On appeal from the decision of a Master delivered January 29, 2014.

Date: 20140611
Docket: CI 12-01-79879
(Winnipeg Centre)
Indexed as: Green v. Tram et al
Cited as: 2014 MBQB 118

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
MARTIN GREEN, plaintiff (appellant),	Plaintiff (appellant) is self-represented
- and -	
HIEP TRAM, ARLENE SKULL, DEB WOLOSHYN, WALLY STEWART, JOHN ANCHAN AND THE UNIVERSITY OF WINNIPEG, defendants (respondents).	For the defendants (respondents): Ted Bock & Geoff Mackwood Judgment delivered: June 11, 2014

MARTIN, J.

I. INTRODUCTION

[1] In November 2011, Mr. Green was removed from his student teacher practicum at Gordon Bell High School. Mr. Tram was a Gordon Bell High School teacher who supervised Mr. Green for one course and Ms. Skull was the principal. Subsequently, for his conduct as a student teacher and other reasons,

Mr. Green was suspended from his studies at the University of Winnipeg teacher certification program. He blames all the defendants for this, claiming they conspired together to injure him by depriving him of his opportunity to become a certified teacher. He further alleges that Mr. Tram and Ms. Skull defamed him.

[2] Mr. Tram and Ms. Skull successfully moved before a Master for summary judgment of the conspiracy and defamation claim against them. The Master concluded that the defence of qualified privilege was available to Mr. Tram and Ms. Skull for the defamation claim. As such, it was necessary for Mr. Green to show some evidence of malice by them, for which the Master found "no substantiation whatsoever". He also concluded that Mr. Tram's and Ms. Skull's unanswered evidence, denying a conspiracy, in the absence of any contrary evidence by Mr. Green, met the test for summary judgment of this allegation.

[3] Mr. Green is mystified with this result and appealed. Thus, the matter appears before the court as a fresh hearing pursuant to Court of Queen's Bench Rule 62. To be clear, the motion before me deals only with Mr. Tram and Ms. Skull.

II. ISSUES

[4] Simply put, the issue before the court is whether Mr. Tram and Ms. Skull have demonstrated, pursuant to Court of Queen's Bench Rule 20 and the common law that has developed since, that they are entitled to summary judgment of the claims against them.

[5] Determination of this issue will involve an understanding of the background and evidence led on the motion, a review of the well-known law of summary judgment, a succinct review of the relevant elements of defamation and conspiracy, and an analysis of these components to determine whether Mr. Tram and Ms. Skull have met the onus upon them and, if so, whether Mr. Green has raised a genuine issue for trial.

[6] A disclaimer is in order before proceeding. The file generated from this action is voluminous. The statement of claim comprises 66 paragraphs, and many more sub-paragraphs, of allegations of fact, background, argument, inferences and conclusions. Mr. Tram's and Ms. Skull's statement of defence comprises 74 paragraphs of detailed denial. Twelve affidavits were referred to in the motion. Mr. Tram's and Ms. Skull's brief is relatively succinct; Mr. Green's is not. Thus the disclaimer is that while I have reviewed all of the relevant material and listened carefully to the oral arguments, this judgment will nonetheless be relatively concise. So, for example, because this is a fresh hearing and the Master's decision is brief, I will not address the errors Mr. Green asserts the Master made. As well, the defendants argued for summary judgment based on one discrete element of each of conspiracy and defamation (the absence of an agreement and the absence of malice, respectively). Thus, my analysis is restricted to those essential elements only.

III. THE LAW

[7] I will reiterate the law of summary judgment in Manitoba from previous summary judgment motions I have adjudicated.

[8] The Manitoba Court of Appeal has dealt with summary judgment on many occasions. A particularly helpful summary is set out in ***Blanco v. Canada Trust Co.***, 2003 MBCA 64, 173 Man.R. (2d) 247 at paras. 18-24. To paraphrase:

(1) a motion for summary judgment is not decided on the assumption that the facts alleged in the pleadings are true. The motion is decided on evidence;

(2) the moving party in a summary judgment application must begin by establishing with evidence a *prima facie* case for the entering of summary judgment, i.e. that the responding party's case must fail;

(3) if the moving party meets this onus of proof, then the responding party has the burden of showing there is a genuine issue for trial;

(4) the motions judge must take a "hard look at the merits of an action" and decide whether there is a "real chance" that the action will be successful, but before doing so, he or she must first be satisfied that the moving party has met the burden upon it;

(5) the "real" chance of success means there is a triable issue which realistically could result in a judgment. The claim must have an "air of reality" to it and there must be, on the evidence, more than a theoretical possibility of success.

[9] Of similar effect are Freedman J.A.'s comments at paras. 14–17 of ***Homestead Properties (Canada) Ltd. v. Robert***, 2007 MBCA 61, 214 Man.R. (2d) 148. More recently, see also ***Bodnarchuk v. RBC Life Insurance Corp.***, 2011 MBCA 18, 262 Man.R. (2d) 225.

[10] I also note ***Manitoba (Hydro Electric Board) v. John Inglis Co.***, 2000 MBQB 218, 101 A.C.W.S. (3d) 1103, for the proposition that a judge on a summary judgment motion is entitled to make credibility findings on affidavit evidence. MacInnes J. (as he then was) in ***Manitoba (Hydro Electric Board)***, quoted Monnin J.A., in an earlier case, ***Caisse Populaire de La Salle Credit Union Ltd. v. River Ridge Properties Ltd. et al*** (1997), 115 Man.R. (2d) 115 (C.A.) at para. 17, that:

> … the matter of the conflicts in the affidavit materials and therefore the issue of credibility findings are but one of the matters that a motions court judge must address on a motion for summary judgment. I concede that a finding of credibility may be hard to arrive at on the basis of contrary affidavits alone, but in this case the motions court judge had more than contrary affidavits. He also had the benefit of the transcripts of the cross-examination, and it is when these transcripts are reviewed in conjunction with the affidavits themselves that the defendants' defences start falling apart and come to be seen for what they are, figments of one's imagination or simple stalling tactics. ...

[11] MacInnes J. also considered two other principles: (1) that it is not sufficient for the responding plaintiff on a summary judgment application to say that more and better evidence will or may be available at trial because "the time is now" to lead it; and (2) the summary judgment rule is not intended to terminate actions and deprive litigants of the right to trial where there is a claim

or defence which has some realistic prospect of success. He concluded, at para. 20, that he was to review all of the evidence before him, and:

> … That includes considering credibility, where possible, not for the purpose of weighing the evidence to determine whether the plaintiff will or will not succeed in its litigation, that is, whether its case passes muster on a balance of probabilities, but rather to determine whether the case has a realistic chance of success. And, in this context, "real" is not intended to establish a level of probability. Rather, it is to denote a realistic rather than theoretical prospect of success; in other words, the plaintiff's case, when held up to scrutiny in light of all of the evidence available for consideration on the motion, must have an air of reality to it and not be merely the product of wishful, fanciful or imaginative thinking on the part of the plaintiff.
>
> (emphasis added)

IV. BACKGROUND – FACTS

[12] Bearing in mind this legal background of summary judgment law, I will outline some of the relevant background, evidence and facts.

Overview

[13] Mr. Green was a student in the teacher certification program at the Faculty of Education at the University of Winnipeg for the 2011-2012 academic year. On November 22, 2011, the Associate Dean of Education, Mr. Anchan, submitted a formal complaint about Mr. Green. Following protocol, an investigation was conducted into the complaint. The investigation noted three sources of complaint: 1) three of Mr. Green's university instructors; 2) two fellow university students; and 3) Gordon Bell High School, where Mr. Green was conducting his student teacher practicum. The investigator concluded that Mr. Green's behaviour constituted non-academic misconduct and recommended the complaint be proceeded with. Ultimately, Mr. Green was suspended from his

studies for a minimum of one year for disorderly conduct and patterns of inappropriate behaviour. Mr. Green appealed and on March 27, 2012 the Student Discipline Appeals Committee, comprised of university staff and students, unanimously upheld the decision and sanctions.

Gordon Bell High School

[14] Beginning in September 2011, as part of his teacher certification program, Mr. Green was assigned to Gordon Bell High School for his student teaching practicum. Mr. Tram acted as his "cooperating teacher" although Mr. Green says it was another teacher who formally held this role. This role is detailed by the university program but can generally be described as receiving, supervising and assessing student teachers. Ms. Skull was the principle of Gordon Bell High School and as such was responsible for all school matters including the student teacher practicum program.

[15] Mr. Tram deposed in his affidavit that, among other matters, he was concerned with Mr. Green's (i) failure to prepare adequate lesson plans, (ii) lectures becoming off-topic; (iii) lack of progress in the curriculum; (iv) refusal to follow his instructions; and (v) defiant attitude in response to suggestions on how to improve his teaching. Mr. Tram reported his concerns to Ms. Skull in conversations and by providing detailed written notes he made. Mr. Tram deposed that he acted in good faith with a view to carrying out his responsibilities fairly and properly. Further he swore:

> … The opinions that I formed about the plaintiff's performance and expressed to Ms. Skull were honestly held by me, and were based on my

> observations, professional experience, judgment and background. I had never met the plaintiff prior to his assignment to Gordon Bell, and I have never borne any animosity or ill will toward him. Contrary to the allegations contained in his statement of claim, I never intended to cause him damage, nor did I conspire with any other person to do so.

I pause to note that Mr. Green considers this assertion to be nothing more than a "bald assertion" that is incapable of holding any evidentiary value.

[16] Ms. Skull deposed that Mr. Tram's reports about Mr. Green were of great concern to her. She was also concerned about a comment she received from a student who said that Mr. Green "had grabbed the student's phone from him and touched the student" (on the shoulder). Ms. Skull, along with the vice principal, attempted to address these concerns with Mr. Green on November 21, 2011. He became agitated, confrontational, and made disparaging comments. She instructed Mr. Green to leave Gordon Bell High School immediately and not return until notified. She then contacted the university's director of student teaching, Ms. Woloshyn, and told her what happened. She followed up with a letter. Ms. Woloshyn responded with an email asking that Ms. Skull reply by email "stating that Marty is not to continue at Gordon Bell" and highlighting the main reasons. Ms. Skull complied with the request. Finally, Ms. Skull swore in her affidavit, in similar language to Mr. Tram's statement, that she acted in good faith, without malice and did not conspire with any other person.

[17] Of note, the substance of the complaints from Mr. Green's university professors and fellow students were independent of, and in part took place before, the concerns articulated by Mr. Tram and Ms. Skull arose.

Litigation

[18] After being suspended from the university, Mr. Green took many steps and initiated many communications to advance his concerns respecting his suspension and his being barred from the University of Winnipeg property. In September 2012, he filed his statement of claim against Mr. Tram and Ms. Skull and the other defendants. Many steps in the action have been taken by Mr. Green and the defendants. He generally complains the summary judgment motion process is inappropriate in this case, because he has not been able to examine the defendants for discovery and they have blocked his efforts at interrogatories. Thus, evidence he thinks is available from the defendants is unavailable to him at this point in the summary judgment motion. Three examples are warranted.

[19] One of the steps he now references was to serve interrogatories including 25 of Ms. Skull's and three of Mr. Tram's. Through counsel, Ms. Skull refused to answer all but two of the questions citing irrelevancy and confidentiality, including that 19 questions requested personal information regarding school staff and students such as names and dates of birth, mailing addresses, etc. Ms. Skull cites her professional code of conduct and Mr. Green's internet blog respecting this matter, as further justification for her answers and her concerns about Mr. Green's behaviour. Mr. Tram answered the interrogatories asked of him. Objectively, I cannot conclude that these defendants acted improperly in dealing

with the interrogatories and further, a motion to compel answers to the interrogatories is not before me.

[20] Another of step in the action involves the other defendants. In this respect, for the motion before me, Mr. Green relies upon an affidavit of Ms. Clunie-Powell, a legal assistant of the other defendants' lawyer, attaching an unsworn affidavit of Mr. Anchan and Ms. Woloshyn. Ms. Clunie-Powell deposes that if those defendants are allowed to file additional affidavits for that step in the action, involving those defendants, the unsworn affidavits would be sworn and relied upon. Thus, the sworn affidavits of Mr. Anchan and Ms. Woloshyn are not before me and, in any event, certain comments in the unsworn affidavits indirectly support Mr. Tram's and Ms. Skull's evidence that they generally acted properly, within the scope of the role and without malice or conspiring with anyone. Ultimately, this proposed evidence of Mr. Anchan and Ms. Woloshyn is not properly before me and I will not consider it as part of this motion.

[21] Finally, in respect of this motion, Mr. Green did not cross-examine Mr. Tram or Ms. Skull respecting their evidence. Rather, he relies on the pleadings and other documents he cites including his own affidavits which, for the most part, dispute and challenge Mr. Tram's and Ms. Skull's versions or details of events leading to, and after, his leaving his practicum at Gordon Bell High School. At best, this amounts to a "he said, she said" contest about whether Mr. Tram's and Ms. Skull's detailed versions of what they reported to the university are entirely accurate. Mr. Green conceded in oral argument that he consciously

determined not to cross-examine on the affidavits as he felt it would not bear sufficient fruit and it would not be to his tactical advantage.

V. POSITIONS OF THE PARTIES

[22] In essence, Mr. Green advances two positions. First, as noted, he complains the summary judgment process is not appropriate for conspiracy and defamation claims where the claim will turn, he says, on the nuances and credibility of the facts and evidence that he can establish at trial when he gets to cross-examine all defendants. Second, while acknowledging the elements that Mr. Tram and Ms. Skull say he must prove for each claim, he says these components are nonetheless obvious from a review of the evidence which has been submitted. In fact, in oral argument, he seemed genuinely incredulous that the court, as an objective observer, could not see "malice dripping" from the affidavits and that conspiracy was an unmistakable inference arising from the evidence. He says that Mr. Tram's and Ms. Skull's declarations in their affidavits of *bona fides*, or good faith dealings with Mr. Green, are nothing more than "bald assertions" that need not be cross-examined on or responded to. Further, he says that the omission of evidence, for example from the vice principal or from Mr. Green's formally designated cooperating teacher or students in the classes he taught, should give rise to an adverse inference against Mr. Tram and Ms. Skull. Especially so, he says, as Ms. Skull refused to answer her interrogatories, essentially to provide contact information, so Mr. Green could gather evidence from the teachers and students himself.

[23] As to Mr. Tram's and Ms Skull's position, they advanced very narrow points as the only bases for summary judgment. As indicated, (i) for the defamation action they argue only qualified privilege (despite pleading other defences) and the absence of proven malice; and (ii) for the conspiracy they rely on the absence of an agreement between individuals to cause injury to Mr. Green. They say to the extent that Mr. Green is concerned about the omission of evidence or inferences arising from the evidence, he ought to have cross-examined Mr. Tram and Ms. Skull on their affidavits. They say his failure to do so, along with failing to lead any other evidence relevant to the two narrow points, gives rise to an adverse inference. Finally, they acknowledge that summary judgment is somewhat unusual respecting defamation and conspiracy, but point to precedents where it has been successfully invoked.

VI. ANALYSIS

[24] I start my analysis by summarily observing several points. First, dealing with the law:

a) motions for summary judgment are determined on evidence, not the pleadings (Queen's Bench Rule 20.02(1));

b) a court may draw an adverse inference from the failure of a party to cross-examine on, or file affidavit evidence in response to, an affidavit (QB Rule 20.02(2));

c) summary judgment motions may result in a final determination of the action. As such, parties are expected to put their best case and

evidence forward, or risk losing the motion without further recourse to filing more evidence later;

d) malice is an essential element which, if not proven, denies a claim of defamation where the defence of qualified privilege exists. In this respect I note the Manitoba Court of Appeal's comments at paras. 25-26 of ***Weisenberger v. Johnson & Higgins Ltd.*** (1998), 131 Man.R. (2d) 274 (C.A.);

e) evidence of an agreement between two or more persons to act unlawfully to injure another person is an essential element which, if not proven, denies a claim of conspiracy (see ***Polimeni v. Danzinger*** (1995), 105 Man.R. (2d) 91 (Q.B.), paras. 82–89);

f) particularly when considering issues of malice or conspiracy, a court on a summary judgment motion must be cautious that evidence supporting malice or conspiracy is often not obvious because the very nature of proving such elements most often involves indirect and oblique evidence that is not easily transparent. Having said that, there is no bar to dismissing such an action on a summary judgment motion where there is no such evidence.

[25] Second, dealing with the evidence:

a) as noted, Mr. Tram and Ms. Scull clearly and explicitly:

(i) deny that they acted with malice, or in any way other than good faith in the execution of their responsibilities as cooperating teacher and principal respectively; and

(ii) deny they conspired with others against Mr. Green;

b) Mr. Green has not directly challenged, contested, or led contrary evidence respecting the above-mentioned two points. In fact, he has articulated in his evidence and brief a conscious strategy not to do so in part because he believes they will simply manufacture more evidence in response, and in part because of the litigation strategy he has chosen in order to resist or argue this motion;

c) respecting defamation, it is clear that the defence of qualified privilege exists in this case. Mr. Green does not seriously dispute this nor does he dispute the elements upon which he must lead evidence to support the conspiracy claim, namely that Mr. Tram and Ms. Skull entered into an agreement with others – the university staff – to injure Mr. Green;

d) overall, Mr. Tram's and Ms. Skull's sworn denials of malice and agreement are generally consistent with the totality of the background and evidence;

e) further, on the evidence, Mr. Tram and Ms. Skull had no cogent reason, in fact no reason at all, to have malice or conspire against

Mr. Green, a man they did not even know before he was assigned to Gordon Bell High School;

f) there is clear evidence that Mr. Tram and Ms. Skull simply fulfilled their responsibilities to their school and students, and the teacher certification program, to the best of their abilities;

g) when viewed objectively, whatever discrepancies may be inherent to Mr. Tram's or Ms. Skull's evidence, or between their evidence and that of Mr. Green or others, such discrepancies are at once minor and understandable (considering the limited nature and fulfillment of their role with Mr. Green at Gordon Bell High School). The discrepancies do not lead to an inference of malice or an inference of an agreement for conspiracy; and

h) despite Mr. Green's assertions of the subtleties of the evidence, there is no coherent or sound evidence to support a reasonable inference that Mr. Tram or Ms. Skull acted with malice or in a conspiracy. I disagree that the malice or conspiracy can be found or inferred from the differences in evidence between what they say they observed versus what Mr. Green says the "truth" actually is, or from the lack of evidence from other students or teachers, or from the lack of balance (i.e. "it is all negative, where is the positive?") in Mr. Tram's notes or Ms. Skull's reports.

[26] I finish my analysis by finding, overall, that I am satisfied that Mr. Tram and Ms. Skull have met the first step for summary judgment in that they have established a *prima facie* case that Mr. Green's claims of defamation and conspiracy against them must fail. Further, respecting the second step, I fail to see that Mr. Green has established a genuine issue for trial. My finding is based on clear, uncontroversial, common sense conclusions arising from an objective assessment of the evidence presented. To be clear, I would not have found an adverse inference against Mr. Tram and Ms. Skull for the evidentiary deficiencies Mr. Green asserts, and I am not relying on an adverse inference against Mr. Green for failing to cross-examine.

[27] I do not mean to be harsh, but regrettably, Mr. Green relies on self-serving conjecture and speculation. I do not agree that the notes, reports, emails or any discrepancies are "severe" or show "great care" was taken to keep Mr. Green "in the dark", or that the notes were a "secret dossier" used to "ambush" Mr. Green. In analyzing the evidence, or his belief of omissions of evidence, he subjectively stitches together "facts", conclusions or inferences which, objectively, amount to a tapestry of mischaracterization. In saying this, I am in no way suggesting that Mr. Green is either being disingenuous or deceitful. I have no doubt that he honestly believes what he sees and says. However, I also have no doubt that the conclusions he urges upon the court to support his claim, and to show that there is a genuine issue for trial, fall within that category referred to in ***Manitoba (Hydro Electric Board)***, as "the product of wishful,

fanciful or imaginative thinking on behalf of the plaintiff". There is no substance to it. There is no air of reality to it. At least vis-a-vis Mr. Tram and Ms. Skull, it is incapable of demonstrating malice or an agreement to injure (conspiracy).

VII. CONCLUSION

[28] In the end result, Mr. Tram's and Ms. Skull's motion for summary judgment is granted. As usual, as the prevailing party, they are entitled to costs. Since Mr. Tram and Ms. Skull are represented by the same counsel, and because the legal and evidentiary issues were virtually identical, they shall be entitled to one set of tariff costs. The class of costs was not addressed, but appears to be Class 2. If there is any disagreement respecting the class or the bill of costs, that can be referred to me and I will set them.

_____J.