

COURT FILE NO.: 99-CV-181819 CP
DATE: 20080407

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kathryn Anne Taylor – Plaintiff/Respondent - and – The Attorney General
for Canada – Defendant/Moving Party

BEFORE: Justice Cullity

COUNSEL: John Legge and Kirk Baert, for the Plaintiff/Respondent

Paul J. Evruire, Q.C. - for the Defendant/Moving Party

DATE HEARD: April 1 and 2, 2008

Proceeding Under the *Class Proceedings Act*, 1992

ENDORSEMENT

[1] The Attorney General moved to strike numerous paragraphs in the fresh as amended statement of claim, and the plaintiff's reply, as being, for the most part evidence, and, in some instances, prejudicial, scandalous, frivolous and vexatious. At the conclusion of the hearing on April 2, 2008, I indicated that the motion would be dismissed and that I would elaborate on my reasons in an endorsement.

[2] The statement of claim was served on the Attorney General in June, 2006 and in July, 2006 the Attorney General delivered a statement of defence - to which the plaintiffs delivered their reply on August 1, 2006. The Attorney General served a fresh as amended third party claim in September, 2006. Notice that the Attorney General intended to bring the motion to strike was first given to the parties in January, 2008. In the meantime, case conferences had been held, a schedule for the hearing of the certification motion had been set, the motion was heard, and the decision was released on September 5, 2007.

[3] In addition, several of the impugned paragraphs had been included in versions of the statement of claim in the combined Taylor/Drady action that predated the delivery of the separate Taylor pleading in June 2006. In June 2007, a motion to strike the Attorney General's third party claim in this action and a motion of the Attorney General in the then severed Drady action - in which the statement of claim contained substantially similar paragraphs - were heard. In an even earlier case - *Baric v. Tumulic*, [2006] O. J. No. 890 (S.C.J.), the Attorney General had moved to strike the plaintiff's pleading for failure to disclose a cause of action. In dismissing the motion,

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the court relied explicitly on allegations by the plaintiff to which objection is now taken in this case. No similar objections to the pleadings were raised in any of those motions and, as I have indicated, it was not until January 2008 that the Crown communicated its intention to strike the paragraphs in the pleading in this action.

[4] In these circumstances, I cannot accept that the motion was made within a reasonable time after the Attorney General ought reasonably have known of what are now identified as irregularities in the pleading. In consequence - and independently of the power of the court under section 12 of the CPA - leave to make the motion to strike is required by rule 2.02 (a).

[5] I am also satisfied that, in the circumstances I have described, leave should not be granted. There were numerous procedural motions and case conferences prior to the severance of the Taylor and Drady motions and the need to "tidy up" the pleadings had been emphasised by the case management judge. The timetable for steps to be taken leading up to the certification motion was set in April 2007. All parties were aware that one of the issues would be whether the plaintiff's pleadings disclosed a cause of action and that this would be determined from the pleadings in their then existing form and in their entirety. The proceeding was under case management and, if the defendant wished to move to strike paragraphs of the pleadings as evidence or as vexatious, it was incumbent on it - at the very least - to raise the question prior to the certification hearing. It appears that it did not do so because senior counsel in charge of the file at that time did not agree that the pleadings were deficient in these respects. If the matter had been raised at a case conference, the court could then have decided whether a motion to strike on the present grounds should be heard before the motion to certify. It is not conceivable that leave would have been granted to bring the motion after the certification hearing.

[6] The Attorney General did not raise the question until January, 2008 and, in consequence, the hearing proceeded in July 2007, and - as in *Baric* - the decision on certification was made, on the basis of the pleadings as they then stood without objection by counsel for the Attorney General. In these circumstances, the plaintiffs - and the court - were, in my opinion, entitled to assume that the Attorney General had waived any irregularities in the pleadings. The court should not at this stage have to deal with this motion and then go back and reopen the question of certification to determine whether the decision would have been different if any paragraphs subsequently found to be objectionable had been omitted.

[7] The fact that the CPA contemplates that certification motions will normally be the first procedural step, and be disposed of before motions for summary judgment that involve the merits of the proceeding, does not mean that objections to irregularities in the plaintiff's pleading can properly be deferred pending certification. Because of the similarity of the issues under rule 21.01 (1) (b) and those under section 5 (1) (a) of the CPA, motions to strike for failure to disclose a cause of action are often postponed to be heard at the same time as - or, in effect, as part of - a certification motion, but, obviously, no later.

[8] In view of the length of the delay in this case, the ample opportunity to raise the question prior to the certification hearing, the absence of any satisfactory explanation for the failure to do so, and the fact that the proceedings have now been certified, I am satisfied that leave to make

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this motion should be denied in the interests of the fair and expeditious conduct of the proceeding referred to in section 12 of the CPA.

[9] I do not consider the above conclusion to be inconsistent with either the existence of the express authority in section 5 (2) of the CPA to permit pleadings to be amended during the certification hearing, or by the amendments that have since been made to the statement of claim. Motions to strike parts of the amendments in either case could be permitted, but that is not what has been requested in this motion.

[10] As leave is denied, it is unnecessary to consider the merits of the defendant's objections to the pleading. I will comment only that, in view of the nature of the plaintiff's claims – including, but not limited to, the claim for punitive damages – I do not believe the paragraphs in question could be said to be unfairly prejudicial to the defendant's case at the trial of common issues. They do not lack relevance, it has not been suggested that they affected the ability of the defendant to frame the statement of defence, and the omission of at least some of those that are said to have fallen on the wrong side of the line between material facts and evidence might well have justified a demand for particulars: see *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 506 (Master), at para 13; *Prior v. Sunnybrook and Womens College Health Sciences Centre*, [2006] O.J. No. 2070 (Master), at paras 8 and 9. If anything, the wealth of detail provided is likely to have assisted the defendant in determining the case it will have to meet at trial.

[11] For the above reasons, the motion is dismissed.


CULLITY J.

DATE: April 7, 2008

TAYLOR - and - THE ATTORNEY GENERAL FOR CANADA
Plaintiff Defendants

COURT FILE NO. 99 CV 181819 (TORONTO)

Ontario
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

MOTION RECORD
Vol. 1

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Office 1/08
All parties having consented to the proposed amendments - although that of the Attorney General was not filed - leave to make them was granted.

The new litigation proposed by the plaintiffs is a proposed judgment - changes made at the hearing - with adjustments to be made for steps to be taken, or completed, as the parties may agree or failing agreement, as may be determined at our conference. Any further changes that may be required as the future will likewise be made at our conference. There may include any time the defendant may reasonably require to accommodate the amendments of the plaintiffs' to amendments of the claims pleading that since the claims for damages to those that would be affected by the defendant as a result of the relative degree of fault to be attributed to it requires.

on view of the Board made making the Attorney General's
 Final Reply claims, the reply responded in paras 2-3 of
 the Notice of Motion as noted.

Third Parties

Plaintiff

Defendant

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

MOTION RECORD OF THE THIRD PARTIES
(Third Parties' Motion to Strike)

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April 1/08.

In view of the amendments made to the
the three as amended Statement of Claim & strike
all parties consented - the expense of the
Reason is limited to damages for which it
would have no right to contribution from
any person who may have consented by the
confidential to the damages suffered by the
plaintiff and any of the real members. As
the Third Party claims of such a right to
depend on the existence of such a right, it
contribution from the named third parties,
the claims are not maintainable and, accordingly,
the motion to strike the same is granted.
Kathryn Taylor