon is the Charter s. 7 – Life, Liberty and Security of the Person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to liberty, which protects an individual's freedom to act without physical restraint. However [sic], the right has been extended to include the power to make important personal choices. The court described it as “[touching] the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can be characterized as fundamentally or inherently personal”

[3] MHA has made a motion for summary judgment on the pleadings in accordance with Civil Procedure Rule 13.03. MHA alleges that:

- (i) the Statement of Claim fails to disclose a reasonable cause of action against the Metropolitan Regional Housing Authority;
- (ii) the pleadings make claims that are unsustainable when the Statement of Claim is read on its own;
- (iii) the Statement of Claim violates the rules respecting pleadings, including Nova Scotia Civil Procedure Rule 38.02 and Rule 38.03(3);
- (iv) such further and other grounds submitted by counsel at the motion hearing.

[4] NSHA had initially intended to join the MHA in this motion, but on July 19, they withdrew this intention.

[5] Mr. Gerrard is self-represented. He signed the court's personal representation form on June 12, 2018.

The Legislation

[6] Civil Procedure Rule 13.03 states:

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

- (a) it discloses no cause of action or basis for a defence or contest;
- (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
- (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

- (a) judgment for the party making a claim, when the statement of defence is set aside wholly;
- (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
- (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
- (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

- (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
- (b) the outcome of the motion depends entirely on the answer to the question.

[7] Section 7 of the *Charter* states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Test for Summary Judgment on Pleadings

[8] In *Canada (A.G.) v. Walsh*, 2016 NSCA 60, Bryson J.A., speaking for the unanimous court, outlined the test for summary judgement on the pleadings and stated:

[17] The parties share common ground that:

1. The test for summary judgment on pleadings requires the Court to assume that the facts pleaded by the plaintiffs are true;
2. The motion can only succeed if the claims disclose “no cause of action”, and are “clearly unsustainable”, (Civil Procedure Rule 13.03(1), *Eisener v. Cragg*, 2012 NSCA 101 (CanLII) at ¶ 9).

[18] These principles are too well known to warrant extensive recapitulation. A recent example in the negligence context is *R. v. Imperial Tobacco Canada*, 2011 SCC 42 (CanLII), where Chief Justice McLachlin discussed the principles applicable to striking out claims on pleadings. They can be summarized:

- Claims should only be struck if it is “plain and obvious” that they cannot succeed.
- The power to strike out claims is “a valuable housekeeping measure which weeds out hopeless claims”. This power promotes efficiency in the conduct of litigation and correct results, both serving the interests of litigants and the administration of justice.
- The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed.
- The pleadings are assumed to be true, and no evidence is admissible on the motion. Claimants cannot rely on the possibility that new facts may turn up. They must plead facts material to the causes of action they assert.

[19] Whether a pleading should be struck as disclosing no cause of action is a question of law reviewed by this Court on a standard of correctness, (*Innocente v. Canada (Attorney General)*, 2012 NSCA 36 (CanLII), ¶ 23).

Analysis

[9] The only mention of the MHA in the Statement of Claim is found at paragraphs 2, 3, 4 and 23, which state variously:

2. The Defendants in this matter are Metropolitan Housing Authority (the “First Defendant”), Halifax Regional Police (the “Second Defendant”) and Mental Health Mobile Crisis Team (the “Third Defendant”).
3. In 2015, the Plaintiff filed a complaint against his neighbor with the First Defendant, regarding noise after midnight. The Plaintiff spoke to Angela Power, property manager and employee of the First Defendant.
4. Ms. Power never responded to the Plaintiff’s complaint, so the Plaintiff phoned the police, the Second Defendant. The Plaintiff was told by an employee of the Second Defendant that if he phoned them again they would “throw handcuffs on him and throw him in jail”.
- ...
23. Because the Plaintiff has no other recourse, he has decided to file this statement of claim against the Defendants.

[10] Mr. Gerrard claims that his constitutionally protected right to life, liberty and security of the person have been violated by the MHA because Angela Power, an employee of the MHA, failed to respond to a noise complaint.

[11] According to *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, any analysis of s. 7 of the *Charter* requires a two-pronged approach. Speaking for the court, La Forest J. stated:

28. The analysis of s. 7 of the *Charter* involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice. Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question; see *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344.

Deprivation of the right to "life, liberty and security of the person"

[12] Mr. Gerrard relies on *R. v. Clay*, 2003 SCC 75, in support of his claim that the failure by MHA to respond to a noise complaint resulted in a violation of his right to life, liberty, and security of the person. Speaking for the unanimous court, Gonthier and Binnie JJ. stated:

31 Reliance is placed by the appellant on the observations of La Forest J. that “privacy is at the heart of liberty in a modern state” (*R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 427) and that “the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an

irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference” (*Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66). However this “privacy” aspect of s. 7 relates to “inherently private choices” of fundamental personal importance. It was invoked by Wilson J., speaking for herself only, to include “the decision of a woman to terminate her pregnancy” in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 171. La Forest J., for a plurality in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 83, spoke in this regard of “the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care”. In *Godbout, supra*, he extended the “irreducible sphere of personal autonomy” (para. 66) to include “the intensely personal considerations that often inform an individual’s decision as to where to live” (para. 67), but six of the nine judges who decided the appeal did not join in that opinion. What stands out from these references, we think, is that the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in “matters that can properly be characterized as fundamentally or inherently personal” (*Godbout*, at para. 66).

[13] In their brief, MHA states:

17. There is no precedent for a noise complaint raising to the level of a deprivation of life, liberty, or security. The Statement of Claim relies on the Supreme Court of Canada’s decision in *R. v. Clay*, 2003 SCC 75, that:

... the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in “matters that can properly be characterized as fundamentally or inherently personal” (*Godbout*, at para. 66).

18. Furthermore, the Plaintiff has not alleged that the Housing Authority has breached the principles of fundamental justice. The Plaintiff has not plead material facts regarding the Housing Authority infringing his life, liberty and security of person; nor did the Plaintiff plead material facts related to a breach of the principles of fundamental justice. The test for a breach of the Plaintiff’s section 7 rights cannot be met by reading the Statement of Claim on its own and is therefore unsustainable against the Housing Authority.

[14] In *Clay*, the appellant argued that his section 7 rights to liberty and security of the person were violated by the availability of imprisonment as a penalty for simple possession of marijuana. The majority of the court held that “while the availability of imprisonment following his conviction for simple possession of marihuana put at risk the appellant's liberty and security of the person, it did so in a manner that complied with the principles of fundamental justice” (para 3). That, of course, was a case of a person actually charged with an offence.

[15] The contours of the section 7 liberty interest are discussed in *Halsbury's Laws of Canada* at §HCHR-57:

Section 7 right to liberty. The s. 7 right to liberty is no general libertinism: it is not a right to do whatever one wants. The protection is, rather, centered on “the core of what it means to be an autonomous human being blessed with dignity and independence in 'matters that can properly be characterized as fundamentally or inherently personal'.” The philosophical view of autonomy underpinning s. 7 is a richer concept than some notion of complete freedom and thus protects instead those freedoms compatible with the ideas of dignity and independence. Accordingly, this branch of s. 7 has been held to protect two interests: (1) freedom from physical restraint; and (2) the making of fundamental personal choices as defined within this conception of autonomous human beings with dignity.

...

Fundamental personal choices. The s. 7 liberty interest also protects a core of human autonomy. The choices accordingly protected are those “basic choices going to the core of what it means to enjoy individual dignity and independence.” These choices would be those choices that are fundamental to a person's choice of how to live his or her life, those within a sort of invisible fence around the individual, such as: decisions to marry or not to marry; decisions to have children or not to have children; decisions concerning medical treatment, parental decisions about the upbringing of their children, and so on.

Constraints not affecting legitimate claims. The s. 7 liberty interest, given its underpinnings, protects only those fundamental choices concerning which individuals have a genuine and legitimate claim grounded in the values of human autonomy and dignity. It is a protection of the fundamental and not the petty and of that which is rightfully claimed rather than what someone merely asserts to be important. Thus, the liberty interest is not engaged by the simple deportation of a non-citizen who has no right to be here (absent state-attributable threats to a s. 7 interest arising because of what is likely to happen thereafter). It is not engaged by the wishes expressed by some to engage in some particular form of consumption of alcohol or drugs or to smoke tobacco. It is not engaged by minor constraints on driving. [Emphasis added.]

[16] I am satisfied that the plaintiff's issue with the handling of his noise complaint by MHA is not within the category of “fundamental choices concerning which individuals have a genuine and legitimate claim grounded in the values of human autonomy and dignity” that might bring it within the liberty interest. While the plaintiff no doubt considered the matter important, that alone does not bring it within the liberty interest.

[17] The authors go on to comment on the section 7 interest in security of the person at §HCHR-58:

HCHR-58 Security of the person. Corresponding to the protections of an individual's very life and an individual's fundamental choices going to his or her core of autonomy and dignity is a protection of a further dimension of the autonomous dignity-bearing self, this being a protection of security of the person. Security of the person as a protected interest under s. 7 has a physical aspect and a psychological aspect. Serious state interference with either of these fundamental aspects of security of the person engages this branch of s. 7.

Bodily/physical integrity. Security of the person protects, in the first instance, bodily integrity in a physical sense. It is engaged, then, by state action causing a risk to health. It is similarly engaged by defences that authorize individuals to use force against one another. It is also engaged by state action that restricts an individual's ability to make choices affecting his or her own body...

[Emphasis added]

[18] I can see no basis on which it would be possible to find that the plaintiff's complaint about MHA's handling of the noise complaint amounted to "serious state interference" with his security of the person. As Hamish Stewart notes in *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 94, trivial or insignificant state actions do not fall within the coverage of section 7.

Part Two: Deprivation is contrary to the principles of fundamental justice

[19] Since there is no violation of s. 7 of the *Charter*, I do not need to go on to consider whether there has been a violation of the principles of fundamental justice.

Rules of Pleading

[20] In seeking to have pleadings struck, the defendant must establish that "even with the assumption that all pleaded facts are true, it is plain and obvious that the claim cannot succeed either because the pleadings on their face show no reasonable cause of action, or that the claim is absolutely unsustainable, or that it is certain to fail because of a radical defect": *Barton v. Nova Scotia (Attorney General)*, 2013 NSSC 121, [2013] N.S.J. No. 187, at para 12. I am satisfied that the pleading discloses no cause of action against MHA.

[21] MHA also argues that Civil Procedure Rule 38.02(3) is violated by the Statement of Claim in that the plaintiff did not plead material facts necessary for MHA to know the contravention.

[22] Rule 38.02(3) provides that “[m]aterial facts must be pleaded, but the evidence to prove a material fact must not be pleaded.” This is a case where the statement of claim “does not disclose a coherent, discernible, or sustainable cause of action”: *Smith v. Brothers*, 2015 NSSC 83, [2015] N.S.J. No. 116, at para. 16. The pleading does not provide material facts that could support a claim.

Conclusion

[23] MHA’s motion is granted. Mr. Gerrard’s claim against them discloses no cause of action. On the pleadings, this is a hopeless case in respect of MHA and must be weeded out of the court system. The claim will be struck as against MHA only.

[24] Each party will bear their own costs.

Arnold, J.