CITATION: Savino v. Shelestowsky, 2013 ONSC 4394
COURT FILE NO.: CV-12-462382
DATE: 20130627

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E EN :	)	
	)	
EUNICE SAVINO and GUISEPPE SAVINO	)	*Chadi Yehia* for the Plaintiffs
Plaintiffs	)	
– and –	)	
CONNIE SHELESTOWSKY, ROY SHELESTOWSKY and JEAN SHELESTOWSKY	)	*Nicole Godfrey* and *Claudia Scherman* for the Defendants (Moving Party)
Defendants	)	
	)	**HEARD:** JUNE 7, 2013

CHAPNIK J.:

[1] This matter involves a long-standing dispute between neighbours. The action was commenced by Statement of Claim on August 29, 2012, under the Simplified Procedure Rules set out in Rule 76 of the *Rules of Civil Procedure*. Briefly, the plaintiffs, Eunice Savino (Eunice) and Guiseppe Savino (known as "Joe"), claim damages against the defendants for harassment and malicious prosecution, as well as punitive damages and costs. The malicious prosecution claim is restricted to one defendant, Connie Shelestowsky (Connie).

[2] The defendants bring this motion for an order striking out various paragraphs of the plaintiffs' Statement of Claim; or in the alternative, striking out the Statement of Claim and dismissing the action without leave to amend, pursuant to rules 21.01, 25.06 and/or 25.11.

[3] They contend that the said pleading discloses no reasonable cause of action, pleads no material facts and/or is frivolous, vexatious and an abuse of the court's process.

[4] The plaintiffs submit that their pleading includes one or more causes of action recognized by law and, accordingly, ask this court to dismiss the motion.

THE FACTS

[5] The parties have been neighbours for many years. The problems between them appear to have surfaced almost 30 years ago. Since then, and even more so since July 2003, the defendants have complained numerous times to the police and sometimes to the Municipality regarding alleged noise and bad conduct emanating from the plaintiffs' property. The plaintiffs say that all such complaints are unfounded.

[6] The Statement of Claim contains allegations of numerous "unfounded" noise complaints and harassment by the defendants against the plaintiffs, in the years 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012.

[7] A sampling of the impugned paragraphs from the Statement of Claim follows:

> On or about July 1, 2003, the police attended the Property regarding an alleged dispute. Connie informed the police that Eunice was playing her small portable radio too loudly while gardening. The police did not instruct Eunice to turn the radio off or to reduce the volume. No charges were laid against Eunice by the police with respect to this incident.
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> ...
>
> On or about November 8, 2003, the police attended the Property regarding a noise complaint. Connie complained to the police that Eunice's use of a leaf blower resulted in excessive noise. No charges were laid against Eunice by the police with respect to this incident.
>
> On or about November 28, 2003, the police attended the Property with regards to an unwanted guest. No charges were laid by the police.
>
> ...
>
> On or about January 18, 2006, February 12, 2006, February 27, 2006, June 15, 2006, July 30, 2006, August 17, 2006, September 2, 2006 and September 3, 2006, the Defendants complained to the police that excessive noise originated from the Property. No charges were laid against Eunice or Joe with regards to any of these complaints.
>
> In or about late January to February 2006, Eunice received a letter from the Municipality, dated January 12, 2006, stating that a complaint with regards to excessive noise at the Property had been submitted to the Municipality. Eunice was not charged as a result of this letter by the Municipality.

[8] Similar complaints were made to the police and to the Municipality on numerous occasions in 2007, 2009, 2010 and 2011, with similar results.

[9] As to the plaintiffs' claims for malicious prosecution, the plaintiffs assert that they suffered damages when they were issued a ticket for allegedly causing a noise disturbance in February 2008; and again, in November 2011, when Connie submitted a complaint to the police alleging that the plaintiffs had threatened her. She requested a peace bond against them. In making her complaint, Connie stated, among other things, that she had reasonable grounds to fear the plaintiffs would cause her personal injury and cause damages to the defendants' property.

[10] In both instances, in 2008 and then in 2011, the matters were withdrawn or dismissed in court. The plaintiffs contend that the defendant had no reasonable grounds to initiate the above proceedings and that the claims against them were totally unfounded.

THE RELEVANT LAW

Rule 21

[11] To be successful on a Rule 21 motion, the defendant must establish that it is "plain and obvious" and "beyond doubt" that the plaintiff could not succeed if the matter were to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at paras. 23-34).

[12] When considering whether such is the case, the allegations of fact plead in the plaintiff's claim must be accepted as proven, and the pleadings should be read generously in favour of the plaintiff "with allowances for drafting deficiencies" (*Williams v. Canada (Attorney General)*, 2009 ONCA 378, [2009] O.J. No. 1819, at para.10).

[13] Further, the claim must not be struck merely because it is novel. In *Imperial Tobacco Canada Ltd.*, McLachlin C.J. stated the following at para. 21:

> The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, *on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.* [Emphasis added.]

[14] That principle applies to the next category of law and is relevant to these proceedings.

Harassment

[15] There is debate as to whether the tort of harassment has been established as a civil cause of action in Canada (*Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (S.C.), at para. 66). While it is not largely accepted, the door does not appear to be entirely closed on the possibility of this tort's existence.

[16] In one of few Canadian cases where the elements of the tort of harassment were set out, the requirements were articulated as follows: (i) outrageous conduct by the defendant; (ii) the

defendant's intention of causing or reckless disregard of causing emotional distress; (iii) the plaintiff's suffering of severe or extreme emotional distress; and (iv) actual and proximate causation of the emotional distress by the defendant's outrageous conduct (*Mainland Sawmills Limited v. IWA-Canada, Local 1-3567 Society,* 2006 BCSC 1195, [2006] B.C.J. No. 1814, at para. 17). In that case the court found it unnecessary to determine the status of the tort of harassment in Canada since even if it existed, the evidence presented fell short of proving harassment.

[17] In several cases, the courts have likened the term "harassment" to alternative theories of liability arising from the same factual nexus, namely the torts of *nuisance* and *intentional infliction of mental suffering* (*Gladstone v. Canadian National Transportation Ltd.*, [2009] O.J. No. 3118, at paras. 39-44).

[18] The conceptual similarities between the tort of intentional infliction of mental suffering and the (potential) tort of harassment are highlighted in *Lynch*, a decision in which the Court held that the plaintiff failed to disclose a reasonable cause of action in respect of the tort of harassment "as she has failed to plead the elements of the tort of intentional infliction of mental suffering". In the alternative, if the tort of harassment was accepted as existing in Ontario, she failed to plead its required elements as set out in *Mainland Sawmills Limited.*

[19] When considering actionable incidents of harassment involving neighbours, the Court in *Garrett v. Mikalachki*, [2000] O.J. No. 1326 (S.C.), at para. 138, stated that "[t]he categorization of wrongs in this area is in flux" but the "conduct is actionable within the common law categories of intentional infliction of emotional distress, nuisance or invasion of privacy, and harassment".

[20] The tort of nuisance consists of interference with the claimant's use or enjoyment of land that is both substantial and unreasonable (*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] S.C.J. No. 13, at paras. 18-19).

[21] The tort of intentional infliction of mental suffering requires that the following three elements be proven on a balance of probabilities: (i) flagrant or outrageous conduct; (ii) calculated to produce harm; and (iii) resulting in a visible and provable illness (*Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200 (S.C.C.), at paras. 53-56).

[22] These three elements are explored in greater detail in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.), at paras 41-48, and *Fitzpatrick v. Orwin*, 2012 ONSC 3492, [2012] O.J. No. 2731, at paras. 114-134.

[23] An act is "calculated to produce harm" where it is clearly foreseeable that it would cause harm to the victim (*Prinzo*, at para. 45). The extent of the harm need not be anticipated, but the kind of harm (*e.g.* psychological harm) "must have been intended or known to be substantially certain to follow" (*Piresferreira v. Ayotte*, 2010 ONCA 384, [2010] O.J. No. 2224, at paras. 78-79; *Fitzpatrick*, at para. 128).

[24] In *Prinzo*, the mental distress was inflicted at the complainant's place of employment. In the subsequent case of *Fitzpatrick*, Stinson J. held that where the harassment took place at the plaintiff's home, which is the place most supposed to "inspire feelings of comfort and safety, not fear and trepidation", the infliction of mental distress was particularly harmful. Stinson J. held that in such cases a higher award in damages should be granted.

Malicious Prosecution

[25] According to the Supreme Court of Canada in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at para. 42, a finding of malicious prosecution requires that the plaintiff prove the following four elements:

i) the proceedings must have been initiated by the defendant;

ii) the proceedings must have terminated in favour of the plaintiff;

iii) the absence of reasonable and probable cause; and

iv) malice, or a primary purpose other than that of carrying the law into effect.

[26] In *Kefeli v. Centennial College of Applied Arts & Technology*, [2002] O.J. No. 3023 (C.A.), at para. 24, Simmons J.A. held that in rare cases it is possible for a plaintiff to successfully bring a claim for malicious prosecution against a private party (the complainant), rather than the state actor or police officer who laid the charge. Such a case may be appropriate, for example, where the party provided malicious or false information to authorities intending that it would result in prosecution, where this was the very information relied upon when the charges were ultimately brought.

[27] Thus, the definition of "prosecutor" for the purpose of the tort includes anyone who is instrumental in commencing criminal proceedings against the plaintiff, even if they are not in charge of the prosecution (*Canada v. Lukasik*, [1985] A.J. No. 1104 (Q.B.), at paras. 24-26; *Casey v. Automobile Renault Canada Ltd.*, [1965] S.C.R. 607, at p.615). Since a private information for a peace bond is first heard by a justice on an *ex parte* basis, mainly on the testimony of the informant, the charge may be viewed as having been initiated by the defendant (*Criminal Code*, R.S.C. 1985, c. C-46, s.810).

[28] Moreover, the withdrawal of charges may be viewed as the termination of proceedings "in favour of the plaintiff" (*Lang v. Bognar*, [1997] O.J. No. 191, at para. 34).

[29] The final element, malice, may be inferred from the surrounding circumstances (*Pate v. Galway-Cavendish (Township)*, 2011 ONCA 329, [2011] O.J. No. 3594, at para. 32).

ANALYSIS

[30] As noted, the defendants contend that no material facts are pleaded sufficient to ground a claim in either harassment or malicious prosecution. Moreover, some facts have been pleaded only for "colour" or to cast one or more of the defendants in a "bad light".

[31] I disagree.

[32] The purpose of pleadings is to give notice to the other party of the case to be met, to define the matters in issue and to provide a permanent record of the issues raised (*Cerqueira v. Ontario*, 2010 ONSC 3954, [2010] O.J. No. 3037, at para. 11).

[33] In my view, the plaintiffs have satisfied that purpose. It is for the trial judge to determine whether all of the elements of the claims have been proven on a balance of probabilities, including whether the defendants' conduct was "flagrant" or "outrageous". I make no comment whatsoever on the merits of the plaintiffs' case. Nevertheless, as it stands, the Statement of Claim sets out causes of action recognized by law and sufficient material facts to support those claims. The Statement of Claim alleges the torts of harassment and malicious prosecution as causes of action. As noted in the plaintiffs' factum and the case law, the torts of nuisance or intentional infliction of mental suffering may arise from the same factual nexus as the tort of harassment.

[34] The 45 impugned paragraphs objected to by the defendants are relevant to these claims and provide sufficient details to permit the defendants to respond. In some instances, they provide evidence of the pre-existing relationship between the parties and the context surrounding the allegations made by the plaintiffs. It is certainly not plain and obvious that the claim, as drafted, discloses no reasonable cause of action, as alleged. Nor is the claim vexatious, scandalous or an abuse of the court's process.

[35] Moreover, the defendants have not shown that the plaintiffs' action, as pleaded, has no chance of success.

CONCLUSION

[36] The plaintiffs seek a dismissal of the defendants' motion or leave to amend their pleading. For the reasons outlined above, the defendants' motion is dismissed. Nevertheless, should the plaintiffs wish to amend their pleading in any way I give them leave to do so, if leave is required. It is noted that the parties have not yet conducted discoveries.

[37] This is a simplified procedure matter. It is time the parties moved this action along. Bearing in mind the criteria set out in r. 57.01, costs of the motion are awarded to the plaintiffs in the all-inclusive sum of $3,000. This amount is within the reasonable contemplation of the parties and the applicable case law.

Sandra Chapnik J.

CHAPNIK J.

RELEASED: JUN 27 2013