COURT OF APPEAL FOR ONTARIO

CITATION: Lukezic v. Royal Bank of Canada, 2012 ONCA 350
DATE: 20120528
DOCKET: C54312

Laskin, Rosenberg and Goudge JJ.A.

BETWEEN

James Joseph Lukezic, Walker Hall Winery Ltd.

Plaintiffs (Appellants)

and

Royal Bank of Canada

Defendant (Respondent)

James Joseph Lukezic, appearing in person

Milton A. Davis and Brendan Hughes, for the respondent

Heard: April 11, 2012

On appeal from the judgment of Justice Glen A. Hainey of the Superior Court of Justice, dated September 9, 2011, with reasons reported at 2011 ONSC 5263.

Goudge J.A.:

[1] The appellants commenced this action against the respondent on April 4, 2011. The action arose out of the appellant company's commercial relationship with the respondent. The respondent immediately brought a motion in the action for various forms of relief.

[2] On May 16, 2011, Hainey J. allowed the motion and issued an order dismissing the appellants' action as disclosing no reasonable cause of action, and declaring the appellant Lukezic a vexatious litigant pursuant to s. 140(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[3] Both appellants appeal from the first part of that order, and the appellant Lukezic appeals from the second part of the order. There are thus two issues in this appeal.

[4] This court did not call on the respondent on the first issue. I would dismiss the appeal from the dismissal of the action. I agree with the motion judge that the appellants' statement of claim is virtually the same as their statement of claim in a prior action against the respondent, which was also struck out. It asserts a claim which relates entirely to the appellant Walker Hall Winery Ltd. That company is in receivership and the appellant Lukezic has no authority to bring a claim on its behalf without leave, which he does not have. The appeal from this part of the order is therefore dismissed.

[5] The appellant Lukezic also challenges that part of the order of the motion judge declaring him a vexatious litigant. He does not argue any error in the reasoning of the motion judge in making that order. Nor in my view could he do so. The reasons of the motion judge are compelling.

[6] Rather, he argues that s. 140(1) of the *Courts of Justice Act* requires that an application must be brought to obtain this relief. The court cannot grant the order when it is sought by a motion in an action.

[7] While this argument does not appear to have been made to the motion judge, I would give effect to it. Since the vexatious litigant order was sought in this case by way of motion in an action, the motion judge did not have jurisdiction to grant that relief.

[8] Section 140(1) of the *Courts of Justice Act* reads as follows:

> **Vexatious proceedings**
>
> 140.(1)Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,
>
> (a) instituted vexatious proceedings in any court; or
>
> (b) conducted a proceeding in any court in a vexatious manner,
>
> the judge may order that,
>
> (c) no further proceeding be instituted by the person in any court; or
>
> (d) a proceeding previously instituted by the person in any court not be continued,
>
> except by leave of a judge of the Superior Court of Justice.

[9] The issue of whether a vexatious litigant order can be made only on application, rather than by motion in an action was before this court in *Kallaba v. Bylykbashi* (2006), 265 D.L.R. (4th) 320 (Ont. C.A.). In that case my colleagues Cronk J.A. and Juriansz J.A. held that they need not decide the issue. They set aside a vexatious litigant order that had been obtained against the appellant on motion, concluding that even if the motion judge had jurisdiction to make the order, the appellant had not been accorded a fair hearing when the order was made.

[10] However, my colleague Lang J.A. addressed the issue squarely. In detailed reasons, she set aside the vexatious litigant order because it was made on a motion in an action, not by way of application. She found that the order was therefore made without jurisdiction.

[11] I agree with Lang J.A.

[12] My colleague concluded that the proper interpretation of s. 140(1) requires that an application be brought to obtain this relief. It cannot be obtained by way of motion in an action. She offered four reasons for this conclusion, all set in the context of the reality that, as the majority said in that case, a vexatious litigant order is an extraordinary remedy that alters a person's right to access the courts.

[13] In summary, Lang J.A. emphasized that the *Courts of Justice Act* is designed to advance access to justice which is, as she says, a fundamental pillar

of the rule of law. Section 140(1) runs contrary to that important goal by denying access to individuals with carefully specified characteristics. In that sense, it is an exception to the thrust of the legislation and therefore should be construed strictly.

[14] Second, Lang J.A. looked to the legislative history of s. 140(1) to support her conclusion. The first and only previous legislative incarnation permitting this relief was the *Vexatious Proceedings Act*, R.S.O. 1980, c. 523. It required an "originating notice" which was clearly different from an interlocutory motion.

[15] Third, Lang J.A. found that the plain reading of s. 140(1) compels the same answer. The relief must be sought "on application". Section 1 of the *Courts of Justice Act* defines "application" as "a civil proceeding that is commenced by notice of application or by application". This is different from a motion in an action.

[16] Finally, Lang J.A. found that an application provides the procedure best suited to the determination of whether a litigant is vexatious. In large measure this is because of the due process protections which that procedure accords to the person targeted, such as personal service, adjudication by a judge, a directed trial of an issue if necessary, and the right of appeal without the need for leave.

[17] I agree with this reasoning. As a consequence, I would allow the appeal from that part of the order of the motion judge and would dismiss the respondent's claim for an order that the appellant Lukezic is a vexatious litigant.

[18] Since success is divided, and the appellant Lukezic is self-represented, I would not award any costs of this appeal.

Released: May 28, 2012 ("J.L.")

"S.T. Goudge J.A."
"I agree J.I. Laskin J.A."
"I agree M. Rosenberg J.A."