Huismans v. Black, 2000 CanLII 22734 (ON SC)

Date: 2000-08-30
Docket: 00-B1009
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Ontario Supreme Court
Huismans v. Black
Date: 2000-08-30

Mark Huismans, Plaintiff

and

Laura Black, Defendant

Ontario Superior Court of Justice Sheppard J.

Heard: July 11 and 13, 2000

Judgment: August 30, 2000

Docket: 00-B1009

Cary Boswell for Plaintiff.

Mark Scharf, for Defendant.

Sheppard J.:

1 By Statement of Claim dated January 27, 2000, Mark Huismans, plaintiff and former husband of the defendant, commenced an action against Laura Black claiming:

(a) general damages for defamation in the amount of $250,000.00;

(b) general damages for malicious prosecution in the amount of $250,000.00;

(c) in the alternative, general damages for injurious falsehood in the amount of $250,000.00;

(d) punitive damages in the amount of $25,000.00, plus interest and costs.

2 The defendant (Black) filed a statement of defence and counter-claim wherein she claimed against the plaintiff (Huismans):

(a) general damages for assault and harassment in the amount of $500,000.00;

(b) punitive damages in the sum of $50,000.00 plus interest and costs.

3 The parties began to cohabit in or about 1991. They married in September 1995. They separated in July 1998. They entered into minutes of settlement resolving proceedings in the Family Court on December 8th, 1998. They were divorced by order dated August 17th, 1999.

4 It is important to keep in mind the date of December 8th, 1998 (the date of the minutes of settlement) in relation to the following events which I have taken from the transcript of proceedings before the Ontario Court of Justice on August 30th, 1999. That court was being asked to resolve all criminal charges against Huismans upon his entering into a peace bond for $500.00 for one year subject to conditions that Huismans have no contact with Black or Michael Beam. With the peace bond in place, the Crown then withdrew all charges against Huismans stating, "the reasonable prospect of conviction on those charges was rotten". I take from the Crown's statement outlining the charges that Huismans threatened harm to Black on more than one occasion between July 1st, 1998 and August 30th, 1998. Huismans was charged, arrested and released on his own recognizance and ordered not to have contact with Black. Huismans breached that term and he was charged with failing to comply, arrested and remained in jail for 14 days before being released on October 19th, 1998.

Huismans alleges in paragraph 5 of his statement of claim that on or about August 9th, 1998, Black "falsely and maliciously published a statement to Barrie City Police officer, namely Constable James Falkeisen, which statement contained numerous defamatory statements in relation to Huismans, including...". The paragraph goes on to itemize a number of allegedly false allegations of abuse and threatening made by Black to the police against Huismans.

Counsel for Black contends that Huismans is by law estopped from pursuing such action on the ground of cause of action estoppel or on the basis that to allow such action to proceed would be an abuse of process. Counsel contends that all issues between the parties were resolved by the December 8th, 1998 minutes of settlement which were confirmed by a final court order on the same date. Although the nature of the claims now brought by Huismans were not expressly raised in the Family Court proceedings, counsel contends they could have been and should have been raised and by failing to do so Huismans is now precluded or ought to be precluded from raising them. As counsel for Black submitted, Huismans knew about the false allegations from

the moment they were made on August 9th, 1998. When Huismans signed the December 8th, 1998 minutes of settlement, he resolved on a final basis all claims as between the parties arising out of their marital relationship. Not just claims that were the subject of the Family Court proceedings but claims that had arisen in fact and could have and should have been raised before the Family Court.

Counsel for Huismans contends that the defamatory statements made by Black against him caused him damage and give rise to a separate and distinct cause of action totally unrelated to the issues raised and relief sought in the Family Court proceedings and as such should be allowed to go to trial.

The first question is: did the Family Court have jurisdiction to adjudicate on claims for damages for defamation and malicious prosecution had they in fact been raised in proceedings before that court?

Section 21.9 of the *Courts of Justice Act* 1990 R.S.O. C.43 provides:

> Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters.

The answer to the first question is yes, the court, with leave of the judge, had jurisdiction.

The second question is: does the doctrine of cause of action estoppel apply to the facts of this case?

The issues in the Family Court proceedings were:

1. By an application and notice of motion both dated September 3rd, 1998, Black sought:

(a) a divorce and restraining order against Huismans; and

(b) an order for the sale of the matrimonial home and an unequal division of the net proceeds of sale.

2. By a notice of motion dated December 1st, 1998, Huismans sought an order for spousal support in the amount of $1,500 per month.

The issues before the Family Court were resolved by minutes of settlement confirmed by a final court order on December 8th, 1998. Essentially, the parties settled the property issues between them and signed the minutes which contained the following paragraph:

> 6. This completes a full equalization of all property issues between the parties who release all rights in the property in the possession of each other.

It should be noted that as of December 8th, 1998, Huismans would have been aware of the nature of the allegations of abuse and threatening made by Black to Barrie police on August 9th, 1998. In fact, Huismans had been arrested and charged based on these allegations - allegations which Huismans believed to be false. Yet no claim was made in the course of resolving the Family Court proceedings even though according to the material filed in court, Huismans had to make an equalization payment of some $40,000 to Black.

Cause of action estoppel was discussed by Ground, J. in *Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.)

At page 158, Ground, J. in discussing the doctrine of *res judicata* said:

> With respect to the res judicata issue, it is apparent from the materials filed with the court and from the submissions of counsel that the issues raised in the current action by Mr. Reddy with respect to negligence on the part of the defendants Oshawa, Whitby, Adamson, Cessna and Bayes are virtually identical to the issues raised in the claims, counterclaims, cross-claims and third party claims in the three earlier actions. Res judicata operates by the application of two doctrines of estoppel developed in the case law as cause of action estoppel and issue estoppel. The doctrine of cause of action estoppel is based on the premise that, where the legal rights or liabilities of the parties have been determined in a prior action, they should not be re-litigated. Cause of action estoppel applies not only to points on which the court has pronounced but to every point which properly belonged to the subject of the litigation (*Henderson v. Henderson* (1843), [1843-60] All E.R. Rep. 378. 67 E.R. 313, 3 Hare 100 (Eng. V.-C.), at p. 381 [E.R.]).
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> The Ontario Court of Appeal in *Upper v. Upper,* 1932 CanLII 111 (ON CA), [1933] O.R. 1, [1933] 1 D.L.R. 244, at p. 7 [O.R.] cited *Henderson,* supra, with approval and quoted the following proposition from that judgment:
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> > Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward... only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the trial.
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> *Henderson,* supra, has also been applied by the Ontario Court (General Division) in *Greymac Properties Inc. v. Feldman* (1990), 1990 CanLII 6939 (ON SC), 46 C.P.C.(2d) 125, 1 O.R. (3d) 686.

In the case before the court, minutes of settlement were signed with respect to all three prior actions and consent orders dismissing the actions and the counterclaims, cross-claims and third party claims in these actions were issued. Reddy was a party to the consent orders and signed such orders. The case law seems to be clear that a consent order which ends an action is of the same effect for purposes of the res judicata doctrine as a judgment issued by the court on completion of a trial or hearing.

It was held in *Staff Builders International Inc. v. Cohen* (1983), 38 C.P.C. 82 (Ont.H.C.), at p. 85 as follows:

> Those issues in the counterclaim in this action already dealt with in the prior actions are res judicata. It matters not whether the decision is on consent or after a trial; the result is the same.

The court in *Staff Builders,* supra, applied *Re Ontario Sugar Co.; McKinnon's Case* (1911), 24 O.L.R. 332 (Ont. C.A.), in which it was held at p. 336:

> It is not now questioned that a judgment by consent may raise an estoppel inter parties. That it is as binding and conclusive between the parties and their privies as any other judgment (subject, perhaps, to certain exceptions in cases of fraud or mistake), is well established …

Referring to the statements made in *Henderson v. Henderson* [*Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.)] and *Upper v. Upper* [*Upper v. Upper* (1932), 1932 CanLII 111 (ON CA), [1933] O.R. 1 (Ont. C.A.)], it would seem that Huismans, aware as he was of what he regarded as defamatory statements made by Black against him to police, could have and ought to have brought his claim for damages for defamation before the Family Court for adjudication along with the other claims, all of which arose out of the parties' conduct, the one toward the other, in the course of their marital relationship. In my view, therefore, the doctrine of cause of action estoppel applies to preclude Huismans' claim for damages for defamation and injurious falsehood.

Damages for assaultive behaviour have been awarded by the courts as an additional award to claims made under the *Family Law Act* or *Divorce Act* upon marriage breakdown in the following cases:

Surgeoner v. Surgeoner (December 2, 1993), Doc. ND 181185/91Q (Ont. Gen. Div.)

Harris v. Cohen (September 27, 1994), Doc. 40537/89Q (Ont. Gen. Div.)

Dhaliwal v. Dhaliwal (August 13, 1997), Doc. Ottawa 52665/96 (Ont. Gen. Div.)

Awards of this nature are relatively new but they appear to be increasing in number. I see no difference between a claim for damages for assault and a claim for damages for defamation, both arising out of conduct in a marital

relationship. Such claim could have been combined in the Family Court proceedings.

As for Huismans' claim for damages for malicious prosecution, that is a different issue.

In *Nelles v. Ontario,* 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170 (S.C.C.) at p. 192, Lamer J. said in discussing the tort of malicious prosecution:

> There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:
>
> (a) the proceedings must have been initiated by the defendant;
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> (b) the proceedings must have terminated in favour of the plaintiff;
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> (c) the absence of reasonable and probable cause;
>
> (d) malice, or a primary purpose other than that of carrying the law into effect.
>
> (See J.G. Fleming, *The Law of Torts* (5th ed. 1977), at p. 598.)

For the present purposes only paragraph (b) need be considered. The proceedings, that is the criminal proceedings in the Ontario Court of Justice, terminated on August 30th, 1999 when Huismans entered into a peace bond with conditions. Although there was no finding of guilt in relation to the original charges, the proceedings did not terminate in favour of Huismans. Whether the claim can survive for other reasons is for another court to decide. For this courts' purposes, the claim cannot be dismissed on the basis of cause of action estoppel for the reason that the proceedings had not terminated as of the date of the minutes of settlement and court order (Dec. 8/98). This particular claim for relief could not have been combined in the Family Court proceedings.

The last question is: should Huismans' action be stayed or dismissed as amounting to an abuse of process? Section 106 of the Courts of Justice Act provides:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

In *Reddy v. Oshawa Flying Club* at p. 161, Ground J. cited the decision of Haly J. in *Donmor Industries Ltd. v. Kremlin Canada Inc.* (1991), 1991 CanLII 7360 (ON SC), 6 O.R. (3d) 501 (Ont. Gen. Div.) at p. 506:

> ... these plaintiffs are abusing the court process in attempting to put forward again issues which were either raised in the first action or which were known to them and left unraised at the time of the first action ...

As has been pointed out, the criminal proceedings did not terminate until after the final order disposing of the Family Court proceedings, so abuse of process cannot apply to stay or dismiss Huismans' claim for damages for malicious prosecution. In my view, however, the analysis does not end there. Section 106 gives the court broad powers to stay any proceeding on such terms as are considered just. The court, however, should exercise its discretion to stay an action only in extraordinary and exceptional circumstances. It seems to me that it would be contrary to societal interests and contrary to public policy to allow one spouse to claim damages against the other for conduct suffered during their marital relationship following the final disposition of all claims which were or ought to have been presented to the court for resolution upon the breakdown of the marriage. Other than for changed circumstance relating to custody of children and spousal and child support, when the parties come to a settlement or a court issues a final order, each party should be free to get on with his or her life, free from any further claims based on misconduct during the marriage. Claims for damages for abuse suffered during the marriage is a developing area in the law, and if such claims exist they should be adjudicated upon as part of a final determination of all claims between the parties. A divorced or long-lime separated spouse should not have to re-litigate a historical claim for damages for alleged misconduct during the marital relationship after that relationship has been terminated and all recognized claims at law finally resolved.

In my view, the claim for damages for malicious prosecution must be stayed for public policy reasons. I say this notwithstanding that the claim may well be dismissed on the ground that the criminal proceedings were not terminated in favour of Huismans. He had to enter into a peace bond with conditions before the criminal charges were withdrawn. He was not judged not guilty.

An order shall issue pursuant to rule 20.04(4) and section 106 of the Courts of Justice Act dismissing Huismans' action against Black, action no. 00-B1009 with costs. As costs were not addressed, I shall leave it to counsel to attempt to settle the issue between themselves, failing which they may arrange a date with the Barrie trial co-ordinator to appear before me.

Motion granted.