

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

BOBBI JO PANCIERA,

Applicant,

- and -

BERNARD ROKOVETSKY, THE
ATTORNEY GENERAL FOR MANITOBA,
JACK EWATSKI in his capacity as Chief
of Police, THE CITY OF WINNIPEG,
CST. G. HALUK, CST. B. ZELMER and
SGT. G. MANN,

Respondents.

COUNSEL:

) For the Applicant:
) Donald R. Knight, Q.C.

) For the Respondent
) Bernard Rokovetsky:
) David A. Guttman

) For the Respondent
) The Attorney General for Manitoba:
) Alan J. Ladyka

) For the remaining Respondents:
) Denise A.M. Pambrun

) Judgment delivered:
) May 21, 2009

SCURFIELD J.

INTRODUCTION

[1] The applicant seeks an extension of time to file a statement of claim alleging false arrest, false imprisonment and malicious prosecution against all of the respondents except Bernard Rokovetsky.

[2] Although Mr. Rokovetsky is named as a respondent in the style of cause, the applicant does not need an extension of the limitation period to file a claim

against him for assault. Assault is the proposed claim against him in the draft statement of claim. Similarly, the applicant does not need an extension of the limitation period to file a claim against the other respondents based on an allegation of negligent investigation. That is because the limitation period with respect to these two proposed claims has not expired.

[3] In contrast, the limitation period under ***The Limitation of Actions Act***, C.C.S.M. c. L150 ("the ***Act***"), for a claim that alleges false arrest, false imprisonment and malicious prosecution is ordinarily two years. The incident which underpins the proposed claim occurred on June 30, 2005. The applicant alleges that during this incident, she was wrongfully arrested, imprisoned and prosecuted following an assault upon her by Mr. Rokovetsky, her domestic partner. The charge against her was ultimately stayed by the Crown on January 31, 2006. Thus, the limitation period with respect to these causes of action would have expired, at the latest two years later, on January 31, 2008.

[4] The applicant did not file a statement of claim within that time period. Rather, on March 20, 2008, she filed an application under the ***Act*** which seeks an extension of time to permit her to proceed with the claim of false arrest, false imprisonment and malicious prosecution against all of the respondents except Mr. Rokovetsky. That is the application that is currently before the court.

APPLICABLE LEGISLATION

[5] The relevant sections of the ***Act*** read as follows:

Persons under disability

7(1) For the purposes of this section and section 8, a person is under a disability

- (a) while he is a minor; or
- (b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

Extension of time in certain cases

14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between

- (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
- (b) the date on which the application was made to the court for leave.

Additional requirement for leave after action begun

15(3) Where an application is made by a plaintiff under section 14 to continue an action already begun by him, the court shall not grant leave unless, on evidence adduced by the plaintiff, it appears to the court that, only after the date the action was begun, the plaintiff first knew or, in all the circumstances of the case, ought to have known, that the matters constituting the cause of action had occurred at a time which, apart from section 14, afforded a defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

LEGAL PRINCIPLES

[6] The legal principles to be applied to such an application are set out succinctly by the Manitoba Court of Appeal in *Einarsson et al. v. Adi's Video Shop et al.* (1992), 76 Man. R. (2d) 218.

[7] There are two ways that this applicant could qualify for an extension of time under the **Act**. First, she could prove under section 7(1) of the **Act** that she was "in fact incapable of the management of [her] affairs because of disease or impairment of [her] physical or mental condition." Alternatively, she could prove under section 14(1) of the **Act** that "not more than 12 months have elapsed between the date on which [she] first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and the date on which the application was made to the court for leave."

[8] If the applicant can prove that she is qualified under section 7(1) or section 14(1) of the **Act** for an extension, she then must go on to demonstrate that the claim that she intends to file has a reasonable chance of success. Scott C.J.M., in *Justice v. Cairnie Estate et al.* (1993), 88 Man. R. (2d) 43 (C.A.), quoted from *Einarsson et al. v. Adi's Video Shop et al., supra*, wherein Twaddle J.A. stated, at p. 220:

[11] ... [T]he applicant must prove by evidence that he has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success.

[9] The onus throughout this application is upon the applicant.

ISSUES

[10] The issues are as follows:

- (1) Has the applicant proved that she was incapable of managing her affairs because of impairment of her mental condition for at least two months during the time when the limitation period was running?
- (2) In the alternative, has the applicant demonstrated, pursuant to section 14(1) of the ***Act***, that not more than 12 months have elapsed between the date on which she first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the causes of action are based, and the date on which the application was made to this court for leave?
- (3) Has the applicant proved that if an extension were granted, there is evidence from which the court could conclude that the proposed causes of action have a reasonable chance of success?

ANALYSIS

Issue No. 1: Has the applicant proved that she was incapable of managing her affairs because of impairment of her

mental condition for at least two months during the time when the limitation period was running?

[11] In support of her claim that she was incapable of managing her affairs because of impairment of her mental condition, the applicant filed an affidavit by Dr. Fred Shane. Dr. Shane is a psychiatrist. His affidavit attached and adopted a report that he provided to the applicant. His opinion supports the applicant's application under section 7(1) of the **Act** in a general way. He says, at the beginning of his report:

After evaluating this matter extensively, it is my opinion that from a psychological perspective, it was not until after February 28, 2008 that Ms. Panciera was able to instruct her counsel in a competent manner. The issues of her assaults, based upon what she has told me and the information available to me related to the traumatic relationship in which she was involved, impaired her psychologically in terms of dealing with this issue in terms of instructing her counsel to pursue a lawsuit.

[12] Generally Dr. Shane concluded that as a result of the physical abuse she sustained at the hands of her domestic partner, the applicant suffers from post-traumatic stress disorder, battered-woman syndrome, and depression. Dr. Shane's report was based on interviews with the applicant that took place after the limitation period had expired and on a review of her medical history. His opinion is not directly supported by the affidavit of any other medical professional.

[13] However, the applicant's medical history is attached to her affidavit sworn April 23, 2009. Contained within that medical history are reports from two

clinical psychologists, Dr. Rowan and Dr. Etkin. They provided written reports for different purposes on June 7, 2007 and July 11, 2007, respectively. Those reports support the conclusion that the applicant suffered from a significant form of mental illness during the limitation period. She was diagnosed as having post-traumatic stress disorder and depression. In one of the reports, her symptoms were described as severe.

[14] Counsel for the applicant and for the respondents agreed that the court should consider the medical history when evaluating this application despite the fact that the records were not attached to an affidavit from their makers.

[15] Dr. Shane was not cross-examined on his affidavit. However, the respondents argue that Dr. Shane makes no attempt in his report to identify a specific period of incapacity during the time frame preceding February 28, 2008. There are two reasonable inferences to draw from his opinion. Either he did not turn his mind to that issue or he simply decided that following the assault and the events surrounding June 30, 2005, the applicant was incapable of managing her affairs because of impairment of her mental condition, and that this state continued until February 28, 2008.

[16] My assessment of Dr. Shane's report leads me to conclude that his principal focus in the report is supporting the diagnoses of post-traumatic stress disorder, battered-woman syndrome, and depression. The reports of Dr. Rowan and Dr. Etkin, which he reviewed, confirm these diagnoses. They concluded that

the applicant was disabled from employment by post-traumatic stress disorder and depression. Based on their reports, that disability would appear to extend at least until July 11, 2007.

[17] In response, the respondents point out that the medical records contain several references to the applicant being fully aware of her legal rights. Of greater significance, the applicant concedes at paragraph 5 of her affidavit sworn April 25, 2008 that she received legal advice with respect to her potential claim for malicious prosecution, on February 22, 2007. Paragraph 5 of that affidavit of April 25, 2008 reads:

5. I retained the services of Mr. Norman Boudreau on or about February 22, 2007, to assist me with a LERA complaint as against the Respondents Constable G. Haluk, Constable B. Zelmer and Sergeant G. Mann. At that time, Mr. Boudreau informed me that a limitation period existed to commence an action for malicious prosecution and failure to protect. I was mainly focused however on the LERA complaint.

[18] Significantly, the applicant does not go on to say that at that time, or for that matter, that at any time during the ordinary limitation period, she was incapable of managing her legal affairs because of a mental condition. She does not say that her failure to file a statement of claim was the result of her mental condition and consequent incapacity. Indeed, she appears to offer the fact that she was focused on her LERA complaint as the reason for not proceeding with a statement of claim.

[19] There is no doubt that during the time when the limitation period was running, the applicant instructed counsel to defend her with respect to her charge of assault and to prosecute the LERA complaint. While it might be argued that the fact that she was giving legal instructions does not mean that she was doing so in a capable manner, there is no specific evidence to support that speculation. She does not even depose that that was her situation. The evidence of Dr. Rowan and Dr. Etkin satisfies me that the applicant suffered from a significant form of mental illness that rendered her incapable of employment. However, those reports do not address her capacity to manage her business and legal affairs. The concepts are distinct.

[20] Similarly, although Dr. Shane's report satisfies me that the applicant suffered from a significant mental illness during the material time frame, he does not support his conclusion that she was incapable of instructing counsel in a competent manner during this time frame. Indeed, that conclusion appears to be inconsistent with the fact that the applicant was instructing counsel during this time frame, and even more significantly with the fact that she has not sworn that she did not have the capacity to do so.

[21] Dr. Shane's opinion does not make reference to this contradictory behaviour. Since it is material to his opinion, the most reasonable inference to draw is that he did not consider the information. While it would have been helpful to have the benefit of a cross-examination of Dr. Shane, it is not

reasonable for me to infer that he considered this inconsistent activity. Indeed, when I examine the foundation that Dr. Shane provides for his opinion, I am left with the impression that once he reached the general conclusion that the applicant had a significant form of mental illness during the material time frame, he decided that it automatically followed that she met the section 7(1) test. He does not specifically identify any examples of her incapacity to manage her business or legal affairs during that time frame. He does not even indicate that he specifically explored this issue with her. That fact weakens his opinion.

[22] An opinion is only as strong as its foundation. When the opinion is taken together with the fact that the applicant has not sworn that she was incapable of understanding or acting upon her lawyer's advice because of impairment of her mental condition, I am compelled to conclude that the applicant has not met her onus under section 7(1) of the *Act*. She has not established that she was incapable of managing her legal affairs for any specific period of time during the ordinary limitation period.

Issue No. 2: **In the alternative, has the applicant demonstrated, pursuant to section 14(1) of the *Act*, that not more than 12 months have elapsed between the date on which she first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the causes of action are based, and the date on which the application was made to this court for leave?**

[23] Once again, the applicant's submission relies on the opinion of Dr. Shane. He concludes his opinion with the general comment that "because of the medical

condition it was not until February 28, 2008 that she first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based”.

[24] The foundation for that general opinion is clearly his conclusion that the applicant is a victim of post-traumatic stress disorder and of battered-woman syndrome. He does not provide any other information to support his conclusion. Specifically, he does not identify a single fact much less a material one of a decisive character that was not known by the applicant prior to February 28, 2008.

[25] The **Act** is very specific. I am satisfied that a person can be mentally ill and yet be capable of managing their legal affairs or capable of knowing all of the material facts of a decisive character related to a potential claim. An applicant has the onus of connecting their mental illness to the lack of capacity or to the inability to comprehend all of the material facts of a decisive character. The applicant filed two affidavits. In neither of her affidavits does she identify or even attempt to identify a material fact that she did not know or that she was not capable of appreciating because of impairment of her mental condition. The onus is on the applicant to do so.

[26] In these circumstances, I am compelled to conclude that the applicant has not met her onus of establishing that she is qualified under section 14(1) of the **Act** for an extension of time.

Issue No. 3: Has the applicant proved that if an extension were granted, there is evidence from which the court could conclude that the proposed causes of action have a reasonable chance of success?

[27] Because of the conclusions that I have reached with respect to the applications under section 7(1) and section 14(1) of the *Act*, it is not necessary for me to determine whether or not the proposed causes of action would have had a reasonable chance of success.

_____.J.