SUPREME COURT OF NOVA SCOTIA
Citation: *Bralich v. Brown*, 2023 NSSC 163

Date: 20230525
Docket: Halifax, No. 518063
Registry: Halifax

Between:

Philip A. Bralich

Plaintiff

and

David Brown Secretary to Sakyong Mipham Rinpoche, Shambhala Canada Inc., Shambhala International, Sakyong Potrang, Inc., Front Range Shambhala, Inc., Global Shambhala Services, Inc.

Defendant

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	March 9, 2023, in Halifax, Nova Scotia
Written Decision:	May 25, 2023
Counsel:	Philip A. Bralich, Ph.D., Self-Represented Plaintiff Michelle L. Chai, Counsel for Defendants, David Brown and Sakyong Potrang, Inc. Stewart F. Hayne and Ryan P.W. Lebans, Counsel for Defendant, Shambhala Canada, Inc.

By the Court:
Overview

[1] In the words oft-attributed to Buddha: "People with opinions just go around bothering one another."

[2] This dispute concerns the alleged wrongdoings of several parties ostensibly involved in the governance of the Shambhala community. The Plaintiff, Philip A. Bralich, is self-represented. He is a member of the Shambhala community.

[3] The Defendants, Shambhala Canada Society and David Brown and The Sakyong Potrang Canada, are seeking summary judgment on the pleadings. The other Defendants, Front Range Shambhala Inc. and Global Shambhala Services, take no position on the motion and contest the jurisdiction of this Court. The Plaintiff strongly argues against the motion and seeks his own relief based on the pleadings.

[4] I find the Plaintiff's action is unsustainable as its pleadings disclose no cause of action. The Defendants' motions for summary judgment on the pleadings are granted.

History of the Proceedings

[5] The Plaintiff filed a Notice of Action and Statement of Claim on September 28, 2022, against the Defendants: Shambhala Canada Society (misidentified as "Shambhala Canada, Inc." in the pleadings), Sakyong Potrang Canada (misidentified as "Sakyong Potrang, Inc." in the pleadings), Shambhala USA (misidentified as "Shambhala International" in the pleadings), Front Range Shambhala, Inc., David Brown, and Global Shambhala Services, Inc.

[6] On December 1, 2022, Shambhala Canada Society filed a Notice of Motion for summary judgment on the pleadings pursuant to Rule 13.03 of the Nova Scotia *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009, (the "*Rules*").

[7] The Plaintiff filed a written response to the Notice dated December 9, 2022 and filed on December 28, 2022 the "Plaintiff's Response to Summary Judgement Motion". Within this response, the Plaintiff also advanced a request for a motion for "reverse" or "boomerang" summary judgment to the effect that he seeks an order granting his claim based solely on his pleadings (see p. 2).

[8] The Defendants, David Brown and Sakyong Potrang Canada (together, the "Sakyong Defendants"), are represented jointly. On January 27, 2023, their counsel filed a Notice of Motion for summary judgment on a similar basis to the notice filed by Shambhala Canada Society.

[9] On February 23, 2023, the Plaintiff filed a Motion for Default Judgment against Shambhala USA and Front Range Shambhala Inc. Subsequently, on February 28, 2023, counsel for Shambhala USA and Front Range Shambhala Inc., filed a letter with the Court, taking the position that they have not been provided with proper service of the Plaintiff's claim and that, should the motions for summary judgment fail, they intend to challenge the Court's jurisdiction over the matter.

[10] On March 6, 2023, the Plaintiff filed further material in response to the motions for summary judgment and in support of his motion for "reverse summary judgment" (Plaintiff's Brief and Reverse Motion).

[11] The attorned Defendants filed material in response to the Plaintiff's "reverse" motion respectively on February 24, 2023, from the Sakyong Defendants, and March 1, 2023, from Shambhala Canada Society.

[12] On March 9, 2023, a hearing was held with the Plaintiff and counsel for both the Sakyong Defendants and Shambhala Canada Society.

[13] At the outset, the parties agreed that it would be expeditious and proper for the motions for summary judgment to be considered in advance of the Plaintiff's motions for default judgment and "reverse summary judgment".

[14] The Court reserved its decision at the conclusion of the hearing. This is my decision.

Position of the Parties

Shambhala Canada Society

[15] Shambhala Canada Society argues that summary judgment should be awarded on three grounds, each of which it says is sufficient to meet the burden it bears to establish summary judgment on the pleadings.

[16] First, it argues that the Plaintiff lacks standing. It says the Plaintiff has not alleged harm that would amount to private interest standing, because he did not claim that he suffered a legal wrong but, rather, that he is claiming relief on behalf

of others. It further argues that the Plaintiff cannot initiate a legal proceeding in respect of generalized injuries relating to the general public.

[17] Shambhala Canada Society argues that the Plaintiff also lacks public interest standing. It says that the pleadings do not meet the public interest standing test outlined by the Supreme Court of Canada in *Downtown Eastside*, 2012 SCC 45, because there is no serious justiciable issue, the Plaintiff has failed to plead any real stake or genuine interest in the outcome of the matter, and the action is not a reasonable or effective means of litigation.

[18] Second, Shambhala Canada Society argues that the action is contingent or premature and that damage must be "actual or imminent, rather than speculative or hypothetical" (see para. 53 of Shambhala Canada Society brief on Motion for Summary Judgment on the Pleadings). They rely on the Plaintiff's admission that the Sakyong is not a party to these proceedings and that his position regarding the trademark and licencing agreement remains unknown. They argue that a claim based on speculation of the Sakyong's opinion would be radically defective as the Plaintiff cannot know and cannot prove their claim because it is premised on something that is unknown, yet undetermined, or has yet to happen.

[19] Finally, Shambhala Canada Society argues that, even if the Plaintiff rectifies the issues noted above, the claim discloses no cause of action. It submits that the Plaintiff has not pleaded that he has any interest in the trademarks or logos and is not privy to any of the trademark licencing agreements being subject to the action. Therefore, it argues that the Plaintiff has not been conferred any rights arising from the licencing agreements and cannot consequently suffer any damages.

[20] Shambhala Canada Society concludes that the Plaintiff's claim is "based on inferences and his subjective feelings towards whom he believes should be the rightful owners of the logos and trademarks" (see para. 72 of Shambhala Canada Society brief on Motion for Summary Judgment on the Pleadings).

[21] Shambhala Canada Society seeks an order that the pleadings be struck in their entirety, and the proceeding dismissed with costs.

The Sakyong Defendants

[22] The Sakyong Defendants agree with Shambhala Canada Society's submissions and have made their own submissions in arguing that the pleadings

disclose no cause of action. In particular, they focus on the civil tort of fraud and trademark infringement.

[23] Regarding fraud, they argue that the Plaintiff has no legal standing, does not specify his own loss, and makes bald allegations of bad faith and abuse of power by the Defendants without particularizing them. The Sakyong Defendants rely on Rule 38.03(3) that requires pleadings to "provide full particulars of a claim alleging unconscionable conduct".

[24] Regarding trademark infringement, they argue that the Plaintiff does not have standing, as the rights belong to the Defendants, any non-authorized use is based on the unknown opinion of the Sakyong, and the Plaintiff does not disclose any personal damages for the tort of passing off.

[25] The Sakyong Defendants seek that the pleadings be struck, and the proceeding dismissed with costs.

The Plaintiff

[26] The Plaintiff rejects all the arguments advanced by the Defendants.

[27] The Plaintiff argues that he has private standing as a member of the Shambhala community, evidenced by his knowledge of Shambhala as contained within the pleadings. He further submits that he has public interest standing as a citizen of the United States of America.

[28] The Plaintiff argues that the cause of action is the "loss of the product that he has supported and participated in for 40 years through the … frauds perpetrated by the defendants" (Plaintiff's Response to Summary Motion at p. 5). He further submits that the Defendants committed fraud: "primarily a fraud by omission of crucial pertinent facts concerning the continuing authenticity of the product of the trademarks agreement" (Plaintiff's Brief and Reverse Motion at p. 5).

[29] The Court finds what can fairly be gleaned from the totality of the Plaintiff's arguments is that, in his submission, the restructuring of the Shambhala community has resulted in a fraudulent continuance of Shambhala practice -- one which is different than before but disguised as the authentic original.

[30] In considering the Plaintiff's position, it is worth commenting on the abusive language of the pleadings and submissions. Some examples of this reflect what I

see as the Plaintiff's disagreement with the recent developments in the Shambhala community -- a perspective immersed in the Plaintiff's submissions.

[31] The Plaintiff puts forward multiple grievances with the Shambhala community; however, these do not amount to material facts with relevancy to the Plaintiff's claims. For example, the Plaintiff refers to the need to prevent "new age screwballs and guru wannabes from going off half-cocked and proclaiming themselves enlightened-er than their teachers" (Plaintiff's Response to Motion at p. 4). He refers to a "coterie and shadow network" conspiring to govern the Shambhala community outside of traditions (Plaintiff's Brief and Reverse Motion at p. 4). He suggests that the Sakyong was scandalized by "hyperbolic and near hysterical reinterpretations of trivial, perfectly legal mishaps and disputes in mature, adult heterosexual relationships … partly aggrandized through further hyperbolic insistence that religious leaders had a higher standard to meet in dating behaviors than the average public and that abuse could reasonably be alleged against any disappointment a partner of a religious leader might have due to teacher-student disparities in power and influence … as though anyone who had significant wealth could be held accountable for abuse for virtually any dispute or disparity that might occur with an impoverished partner" (Plaintiff's Statement of Claim at p. 4). He says that the investigation of this scandal was managed by a "squawking mob of bumpkins hyped up on hearsay and mob mentality that is instead nothing but kangaroo courts and lynch mobs fueled by sexually deluded and power crazed would be usurpers of the Sakyong's influence" (Plaintiff's Statement of Claim at p. 4).

[32] These statements reflect the Plaintiff's frustration surrounding changes in the Shambhala religious community but do not amount to legal claims.

Analysis

[33] Summary judgment on the pleadings is governed by Rule 13.03. The Rule reads:

> 13.03 Summary judgment on pleadings
>
> (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.

[34] Rule 13.01 narrows the scope of utility in considering a motion for summary judgment. It reads, in part:

13.01 Scope of Rule 13

…

(2) This Rule is not for economical disposal of a claim or defence that may have some merit, to be determined through assessment of credibility or otherwise …

> (3) This Rule is not for disposal of frivolous, vexatious, scandalous, or otherwise abusive pleadings …

[35] The principles applicable to such motions are discussed in *McDougall v. Nova Scotia (Workers' Compensation Board)*, 2016 NSSC 333:

> [4] The principles governing summary judgment on pleadings have been summarized in several cases, including *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2010 NSSC 25, … . In *Body Shop*, Bourgeois J. (as she then was) said:
>
> > 10 A motion pursuant to Rule 13.03, on the pleadings, is analogous to the "application to strike" under Rule 14.25 of the former 1971 Civil Procedure Rules … [T]he implementation of the current Civil Procedure Rules on January 1, 2009, has not eroded the applicability of earlier case authorities. This approach has been recently endorsed by this Court in *Murphy v. Murphy* 2009 NSSC 138, where Warner, J. writes at para. 26 as follows:
> >
> > > The test in new CPR 13.03 (old CPR 14.25) – summary judgment on pleadings, is that the pleading discloses no cause of action [13.03(1)(a)], or the claim is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Supreme Court wrote that the question was: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of claim disclosed no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck.
> >
> > 11 The Court of Appeal has recently re-affirmed the rule for striking of pleadings, which I find is still applicable to motions under new Rule 13.03. Writing for the Court in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, MacDonald, C.J.N.S. writes at para. 17 as follows:
> >
> > > [17] Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.
> >
> > 12 The Court further, reaffirms the standard as articulated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, writing at para. 18 as follows:

> > [18] In following *Hunt*, our court has recently confirmed that in order to strike pleadings under Rule 14.25(1)(a), they must appear to be either "certain to fail" (2007 NSCA 70 at para. 13) or "absolutely unsustainable" (*CGU Insurance Co. of Canada v. Noble*, 2003 NSCA 102 at para. 13).
>
> [5] In *Walsh v. Atlantic Lottery Corp. Inc.*, 2015 NSCA 16, [2015] N.S.J. No. 56 (N.S. C.A.), the Court of Appeal cited with approval the summary of the law set out by the chambers judge:
>
> > 7 Justice LeBlanc was well aware of the heavy burden faced by the Government. It would have to establish that, assuming every alleged fact to be correct, the claim still would have no chance of success. He observed:
> >
> > > [16] Summary judgment on the pleadings should not be granted lightly. A party whose action is summarily dismissed under Rule 13.03 will be denied his or her day in court. The harsh nature of the remedy demands that the applicant meet a heavy burden. I must be satisfied, even after assuming that all allegations contained in the pleadings are true without the need to call evidence, that the claim "is certain to fail", or is "absolutely unsustainable" or "discloses no reasonable cause of action": *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para. 17, *Eisener v. Cragg*, 2012 NSCA 101 at para. 9.
>
> [6] In considering an application for summary judgment on pleadings, the court is required to "take as proven all of the allegations in the statement of claim. It must then determine whether the claims as pleaded are clearly unsustainable": *Andrews v. Duncan*, 2016 NSSC 103, [2016] N.S.J. No. 148 (N.S. S.C.), at para. 7.

[36] In the context of hearing the Plaintiff's arguments and making this decision, I am mindful of his status as a self-represented litigant.

[37] My analysis will follow the three grounds for summary judgment advanced by the moving parties, that the Plaintiff lacks standing, that the action is contingent or premature, and that the pleadings disclose no cause of action. I will also consider whether the Plaintiff should be allowed to amend his pleadings.

1. Does the Plaintiff lack standing?

Private interest standing

[38] The Defendant, Shambhala Canada Society, submits that the Plaintiff lacks standing to bring the action. They rely on the Supreme Court of Canada in

Downtown Eastside, at para. 1, where the Court held that: "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter".

[39] Although it was not raised, the issue of standing falls within the inherent jurisdiction of this Court, as was found in *Canadian Elevator Industry Education Program (Trustees of) v. Nova Scotia (Elevators and Lifts Act)*, 2015 NSSC 362 at para. 69. The Court in that case was considering private interest standing for bringing a judicial review. However, I find the principles applicable to the issue of private interest standing before me. As provided beginning at para. 71:

> [71] To have standing to bring an application for judicial review, a person has a certain test to meet: commonly phrased as a "person aggrieved". It has also been described as "an interest peculiar to him or herself", a "more special interest", and interest "beyond that of the general public". I refer to the case *Lord Nelson Hotel Ltd. v. Halifax (City)* (1972), 4 N.S.R. (2d) 753 (N.S.C.A) as an example. Many cases and authors both inside and outside Nova Scotia have discussed this test. Furthermore, there must be a correlation between the decision and its effect on the applicant.
>
> [72] In order to make that determination, I will need to look at the circumstances whereby the parties find themselves before this Court.

[40] The Nova Scotia Court of Appeal upheld the decision (see 2016 NSCA 80), and further clarified at para. 37:

> [37] As a matter of principle, the merits should not matter when considering private interest standing for the simple reason that a party who has an interest in the proceeding should not need to demonstrate the strength of his case to obtain the standing to make it. …

[41] The Plaintiff argues that his standing comes from his membership in the Shambhala/Naropa community and his American citizenship. However, he does not disclose this in his pleadings but only his Response to Summary Judgment Motion and Brief and Reverse Motion.

[42] The Plaintiff has not pled that he is a party to the subject trademark or licencing agreement. He has not pled that he is the owner of the subject trademark or licence. There is simply no basis grounded within the pleadings to find that the Plaintiff has standing in relation to the alleged trademark infringement/fraud.

[43] In addition, even with a generous assessment of the pleadings in light of the fact that the Plaintiff is self-represented, I cannot conclude that the pleadings support a finding that he has standing on the alleged fraud either.

[44] In fact, the pleadings neither reference the Plaintiff, nor do they situate the Plaintiff's relationship to the Defendants and the alleged wrongdoings. In each instance where the Plaintiff is alleging harm or claiming relief, he is doing so on behalf of others without any pleaded basis for doing so. Nowhere in the pleadings does the Plaintiff claim to fall into one of the groups being deceived: "new member", "dues member", "donor" or "granting authority" (Plaintiff's Statement of Claim at p. 5). Later in his Brief and Reverse Motion, the Plaintiff claims to be a member of the Shambhala community and that they have "committed to and have been paying for for decades [sic]" for lineage-based religious programs. This, however, was not disclosed in the pleadings.

Public interest standing

[45] In addition to private interest standing, the Plaintiff has argued that he has public interest standing in this action as "a citizen in good standing of the United States of America" (Plaintiff's Response to Summary Motion at p. 4).

[46] The Plaintiff's position does not meet the threshold for public interest standing. The test for public interest standing as discussed in *Downtown Eastside* at para. 2, requires a Court to consider:

(a) whether the case raises a serious justiciable issue;

(b) whether the party bringing the action has a real stake or genuine interest in its outcome; and

(c) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

[47] First, I cannot find that a justiciable issue arises, as the pleadings do not disclose a cause of action capable of being adjudicated (explored below). The Supreme Court at para. 42 of *Downtown Eastside* held that a serious issue must raise a "substantial constitutional issue" or an "important one". The pleadings do not contain any issues relating to the Constitution, the *Charter* or any other piece of legislation. Although public interest standing can be dismissed at this stage of the test, I will move through the next stages of the analysis.

[48] Second, the pleadings themselves do not support a finding that the Plaintiff has a real stake or genuine interest in the action's outcome. I make this conclusion for the same reasons for which he does not have private interest standing, because the Plaintiff has not provided any information in the pleadings to create even a tenuous link between his own interests and the outcome of this action. His pleadings do not disclose any connection between himself as a rightsholder to the trademark or in any public being frauded. At times, the Plaintiff has made submissions akin to him being a representative party to a class of victims, without any meaningful basis upon which this could reasonably be advanced.

[49] Furthermore, being a "citizen of the United States of America" does not sufficiently support a "real stake or genuine interest" in this action (Plaintiff's Response to Summary Motion at p. 4). Besides this being an overly generalized basis to create the requisite interest, this action is being brought in Canada, specifically Nova Scotia.

[50] Third, this is clearly not a reasonable and effective means for bringing this case to court. When considering what constitutes a "reasonable and effective means", the Supreme Court in *Downtown Eastside* stated at para. 50 that:

> [50] … courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. …

[51] The Supreme Court added at para. 51 that the judge may further consider "the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting," whether "those with a more direct and personal stake in the matter have deliberately refrained from suing" and "whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination."

[52] The Plaintiff's pleadings do not create such a "factual setting" from which I can find a justiciable cause of action. As conceded by the Plaintiff, the Sakyong himself has not yet claimed infringement or fraud. The Plaintiff, in submissions and in a letter to the Defendants to which this Court was copied, has suggested that if the Defendants were to contact the Sakyong Potrang, then this entire matter could be resolved. This suggestion by the Plaintiff is a direct concession to an

alternative means for a more effective use of judicial resources for an adversarial determination. For these reasons, the claim of public interest standing must be dismissed.

[53] Therefore, the Plaintiff lacks both private and public interest standing in relation to both the alleged trademark infringement/fraud and alleged misrepresentation.

[54] In the event I am wrong in my conclusion on the Plaintiff's private interest standing, I will proceed to consider whether the claim is contingent or premature, and whether the pleadings sufficiently disclose a cause of action.

2. Is the action contingent or pre-emptive?

[55] Whether the action is contingent or pre-emptive is a factor weighed in both the issue of standing and the failure to disclose a cause of action. The issue of whether the Plaintiff has an interest or genuine stake is a matter of standing. Whether the material facts from the Plaintiff's pleadings create a contingent or pre-emptive cause of action will be addressed in the next section.

3. Does the Statement of Claim fail to disclose a cause of action?

[56] *Holloway Investments Inc v. Hardit Corporation*, 2020 NSSC 132, held that "[t]he summary judgment rule must be read in conjunction with Rule 38, which pertains to pleadings. This provision mandates that pleadings must provide sufficient information to allow the other party to respond …" (see para. 23).

[57] Rule 38 reads:

> 38.02 General principles of pleading
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> …
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.
>
> …
>
> 38.03 Pleading a claim or defence in an action
>
> …
>
> (3) A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.

[58] The Court in *Holloway* provided a helpful summary of the required threshold for considering whether material facts have been provided such that the pleadings disclose a cause of action:

> [29] In *Knight v Imperial Tobacco Canada Ltd*, *supra*, the Supreme Court of Canada put it in these terms:
>
> > 22 It is incumbent on the claimant to clearly plead the facts upon which it relies on making its claim.
>
> The Nova Scotia Court of Appeal has confirmed repeatedly that, to avoid summary judgment, the statement of claim must plead the essential facts needed to support the asserted causes of action. In *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, Justice Fichaud found that under Rule 13.03, the pleadings must advance a cause of action and plead the facts which satisfy the legal elements of that cause of action:
>
> > 23 Whether to grant an order for summary judgment on the pleadings usually is not discretionary. It is a matter of law, premised on assumed facts, and involves analysis and comparison of the written pleadings and the legal prerequisites for the cause of action that is advanced. …

[59] The Plaintiff's pleadings in this case are challenging to follow. They are long-winded and confusing. They are not concise. A large portion of the hearing was spent trying to obtain a clear description from the Plaintiff of what this action entails.

[60] There are only three causes of action which could be deducted from the totality of the Plaintiff's submissions: trademark infringement, fraud, and breach of contract.

Trademark Infringement

[61] The Plaintiff alleges that the trademark infringement cause of action relates to the Defendants' use of logos and trademarks allegedly held by the Sakyong Potrang and arising from a fraudulent licencing agreement. Notwithstanding the apparent issue of standing, this cause of action is unsustainable given the lack of material facts pled to support it.

[62] Quite simply, the pleadings fail to disclose any non-authorized use of the subject logos and trademarks. Rather, the pleadings effectively admit that there are no facts to support this basic element of the alleged infringement, stating: "the opinion of the true leader [that being the Sakyong who allegedly is the true owner of the trademarks] … remains unknown" (Plaintiff's Notice of Action at pp. 1–2).

Civil Tort of Fraud

[63] The Supreme Court of Canada in *Bruno Appliance and Furniture, Inc v. Hryniak*, 2014 SCC 8 at para. 21 outlines four elements required to make out the civil tort of fraud:

> (a) a false representation made by the defendant;
>
> (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
>
> (c) the false representation caused the plaintiff to act; and
>
> (d) the plaintiff's actions resulted in a loss.

[64] In this case, the pleadings fail to provide sufficient material facts such that they disclose the civil tort of fraud. In particular, the pleadings do not disclose any basis on which it could be suggested that the alleged false representation, namely, the offering of Shambhala services despite no "authenticity" caused the Plaintiff to act. The pleadings do not suggest the Plaintiff was induced in any way. Even if there were material facts provided in the pleadings which satisfied this element, the pleadings also fail to show how that purported action resulted in a loss.

[65] While only the pleadings can be considered in a motion for summary judgment on the pleadings, I would further clarify that the Plaintiff has subsequently submitted that his losses are the "loss of the product which he has supported and participated in for 40 years", "the Plaintiff's ability to act (to study

and practice in an authentic, Buddhis lineage)" and "the ability to continue old practices and add new ones" --which I interpret to refer to what the Plaintiff calls authentic Shambhala practice (Plaintiff's Response to Summary Motion at p. 5 and Plaintiff's Brief and Reverse Motion at p. 13). However, these submissions do not show the connection between how the Plaintiff's actions resulted in this loss. Indeed, in the Plaintiff's view, the alleged loss *resulted* in his action; the civil tort of fraud does not work in this order.

Contractual Misrepresentation

[66] In considering the pleadings in their totality, the Plaintiff may be advancing another cause of action, a breach of contract by misrepresentation.

[67] The following excerpts of the Statement of Claim vaguely clarify this cause of action:

- "In addition, new members, donors, and granting authorities <u>are being misled</u> into thinking they are participating in and perhaps joining a legitimate Buddhist or Shambhala church with an established and intact lineage …" (p. 2)
- "As dues members, donors, and granting authorities have all been paying for and supporting the authenticity of the Buddhist teachings and traditions since 1973 until this licensing agreement of 2022, it must also be necessarily concluded that any and all expenditures by Shambhala International since that vote are <u>fraudulent violations of the contract and the trust of those who have paid</u> for and continue to pay for the expenses of the community." (p. 5)

[Emphasis added]

[68] Misrepresentation in a contractual setting contains common elements with the civil tort. The available remedies are different. Only an action in contract allows for recission of the contract. Iacobucci J. writing for the Supreme Court of Canada at para. 39 in *Queen v. Cognos Inc*, [1993] SCJ No. 3, added:

> … The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. Put another way, did the pre-contractual representation relied on by the plaintiff become an express term of the subsequent contract? …

[69] In *Kelemen v. El-Homeira*, 1999 ABCA 315 (leave to appeal refused [2000] SCCA No. 40), the Alberta Court of Appeal held that contractual misrepresentation must induce the Plaintiff into entering the contract based on an objective or reasonable person standard (see paras. 19–20).

[70] The Plaintiff has pled insufficient facts to show that there was the formation of a contract between himself and the Defendants. The only semblance of a contractual relationship are the references to "dues members" but, even assuming that the Plaintiff fits within that class, does not rectify the scarcity of material facts provided in the pleadings upon which a contract could said to be formed.

[71] There are insufficient material facts pled to show that there was a misrepresentation. The pleadings suggest that the developments in the Shambhala community to which the Plaintiff takes disagreement were public. These circumstances do not support misrepresentation.

[72] Moreover, the pleadings do not disclose any express terms made out by the Defendants that caused the Plaintiff to act by entering into a contract.

[73] Finally, and again, the pleadings do not support a finding that the Plaintiff has suffered any losses. This is another missing element for an action based upon a breach of contract.

[74] In summary, it is plain and obvious that the pleadings disclose no cause of action such that the action is unsustainable.

Should the Plaintiff be permitted to amend the Statement of Claim?

[75] Should this Court allow the Plaintiff an opportunity to amend its Statement of Claim in order to rectify the deficiencies in the pleadings.

[76] Under Rule 83.02(2) to (3), the Plaintiff may amend its pleadings if the parties claimed against have not filed a Notice of Defence; however, this must be read considering the Defendants' motions for summary judgment, the events of this proceeding, and Rule 13.03.

[77] First, and most importantly, the Plaintiff has not put forward a motion to amend its pleadings or made a request to amend them.

[78] Second, I find that the Plaintiff's failure to abide by the requirements for pleadings is not an irregularity which I can excuse by allowing an amendment in light of the Defendants' motions for summary judgment.

[79] Rule 2.03(3)(a) is clear in stating that a judge's general discretion does not override mandatory provisions in the *Rules*. Rule 13.03(1) and (2) are clear in stating that where the pleadings are deficient in the stipulated ways, I must set them aside and I must grant summary judgment for the moving party. These are mandatory provisions.

[80] Third, and being mindful of the Plaintiff's status as a self-represented litigant, I find that this is not a circumstance where the Defendants' motions for summary judgment should be adjourned to allow the Plaintiff to make a motion to amend the pleadings.

[81] In *Lamey v. Wentworth Valley Developments Ltd*, [1999] NSJ No 122, (NSCA) at para. 23, Glube CJ writes that the decision to strike a motion to amend pleadings is based on "whether it is 'plain and obvious' that the amendment to the statement of claim discloses no reasonable claim or cause of action." There is no motion before the Court and, even given a generous leniency to the Plaintiff as a self-represented litigant, I have not been able to deduce how an amendment would produce a reasonable claim or cause of action.

[82] The Plaintiff has had ample opportunities to clarify his position through his letter in reply to the motion for summary judgment, his pre-hearing brief, and the hearing itself. The Plaintiff submitted both a response to the Shambhala Defendant's motion for summary judgment and a pre-hearing brief that contained his reverse "boomerang" motion and effective response to the Sakyong Defendants' parallel motion for summary judgment (Plaintiff's Response to Summary Motion and Plaintiff's Brief and Reverse Motion). These additional submissions attempted to amend his original pleadings by adding responses to the motions of the Defendants and new facts as well as claims. Moreover, the Plaintiff had the opportunity to further clarify his pleadings at the summary judgment hearing.

[83] Noting his status as a self-represented litigant, I have attempted to make out any possible claims and issues of standing given the totality of the Plaintiff's submissions. Through such a review, I have not found any reasonable claim or cause of action.

[84] For these reasons, I shall not adjourn the summary judgment motion to allow the Plaintiff to amend his pleadings.

Conclusion

[85] The Supreme Court of Canada reminded all participants to the legal system of the value of summary judgment proceedings in *Knight v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para. 19:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[86] This is one of those hopeless claims where housekeeping is justified. The Plaintiff's action is unsustainable.

[87] The motions are granted. The pleadings shall be struck, and summary judgment granted for the moving parties. If the parties are unable to reach an agreement on costs, I shall receive written submissions within 30 days of the date of this decision.

Bodurtha, J.