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Former law firm associate's claim struck against individual firm lawyers *(Brown v. WeirFoulds LLP)*

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In general, individual employees of a corporate defendant are not personally liable for claims involving duties owed by their employer to its customers. The same principle applies to individual members of partnerships which can be sued in their own right. Claims which include individual employees or members of a corporate defendant may be struck, as demonstrated by *Brown v. WeirFoulds LLP*, 2024 ONSC 3429 (CanLII).

The plaintiff in the case was an associate lawyer with the defendant law firm for roughly two and a half months in 2023. After resigning from the firm on June 13, 2022, he sued the firm and three of its lawyers for constructive dismissal, breach of employment contract, discrimination under the Ontario *Human Rights Code*, breach of the Law Society of Ontario's *Rules of Professional Conduct*, defamation, and unlawful conspiracy. The statement of claim was 165 pages in length.

Subsequently, the plaintiff amended the claim and added a new cause of unlawful conduct conspiracy.

The individual defendants brought a motion to strike the claims against them as containing no viable cause of action or no meaningful chance of success under Rule 21.01 and Rule 25.11 of the *Rules of Civil Procedure*.

Under these rules, a court may strike out claims containing untenable pleas, arguments, or insufficient material facts to support the allegations made. The court may also strike pleadings that contain spurious allegations and/or inflammatory allegations that are made to impugn the character of an opposing party.

As examples of improper pleadings, the defendants pointed to descriptions in the claim of the lives of the plaintiffs' parents, who were not parties to the litigation. The claim alleged that the plaintiff was raised by a single mother who suffered from chronic depression and post-traumatic stress disorder caused by her abusive relationship with the plaintiff's father. The claim also described details about the history of the law firm and its members which had no relevance to the alleged claims against them.

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The defendants argued that these statements were inserted for improper purposes, to embarrass the firm and its members, and to heighten the emotional impact of the pleading rather than to set out the objective facts on which the claim was based.

The individual defendants further submitted that none of the causes of action pleaded against them were legally cogent or had any "reasonable prospect of success", as required by *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), at paragraph 17.

With regard to the employment-related claims, the motion judge noted that it was obvious that the plaintiff's employer was the law firm rather than the individual defendants. An employee acting in the course of her employment cannot be sued personally for breaching a duty of care owed to a customer by the employer, except only in rare cases: *Sataur v. Starbucks Coffee Canada Inc.*, 2017 ONCA 1017, at paragraphs 4-5. These rare cases generally involve alleged actions of the employees that are themselves tortious or where the actions of the employee exhibit a "separate identity or interest" from the employer: *Segal v. Hyperblock Inc.*, 2022 ONSC 8303, at paragraph 13.

In the case at hand, since the law firm was a "suable entity," there was nothing in principle to distinguish corporate liability from the liability of a law firm partnership. For contract and employment law purposes, associate lawyers stand in relation to the firm as employees do to a corporation, and partners stand in relation to the firm as directors or officers do to a corporation. The individual defendants were not parties to any contract with the plaintiff, and to the extent that they participated in the hiring and reviews of the plaintiff they did so on behalf of the firm.

Accordingly, there was no basis on which the individual firm members could be liable for breach of contract by the law firm.

As for the plaintiff's defamation claim, it was premised on the alleged act of constructive dismissal along with a single email that one individual defendant, writing on behalf of the construction law practice group to which the plaintiff belonged, sent to the plaintiff himself. It was copied to only the head of the practice group who was a part of the group authoring the email, not a third party. There was no allegation that the email was published or disseminated outside of the firm or to any third party, including any uninvolved member of the firm.

The motion judge commented that this method of communication follows a pattern commonly used in email correspondence and is analogous to an email that might come from a corporate director and be copied to other board members. In this way, the communication is kept within the group already acting in an authorship capacity and was not "published" in the sense the law requires for the alleged defamation to be communicated to a third party: *Popat v. MacLennan*, 2014 BCSC 1601, at paragraph 43.

Further, the impugned email could not be said to have lowered the reputation of the plaintiff in the eyes of a reasonable person as required by *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), at paragraph 28.

Rather, the email at issue was not read by anyone outside of the very parties who sent it to the plaintiff. The contents of the email described the authors' view of what occurred during a meeting with the plaintiff and could not be construed as defamatory. In the words of the motion judge at paragraph 26: "One side recalls a half-eaten apple or a nearly performed contract, the other recalls a half-intact apple or a contract barely performed." Neither side is lying, neither version is a fabrication, and neither can be said to be defamatory of the other.

With respect to "unlawful conduct conspiracy," such claims must plead that those persons

involved in the alleged conspiracy acted in a way that is both unlawful and in concert: *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at paragraphs 26-28.

The plaintiff's claim failed to state with any precision the supposed purpose or objects of the conspiracy being alleged or any overt acts which were done by each of the alleged conspirators in pursuing or in furthering the conspiracy. The individual defendants were described as having acted within their employment capacity with no further collusion or collective action. They acted on behalf of the firm of which they are all members. In effect, the motion judge commented, the statement of claim describes the firm as conspiring with itself, which is not a legally cogent claim.

Lastly, the courts have held that a cause of action for breach of the *Rules of Professional Conduct* does not exist and cannot be brought against the individual defendants. Breach of a statute or regulation or set of rules such as the *Rules of Professional Conduct* does not create a private cause of action: *Bernal v. The Centre for Spanish Speaking Peoples*, 2016 ONSC 7981, at paragraph 14.

In short, it was plain and obvious that none of the causes of action alleged against the individual defendants could succeed.

The claims against the individual defendants were therefore struck. The plaintiff was allowed to plead breach of contract, wrongful (constructive) dismissal, and breach of employment standards legislation against the firm. The moving parties were awarded costs of $10,000.

The decision demonstrates the importance of carefully choosing who to include as a defendant. The inclusion of the individual defendants was unnecessary for the purposes of advancing the claim against the law firm and resulted in a motion, and costs, that could have been avoided.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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