CITATION: Kazen v. Whitten & Lublin Professional Corporation et al., 2019 ONSC 6598
COURT FILE NO.: CV-19-617405
DATE: 2019-11-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SAMUEL KAZEN, Plaintiff

AND:

WHITTEN & LUBLIN PROFESSIONAL CORPORATION, DANIEL ASHER LUBLIN, DAVID ALAN WHITTEN, MARC WARREN KITAY, STEPHEN CLIFFORD WOLPERT and GAURI JALOTA, Defendants

BEFORE: Schabas J.

COUNSEL: Gavin Tighe and Lauren Rakowski, Counsel for the Defendants, Whitten & Lublin Professional Corporation, Daniel Asher Lublin, David Alan Whitten, Marc Warren Kitay and Stephen Clifford Wolpert

Samuel Kazen, for himself

HEARD: November 14, 2019

ENDORSEMENT

[1] This is a motion to strike the statement of claim pursuant to Rule 21 on the grounds that it is frivolous, vexatious and an abuse of the Court's process, and that the claim discloses no reasonable cause of action. For the reasons that follow, I order that the claim be struck out without leave to amend.

[2] The plaintiff, Samuel Kazen ("Kazen"), is a lawyer suing the defendants, a law firm and individuals connected to the firm ("Whitten & Lublin"), for allegedly breaching solicitor client privilege arising from the firm having provided legal advice to Kazen several years earlier. It is asserted that this breach occurred on a motion in a lawsuit against a professional corporation, Hamburg, Olsen Law Professional Corporation ("HOLPC"), owned by Kazen, in which Whitten & Lublin was representing the plaintiff, Nilton Texeira ("Texeira"), a former employee of HOLPC, and Kazen was representing his company, HOLPC.

[3] In the course of that proceeding, which was commenced in 2017, Whitten & Lublin brought a motion to remove Kazen as counsel for HOLPC on the basis that he lacked the independence required of counsel as, among other things, he was the principal of HOLPC and also a potential witness in the case. In response, Kazen raised as a preliminary issue whether Whitten & Lublin could act at all as they had previously been consulted by and met with Kazen on one occasion in 2010. As Kazen disclosed the fact of this retainer, Whitten & Lublin then filed some limited evidence in Reply, through an affidavit of Mr. Lublin, regarding the retainer,

and Kazen then complained that Whitten & Lublin had breached solicitor-client privilege and sought to strike certain evidence.

[4] The motion was heard by Master Sugunasiri in September 2017. In extensive reasons (*Texeira v. Hamburg Olson LPC*, 2017 ONSC 7 that 532), she granted the plaintiff's motion and found that Kazen could not act for HOLPC. She dismissed Kazen's argument that Whitten & Lublin were in a conflict of interest "in acting for Mr. Texeira because of a single consultation that took place between Mr. Kazen and Mr. Whitten or Mr. Lublin 10 years ago."

[5] Master Sugunasiri also addressed Kazen's allegations of breach of privilege and concluded at para. 23 that "HOLPC has expressly waived that privilege." Apparently the action by Texeira against HOLPC was later settled. Although a notice of appeal was filed regarding Master Sugunasiri's order, the appeal did not proceed.

[6] In my view, the action Kazen now brings is an improper attempt to relitigate the finding of Master Sugunasiri that privilege has been waived. Although the Master did not specifically address Mr Lublin's affidavit in her reasons, as Mr. Kazen emphasized in argument before me, that does not mean she did not consider it in coming to her conclusion on the waiver issue. As Iacobucci and Major JJ. stated in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 46, we should presume that a judge reviewed and considered all the material before her "absent further proof that the trial judge forgot, ignored or misapprehended the evidence." *Housen* dealt with an appeal; but the rule must be even stronger when a litigant is seeking to pursue a collateral attack on a decision, as is the case here.

[7] Kazen's action checks all the boxes for an impermissible collateral attack and attempting to relitigate an issue already determined. In *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, the Supreme Court set out a three part test for determining whether a matter is res judicata, quoting Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] A.C. 853, at 953:

> …(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised their privies…

[8] Here, the test is clearly met. The Master found that there was a waiver and therefore no breach of privilege, which is the issue raised in this action. The decision was not appealed and is final. The parties to the Master's decision, or their privies, are the same as the parties in this case.

[9] Kazen argues that since the Master's decision does not clearly address the Lublin affidavit it cannot be concluded that she made a determination of that issue, relying on *Angle* at para. 3, which warns that, in considering issue estoppel, "[i]t will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." To some extent this is addressed by my reference to *Housen*, above; however, in my view the issue of privilege and waiver arising from the retainer and the Lublin affidavit was squarely before the Master, and her decision on the issue does not require

the drawing of inferences in order to conclude that she addressed the same issues as are now, or again, raised by Kazen.

[10] On the third point, it is clear from the Master's decision that, although they were not parties, the dispute over privilege was between Kazen and Whitten & Lublin, both of whom were present and able to make submissions on the issue. Kazen acknowledges as much in his factum, stating that HOLPC "is indeed a privy of the plaintiff at bar, Mr. Kazen, as it is the predecessor in title to Mr. Kazen's corporation." Mr. Kazen nevertheless says that the test is not met because Texeira is not a privy to the defendants Whitten & Lublin. But the defendants were present at the hearing, and they are not seeking to challenge the Master's ruling. It is Kazen who is challenging it, and his own submission recognizes that he was a participant in the earlier ruling and the matter was decided against him. This is a bar to Kazen relitigating the issue.

[11] While I am mindful that there is nevertheless some discretion not to apply issue estoppel in individual cases (see, e.g., *Penner v. Niagara*, [2013] 2 S.C.R. 125 at para. 93, per LeBel and Abella JJ.), I see no basis to do so here. The comments of Binnie J. in *Danyluk v. Ainsworth Technologies*, 2001 SCC 44 at para. 18 (and quoted with approval in *Penner*) are apt:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[12] Accordingly, as the cause of action is barred by issue estoppel, it should be struck as vexatious and an abuse of process. The motion is granted.

[13] As to costs, the defendants seek a total award of $23,738.96 including disbursements and HST. This strikes me as high, and I have some concern with the number of timekeepers who have worked on this matter and the amount of time spent on what is a straightforward motion without evidence. The overall objective is to fix an amount for costs that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Counsel for Ontario*, (2004), 71 O.R. (3d) 291 (Ont. C.A.).

[14] I have considered the factors set out in *Boucher*, as well as the principle of proportionality keeping in mind that the Court should seek to balance the indemnity principle with the fundamental objective of access to justice. I therefore fix costs at $15,000 inclusive of disbursements and taxes.

Schabas J.

Date: November 15, 2019