

COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845

DATE: 20191025

DOCKET: C66718

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Cassandra Ma, for the respondents

Heard: October 11, 2019

On appeal from the order of Justice Michael T. Doi of the Superior Court of Justice, dated March 20, 2019, with reasons reported at 2019 ONSC 1212.

REASONS FOR DECISION

I. OVERVIEW

[1] The appellant appeals from the motion judge's order dismissing her action against the respondents under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend, and ordering her to pay costs to the respondents. For the reasons that follow, we allow the appeal, set aside the

order of the motion judge, and grant the appellant leave to further amend her Amended Statement of Claim in respect of the claim against Bryan Larkin.

II. BACKGROUND

[2] In her Amended Statement of Claim, the appellant alleges that the respondents breached the terms of a Release and of a confidentiality provision contained in a settlement agreement (the “Agreement”), dated June 8, 2017. Under the Agreement, the appellant resigned her employment in June 2017, as a police officer with the respondent Waterloo Regional Police Services Board (the “Board”). She seeks damages against the Board and Bryan Larkin, the Chief of the Waterloo Regional Police Service.

[3] The appellant alleges that the respondents (1) breached the Release by appealing her claim for benefits to the Workplace Safety and Insurance Board (“WSIB”) arising from a workplace injury; and (2) breached the confidentiality provisions of the Agreement by delivering an affidavit sworn by Chief Larkin, containing information about the Agreement, in defence of a class proceeding against the Board.

[4] The motion judge struck the claim related to the WSIB appeal on the basis that an employer cannot contract out of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A (“WSIA”). Pursuant to the Release, the Board, among other things, “release[s] and forever discharge[s] [the appellant] from any

and all...appeals". The appellant pleads that she applied to the WSIB in April 2017, before signing the Release, for benefits related to post-traumatic stress disorder ("PTSD"). After the Board signed the Release, it submitted an appeal of the WSIB's decision.

[5] The motion judge accepted that it was at least arguable that the Release captured the Board's review of the WSIB's initial entitlement decision: at para. 20. His decision that it was plain and obvious that the Amended Statement of Claim failed to disclose a cause of action in respect of the alleged breach of the Release was based on his conclusion that the result was governed by this court's decision in *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal refused, [2016] S.C.C.A. No. 113. The motion judge concluded that *Fleming* made it abundantly clear that the Release "cannot operate to preclude the Board, or the [appellant] ...from exercising rights and discharging obligations under the WSIA", because "as a matter of law, parties cannot contract out of the scheme under the WSIA": at para. 23. The motion judge also concluded that the privative clause in s. 118(4) of the WSIA, which provides, in relevant part, that an action or decision of the WSIB under the Act cannot be restrained by a court process or procedure, would preclude the appellant's claim for breach of the Release in relation to the WSIB proceedings: at paras. 24-25.

[6] The motion judge struck the claim related to the breach of confidentiality because he concluded that it could not be based solely on an affidavit prepared

for a court proceeding. The Agreement required the parties, except where required by law, to “keep the terms and existence of [the Agreement] in absolute and strict confidence at all times”. While the motion judge found, at para. 33, that “it seems less clear whether Chief Larkin’s affidavit sufficiently preserves the [appellant’s] confidentiality”, he concluded that because his affidavit was used in defending a class action in court, it was covered by absolute privilege. Accordingly, the motion judge concluded that the appellant’s claim had no reasonable chance of success.

[7] The motion judge further concluded that the pleading contained insufficient allegations to establish an independent cause of action against Bryan Larkin with respect to either of the appellant’s claims.

III. ANALYSIS

[8] We are not persuaded that it is plain and obvious that the appellant’s claims against the Board cannot succeed. We agree with the motion judge that the appellant did not plead a tenable claim against Chief Larkin, but in the circumstances of the case we would allow the appellant leave to amend this claim.

(1) The Breach of Release Claim

[9] As already indicated, the motion judge made his order dismissing the appellant’s action without leave to amend under r. 21.01(1)(b). As a result, and as he acknowledged in his reasons, he could not consider anything extrinsic to the

Amended Statement of Claim which was not referenced in the claim. Moreover, he had to accept the pleaded facts as true for the purpose of the r. 21 motion.

[10] On a generous reading of the Amended Statement of Claim, the appellant had applied for and had been receiving WSIB benefits at the time the Agreement containing the Release was signed. She pleads, at paras. 9-10, that she was diagnosed with PTSD in December 2015, and that, starting in February 2017, she could not attend work due to the severity of her PTSD symptoms. She pleads that in April 2017 she applied to the WSIB for benefits and that her claim was approved: at para. 11. Indeed, she pleads at para. 19 that after her resignation she “continued to receive benefits from WSIB in the form of psychological treatment”. The appellant pleads, at para. 20, that in August 2018 she was made aware by WSIB that on January 11, 2018 the Board submitted an appeal of her claim.

[11] *Fleming* was a case that involved uninsured employment under Part X of the WSIA. At issue was the enforceability of a waiver signed by Fleming, who was injured in a go-kart race in which he was the race director. The waiver purported to release all of the respondents from liability for all damages associated with participation in the event. This court concluded that Fleming was an employee, and that the waiver contravened s. 114 of the WSIA, which provides specifically that workers who are not insured under the workers’ compensation scheme, like Fleming, are permitted to sue their employers for workplace accidents. The court concluded that enforcement of the waiver would constitute a contracting out of the

protections of the WSIA, and that contracting out of this protection would be contrary to public policy. At para. 34, Juriansz J.A. wrote the passage that the motion judge relied on:

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. [Emphasis added.]

[12] However, Juriansz J.A. also wrote, at para. 45, that, “[r]eading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation”.

[13] The Release is not plainly contrary to the WSIA’s objective, as identified by Juriansz J.A. Nor have the respondents identified any express statutory provision that the Release would contravene.

[14] Respectfully, it is not plain and obvious that *Fleming* would stand in the way of the appellant’s claim in this case. Again, on the facts pleaded by the appellant, following her resignation, she continued to receive benefits from the WSIB in the form of psychological treatment, and it was not until several months after the parties signed an Agreement in respect of her resignation, which included the Release, that the Board initiated an appeal to the WSIB, to challenge her entitlement to benefits. This is very different from the *Fleming* case where the

waiver signed by the employee violated a provision of the WSIA specifically providing for the employee's right of action.

[15] And with respect to the motion judge's conclusion based on the privative clause in s. 118(4) of the WSIA, in our view it is not plain and obvious that the appellant's action in respect of the Release would contravene the WSIB's exclusive jurisdiction to determine matters set out in s. 118 of the WSIA and the privative clause contained in that section.

(2) The Breach of Confidentiality Claim

[16] Nor is it plain and obvious that Chief Larkin's affidavit is subject to absolute privilege and that, accordingly, the appellant's claim has no reasonable prospect of success.

[17] There is arguably an important competing interest at stake that weighs against absolute privilege: there is a confidentiality provision that is part of a settlement agreement. There is an overriding public interest in favour of settlement; promoting settlements contributes to the effective administration of justice in this province: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 11. This is not a situation where a party seeks to rely on the provisions of a confidentiality agreement to shield itself from claims. Moreover, the statement at issue was not made by counsel and it is not apparent that it was necessary for the respondents to include the information that allegedly

breached the Agreement in the affidavit for the Board to defend against the certification motion.

[18] We conclude, as this court did in *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155, at paras. 68-69, 97, that because this matter arguably involves competing interests and privileges, it should be decided with an evidentiary record and not on a pleadings motion.

(3) The Claim against Chief Larkin

[19] The appellant's claim against him is pleaded in contract and is based only on the fact that he swore the affidavit and signed the Release and Agreement on behalf of the Board. The appellant did not plead any facts showing that the Chief's actions were tortious: see e.g., *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 2 S.C.R. 263.

[20] However, the appellant represents herself in this matter. Having concluded that the motion judge erred in striking her claims against the Board, we would grant her leave to amend her claim against Chief Larkin to plead how his actions were tortious.

IV. DISPOSITION

[21] Accordingly, we would allow the appeal and set aside the order of the motion judge. If the appellant seeks costs of this appeal and of the motion before the motion judge, she shall, within 14 days, serve on the respondents and file with this

court brief written submissions, including proof of any disbursements she has incurred and seeks to recover. The respondents shall serve on the appellant and file with this court their responding submissions within 10 days thereafter.

“Alexandra Hoy A.C.J.O.”

“K. van Rensburg J.A.”

“L.B. Roberts J.A.”