COURT FILE NO.: 01-CV-222317CM2
DATE: 20050518

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Starwood Group Inc. v. Carol Calvelti, Debra Boland, Jane Larocque and John Pozios

BEFORE: Mr. Justice H.J.W. Siegel

COUNSEL: *Patricia M. Conway,* for the Applicant

Andrew Stein, for the Respondent

HEARD: April 28, 2005

ENDORSEMENT

[1] The applicants bring this motion under Rule 21.01(3)(d) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 seeking an order dismissing the action on the grounds that it is an abuse of process. The action is brought by Starwood Group Inc. ("Starwood" or the "respondent") against three directors of Metropolitan Toronto Condominium Corporation No. 1250 ("MTCC 1250") and a further party who was also involved with certain newsletters described below. Starwood was one of the corporations involved in the development of MTCC 1250.

Background

[2] In this action, Starwood claims trade defamation arising out of statements made in two newsletters published by the applicants.

[3] The first, published in April 2001, identified "The Starwood Group" as a member of the "Developer Group", along with 188 Lofts Inc. ("Lofts"), Bruce Greenberg ("Greenberg"), The Mastercraft Group Inc. ("Mastercraft"), and Bruce McMahon, and referred to difficulties with the hydro metering system. Starwood says this was defamatory in that, among other things, it was understood to mean that Starwood was responsible for providing an inaccurate and unreliable method of calculating hydro in the building.

[4] The second, published in August 2001, referred to Starwood in connection with elevator problems at the building. Starwood says this was defamatory in that, among other things, it was understood to mean that Starwood was involved in, and responsible for, upgrading the elevators in the condominium building, that it failed to upgrade the elevators to modern standards and that

its action or inaction caused people to be trapped in elevators without emergency communication devices.

[5] The applicants have not yet filed a Statement of Defence in this action.

[6] There are two companion actions that have been consolidated. In the first, S-99 Limited, a corporation also involved in the development of the condominium, seeks an order directed against MTCC 1250 that S-99 Limited is the owner of the heating, ventilation and air conditioning equipment in the condominium building and other related relief. In the second action (the "MTCC 1250 action"), MTCC 1250, on its own behalf and on behalf of the owners of units in the condominium building, claims damages from Mastercraft, Lofts, 188 Eglinton Inc., Lomico 188 Inc. and Greenberg for various deficiencies and other matters relating to the condominium building. It is expected that Starwood will be substituted in this action for Mastercraft.

Issues

[7] The applicants say the present action is frivolous, vexatious or otherwise an abuse of process and should be stayed or dismissed pursuant to Rule 21.01(3)(d). In support of this position, the applicants make two arguments. First, they say that Starwood has failed to plead the requisite elements to establish a claim for defamation and that the absence of a viable claim demonstrates the abusive nature of the action. Second, they say the circumstances surrounding the timing of this action indicate that it was intended to increase the legal costs of MTCC 1250, intimidate the applicants and force MTCC 1250 into an unfavourable settlement of the other actions. They say the cumulative effect of these circumstances is that the action is abusive or vexatious.

[8] The applicable standard has been addressed by Armstrong J.A. in *Currie v. Halton (Region) Police Services Board* (2003), 233 D.L.R. (4th) 657 (C.A.) as follows:

> It is apparent that there is a degree of overlap in the meaning of the terms frivolous, vexatious and abuse of process. What I take from the authorities is that any action for which there is *clearly no merit* may qualify for classification as frivolous, vexatious or an abuse of process. The common example appears to be the situation where a plaintiff seeks to relitigate a cause which has already been decided by a court of competent jurisdiction. ...
>
> I am mindful that when the court invokes its authority under rule 21.01(3)(d) or pursuant to its inherent jurisdiction to dismiss or stay an action, it does so *only in the clearest of cases*. See *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (Gen. Div.) at paragraph 21 [emphasis added]

[9] The same standard was articulated in *Temilini* v. *Commissioner of the Ontario Provincial Police et al.* (1990), 73 O.R. (2d) 664, [1990] O.J. No. 860 (C.A.) by Goudge J.A

who cautioned that courts should be loath to determine actions in summary fashion where the issue is dependent upon its facts:

> The test, which has been articulated time and time again, and recently in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 69 O.R. (2d) 448 (Note), 42 C.R.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, particularly at pp. 176-77 S.C.R., pp. 7-8 C.R.R., p. 627 D.L.R., is that the rule should be exercised *only in the clearest cases*. Where a case cannot succeed because the law forbids it, the rule brings a salutary end to the proceedings. In cases depending on the facts, however, the court should be very loath to determine those issues in a summary fashion. When the case appears only to lack evidence, so long as the gaps may be filled, either by discovery or the revelation of evidence at trial, the case should be allowed to proceed. [emphasis added]

[10] I will deal with each issue in turn.

Analysis and Conclusions

Pleadings Regarding Defamation Claim

[11] The first argument of the applicants is that the pleadings do not establish a viable cause of action in defamation. They say that the respondent has failed to establish that the words published in the newsletters could reasonably be understood by the recipients to be defamatory. They also say that, even if Starwood can establish that the words are defamatory, there is no reasonable prospect of success because qualified privilege attached to the publication of the statements and there is no evidence of malice. In order to consider whether this action is an abuse of process as the applicants allege, it is therefore necessary to assess the merits of the action including the defences relied on by the applicants.

[12] The test of whether statements are capable of a defamatory meaning is "whether the words are reasonably capable of a defamatory meaning": see *Makow* v. *Winnipeg Sun*, [2003] M.J. No. 79 at para. 31 (Man. Q.B.). In approaching this issue I have also had regard to the statement of the law of R.E. Brown in *The Law of Defamation in Canada*, 2nd ed. (Scarborough Ont.: Carswell, 1994) at 1-15 approved of by Cory J. on behalf of the Supreme Court in *Botiuk* v. *The Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; (1995), 126 D.L.R. (4th) 609 at para. 62:

> [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the

> audience to whom they were published and the manner in which they were presented.

[13] I agree with the applicants that the statement regarding the hydro meters is not, as a matter of law, capable of a defamatory meaning. The section of the April 2001 newsletter containing the reference is clearly distinct from the other items describing actions against the Developer Group. There is also no mention of Starwood in the relevant section and there is no suggestion that the deficiency is actionable against any third parties, and, in particular, against Starwood.

[14] I do not agree with the applicants that the statements regarding the elevators are incapable of a defamatory meaning. A reasonable person reading the newsletter could conclude that the elevators did not meet modern standards and that there had been a history of individuals being stuck in the elevators with inadequate means of communication. A reasonable person could also conclude that the risk of being stuck in the elevators continued, but that working emergency telephones had now been installed.

[15] The applicants submit that it is clear that qualified privilege attached to the statements when they were made. They say the test to establish qualified privilege is whether persons of ordinary intelligence and moral principle would have considered it a duty to communicate the information to those to whom it was published. They rely on *Fast* v. *Cowling*, [1996] 10 W.W.R. 73 (B.C.S.C.) for this principle which, at para. 41, adopts the statement of the principle of qualified privilege in *The Law of Defamation in Canada, supra,* at p. 17 as follows:

> There is a qualified privilege to publish defamatory remarks if they are made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest of either the publisher or the person defamed or some third person, if the publication is made to a person who has some corresponding interest in receiving the information. The duty may be either legal, social or moral and the test is whether persons of ordinary intelligence and moral principle would have considered it a duty to communicate the information to those to whom it was published. The privilege may be lost if it is made maliciously, if the comments go beyond the exigency of the occasion, or if they are communicated to those who have no interest in receiving the information.

[16] The applicants argue that they meet this test because, as members of the board of directors of MTCC 1250, they had a legal and private duty to provide the occupants of the building with all relevant information that has a direct or indirect impact on the safety and enjoyment of their units and the building as part of their responsibilities to ensure that the affairs of MTCC 1250 are properly managed. They say the recipients had a corresponding interest in receiving the information as occupants and owners of the units and for the purpose of ensuring that the board of directors performs its function properly.

[17] The respondent does not disagree with the statement of the operation of qualified privilege. It suggests, however, that, by placing the comments in newsletters that were left in the

lobby of the building and delivered to tenants as well as owners of the units, the board of directors went beyond what was required in the circumstances. It says they should have communicated these matters only to the owners and in the form of legal notices.

[18] Entitlement to the defence of qualified privilege is heavily dependant on the facts in each particular situation. The affidavit materials before the Court do not demonstrate that it is "plain and obvious" that qualified privilege is available as a defence to the applicants. In particular, there is an issue as to whether the extent and nature of the distribution went beyond what was required in the circumstances. I would note, however, that while I have concluded that there is a basis for a dispute between the parties on this issue, the evidence before the Court more strongly supports the applicants' position that they are entitled to claim qualified privilege in respect of the statements.

[19] The applicants say there is no evidence of malice on their part. Starwood suggests in its factum that the timing of the statements was consistent with retaliation by the applicants on behalf of the directors of MTCC 1250 and owners of units in the building for cancellation of their parking spaces in the building and other perceived and alleged violations of their rights by Bruce Greenberg that are addressed in other actions. Given the determinations above, it is unnecessary to address the issue of malice. However, on the evidence before the Court, Starwood's allegation of malice is highly speculative and questionable.

[20] Based on the foregoing, I have considerable doubt that the respondent will be able to succeed in its claim for defamation in respect of the statements in the newsletter concerning the elevators. Nevertheless, I cannot conclude that it is clear that the claim for defamation related to these statements will not succeed. Accordingly, I do not believe I can take this factor into consideration in my determination as to whether the action is frivolous, vexatious or an abuse of process.

Abuse of Process Allegation

[21] The applicants also suggest that the various circumstances surrounding this action demonstrate that it is oppressive. They rely on the timing of the action relative to the publication dates of the newsletters, the fact that Greenberg cannot recall when he first saw the newsletters to which he objects, and the fact that Starwood took no steps in this action while negotiations were underway in respect of the two other actions that have been consolidated.

[22] As evidence of Greenberg's tactics in other similar situations, they also rely upon statements by Greenberg in an affidavit in another action against Lomico 188 Inc. and the fact that Greenberg is a plaintiff in a separate action against a different condominium corporation and its directors. However, it is impossible for the Court to assess the significance of these two submissions in the absence of a more complete understanding of the facts behind the two actions than is available from the materials before the Court.

[23] While I have considerable sympathy for the position of the applicants, I believe these circumstances are too speculative to satisfy the test that, on the evidence before the Court, it be clear that the action was initiated for the principal purpose of oppressing the applicants and

indirectly MTCC 1250. Accordingly, I cannot conclude that the action should be dismissed on the grounds that it is an abuse of process. I would note, however, that if evidence to this effect becomes available, such actions could support a claim for either or both of costs on a substantial indemnity basis and punitive damages.

Alternative Relief

[24] In the alternative, the applicants seek a stay of this action pending a determination of the MTCC 1250 action. They say that the findings in that action with respect to the hydro metering and the elevators will determine, or at least significantly narrow, the issues in this action.

[25] I agree with the respondent that this action is not, in substance, duplicative of the MTCC 1250 action as the issue of hydro monitoring is not raised in the same manner in the pleadings in that action and the issue of the elevators is not specifically raised in the pleadings in the MTCC 1250 action. Therefore a stay is not appropriate in this case.

Costs

[26] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter in accordance with the following schedule. The respondent shall deliver a copy of its submission to the applicants within fifteen days of the date of these reasons. The applicants shall deliver a copy of their submission to the respondent within ten days of receipt of the applicants' submission. The respondent shall file with the Court a bound volume containing the two submissions and any reply submission within five days of receipt of the applicants' submission. Any such submissions seeking costs shall identify all lawyers on the matter, their respective years of call and rates actually charged to the client and shall include supporting documentation as to both time and disbursements.

H.J.W. Siegel J.

DATE: May 18, 2005