

CITATION: ProResp Inc. v. Wallace, 2018 ONSC 3192
COURT FILE NO.: 733/17
DATE: 20180523

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ProResp Inc., Plaintiff

AND:

James Wallace, Edward Muscat, 1442097 Ontario Ltd. (c.o.b. as Gas Products Management), Ontario Cylinder Services Incorporated, Certified Cylinder Services Incorporated, Ontario Medical Oxygen Services Incorporated, Dowbico Supplies Limited, Defendants

BEFORE: Morissette J.

COUNSEL: Y. Ventresca and Jacob R. W. Damstra, Counsel for the Plaintiff, ProResp

G. MacKenzie and B. MacKenzie, Counsel for the Defendants James Wallace, Edward Muscat and 1442097 Ontario Ltd. (GPM)

HEARD: May 11, 2018

ENDORSEMENT

Overview:

- [1] This is a motion by the plaintiff to strike parts of a statement of defence of the defendant 1442097 Ontario Ltd (c.o.b. as Gas Products Management) (GPM).
- [2] In its claim, the plaintiff, ProResp Inc. has advanced serious allegations against GPM, including that they mismanaged the GasPro division of the plaintiff, caused health and safety concerns, did not maintain proper or adequate records, and generally failed in their duty to act in ProResp's best interest.
- [3] The plaintiff, ProResp Inc. moves for an order striking the following words and paragraphs from the defendant's statement of defence and counter-claim:
 - i) The last sentence of paragraph 50: "... While under GPM's management, GasPro consistently satisfied all Health Canada requirements; GasPro underwent regular compliance audits by Health Canada, who described GasPro's compliance and record-keeping as "robust".
 - ii) All of paragraph 51: "Indeed, in light of their competent management of GasPro ProResp asked GPM to assist with preparations for Health Canada's inspections of ProResp's other branches and sites. In so doing,

Mr. Wallace and Mr. Muscat identified numerous deficiencies in ProResp's own compliance management. For instance, although Health Canada requires all providers of medical oxygen (a regulated drug) to register each of their locations with an Establishment License, ProResp registered only three of its sites, and was operating numerous locations, including joint venture hospital locations, that were not registered with Health Canada. As a result, those locations were not regulated by Health Canada's Good Manufacturing Practices (which require, among other things, documented quality assurance, purity testing, recall procedures, and operator and quality control training records), and were not subject to Health Canada oversight, such as regularly scheduled compliance audits to verify that all mandated Good Manufacturing Practices were being followed and accurately documented. GPM brought these deficiencies to the attention of ProResp's senior management in their continuing efforts to "faithfully serve ProResp and use [their] best efforts to promote the interest of ProResp", but to their knowledge ProResp has not remedied these deficiencies; and

- iii) Paragraph 53(b): GPM specifically deny that ProResp is entitled to an accounting of profits, revenues, income, or other benefits; restitution; a constructive trust; or any other equitable remedy because ProResp has acted in bad faith and does not come to the Court with clean hands. In particular, ProResp has acted in bad faith and has itself breached the Agreement by:

...

- (b) operating its business in a manner contrary to Health Canada requirements, as described in paragraph 51...

The issues:

- [4] Should the impugned paragraphs be struck on the basis that they contain allegations that violate the rules of pleading, will prejudice or delay the fair trial of the action, or are scandalous, frivolous, or vexatious?
- [5] If so, should the impugned paragraphs be struck without leave to amend?

The position of the parties:

Moving party: ProResp:

- [6] The Plaintiffs ProResp submits that the impugned paragraphs offend the rules of pleadings because it says that ProResp's compliance with Health Canada requirements and regulations is not material as that issue is not necessary to any cause of action in the statement of claim. ProResp says that it did not plead deficiencies in Health Canada compliance on the part of the management of the defendants. Accordingly, ProResp submits that these impugned paragraphs raise matters that are unrelated to the real issues

in dispute and will have no bearing on the outcome of this proceeding. Finally ProResp states that the words pleaded by the defendants intend to cast ProResp in a bad light and open up an inquiry into ProResp's business practices and regulatory compliance, which it says is irrelevant to the allegations in the statement of claim.

The responding party the defendant GPM:

- [7] GPM submits that the motion to strike is an attempt to evade its obligation to produce documents relevant to the matters at issue in the action which would result in GPM's ability to defend against the allegations of mismanagement and impropriety in respect of which ProResp has claimed \$5.5 million in damages.
- [8] ProResp did not take issue with the impugned paragraphs until GPM delivered a draft discovery plan stating that they expected ProResp to produce documents relating to the facts pleaded at paragraph 51 of the Statement of Defence. ProResp delivered a Reply in which they stated at paragraph 7 that ProResp is in compliance with all such requirement and regulations, although this is irrelevant to the Management Defendants breaches of the agreement. The pleadings were closed in September of 2017.
- [9] GPM submit that the impugned paragraphs are responsive to ProResp's broadly-pleaded causes of actions, such as allegations of breach of contract, breach of fiduciary duty, and unjust enrichment. It further states that it is incumbent on them to not only deny the facts pleaded by ProResp, but to plead their own version of the facts in their defence.

The law and analysis:

- [10] A pleading must contain a concise statement of the material facts on which the party relies for its claim or defence.¹
- [11] A fact is considered "material" when it constitutes a necessary element of the cause of action grounding the suit or a defense and supports the theory of the case as advanced by the party pleading it in a legally relevant manner.²
- [12] If a party takes the view that an allegation in the opposing party's pleading fails to meet the "material fact" threshold, the party has recourse to Rule 25.11, which provides that the court may strike out part of a pleading if it (a) may prejudice or delay the fair trial of the action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of the process of the court.³
- [13] Motions under rule 25.11 should be granted only in the "clearest of cases".⁴ In other words, counsel may frame their pleadings as they deem advisable and this right should not be lightly infringed by the court. Accordingly, it is incumbent upon the party seeking

¹ Rule 25.06(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194

² Witten v. Bhardwaj, [2008] O.J. No. 1769 (S.C.J.) at para. 16

³ Ibid, at para. 19

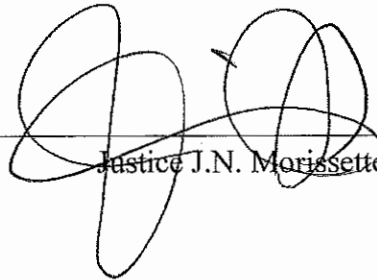
⁴ *Jama (Litigation guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.J. No. 1068 (SCJ) at para. 21

to strike out pleadings, to show that he or she is prejudiced or embarrassed by the pleading or that a fair trial will be delayed by the irregularity.⁵

- [14] The impugned paragraphs must be read in context, considering them in light of the broad allegations made against GPM. In my view the impugned paragraphs are material facts relating to GPM's management of GasPro, its efforts to promote ProResp's interest as required by the Agreement, and the standards against which GPM's actions must be measured.
- [15] When read in the context of the allegations, the words are not frivolous and can be seen as at least with some marginal probative value.
- [16] With respect to the "clean hands doctrine", I simply say that it is not "plain and obvious" that GPM's defence to ProResp's claims of equitable remedies "must fail at trial". That question is not for a pleadings motion judge but rather for the trial judge.
- [17] Finally I fail to see how these impugned paragraphs will delay the fair trial. As GPM has stated in its submissions, if ProResp has documents demonstrating that it is in compliance with all licensing requirements (as it has pleaded) it should be a simple matter for it to produce them.

Disposition:

- [18] For all of these reasons, I dismiss the motion to strike.
- [19] Should the parties be unable to agree on costs, they may deliver brief written submissions on costs by no later than May 30, 2018.


Justice J.N. Morissette

Date: May 23, 2018

⁵ *AB v. Halton Children's Aid Society*, 2016 ONSC 6195 at paras 28-29.