COURT OF APPEAL FOR ONTARIO

CITATION: Athanassiades v. Rogers Communications Canada Inc., 2024 ONCA 497
DATE: 20240619
DOCKET: COA-23-CV-1065

Huscroft, Miller and Favreau JJ.A.

BETWEEN

Andrew Athanassiades

Plaintiff (Appellant)

and

Rogers Communications Canada Inc.

Defendant (Respondent)

Robert Konduros, for the appellant

Cynthia Spry and Brendan Monahan, for the respondent

Heard: May 16, 2024

On appeal from the judgment of Justice Robert B. Reid of the Superior Court of Justice, dated August 17, 2023, with reasons reported at 2023 ONSC 4593.

Favreau J.A.:

A. INTRODUCTION

[1] The appellant, Andrew Athanassiades, brought an action against the respondent, Rogers Communication Canada Inc. ("Rogers"), for damages allegedly arising from Rogers's failure to provide him with internet service and its subsequent collection attempts. Mr. Athanassiades advanced four causes of

actions against Rogers: 1) spoliation, 2) intentional infliction of mental suffering, 3) defamation and 4) breach of contract. He claims damages in the amount of $1 million, including punitive and aggravated damages.

[2] After the parties exchanged affidavits of documents and conducted discoveries, Rogers brought a motion for summary judgment. Based on the parties' affidavits and transcripts from cross-examinations, the motion judge dismissed Mr. Athanassiades's claims for spoliation and intentional infliction of mental suffering because he was satisfied that these claims did not raise genuine issues for trial. The motion judge also found that he could not decide the claim for defamation without *viva voce* evidence and that he required further submissions on the claim for breach of contract. On this basis, the motion judge directed that these issues be decided by way of a mini-trial pursuant to r. 20.04(2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] Rather than completing the summary judgment proceedings and participating in the mini-trial, Mr. Athanassiades commenced an appeal to this court.

[4] Prior to the hearing, the Court's legal officer sent a letter to counsel for the parties advising them as follows:

> The Panel hearing the appeal has asked that, assuming that the appeal concerns a final order within the jurisdiction of the court, the parties please be prepared to

> address possible concerns arising out of bifurcating the proceeding and hearing the appeal at this stage, when the mini-trial on the remaining causes of action has yet to occur.

[5] At the beginning of the hearing, the panel invited counsel for the appellant and the respondent to address this preliminary issue. After hearing counsels' submissions, the panel advised that the appeal was dismissed with reasons to follow. These are the reasons.

B. THE SCOPE OF THE APPEAL

[6] The parties took out a formal order following the motion judge's reasons (the "Order"). The Order includes two terms explicitly dismissing the claims for intentional infliction of mental suffering and spoliation. The Order also includes two terms that require the parties to attend to give oral evidence on the claim for defamation and to make further submissions on the claim for breach of contract.

[7] In his notice of appeal and factum, Mr. Athanassiades takes issue with the motion judge's decision as a whole and asks that the action be remitted back to the Superior Court for a trial, and that he be allowed to amend his statement of claim to add two causes of action. The grounds of appeal do not explicitly differentiate between the various aspects of the Order, but instead allege that the motion judge "misapplied" the test for summary judgment and failed to explain why he preferred Rogers's evidence over Mr. Athanassiades's evidence.

[8] The only part of the notice of appeal that explicitly differentiates between the different aspects of the Order is in the section dealing with this court's jurisdiction. There, the appellant states that the court has jurisdiction over the appeal based on s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, because the dismissal of the claims for intentional infliction of mental suffering and spoliation are final orders. He also relies on s. 6(2) of the *Courts of Justice Act* to explain why this court can hear the appeal as a whole.

[9] The factum takes a similar approach. There are no arguments specifically directed at the motion judge's dismissal of the claims for spoliation and intentional infliction of mental suffering. Instead, the factum consists of a broad attack on the motion judge's approach to the motion for summary judgment, with specific emphasis on his decision to direct a mini-trial.

C. ANALYSIS

[10] Section 6 of the *Courts of Justice Act* establishes this court's jurisdiction. Pursuant to s. 6(1)(b), the court has jurisdiction to hear appeals from final orders, unless the final order falls within the Divisional Court's monetary jurisdiction of $50,000 or less, or the appeal otherwise lies to the Divisional Court by statute. Pursuant to s. 19(1)(b) of the *Courts of Justice Act*, appeals from interlocutory orders lie to the Divisional Court, with leave of that court. Section 6(2) of the *Courts*

of Justice Act allows this court to hear combined appeals that fall within the court's jurisdiction and the jurisdiction of the Divisional Court:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

[11] This appeal raises unusual jurisdictional and procedural concerns. There is no doubt that the aspects of the Order dismissing the claims for spoliation and intentional infliction of mental suffering are final. However, these orders were made in the context of a motion for summary judgment that has not yet been completed. Indeed, the mini-trial dealing with the claims for defamation and breach of contract has not yet taken place. The motion judge's order that these issues be dealt with by way of a mini-trial is interlocutory. Therefore, the proposed appeal arises from a mix of final and interlocutory orders, in circumstances where the motion for summary judgment, which was meant to deal with all four causes of action, has not been completed.

[12] This raises three related concerns that led to the decision to dismiss the appeal.

[13] The first concern is jurisdictional. This court does not have jurisdiction to hear the interlocutory aspects of the Order, absent an order granting leave to appeal from the Divisional Court. Mr. Athanassiades relies on s. 6(2) of the *Courts of Justice Act* as authority for this court to hear the appeal. However, this court has

established that, where an appeal lies to the Divisional Court and leave is required from that court, in the normal course, the appellant must first obtain leave from the Divisional Court before seeking to combine an appeal that lies to the Divisional Court with an appeal that lies to this court as of right: *Cole v. Hamilton (City)* (2002), 60 O.R. (3d) 284 (C.A.), at paras. 15-16; *Mader v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714, 123 O.R. (3d) 120, at para. 55; *Brown v. Hanley*, 2019 ONCA 395, at paras. 19 and 20. In some exceptional cases, where an appellant has failed to obtain leave from the Divisional Court, this court has granted leave as part of the appeal: *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.), at para. 9; *Azzeh v. Legendre*, 2017 ONCA 385, 135 O.R. (3d) 721, at paras. 25-26, leave to appeal refused, [2017] S.C.C.A. No. 289; *P1 v. XYZ School*, 2021 ONCA 901, 160 O.R. (3d) 445, at paras. 37-39. However, these are exceptional cases where this court has found that leave would inevitably have been granted because the final issues that were decided are so intertwined with the interlocutory issues raised on appeal. This is not such a case. On the contrary, as discussed below, the focus of the appeal is on the interlocutory aspects of the decision and not on the final aspects.

[14] The second concern relates to the manner in which Mr. Athanassiades has framed his appeal. In theory, despite the fact that this court does not have jurisdiction over the interlocutory aspects of the appeal, we could proceed to hear

an appeal from the aspects of the Order that are final. However, in the circumstances of this case, such an approach is impracticable because the crux of Mr. Athanassiades's complaint is not the dismissal of his claims for intentional infliction of mental suffering and spoliation *per se*, but rather the manner in which the motion judge approached the motion for summary judgment, with particular emphasis on the terms of his direction of a mini-trial.

[15] The third concern is one of procedure and judicial economy. Rule 20 of the *Rules of Civil Procedure* sets out the procedures to be followed on a motion for summary judgment. Rule 20.04(2) requires motion judges to grant summary judgment if they are satisfied that there is no genuine issue for trial. Rules 20.04(2.1) and (2.2) set out the motion judges' factfinding powers on a motion for summary judgment. This includes the authority to hear oral evidence. Accordingly, the motion judge's direction that there be a mini-trial and further submissions on the claim for breach of contract is part of the motion for summary judgment proceeding. This appeal was therefore launched before the motion for summary judgment was even completed.

[16] It is singularly impractical and a waste of judicial resources to hear an appeal from a motion for summary judgment that has not yet been completed. This leads to an unnecessary and wasteful fragmentation of summary judgment proceedings that are designed to resolve disputes in a timely and cost-effective manner. If

Mr. Athanassiades loses after the completion of the motion for summary judgment, this would be the sensible point in time to appeal the full outcome of the motion for summary judgment. If Mr. Athanassiades succeeds on the balance of the issues left to be decided on the motion for summary judgment, he can then decide whether to proceed to trial on the remaining issues or whether to appeal with respect to the aspects of his claim that were dismissed before proceeding to trial. This is a far more efficient way of proceeding.

[17] Awaiting the outcome of the mini-trial also potentially avoids concerns over partial summary judgment. As this court has cautioned on several occasions, courts should only grant partial summary judgment in the "clearest of cases", in part to avoid inconsistent or duplicative findings: *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 at para. 34; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561 at para. 4; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 26-29. At this point, given that the mini-trial has not been decided, the issue of partial summary judgment has not yet crystallized. It is unknown whether the motion for summary judgment will dispose of all causes of action or whether the motion judge will dismiss Rogers's motion for summary judgment in relation to those causes of action and refer one or both of them to a full trial. There may well be concerns over granting partial summary judgment in this case, but it is not

possible to properly decide or address that issue until the completion of the mini-trial.

[18] The appeal was therefore dismissed because the court does not have jurisdiction over the interlocutory aspects of the Order, because the grounds of appeal do not properly distinguish between the final and interlocutory aspects of the Order, and because the motion for summary judgment has not been completed.

[19] Absent some truly exceptional circumstances, which are not present in this case, parties ought not to appeal to this court before a motion for summary judgment has been completed. Although it would be unwise to state categorically that such an appeal should never be brought, the circumstances under which it would be advisable are not readily apparent. In any event, any such appeal must be brought with proper regard to the respective jurisdictions of this court and the Divisional Court.

D. REQUEST TO REOPEN ARGUMENT

[20] Following the hearing, counsel for the appellant wrote to the court, requesting an opportunity to make further submissions. The appellant was informed that the appeal has been decided and that the court would not receive further submissions.

[21] The basis for the appellant’s request for an opportunity to make further submissions was a suggestion that there was a lack of procedural fairness in the manner in which the court disposed of the appeal.

[22] I disagree. There was no procedural unfairness. The court notified counsel ahead of time regarding the concern over whether the appeal should be heard before the completion of the mini-trial. Counsel were given an opportunity to address this issue at the beginning of the hearing. Most importantly, the dismissal of this appeal does not preclude the appellant from appealing the disposition of the motion for summary judgment, including the dismissal of the claims for intentional infliction of mental distress and spoliation, at a later date once the motion for summary judgment is completed. There has been no prejudice to the appellant. The only issue decided by this court is the proper timing and procedure to be followed for appeal in this case.

E. DISPOSITION

[23] For these reasons, the appeal was dismissed. The dismissal of the appeal is without prejudice to the appellant renewing the appeal once the motion for summary judgment is completed.

[24] The respondent is entitled to $10,000 in costs, all inclusive. While this amount is significantly less than the amount sought by the respondent, we note

that the basis on which the appeal was dismissed was raised by the court and not the respondent, and that the court has not determined the final merits of the appeal.

Released: June 19, 2024 “G.H.”

“L. Favreau J.A.”
“I agree. Grant Huscroft J.A.”
“I agree. B.W. Miller J.A.”