IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

MARTIN GREEN	)	***M. Green***
	)	*on his own behalf*
(Plaintiff) Appellant	)	
	)	***E. A. Lawlor-Forsyth***
- and -	)	*for the Respondents*
	)	
DAVE BELL, LAURALYN CANTOR, DON METZ, COLIN RUSSELL, JANE DOE and THE UNIVERSITY OF WINNIPEG	)	*Chambers motion heard:* ***September 9, 2021***
	)	
	)	*Decision pronounced:*
(Defendants) Respondents	)	***September 27, 2021***

CAMERON JA

Introduction

[1] In *Green v University of Winnipeg et al*, 2018 MBCA 137 (*Green 2018*), the plaintiff was prohibited from, among other things, continuing proceedings that he had instituted in this Court without first obtaining leave from a justice of this Court. Before the Court at that time were appeals of two decisions of Edmond J consisting of a judicial review decision and a decision granting summary judgment to the defendants dismissing his statement of claim against them. The plaintiff was denied leave to appeal the judicial review decision in *Green v University of Winnipeg*, 2021 MBCA 60 (*Green 2021*). In this motion, the plaintiff seeks leave to continue his appeal of the decision of Edmond J (the motion judge) granting summary judgment

to the defendants dismissing his statement of claim (see 2018 MBQB 2) (*Green QB*).

Facts and Positions of the Parties

[2] The facts relating to the events that form the basis for the plaintiff's claims have been recited in numerous decisions. They are detailed in *Green v Tram et al*, 2015 MBQB 128 at paras 15-42, and summarized by Steel JA in *Green 2018* (at paras 6-9):

> [The plaintiff] became a student at the University in September 2011. A complaint was filed against him by the Associate Dean of Education on November 22nd of that year and one day previous to that, his high school practicum placement was terminated.
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> Over the next several weeks, the Registrar of the University conducted an investigation of those complaints and eventually issued a report finding that [the plaintiff] was "unable to conduct (himself) without being perceived by staff and students as disruptive" and recommended a one-year suspension from the University's Bachelor of Education program. The recommendation was accepted by the President of the University and [the plaintiff] was suspended as of January 2012. His appeal to the Senate Appeals Committee was rejected. His later application for reinstatement was refused.
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> Beginning in September 2011, as part of his teacher certification program, [the plaintiff] was assigned to Gordon Bell High School (Gordon Bell) for his student teaching practicum. Because of alleged concerns, among other things, with [the plaintiff's] failure to prepare adequate lesson plans, off-topic lectures and refusal to follow instructions, he was suspended from the practicum and subsequently removed. Of note, the substance of the complaints from [the plaintiff's] university professors and fellow students were independent of, and in part took place before, the concerns articulated by the staff at Gordon Bell concerning [the plaintiff's] performance as a student teacher.

> As well, in January 2012, [the plaintiff] had an order made against him barring him from the University campus under the authority of *The Petty Trespasses Act*, CCSM c P50. In August 2014, he was convicted of trespassing on the University campus (see *R v Green*, 2014 MBPC 42, leave to appeal refused, 2015 MBCA 60).
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> [emphasis added]

[3] In this motion, the plaintiff seeks leave to appeal the summary dismissal of his claims relating to his suspension from the University of Winnipeg's (the University) Bachelor of Education program and the order barring him from the University campus.

[4] In support of his motion, the plaintiff argues that the motion judge erred in dismissing his claims against the defendants for (1) defamation; (2) breach of contract, negligence and denial of due process; and (3) breaches of the *Canadian Charter of Rights and Freedoms*.

[5] He proposes 14 grounds of appeal. In his written materials and oral argument, he summarizes his grounds of appeal into three "categories". These are that the motion judge erred in (i) applying the summary judgment process; (ii) his assessment of qualified privilege in actions for defamation; and (iii) failing to apply the "effective remedy" test to his claims, rather than determine the matter on summary judgment.

[6] Relying on *Unrau v National Dental Examining Board*, 2019 ABQB 283, the plaintiff asserts that the threshold for leave to appeal is a low one, even where a litigant has been declared vexatious, and that leave should be allowed or denied based on the merits of the case.

[7] The defendants argue that the plaintiff has not met the requirements for obtaining leave as set out in section 31.2(3) of *The Court of Appeal Act*, CCSM c C240, which provides that the Court be satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for proceeding.

[8] For the reasons that follow, I agree with the defendants.

Analysis

Standard of Review

[9] An analysis of the reasonableness of the grounds of appeal advanced by the plaintiff involves a consideration of the test for summary judgment and the standard of review to be applied. In this case, the motion judge correctly identified the two-stage analysis applicable to summary judgment motions. First, the defendants, as the moving party, had the burden of proving, on a prima facie basis, that the claims would not succeed. Once the defendants met that burden, the plaintiff had the evidentiary burden to establish that there was a genuine issue for trial (the *Homestead* test) (see *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 at para 14, explained in *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at paras 70-79 (*Dakota*)).

[10] In reviewing a summary judgment decision, the appellate court applies the standard of correctness to questions of law, and palpable and overriding error to questions of fact and mixed fact and law, absent an extricable error in law, which is reviewable on the correctness standard. The final determination as to whether there is a genuine issue for trial is a

discretionary decision reviewed on a deferential standard. The appellate court will only be justified in intervening when the motion judge misdirects themselves or if their decision is so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 22-28; *Lenko v The Government of Manitoba et al*, 2016 MBCA 52 at paras 34-36; and *Dakota* at paras 36-37).

i) Application of the Summary Judgment Process

[11] The plaintiff argues that the motion judge erred in the summary judgment process respecting his claims by (a) relying on his affidavit evidence to satisfy the first stage of the *Homestead* test in light of the lack of evidence filed by the defendants; (b) not advising him during the summary judgment hearing that the motion judge was satisfied that the first stage of the *Homestead* test had been met; and (c) overlooking the first stage of the *Homestead* test and simply concluding that summary judgment would issue on the basis that the plaintiff had not established a genuine issue for trial.

[12] In reaching his conclusions regarding each of the plaintiff's claims, the motion judge relied on all of the evidence filed, including that of the plaintiff, as he was entitled to do.

[13] Further, the motion judge was under no obligation to advise the plaintiff during the course of the summary judgment hearing that he was of the view that the defendants had satisfied the first stage of the *Homestead* test before considering whether the plaintiff had met the second stage.

[14] Finally, I agree with the defendants that a review of the motion judge's reasons in their entirety demonstrates that he applied the two-stage

analysis in *Homestead*. In the end, he could not find that the plaintiff had demonstrated a genuine issue for trial.

[15] Based on the above, I have not been persuaded that the plaintiff has raised a reasonable argument with respect to any of the three positions that he has advanced regarding the summary judgment process.

ii) Qualified Privilege

[16] This issue concerns letters of complaint that were filed by some of the defendants, which formed part of the formal letter of complaint filed against the plaintiff which eventually led to his suspension. It also involves the issuance of the barring order and the dissemination of that information to staff at the University.

[17] In applying the principle of qualified privilege, the motion judge stated that he considered whether persons of "ordinary intelligence and moral principle would have considered it a duty to communicate the information [in question] to those to whom it was published" (*Green QB* at para 42). He was satisfied on a prima facie basis that "each of the statements . . . were made on an occasion of qualified privilege" (*ibid*; see also paras 43, 44). The motion judge then considered whether the evidence proffered by the plaintiff had established malice and found that it did not support a reasonable inference of such a claim.

[18] The plaintiff argues that the motion judge erred in finding that he had to prove malice at the summary stage, rather than merely having to raise a genuine issue for trial. He also submits that the motion judge ignored evidence from which a finder-of-fact might have reasonably inferred malice.

[19] The motion judge carefully considered the plaintiff's evidence and arguments regarding malice (see paras 46-56). He clearly understood and properly applied the *Homestead* test. He did not purport to apply any other test or hold the plaintiff to any higher standard.

[20] Thus, the issues identified by the plaintiff regarding qualified privilege do not raise a reasonable argument that the motion judge erred.

iii) Effective Remedy

[21] The plaintiff argues that the motion judge erred in refusing to apply the "'effective remedy' test to determine whether the [c]ourts owed deference to the University's disciplinary process" in relation to his claims of breach of contract, breach of duty of care and denial of due process.

[22] In declining to consider the issue, the motion judge applied this Court's reasoning in *Green v Tram et al*, 2016 MBCA 99 at paras 29-30. As was done by this Court in that case, he determined that he could decide the claims on the basis of the summary judgment motion and that there was, therefore, no need to consider the issue of effective remedy.

[23] The plaintiff raises no reasonable argument that the motion judge erred in deciding the summary judgment motion that was before him. Moreover, the plaintiff has not persuaded me that he raises a reasonable argument that the motion judge erred in finding that, after taking a "hard look" (*Green QB* at para 66) at the evidence, there was "no coherent or sound evidence to support [his claims of breach of contract, breach of duty of care and denial of due process]" (*ibid*).

[24] One final note. The plaintiff argues that the motion judge erred in refusing to enforce a disclosure agreement that he had with the defendants. He has not referred to any decision of the motion judge to support his contention that the motion judge made any such refusal. He also argues that the motion judge erred in ordering him to file the affidavits that he was relying on in this motion at the same time as the defendants. His arguments regarding both matters are difficult to discern, are not supported by the record before me and do not provide a reasonable basis to appeal the discretionary decisions of the motion judge.

[25] In conclusion, I would adopt the comments made by my colleague Burnett JA in *Green 2021* (at paras 12-13):

> To summarize, I have carefully considered the applicant's written and oral submissions. Notwithstanding the low threshold, I am not persuaded that he has established any reasonable grounds for the appeal, nor do I believe that any of the proposed grounds reveal an arguable case or have a realistic possibility of success (see *Belway v Lalande-Weber*, 2017 ABCA 108 at paras 4, 6; *ET v Calgary Catholic School District No 1*, 2017 ABCA 349 at para 10; *Makis v College of Physicians and Surgeons of Alberta (Complaint Review Committee)*, 2019 ABCA 341 at para 15; *Bossé v Law Society of New Brunswick*, 2020 CanLII 17736 at paras 13-14 (NBCA); and *Green 2020* [*Green v University of Winnipeg*, 2020 MBCA 49] at paras 11-14).
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> Moreover, I am satisfied that "[t]o permit the appeal to proceed would advance claims that have no hope of succeeding" (*Wong v Leung*, 2012 ABCA 290 at para 16) and would simply be a continuation of the applicant's abuse of the Court process. As O'Ferrall JA observed in *Jordan v De Wet*, 2016 ABCA 366, "Fundamental to both tests (the abuse of process or the reasonable grounds test) is that if the court is convinced the appeal has no chance of success, permission should not be granted" (at para 21).

[26] For all of the above reasons, I would dismiss the plaintiff's motion to continue his appeal with costs on tariff.

Cameron JA