CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212
COURT FILE NO.: CV-18-1938
DATE: 2019 02 21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KELLY LYNN DONOVAN	)	Self-Represented
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN	)	Donald Jarvis and Cassandra Ma, for the Defendants
	)	
	)	
Defendants	)	
	)	
	)	**HEARD:** February 13, 2019

REASONS FOR JUDGMENT

DOI J.

Introduction

[1] This is an action for breach of contract. The Plaintiff claims that the Defendants appealed her claim for workers' compensation benefits and thereby

breached the terms of a release under a Resignation Agreement they executed with her. She also claims that the Defendants delivered an affidavit in a separate court proceeding which identified her, contrary to the confidentiality terms of the Resignation Agreement.

[2] The Defendants brought this motion under Rules 21.01(1)(b), 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to strike the Amended Statement of Claim issued May 4, 2018. For the reasons that follow, the pleading is struck under Rule 21.01(1)(b) without leave to amend.

Background

[3] The Amended Statement of Claim discloses the following.

[4] The Plaintiff is a former police officer who resigned her position with the Defendant Waterloo Regional Police Services Board ("Board") after executing a Resignation Agreement on June 8, 2017 with the Board and her collective bargaining agent, the Waterloo Regional Police Association.

[5] The Amended Statement of Claim refers to the Resignation Agreement and pleads, among other things, the following provisions:

> Except where disclosure is required by law, or where disclosure is to Donovan's immediate family members or to persons providing professional financial/legal advice (all of whom agree to be bound by this non-disclosure and confidentiality clause), the parties undertake and agree that they will keep the terms and existence of this Resignation Agreement in absolute and strict

> confidence at all times, without time limitation, and not disclose its contents to any third party, person or entity. For added certainty, and without limiting the generality of the foregoing, the parties undertake and agree that they will not publicize, discuss, disclose or communicate in any way with any person, entity or organization, in any form whatsoever, the contents or terms of all or any part of this Resignation Agreement. If asked, the parties (and anyone subject to the terms of this non-disclosure and confidentiality clause) will indicate only that all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which settlement are strictly confidential.
>
> […]
>
> THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD […] does hereby release and forever discharge KELLY DONOVAN ("DONOVAN") from any and all actions, causes of action, complaints, applications, appeals
>
> […]
>
> AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.

[6] After the Resignation Agreement was executed, the pleading alleges that the Defendants breached the terms of the contract.

The Claim

[7] On May 9, 2018, the Plaintiff commenced this action. Her Amended Statement of Claim seeks damages against the Board and the personally-named Defendant, Bryan Larkin, Chief of the Waterloo Regional Police Service, and her reinstatement as a police officer with the Board, for the Defendants' alleged breach of the Resignation Agreement by: (i) appealing her claim (Claim No. 30505408) for statutory care and benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace incident; and (ii) delivering an affidavit

sworn by Chief Larkin on December 21, 2017 in a separate court proceeding that contained information that is said to have disclosed her identity in breach of the confidentiality terms under the Resignation Agreement.[1]

[8] The Defendants responded to the claim by delivering a Notice of Motion dated June 7, 2018 to strike the claim.

The Test under Rule 21.01(1)(b)

[9] Under Rule 21.01(1)(b), a party may strike all of part of a claim for failing to disclose a reasonable cause of action. The framework for a Rule 21.01(1)(b) motion is well established. There is no evidence on a Rule 21.01(1)(b) motion. The material facts pleaded are deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or manifestly incapable of being proven. The court is entitled to read and rely on the terms of any document pleaded or incorporated by reference in the claim. As the facts pleaded are the basis for evaluating the claim's possibility of success, a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The novelty of the cause of action is of no concern at this stage of the proceeding, and the statement of claim must be read generously to allow for drafting deficiencies. If the claim has some chance of success, it must be permitted to

[1] On or about May 30, 2017, the Board was named as a defendant in a class action. The putative class members in the class action were current and former employees of the Board and their family members. The Plaintiff was not a putative class member in the proceeding. On July 13, 2018, Baltman J. dismissed the class action; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307.

proceed; *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 22; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 14 and 15.

[10] To strike a claim under Rule 21.01(1)(b), it must be plain and obvious on a generous reading that the claim discloses no reasonable cause of action; *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 7; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. In *Imperial Tobacco*, the rationale for this test was explained (at paras. 17 and 19 to 21):

> The Test for Striking Out Claims
>
> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.
>
> […]
>
> 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.
>
> This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
>
> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. […] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*.

> Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [citations omitted]

[11] Leave to amend a claim will not be permitted when it is plain and obvious that no tenable cause of action is possible on the facts alleged: *Conway v. L.S.U.C.,* 2016 ONCA 72 at para. 16.

Position of the Parties

[12] The Defendants submit that the Amended Statement of Claim fails to plead the requisite elements to support a breach of contract claim against them. Their argument is two-fold. First, they submit that the Board's effort to seek a review of the Plaintiff's initial entitlement decision by the Workplace Safety and Insurance Board ("WSIB") (i.e., by filing an Intent to Object) under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.17, Sch. A, as amended ("WSIA"), was not a breach of contract because the WSIA expressly prohibits parties from contracting out of the statutory scheme. They further submit that Chief Larkin's affidavit cannot form the basis of a claim for breach of contract as it was prepared for use in a court proceeding and is subject to absolute privilege.

[13] The Plaintiff relies on the Resignation Agreement as the contractual basis for her claim. By commencing a review or appeal of her initial entitlement decision by the WSIB for statutory workplace insurance benefits, the Plaintiff

claims that the Defendants breached the terms of their settlement agreement with her. She further alleges that Chief Larkin's affidavit was made without regard to the confidentiality term under the Retirement Agreement as pleaded in the Amended Statement of Claim, and relies on this in further support of her breach of contract claim.

Analysis

[14] As the Plaintiff's action is for a breach of contract, the claim must prove: (i) the existence of a contract with the Defendants; and (ii) a breach of the contract; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 32.

[15] The Amended Statement of Claim pleads the Resignation Agreement as the underlying basis for the claim. Paragraph 5 of the claim pleads the confidentiality clause under the Resignation Agreement, and paragraph 6(a) pleads an excerpt of the Resignation Agreement by which the Board broadly agreed to release and forever discharge the Plaintiff "*from any and all actions, causes of action, complaints, applications and appeals …*" Paragraph 6(b) pleads a further provision of the Resignation Agreement by which the Defendants agreed "*not to commence, maintain or continue any action, cause of action, claim, request, complaint, demand or other proceeding, against any person,*

corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity."

Claim for breach of contract by commencing a proceeding under the WSIA

[16] I am persuaded that the release executed by the Board under the Resignation Agreement did not preclude it from participating in the WSIB proceedings. I also find that it is plain and obvious that the claim arising from the Board's effort to review the Plaintiff's initial entitlement decision by the WSIB has no reasonable prospect of succeeding.

[17] The Amended Statement of Claim pleads that the terms of the Resignation Agreement include a release in favour of the Plaintiff against "*any and all actions, causes of action, complaints, applications, [and] appeals,*" among other things, as well as a further agreement "*not to commence any action, cause of action or claim, request, complaint, demand or other proceeding against any person corporation or entity in which any claim could arise against the Plaintiff for contribution or indemnity.*" The Plaintiff relies on these terms under the Resignation Agreement for her breach of contract claim against the Defendants for submitting an appeal of her initial entitlement decision by the WSIB on January 11, 2018.

[18] The Defendants submit that the Board's review of the Plaintiff's initial entitlement decision by the WSIB could not have led to any kind of finding of

liability or obligation owed by the Plaintiff. Absent any fraud or misrepresentation, which is not alleged here, the Defendants submit that the WSIB will not pursue a recovery of benefits from a worker if it reverses a previous decision that granted the worker entitlement to benefits; WSIB Policy 19-08-04: Recovery of Benefit-Related Debts, at pp. 1, 3 and 4; Decision No. 1658/02, 2002 WSIA 2718 at para. 20. Accordingly, the Defendants submit that the Board's review of the initial entitlement decision did not implicate the term under the Resignation Agreement by which the Board agreed to not commence a proceeding in which a claim could arise against the Plaintiff for contribution or indemnity.

[19] Assuming that the Defendants' view accurately reflects the policy intent of the above-mentioned WSIB Policy and its interpretation by the appeals tribunal, it still remains uncertain (albeit in a remote sense) as to whether the Plaintiff may, at some future time, incur a potential claim for contribution or indemnity based on some aspect of the Board's review of her initial entitlement decision. To definitively say otherwise would necessarily call for speculation as to future events and cause the decision to fall outside the plain and obvious test.

[20] Moreover, the Amended Statement of Claim also pleads a much broader release by the Board under the Resignation Agreement to release the Plaintiff from "*any and all … complaints, applications and appeals*." On a plain reading of this term on its face, it seems at least arguable that it captures the Board's review of the WSIB's initial entitlement decision, as the Plaintiff's submits. She also

notes that the Board sought a review of her initial entitlement decision by the WSIB several months after it executed the Resignation Agreement.

[21] Despite the foregoing, I accept that the Resignation Agreement cannot prevent the parties from participating in proceedings before the WSIB as parties cannot contract out from their rights and obligations under the legislative scheme governing workers' compensation in Ontario. As explained by Juriansz J.A. for the Court of Appeal for Ontario, workplace parties cannot waive their rights and obligations under the WSIA as a matter of law:

> I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

[22] *Fleming v. Massey*, 2016 ONCA 70 at para. 34; leave to appeal to the SCC dismissed with costs, 2016 CanLII 33997; citing *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 214.

[23] The finding by the Court of Appeal in Fleming makes is abundantly clear that the release provision under the Resignation Agreement cannot operate to preclude the Board, or the Plaintiff for that matter, from exercising rights and discharging obligations under the WSIA. As a matter of law, parties cannot contract out of the scheme under the WSIA. Accordingly, it is plain and obvious

that the Plaintiff's claim for breach of contract based on the Board's effort to seek a review of her initial entitlement decision by the WSIB simply fails to disclose a reasonable cause of action.

[24] In arriving at this finding, I also am mindful of ss. 118(1), (2), (3) and (4) of the WSIA which provide the WSIB with exclusive statutory jurisdiction that cannot be restrained by a proceeding in court:

> 118 (1) the Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.
>
> (2) Without limiting the generality of subsection (1), the Board has exclusive jurisdiction to determine the following matters:
>
> […]
>
> 2. Whether personal injury or death has been caused by an accident.
>
> 3. Whether an accident arose out of and in the course of an employment by a Schedule 1 of Schedule 2 employer;
>
> […]
>
> (3) An action or decision of the Board under this Act is final and is not open to question or review in a court.
>
> (4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise in a court. [emphasis added]

[25] Of particular note is the strongly worded privative clause at s.118(4) of the WSIA that precludes a party from restraining proceedings before the WSIB by pursuing a claim or remedy in court; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719 at para. 22. While the legislature cannot completely oust the jurisdiction of the Superior Court, which is

derived under s. 96 of the *Constitution Act, 1867*, I find that s. 118(4) precludes the Plaintiff from pursuing her breach of contract claim to restrain the Board from taking part in proceedings before the WSIB involving her workers' compensation claim under the WSIA; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 54-56, 59 and 66.

Claim for breach of contract by filing affidavit

[26] The Defendants argue that it is plain and obvious that the Plaintiff's claim based on Chief Larkin's affidavit has no reasonable prospect of success. I agree with this.

[27] The Amended Statement of Claim pleads that Chief Larkin swore an affidavit on December 21, 2017 to defend a class action lawsuit (Court File No. CV-17-2346-00) which made allegations alleged of systemic and institutional gender-based discrimination and harassment. Specifically, the claim pleads that Chief Larkin attached to his affidavit a chart prepared by the Human Resources Division of the police service to show complaints to the Human Rights Tribunal that female employees had made in the last five years, together with their status or resolution. The affidavit expressly states that this chart provides non-identifying information to preserve the identities of the complainants, with the exception of the representative class action plaintiff whose complaint to the Human Rights Tribunal remained outstanding when the affidavit was sworn.

[28] The claim pleads that the attached chart to Chief Larkin's affidavit is titled "*Police Officer initiated Ontario Human Rights Complaints*" and lists four (4) female officers who are identified as follows:

a. One female officer is named and the three remaining female officers are not.

b. Of the three-unnamed female officers, two are listed as "Constables" and one as "Sergeant."

[29] Of the two unnamed "Constables" who are mentioned in the chart, the Amended Statement of Claim pleads that one complaint is shown as having had been resolved in the following manner:

i. "SETTLED: - monetary settlement, - withdrawal of OHRT application - voluntary resignation."

[30] The claim pleads that only one female officer is listed on the chart as having "voluntarily" resigned. By process of elimination, the claim asserts that Chief Larkin's affidavit has the effect of identifying the Plaintiff as she is the only female constable employed by the Board over the past five years who had filed a human rights complaint and voluntarily resigned.

[31] In pleading a breach of contract, the Amended Statement of Claim states that Chief Larkin's public disclosure was not required by law, contained sufficient information to identify the Plaintiff, and violated the terms of the Resignation Agreement.

[32] The Defendants submit that Chief Larkin's affidavit does not disclose information in breach of the confidentiality term of the Resignation Agreement, and thus does not give rise to a reasonable cause of action for breach of contract. According to the Defendants, the Plaintiff's claim that the affidavit contains sufficient information for the plaintiff to be identified is wholly speculative and remote at law. In any event, as Chief Larkin's affidavit was delivered for use in court proceedings, the Defendants submit that it is covered by absolute privilege and cannot form the basis of the Plaintiff's claim for breach of contract. They rely on a body of jurisprudence which supports the proposition that statements made in the course of a judicial proceeding, including statements in pleadings and other documents made for the proceeding, are subject to absolute privilege and cannot ground a cause of action.

[33] From the information pleaded in the Amended Statement of Claim, I recognize that Chief Larkin's affidavit, on its face, does not directly identify the Plaintiff or the other complainants who are mentioned in it. I accept that the references in the affidavit to the four (4) female complainants are oblique and anonymized to some degree. However, given that the pool of female complainants is fairly small and features only four members, with one member apparently named given her known role as a representative plaintiff in the class action, it is unclear to me just how anonymous the remaining three complainants actually are to those with some knowledge of the police service. This may be

particularly true in the case of one complainant who is identified in the affidavit as having the rank of sergeant. In the circumstances, it seems less than clear whether Chief Larkin's affidavit sufficiently preserves the Plaintiff's confidentiality. Accordingly, I find that the issue of whether the unnamed reference in Chief Larkin's affidavit is sufficiently capable of identifying the Plaintiff and breaches the confidentiality term of the Resignation Agreement remains an open question.

[34] Regardless of the foregoing, however, it is clear that Chief Larkin's affidavit was prepared and used in a court proceeding. Accordingly, I find that the affidavit is covered by absolute privilege and cannot support the Plaintiff's claim in breach of contract.

[35] Brown J.A. for the Court of Appeal has explained that, "*The doctrine of absolute privilege contains several basic elements: no action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law; the privilege extends to documents properly used and regularly prepared for use in the proceedings;*" *Salasel v. Cuthbertson*, 2015 ONCA 115 at para. 35, citing *Amato v. Welsh*, 2013 ONCA 258 at para. 34. In determining whether absolute privilege applies to a communication, the analysis necessarily focuses on the occasion that the communication is made, not its content; *Salasel* at para. 46. This immunity extends to any and all causes of action, however framed, and is not limited to actions for defamation; *Salasel* at

para. 38, and *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (C.A.) at para. 20. A claim based on communications which take place during, incidental to, and in the furtherance of a court proceeding is subject to absolute immunity; *Cook v. Milborne*, 2018 ONSC 419 at paras. 17-19. The existing doctrine of absolute privilege affords a fulsome immunity that is broadly applied to all matters done *coram judice,* and is unaffected by whether the evidence was given in bad faith and actual malice or without justification or excuse; *Cook* at paras. 19-21; *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.) at para. 9, *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.) at 257-8.

[36] In view of the foregoing, it is plain and obvious that the Plaintiff's claim for breach of contract arising from Chief Larkin's affidavit discloses no reasonable cause of action. His affidavit clearly was used in defending a class action in court, which the Amended Statement of Claim expressly acknowledges. To the extent that the claim rests on this affidavit, it has no reasonable chance of success in law and should not continue; *Cook* at paras. 21, 32-33 and 57; see also *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936 (S.C.J.) at paras. 17-20, and *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 (Gen.Div.).

[37] From my review of the Amended Statement of Claim, I further find that the pleading is insufficient to establish an independent cause of action against the personally-named defendant, Bryan Larkin. The pleading identifies him as the Chief of the police service and an employee of the Board. The claim gives no

indication that he acted outside the scope of his employment duties. While recognizing that he swore the affidavit that the Board relied upon in defending the class action, the claim does not set out separate facts against him or personal interests that are independent from the breach of contract claim against the Board. Rather, the claim against both Defendants is essentially the same. It was the Board, and not Chief Larkin, which was party to the Resignation Agreement, although he signed the agreement on behalf of the Board. As such, and in the circumstances of this case, I find that he is protected from personal liability; *Lussier v. Windsor-Essex Catholic District School Board*, [1999] O.J. No. 4303 (Div. Ct.) at paras. 17-18, citing *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.) at 104.

No Leave to Amend

[38] I recognize that leave to amend a pleading should not lightly be withheld; *Conway v. L.S.U.C.,* 2016 ONCA 72 at paras. 16-18. However, given the context of this case, it is plain and obvious that no tenable cause of action supporting a breach of contract claim under the Resignation Agreement is possible. The Amended Statement of Claim essentially frames a tandem breach of contract claim by relying on the Defendant's effort to review the Plaintiff's initial entitlement decision by the WSIB, and by also relying on Chief Larkin's affidavit to defend the class action proceeding. As explained above, it is plain and obvious that these material facts cannot possibly give rise to a breach of contract

given the parties' inability to contract out of the WSIA and the absolute privilege that attached to the affidavit. No opportunity to amend the pleading could alter this and realistically preserve the action. Accordingly, leave to amend is denied.

Conclusion

[39] The Amended Statement of Claim is struck under Rule 21.01(1)(b) without leave to amend.

[40] The Defendants' motion to strike was also brought under Rules 21.01(3)(a) and 21.01(3)(d), respectively. For the reasons set out above, I am satisfied that this motion is fairly and fully disposed of under Rule 21.01(1)(b) without the need for recourse to these other grounds.

[41] I strongly encourage the parties to agree on costs. If they are unable, the Defendants may deliver cost submissions not to exceed three (3) pages (excluding any cost outline and offer(s) to settle) within fifteen (15) days from this judgment, followed by the Plaintiff's cost submissions on the same terms within a further fifteen (15) days. No reply submissions are permitted without leave.

(Original signed by Justice Doi)

Doi J.

Released: February 21, 2019

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B E T W E E N:

KELLY LYNN DONOVAN

Plaintiff

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN

Defendants

REASONS FOR JUDGMENT

Doi J.

Released: February 21, 2019