

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
KOLA ILUYOMADE, FUNKE) *Kathryn Marshall* for the Plaintiffs
ILUYOMADE, OREOLUWA KOLA-)
ILUYOMADE, and)
IFEDAYO KOLA-ILUYOMADE)
Plaintiffs)
)
– and –)
)
TORONTO COMMUNITY HOUSING) *Lisa M. Bolton* and *Brian Wasyliw* for the
CORPORATION, CITY OF TORONTO,) Defendants Toronto Community Housing
OFFICE OF THE CITY OF TORONTO) Corporation, Gene Jones, Mary Boushel,
OMBUDSMAN, FIONA CREAN,) Michelle Haney-Kileeg, Andrea Austen, and
KWAME ADDO, GENE JONES, MARY) Anand Maharaj
BOUSHEL, MICHELLE HANEY-)
KILEEG, ANDREA AUSTEN, and)
ANAND MAHARAJ)
Defendants)
) **HEARD:** In writing

PERELL, J.

REASONS FOR DECISION - COSTS

[1] After Kola Iluyomade was dismissed as an employee of the Toronto Community Housing Corporation (“TCHC”), he sued the TCHC, the City of Toronto, the Office of the City of Toronto Ombudsman, Fiona Crean, Kwame Addo, Gene Jones, Mary Boushel, Michelle Haney-Kileeg, Andrea Austen, and Anand Maharaj.

[2] Toronto, the Office of the City of Toronto Ombudsman, Ms. Crean, and Mr. Addo, who were sued for intentional infliction of mental suffering brought a motion to strike Mr. Iluyomade’s Statement of Claim (the “Ombudman’s motion”).

[3] Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg, who were sued for intentional infliction of mental suffering, brought a Rule 21 motion to strike Mr. Iluyomades' Statement of Claim on the basis that his claim is statute-barred under the *Limitations Act, 2002*.¹

[4] The motions were heard one after another. I granted the Ombudsman's motion, and I dismissed the Rule 21 motion brought by Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg without prejudice to their asserting later that Mr. Iluyomade's claim is statute-barred.²

[5] Mr. Iluyomade seeks costs on a substantial indemnity basis of **\$131,870.44** inclusive of disbursements of \$3,164.57 for the Rule 21 motion and an associated refusals motion, the costs of which Justice Chiappetta deferred to the hearing of the Rule 21 motion.

[6] Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg seek partial indemnity costs of **\$32,456** with respect to: (a) costs thrown away associated with Mr. Iluyomade's withdrawn affidavits (\$17,940, all inclusive); and (b) the refusals motion (\$14,516, all inclusive). They submit that the costs of the Rule 21 motion, should be "in the cause." In the alternative, if costs are awarded to Mr. Iluyomade for the Rule 21 motion, Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg submit that the costs be on a partial indemnity scale to a maximum of \$15,000, all inclusive.

[7] For a variety of reasons, I disagree with the costs submissions of both parties, and, in my opinion, the appropriate award in the circumstances of the immediate case is to order that there be no order as to costs.

[8] In the circumstances of this case, I would not award Mr. Iluyomade substantial indemnity costs based on a late arriving "You-Surrender Offer to Settle" and although he was technically the successful party on the Rule 21 motion, the substantive issues raised by that motion remain to be determined. Mr. Iluyomade's success may ultimately be a pyrrhic victory, but is enough of a victory that Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg should not receive any costs, including the allegedly wasted costs. There was a divided success on the refusals motion and there should be no order as to costs.

[9] The procedural background to the Rule 21 motion and to the parties' respective costs submissions and claims to costs may be summarized as follows:

- a. On February 5, 2016, Mr. Iluyomade commenced his wrongful dismissal action, just before the two-year anniversary of his dismissal from employment.
- b. On April 22, 2016, Mr. Iluyomade delivered particulars in response to Mr. Jones, Ms. Boushel, and Ms. Haney-Kileegs' Demand for Particulars.
- c. On April 22, 2016, the Ombudsman defendants delivered their Statement of Defence.
- d. On May 3, 2016, Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg delivered their Statement of Defence.
- e. On May 18, 2016, Mr. Iluyomade delivered his Reply to the Ombudsman defendants' Statement of Defence.

¹ S.O. 2002, c. 24, Schedule B.

² *Iluyomade v. Toronto Community Housing Corp.*, 2018 ONSC 7727.

- f. In late May and early June, Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg asserted that Mr. Iluyomade's action was statute-barred and invited him to abandon his action.
- g. On June 9, 2016, Mr. Iluyomade delivered his Reply to the Statement of Defence.
- h. On August 19, 2016, Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg delivered an Amended Statement of Defence.
- i. On October 31, 2016, the parties attended in Civil Practice Court to schedule the Rule 21 motions. Just prior to the attendance, Mr. Iluyomade advised that he intended to seek leave to deliver affidavit evidence to respond to the Rule 21 motion, for which Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg did not consent. The Ombudsman's motion and the Rule 21 motion were scheduled for February 14 and 15, 2017 respectively.
- j. On November 9, 2016, the Ombudsman Defendants brought their motion.
- k. On November 10, 2016, Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg brought their Rule 21 motion.
- l. On December 15, 2016, notwithstanding that Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg did not consent and rather opposed the admission of evidence for the Rule 21 motion, Mr. Iluyomade delivered his affidavit and the affidavit of Maurice Brenner, another former employee of TCHC.
- m. On January 9 and 10, 2017, Mr. Iluyomade and Mr. Brenner, respectively, were cross-examined on their affidavits. During his examination, Mr. Iluyomade refused certain questions including a refusal to produce the file of his former legal counsel (the "Rhode file").
- n. On January 13, 2017, there was a chamber's appointment before Justice Chiappetta. Justice Chiappetta vacated the motion dates scheduled for February 2017 and agreed to hear a refusals motion. The refusals motion was scheduled for April 12, 2017.
- o. Because of scheduling conflicts, the refusals motion was postponed until Justice Chiappetta eventually heard it on March 15, 2018.
- p. The parties disagree about whom was the victor of the refusals motion. In truth, the success was divided. The partial success for Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg was that Justice Chiappetta ordered the Rhode file produced. Justice Chiappetta referred the costs of the refusal motion to the Rule 21 motion.
- q. In May 2018 and June 2018, a dispute developed between the parties about the production of the Rhode files, which included privileged material that was unrelated to the limitations period defence that was the subject of the Rule 21, 2018. Mr. Jones, Ms. Boushel, and Ms. Haney-Kileegs' counsel demanded that the whole Rhode file be produced and threatened contempt proceedings. Mr. Iluyomade's counsel took the course of writing Justice Chiappetta and requesting that she reconsider her Order. Justice Chiappetta did review the file and based on certain assurances about whether all relevant documents had been produced,

Justice Chiappetta advised that Mr. Iluyomade did not need to produce the entire file.

- s. On June 19, 2018, Mr. Iluyomade made an Offer to Settle, the terms of which were that Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg withdraw their motion and pay Mr. Iluyomade his costs on a partial indemnity basis if the offer was accepted by June 29, 2018 plus substantial indemnity costs after June 29, 2018 if the offer was accepted after June 29, 2018.
- t. The motions were eventually scheduled and argued on November 27 and 28, 2018. After the factums for the motions had been delivered, Mr. Iluyomade withdrew the affidavits that had been opposed by Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg. After a two-year procedural sideshow, Mr. Iluyomade ultimately did not seek leave to have the affidavits made part of the record for the Rule 21 motion.
- u. On December 31, 2018, I released my Reasons for Decision. I invited the parties to make costs submissions in writing.

[10] The costs submissions of the parties were voluminous with objections to hourly rates allegations of double billing, complaints about the opponent causing waste and delay, and protests about the reasonable expectations of the unsuccessful party, but, in my view, the major issue is the principle that normally the successful party is entitled to costs.

[11] In my opinion, there is good reason in the immediate case to depart from the normal rule and to exercise my discretion to make no order to costs, leaving both parties bearing their own costs and clearing the slate as the action proceeds.

[12] In my opinion, although Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg were unsuccessful on the Rule 21 motion, the motion was reasonably brought by the losing party. Mr. Jones, Ms. Boushel and Ms. Haney-Killeeg had been Mr. Iluyomade's superiors at TCHC. Ms. Haney-Killeeg's employment with TCHC ended on August 22, 2013. Ms. Boushel's employment with TCHC ended on November 14, 2013. Mr. Jones was the President and Chief Executive Officer of the TCHC from June 18, 2012 until April 24, 2014, when his employment ended.

[13] Mr. Iluyomade's complaints largely concerned the conduct of Ms. Haney-Killeeg and Ms. Boushel, the alleged misconduct obviously occurring before their departures in 2013. His wrongful dismissal action was commenced on February 5, 2016. It was reasonable for Ms. Haney-Killeeg and Ms. Boushel to raise a limitation period defence.

[14] While reasonably brought, the Rule 21 Motion, however, was dismissed. But the dismissal of the motion was not a total failure, because the limitation period defence remains alive should Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg wish to pursue it. In this regard, I set out the pertinent paragraphs of my Reasons for Decision; that is paragraphs 119-124, 126-127, 129, and 134:

119. I disagree with Mr. Iluyomade's submission that in the immediate case there are disputed facts that would preclude the court on a Rule 21 motion from deciding whether or not a claim is statute-barred. All that is required in the immediate case is to apply the provisions of the *Limitations Act, 2002* to the pleaded facts as set out in Mr. Iluyomade's Statement of Claim, his Response to the Demand for Particulars, the admissions contained in the TCHC Defendants' Statement of Defence, and to Mr. Iluyomade's Replies.

120. As I shall explain, the application of the law to the assumed to be true facts yields - favourably to Mr. Iluyomade - my conclusion that for the purposes of a Rule 21 motion, the limitation period for his intentional infliction of mental suffering claim against the individual TCHC Defendants may not have begun to run until he was dismissed on February 25, 2014 making his February 5, 2016 timely.

121. For the purposes of the individual TCHC Defendants' motion, my line of reasoning or explanation for dismissing their motion is as follows.

122. In my opinion, by the end of 2013, Mr. Iluyomade both subjectively and objectively knew that he been injured and damaged and that the injury and damage was caused or contributed to by the acts of individual TCHC Defendants. By the end of 2013, however, it was not the case that having regard to the injury or damage that he had suffered a proceeding would have been the appropriate means to seek a remedy. It is arguable that a proceeding may only have become an appropriate remedy after February 25, 2014 when Mr. Iluyomade was dismissed without cause.

123. In other words, just for the purposes of the Rule 21 motion, it is arguable that Mr. Iluyomade's intentional infliction of mental suffering claim was only discovered on February 25, 2014 when an action against the TCHC and the individual TCHC Defendants would have been appropriate, and, therefore, his February 5, 2016 action was brought within the two-year limitation period of the *Limitations Act, 2002*. In still other words, Mr. Iluyomade's action arguably was saved by the fairness and flexibility of the operation of s. 5(1)(a)(iv) of the Act.

124. It should be appreciated that while the outcome is favourable to Mr. Iluyomade, I do not agree with his argument that his intentional infliction of mental suffering cause of action did not crystalize until February 25, 2014 because his damages only culminated with his dismissal. Mr. Iluyomade had suffered legally actionable damages before the end of 2013. He allegedly suffered from stress, anxiety, and depression, had taken medical leave, and had asked for accommodations for his mental suffering in 2013.

[...]

126. Mr. Iluyomade's cause of action for intentional infliction of mental suffering had crystalized, and it was fully constituted by the end of 2013; however, having regard to the nature of the injury, loss or damage, a proceeding against the individual TCHC Defendants would not have been appropriate means to seek a remedy in 2013.

127. Assuming the material facts alleged in Mr. Iluyomade's Statement of Claim are true, which I am obliged to do on a Rule 21 motion, by the end of 2013, a proceeding against the individual TCHC Defendants would not have been appropriate because it would have entailed that he also bring proceedings for a wrongful constructive dismissal against TCHC.

[...]

129. To be clear, I conclude that for the purposes of a Rule 21 motion, the individual TCHC Defendants do not have a limitations period defence because the pleaded material facts posit circumstances in which a limitation period would not have expired. However, in explaining why I am dismissing the individual TCHC's order, I am not making a final order about the availability of a limitations period defence. As this action proceeds, the individual TCHC Defendants may reassert their limitations defence along with their other defences.

[...]

134. I conclude, that the individual TCHC Defendants' motion should be dismissed without prejudice to their asserting later that Mr. Iluyomade's claim is statute-barred.

[15] Mr. Jones, Ms. Boushel, and Ms. Haney-Kileeg were under no obligation to consent to Mr Iluyomade being granted leave to file affidavit evidence for the Rule 21 motion.

[16] It may or may not have been reasonable for Mr. Mr Iluyomade to seek leave, but this is now unknowable, because after unilaterally filing the affidavit evidence (which was improper

but possibly forgivable), after cross-examinations, after a refusals motion, and after a bitter dispute about complying with Justice Chiappetta's Order, Mr. Iluyomade withdrew the affidavits.

[17] By withdrawing the affidavits, Mr. Iluyomade became the unsuccessful party in a procedural sideshow skirmish for which he should not recover costs.

[18] The refusals motion was another part of this procedural sideshow and isolating that motion, the success was divided.

[19] In all these circumstances, in my view, it is not appropriate to follow the normal rule that the successful party is entitled to costs. Nor would it be appropriate to order costs to the unsuccessful party. Nor, would it be appropriate to order costs in the cause. The Rule 21 motion is spent, and it was ultimately non-productive for either party.

[20] The Rule 49 Offer to Settle changes nothing. The offer was hollow, and it does not change the circumstance that neither party has shown good reason to be awarded costs.

Perell, J.

Released: March 18, 2019

CITATION: Iluyomade v. Toronto Community Housing Corp., 2019 ONSC 1639
COURT FILE NO.: CV-16-546127
DATE: 2019/03/18

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BETWEEN:

**KOLA ILUYOMADE, FUNKE ILUYOMADE,
OREOLUWA KOLA-ILUYOMADE, and
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Plaintiffs

– and –

**TORONTO COMMUNITY HOUSING
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Respondents

REASONS FOR DECISION - COSTS

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