

COURT OF APPEAL FOR ONTARIO

CITATION: Boyer v. Callidus Capital Corporation, 2025 ONCA 79

DATE: 20250204

DOCKET: COA-24-CV-0152

Lauwers, Brown and Coroza JJ.A.

BETWEEN

Craig Boyer

Plaintiff (Respondent)

and

Callidus Capital Corporation

Defendant (Appellant)

David Moore, for the appellant

Peter H. Griffin and Jonathan N. McDaniel, for the respondent

Heard: October 31, 2024

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated January 2, 2024, with reasons reported at 2024 ONSC 0020.

Brown J.A.:

Overview

[1] The respondent, Craig Boyer, was an executive with the appellant, Callidus Capital Corporation (“Callidus”), where he acted as the underwriter of the company’s loan business. His contract of employment was an oral one.

[2] In 2015, Mr. Boyer informed Callidus that he planned to retire at the end of 2016. Ultimately, Mr. Boyer left Callidus in September 2016.

[3] In early 2017, Mr. Boyer sued Callidus. He alleged that in September 2016 the company's toxic work environment had the effect of constructively dismissing him in the face of his planned retirement. Mr. Boyer's pleading sought relief in respect of certain employment-related benefits, including: payment of accrued and unpaid vacation pay; stock options; and deferred bonus payments.

[4] Callidus defended and asserted a counterclaim for damages for breach of fiduciary duty based on allegations that Mr. Boyer had mismanaged loans involving Xchange Technologies Group ("XTG"), Horizontal Well Drillers, and Gray Aqua (the "Three Loans").

[5] Several motions came before the motion judge in 2022. He deferred hearing Mr. Boyer's motion for summary judgment. Instead, he decided two other motions brought by Mr. Boyer – a motion for leave to amend his statement of claim and a motion under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") (the so-called anti-SLAPP provision) to dismiss the Callidus counterclaim. The motion judge dismissed both motions.

[6] Mr. Boyer appealed. In a 2023 decision allowing Mr. Boyer's appeal, this court dismissed Callidus' counterclaim pursuant to *CJA* s. 137.1, granted Mr. Boyer leave to amend his statement of claim, and returned his summary judgment motion to the motion judge for determination: 2023 ONCA 233.

[7] Three main issues were argued on the summary judgment motion: (i) whether Mr. Boyer's departure from Callidus in September 2016 was a retirement or resignation on his part or a constructive dismissal by Callidus; (ii) whether Mr. Boyer was entitled to any accumulated vacation pay, deferred bonuses, and stock options; and (iii) whether issue estoppel barred Callidus from asserting its just cause defence because of this court's 2023 dismissal of its counterclaim.

[8] The motion judge: (i) held that Callidus did not constructively dismiss Mr. Boyer but, instead, Mr. Boyer retired in September 2016; (ii) awarded Mr. Boyer damages of \$93,076.92 for 22 weeks of unused vacation, \$525,000 (plus interest) for unpaid and deferred bonus amounts awarded for 2014 and 2015, and \$1,213,856.98 for the value of lost stock options; and (iii) concluded that issue estoppel barred Callidus from asserting a just cause defence based on Mr. Boyer's handling of the Three Loans.

[9] Callidus appeals. It seeks orders setting set aside the motion judge's order and dismissing Mr. Boyer's summary judgment motion. It advances three grounds of appeal:

- (i) The motion judge committed numerous reversible errors in holding that Mr. Boyer was entitled to the benefits awarded;

- (ii) The motion judge erred in holding that issue estoppel barred the determination of allegations of just cause dismissal Callidus sought to assert; and
- (iii) The relief granted was not appropriate for summary judgment.

[10] For the reasons that follow, I would dismiss the appeal.

FACTS AND CLAIM

[11] In its 2023 decision, this court set out the basic facts about Mr. Boyer's claim and the counterclaim that Callidus pleaded in response: 2023 ONCA 233, at paras. 6-14. There is no need to repeat them in detail. For the purposes of this appeal, only three main points need to be recalled about the claim and counterclaim:

- (i) Mr. Boyer had no written employment contract;
- (ii) The Callidus counterclaim sought damages from Mr. Boyer for his breach of fiduciary duty during his employment in handling the Three Loans; and
- (iii) In dismissing the Callidus counterclaim, this court observed, at para. 54, that Callidus acknowledged that the damages it claimed, \$150 million for breach of fiduciary duty, were "baseless".

[12] I will set out some additional facts when dealing with each issue on this appeal.

FIRST ISSUE: DID THE MOTION JUDGE COMMIT NUMEROUS REVERSIBLE ERRORS IN HOLDING THAT MR. BOYER WAS ENTITLED TO THE BENEFITS AWARDED?

[13] Callidus asserts two errors made by the motion judge in awarding unpaid vacation pay, deferred bonus payments, and stock options: (i) the motion judge granted relief for claims that were not properly pleaded; and (ii) the evidence filed on the summary judgment motion did not support the relief granted.

[14] Regarding the first alleged error, by the time the summary judgment motion was argued before the motion judge in October 2023, the fundamental nature and details of Mr. Boyer's monetary claims were known to Callidus from: (i) the initial Statement of Claim issued in February 2017; (ii) three affidavits sworn by Mr. Boyer (April 2020, December 2020, and August 2023); (iii) Mr. Boyer's 2022 and 2023 cross-examinations; (iv) Mr. Boyer's 2022 and 2023 refusals and undertakings charts; and (v) Mr. Boyer's 2023 amended statement of claim that this court granted him leave to file.

[15] Callidus filed an evidentiary response to Mr. Boyer's claims through an affidavit from Mr. James Riley. As well, it participated in examinations under r. 39.03 of the *Rules of Civil Procedure* of a former Callidus executive, David Reese, and an executive from the XTG, Alan Rupp.

[16] Accordingly, Callidus had ample opportunity to understand, test, and respond to the fundamentals of the claims asserted by Mr. Boyer as framed by his

two pleadings and fleshed out in his evidence, as well as by Mr. Boyer's testing of the Callidus and r. 39.03 evidence. In those circumstances, Callidus' assertion on this appeal that the motion judge unfairly granted relief that was not substantially disclosed by the summary judgment record simply is not tenable.

[17] As to the adequacy of the record to support the relief granted, the motion judge gave reasons that dealt extensively with the record before him. He clearly explained how he exercised his powers under r. 20.04(2.1) of the *Rules of Civil Procedure* to weigh evidence, evaluate the credibility of a deponent, and draw reasonable inferences from the evidence. While Callidus does not agree with certain findings of fact made by the motion judge, it has not demonstrated that the motion judge misapprehended the evidence or made a palpable and overriding error of fact. Nor has it demonstrated that the relief granted by the motion judge was not available, as a matter of law, on the findings of fact he made.

[18] Callidus also submits the motion judge erred by limiting its ability to further expand the record on the stock option issue. I see no error in how the trial judge exercised his discretion to ensure that any expansion of the record was done in a procedurally fair manner. He explained his decision at some length: at paras. 105-113. I see no basis for appellate intervention.

[19] For these reasons, I am not persuaded by this ground of appeal.

SECOND ISSUE: DID THE MOTION JUDGE ERR IN HOLDING THAT ISSUE ESTOPPEL BARRED THE DETERMINATION OF ALLEGATIONS OF JUST CAUSE DISMISSAL CALLIDUS SOUGHT TO ASSERT?

Background

[20] In its 2017 Statement of Defence and Counterclaim, Callidus took the position that Mr. Boyer had not been constructively dismissed but had resigned on September 6, 2016.¹ In the alternative, Callidus pleaded that “Boyer’s conduct as described further in the counterclaim below justifies his dismissal for cause”² (emphasis added). In its counterclaim, Callidus sought damages of \$150 million from Mr. Boyer for breach of fiduciary duty in respect of his handling of the Three Loans.

[21] In its April 2023 decision, this court found that Callidus had failed to plead either the required elements at law or the details of facts necessary to support its claim of breach of fiduciary duty and that it had acknowledged that the \$150 million amount claimed was “baseless”. Section 137.1 of the *CJA* provides that a court shall dismiss a proceeding against a person where the conditions set out in ss. 137.1(3) and (4) are met.³ This court concluded those conditions had been met and dismissed Callidus’ counterclaim.

¹ Statement of Defence and Counterclaim, February 2017, at paras. 16, 20.

² Statement of Defence and Counterclaim, February 2017, at para. 21.

³ Sections 137.1(3) and (4) of the *CJA* state that:

[22] In September 2023, Callidus delivered an Amended Statement of Defence and Counterclaim. In its initial pleading Callidus had alleged that Mr. Boyer's misconduct during his employment regarding the Three Loans amounted to breaches of his fiduciary as a senior employee of the company for which it sought to recover damages by way of its counterclaim, as well as amounting to justification for his dismissal for cause. In its amended pleading, Callidus alleged that the same misconduct regarding the Three Loans constituted serious breaches of his employment duties and responsibilities that constituted just cause for his termination or, alternatively, that "the breaches of duty pleaded herein were and are material to the award and payment of the discretionary bonuses claimed by the Plaintiff in his Amended Statement of Claim."⁴

[23] On the continued summary judgment motion in October 2023, Callidus submitted in its Supplemental Factum that:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

...

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

⁴ Oddly, although in its amended pleading Callidus stated that it accepted and acknowledged the dismissal of its counterclaim by this court pursuant to s. 137.1 of the CJA, the amended pleading continued to contain the counterclaim that had been dismissed.

Boyer was subject to dismissal for cause as of September 2016 by reason of his conduct in relation to the Horizontal (so-called) comfort letters, his interactions with Alan Rupp of XTG which caused Rupp to conclude he was being inappropriately pressured to provide overly optimistic projections to Callidus, and his failure to monitor and test for the actual weight of the salmon which constituted the collateral for Callidus' loan to Gray Aqua.

...

Given the fundamental differences between the analysis under section 137.1 and the principles applicable to summary judgment motions, there is no basis to conclude that the dismissal of Callidus' counterclaim prevents Callidus from fully defending itself against Boyer's claims for compensation.

...

In addition, the facts and circumstances set out in paragraphs 50-53 support the conclusion that Boyer was subject to dismissal for cause in September 2016, regardless of whether he was a fiduciary or whether Callidus had suffered any compensable financial losses because of his conduct.

In any event, it is submitted that at a minimum the foregoing matters raise serious issues requiring a trial, including with respect to Boyer's credibility and reliability, which cannot properly be disposed of on a motion for summary judgment. [Emphasis removed]

Decision of motion judge and alleged error

[24] The motion judge made two findings regarding Callidus' just cause dismissal allegations.

[25] First, the motion judge held that Mr. Boyer was not constructively dismissed but had retired from Callidus on September 6, 2016. He then continued, at para. 119:

Given this conclusion, it is not necessary for me to decide whether there is a genuine issue requiring a trial in relation to whether there was just cause for Mr. Boyer's constructive dismissal. Mr. Boyer is entitled to be paid the compensation owed to him under his contract of employment.

[26] Second, the motion judge stated that if he had erred in concluding that Mr. Boyer was not constructively dismissed, then the preconditions had been met for issue estoppel to bar Callidus from relitigating its allegations regarding how Mr. Boyer handled the Three Loans. Specifically, he held at para. 132:

If I had held that there is no genuine issue requiring a trial in relation to whether Mr. Boyer was constructively dismissed from his employment with Callidus and that he was constructively dismissed, I would conclude that Callidus is precluded by the doctrine of issue estoppel from relying on evidence tendered in support of the allegations in its counterclaim to show a genuine issue requiring a trial on the question of whether such allegations constitute just cause for Mr. Boyer's constructive dismissal.

[27] On this appeal, Callidus argues that the motion judge erred by failing to determine its just cause defence unaffected by any issue estoppel. In its view, the 2023 decision of this court did not decide Callidus' allegation that Mr. Boyer's mismanagement of the Three Loans constituted just cause for his dismissal. According to Callidus, all this court decided in 2023 was that it had not established

Mr. Boyer was a fiduciary, a different issue. Callidus contends that the misconduct of Mr. Boyer, if established, would amount to a breach of the terms of his employment contract and would be “relevant to Boyer’s entitlement to several of the benefits he was claiming.”⁵

[28] Callidus submits the matter should be remitted back to the court below for determination of Callidus’ just cause defence.

Analysis

[29] I see no error in the result reached by the motion judge.

[30] Under Canadian law, an employer who wishes to terminate a contract of employment without cause must give the employee reasonable notice of its intention to do so or, alternatively, provide the employee with pay in lieu of reasonable notice. If the employer has just cause to terminate the contract of employment, no notice is required: Stacey Reginald Ball, *Canadian Employment Law* (Toronto: Thompson Reuters, 2023), at §8:8.

[31] In the present case, the motion judge rejected Mr. Boyer’s argument that he had been constructively dismissed. Instead, he held that Mr. Boyer had retired from his employment with Callidus effective September 6, 2016. As a result, the motion judge did not award Mr. Boyer any damages for pay in lieu of notice.⁶ That

⁵ Appellant’s factum, at para. 60.

⁶ As mentioned, the prayer for relief in Mr. Boyer’s statement of claim did not request damages in the nature of pay in lieu of notice.

determination has not been appealed. Consequently, Callidus' assertion of a defence of just cause no longer has any relevance to claims for wrongful or constructive dismissal.

[32] Does the defence of just cause have any relevance to the claims for which the motion judge granted relief, namely: accumulated but unpaid vacation pay; earned bonuses for which some payment had been deferred; and the exercise of stock options?

[33] Dealing first with vacation that had accumulated at the time of Mr. Boyer's retirement, s. 38 of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 provides that "[i]f an employee's employment ends at a time when vacation pay has accrued with respect to the employee, the employer shall pay the vacation pay that has accrued to the employee in accordance with subsection 11(5)."⁷ Callidus has not filed any authority that would suggest a finding of after-acquired just cause termination of an employment contract would obviate that statutory obligation of an employer.

[34] As to the effect of a finding of just cause termination on Mr. Boyer's entitlement to payment of the deferred portion of his earned bonuses and the

⁷ Section 11(5) states:

(5) If an employee's employment ends, the employer shall pay any wages to which the employee is entitled to the employee not later than the later of,
(a) seven days after the employment ends; and
(b) the day that would have been the employee's next pay day. 2000, c. 41, s. 11 (5).

exercise of his vested stock options, the only affidavit filed by Callidus was the November 13, 2020, affidavit sworn by Jim Riley. That affidavit was prepared well after Callidus asserted a just cause defence in its 2017 Statement of Defence and Counterclaim.

[35] Mr. Riley attached to his affidavit two documents that dealt with Callidus's deferred bonus and stock option (incentive plan) policies:

- (i) The April 15, 2014, Prospectus stated that: (i) an individual had to be employed by Callidus to receive a deferred bonus payment; and (ii) any grant of shares under the incentive plan would expire on the date the person ceased to be an "eligible person" if terminated for cause; and
- (ii) The May 2016 Callidus Amended and Restated Incentive Plan, which states in s. 4.3(d)(i) that if an option holder ceases to be an employee as a result of cause, the expiry date of any vested portion of the option will be the date on which Callidus delivers written notice of the termination or the option holder provides notice of resignation.⁸

[36] The motion judge found that: (i) there was no evidence Mr. Boyer had agreed to the limitation on payment of a deferred bonus as a condition of his employment;⁹

⁸ Section 1.1 (yy), definition of "Termination Date".

⁹ 2024 ONSC 0020, at para. 69.

and (ii) there was no evidence Callidus had provided the Incentive Plan to Mr. Boyer and sought and obtained his agreement to it.¹⁰

[37] Accordingly, on the specific facts of this employment contract, the just cause defence Callidus wishes to litigate has no relevance to Mr. Boyer's entitlement to the amounts actually awarded by the motion judge.

[38] As well, I see no error in the motion judge's conclusion that issue estoppel barred Callidus from asserting its just cause defence.

[39] The Callidus counterclaim and its just cause defence both rest on the same factual core: namely, that in managing the Three Loans Mr. Boyer had engaged in conduct inconsistent with the proper discharge of his employment responsibilities. In the case of its counterclaim, the relief sought by Callidus was in the nature of damages for breach of fiduciary duty; in the case of its just cause defence, the relief sought was the dismissal of Mr. Boyer's monetary claims. Different relief but predicated on exactly the same material facts and the same allegations of improper conduct by Mr. Boyer in the course of performing his employment duties.

[40] As the Supreme Court stated in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when

¹⁰ 2024 ONSC 0020, at para. 100.

first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. [Emphasis added.]

[41] As the court went on to observe, at para. 20, the legal bars to relitigation cover two situations:

The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel). [Citations omitted; emphasis added.]

[42] In 2023, this court dismissed the Callidus counterclaim. It matters not that the basis upon which this court dismissed the counterclaim was *CJA* s. 137.1(3). A dismissal of a claim under that section has the same effect as if the claim was dismissed following a trial. Callidus now seeks to repackage the material facts central to its dismissed counterclaim as the basis for an opportunity to litigate its just cause defence at some future date. Issue estoppel bars such an attempt. It would constitute an abuse of the decision-making process: *Danyluk*, at para. 20. The motion judge was correct in holding that the preconditions for issue estoppel were met: at para. 131.

[43] Accordingly, I see no basis for this ground of appeal.

THIRD ISSUE: WAS RELIEF GRANTED BY THE MOTION JUDGE NOT APPROPRIATE FOR A SUMMARY JUDGMENT MOTION?

[44] As its final ground of appeal, Callidus submits that the motion judge erred in law by dealing with Mr. Boyer's claims on a summary judgment motion. As put by Callidus in para. 90 of its factum:

The claims advanced and the issues relating to them were complex. They involved serious issues regarding the just cause defences raised by Callidus, conflicting and ambiguous evidence, interactions between pleaded and non-pleaded claims and the resulting difficulties, interpretations of substantial written agreements and plan provisions that were central to several of the issues and required contextual analysis, issues of credibility and reliability in several areas, and complex calculations of considerable sums depending on the findings made.

[45] I am not persuaded by this submission. As explained, Callidus' assertion of a just cause defence regarding the Three Loans was not relevant to the issues to be determined and, in any event, barred by issue estoppel. What remained for determination was an employment contract claim of modest complexity, for which a paper record provided an adequate basis upon which the motion judge could make a final determination on the merits. In the circumstances, the summary judgment procedure was well-suited to decide this claim.

DISPOSITION

[46] For the reasons set out above, I would dismiss the appeal.

[47] The parties agree that the successful party is entitled to its costs of the appeal in the amount of \$55,000 “all in”. Callidus shall pay Mr. Boyer that amount within 30 days of the release of these reasons.

Released: February 4, 2025 “P.D.L.”

“David Brown J.A.”

“I agree. P. Lauwers J.A.”

“I agree. Coroza J.A.”