CITATION: Canadian Urethane v. Demilec Inc., 2023 ONSC 2234
COURT FILE NO.: CV-22-00666901
DATE: 20230413

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: CANADIAN URETHANE FOAM CONTRACTORS ASSOCIATION INC.
Plaintiff

AND:

DEMILEC INC. and CALIBER QUALITY SOLUTIONS
Defendants

AND BETWEEN:

DEMILEC INC.

Plaintiff by Counterclaim

AND:

CANADIAN URETHANE FOAM CONTRACTORS ASSOCIATION INC., ANDREW COLE and COLE CORPORATION

Defendants to the Counterclaim

BEFORE: Koehnen J.

COUNSEL: *Gavin H. Finlayson* and *Madeleine Dusseault,* for the Plaintiff

Kyle Lambert and *Ricki-Lee Williams* for the Defendant, Demilec Inc.

HEARD: January 23, 2023

ENDORSEMENT

Background to the Motion

[1] This is a summary judgment motion by Andrew Cole and Andrew Cole Corporation for an

order dismissing the claim against them. Mr. Cole has been the Executive Director of the plaintiff, the Canadian Urethane Foam Contractors Association Inc. ("CUFCA") since 2012.

[2] CUFCA is a not-for-profit quality assurance provider in the polyurethane spray foam industry. Among other things, it provides licensing and certification for spray foam contractors and installers. Its members include manufacturers, contractors, and equipment manufacturers.

[3] The defendant Demilec Inc. is one of CUFCA's former members. Demilec is a wholly-owned subsidiary of Huntsman Corporation, an American multinational manufacturer of chemical products with revenues of approximately $8 billion.

[4] On November 4, 2019, Demilec purported to terminate its membership and licensing agreement with CUFCA.

[5] CUFCA takes the position that Demilec's licensing agreement could only be terminated on its anniversary date and with four months advance notice, neither of which conditions were complied with. CUFCA then commenced an action against Demilec for breach of contract and misuse of intellectual property. In addition, it included Demilec's new quality assurance provider, Caliber Quality Solutions Inc., to the action and alleged that Demilec and Caliber had conspired to interfere with CUFCA's relationship with its members, take over its business for their own benefit, and cause CUFCA to cease operations. Caliber played no role in this motion.

[6] Demilec defended and counterclaimed against CUFCA. In addition, it joined Mr. Cole and "Andrew Cole Corporation" as defendants to the counterclaim.

[7] The essence of the counterclaim against Mr. Cole is that he worked with a competitor of Demilec (CUSE) to manufacture and develop a spray foam (Grizzly Gold) for his personal benefit, which spray foam competed with a Demilec product. In addition, Demilec alleges that Mr. Cole should be liable for several other steps and decisions he made in his capacity as Executive Director of CUFCA. Demilec alleges that CUFCA, as a non-profit corporation, did not gain anything from these steps, as a result of which Demilec says it "reasonably concluded that Mr. Cole was acting out of self-interest."

[8] Demilec admits in its factum that there is "near-total overlap" between Demilec's allegations against CUFCA and Mr. Cole. Indeed, when asserting its counterclaim, Demilec regularly uses statements such as "CUFCA and Cole" did a particular thing or that "Cole on CUFCA's behalf" did a particular thing. In its factum Demilec says that on this motion:

> The Court must decide whether Mr. Cole acted out of self-interest or in CUFCA's interests.

[9] It appears that Demilec has not suffered any damages because of Mr. Cole's alleged wrongdoing. The affidavit of Demilec's deponent on the motion states that its market share in Canada has not materially changed since 2018. Its claim against Mr. Cole is not one for damages but one for disgorgement of profit based on its theory about Mr. Cole's involvement with a competitor's product.

The Evidence Against Mr. Cole

i. Allegations Concerning a Competitive Foam Product

[10] An individual employee is, generally speaking, not personally liable for the acts he carries out in the name of his employer unless the conduct falls into the category of fraud, deceit, dishonesty or want of authority on the part of the employee or amounts to a tort that the employee is carrying out.[1]

[11] The allegation that Mr. Cole was launching a competitive product to that of Demilec is based on the following evidence from the affidavit of Elizabeth Lalli-Reese, Huntsman's Global Vice President of Risk Management and Human Resources:

> 70. On or about August 21, 2019, Tom Harris, then Demilec's Vice President of Building Science, advised of a discussion he had recently had with Mr. Laverne Dalgleish. Mr. Dalgleish is well known in the spray foam industry and is a former CUFCA board member. Mr. Harris advised that Mr. Dalgleish relayed a conversation he had had with Mr. Cole at an Underwriters Laboratories of Canada (ULC) standards meeting. In that discussion, Mr. Cole stated that **he intended to "launch a CUFCA foam" and that he wanted CUFCA to be the only QAP with "our foam"**.
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> 71. After speaking with Mr. Harris, I contacted Mr. Dalgleish to confirm his discussion with Mr. Cole. Mr. Dalgleish advised me that he had met with Mr. Cole over dinner and that, during that meeting, **Mr. Cole had stated his intention to "launch a CUFCA foam" so that CUFCA would be the only QAP with its own foam**.
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> 72. In response, I directly asked Mr. Dalgleish about what he believed Mr. Cole meant. Mr. Dalgleish stated that he understood

[1] *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*, 1995 CanLII 1301 (ON CA)

> Mr. Cole to mean that Mr. Cole wanted to invest in his own foam company. Any such 'foam company' would of course be in direct competition with Demilec. [Emphasis added.]

[12] I will turn in a moment to Mr. Cole's explanation for the comments attributed to him in this passage. For the moment I pause to examine the passage more closely in light of the allegations against Mr. Cole.

[13] Paragraphs 70 - 71 of Ms. Lalli-Reese's affidavit allege corporate conduct. The evidence in those paragraphs refers to a "CUFCA foam" and to CUFCA being the only quality assurance provider with its own foam.

[14] While that evidence might, depending on the circumstances, give rise to a claim against CUFCA, it does not give rise to a claim against Mr. Cole, a CUFCA employee. Creating a competitive product does not in and of itself amount to tortious conduct for which Mr. Cole could be held liable.

[15] In paragraph 72 of her affidavit, Ms. Lalli-Reese extends the evidence to Mr. Cole by alleging that "he wanted to invest in his own foam company" that would compete with Demilec. That does not create a claim against Mr. Cole either. There is nothing unlawful in Mr. Cole developing a competitive product on his own other than it might violate his contract of employment. That, however, is a claim for CUFCA, not Demilec, to advance. Moreover, the extension of the evidence in paragraph 72 is problematic. It is hearsay evidence on a contentious point. It is hearsay that contradicts the earlier hearsay from Mr. Dalgleish contained in paragraphs 71-72 of Ms. Lalli-Reese's affidavit. Demilec does not explain the contradiction. Demilec did not seek to examine Mr. Dalgleish or obtain an affidavit from him.

[16] Mr. Cole has explained that the statements attributed to him were made in jest and have been misconstrued.

[17] In his own affidavit, Mr. Cole explained that the comments were made at a dinner involving several people. Some time before the dinner, he had discovered that another quality assurance provider in the spray foam space, UFC Urethane Foam Consultants Inc., was in fact beneficially owned by a spray foam manufacturer. After learning this, Mr. Cole wrote a letter to the Canadian Construction Materials Center, operated by the National Research Council of Canada, an agency of the Government of Canada. In his letter, Mr. Cole advocated for new disclosure requirements that would prevent the conflict of interest scenarios that arise where a quality assurance provider is associated with the manufacture of a product that the quality assurance provider is purporting to certify and oversee. He noted in his letter that this ownership conflict, if proven, undermined the intent of third-party certification bodies and compromised the integrity of the industry. Mr. Cole produced the letter as an exhibit to his affidavit.

[18] Mr. Cole was discussing that letter with Mr. Dalgleish (whose company previously managed CUFCA), a representative of the Canadian Construction Materials Centre and the former head of the Underwriters Laboratories Standards Group which sets the regulatory standards that spray foam products must meet. During the course of that discussion, Mr. Cole made a joke to the effect that if a manufacturer could own a quality assurance provider, then a quality assurance provider should be able to own a foam system. In the context of the letter that Mr. Cole had written and the representatives with whom he was discussing the issue, the comment was clearly meant ironically.

[19] Mr. Cole was cross-examined for 7 hours and produced extensive documentation on the issue of CUFCA's and his own alleged involvement with a competitive product. Mr. Cole's evidence is clear and uncontradicted: neither CUFCA nor Mr. Cole are pursuing, nor have they pursued the manufacture of any spray foam product.

[20] I was not taken to any evidence which suggests that Mr. Cole's explanation was contradicted, qualified, or shaken on cross-examination. Demilec has introduced no evidence of its own to contradict, qualify or shake Mr. Cole's explanation.

ii. Grizzly Certification

[21] The closest Demilec came to challenging Mr. Cole's involvement with a competitive product involved the Grizzly Gold product of CUSE, a competitor of Demilec. CUFCA certified Grizzly Gold. Mr. Cole was involved in the certification. Demilec suggests there is something improper in that. I disagree.

[22] First, Grizzly Gold was certified after Demilec left CUFCA. Demilec has no standing to complain about something Mr. Cole did after Demilec left unless there is some further tortious allegation such as mis-use of confidential information, appropriation of intellectual property or the like. Second, even if the Grizzly certification process began while Demilec was a member, that forms no basis of a claim against Mr. Cole. There is nothing in CUFCA's rules or its contract with Demilec that prohibits it from certifying products that compete with those of an existing member. Nor is there anything to prohibit the admission of a new member who competes with an existing member. Recall that CUFCA is a quality assurance provider for the spray foam industry. One would fully expect that it has competitors as members.

[23] Demilec then suggests that Mr. Cole somehow short-circuited the certification process for Grizzly Gold. This provides no basis for a claim against Mr. Cole. Whatever Mr. Cole did in relation to Grizzly Gold was done in his capacity as Executive Director of CUFCA. Moreover, as noted, the certification occurred after Demilec had left CUFCA. As a result, even if Demilec had a legitimate complaint to the effect that Grizzly Gold was subject to a less rigorous process than Demilec was, any such complaint would exist on Demilec's part only in its capacity as a member of CUFCA, a status it chose to terminate.

[24] Finally on this point, Demilec complains that Mr. Cole sent out messages promoting Grizzly Gold. That is both understandable and does not form the basis of a claim against Mr. Cole. CUFCA regularly engages in promotional efforts for members. Those efforts are carried out by employees like Mr. Cole. CUFCA has also promoted Demilec products in the past. Moreover, given Demilec's departure from CUFCA, there would be nothing wrong with CUFCA announcing to its members that it now has a replacement product for that of Demilec.

iii. French Language Services

[25] Demilec complains that Mr. Cole refused to offer French language services to contractors in Quebec. Demilec suggests that the failure to provide French language services amounted to a breach of an implied term of its membership agreement. Anything Mr. Cole did in that respect was done in his capacity as an employee of CUFCA. If there is a claim in that regard, it is against CUFCA, not Mr. Cole.

iv. Emails

[26] Demilec also complains about two emails Mr. Cole sent to CUFCA's members concerning Demilec's departure.

[27] After referring to Demilec's departure from CUFCA, the first email stated:

> This means that all our members can continue to buy MPG products from DEMILEC until March 4, 2020. Only then, if we want to continue to buy these products, we will have to join the Caliber program. Demilec will continue to provide us with the details of your purchases, and yes, the FDI will be added and due on your purchases during that time period.

[28] Demilec complains that it had left CUFCA immediately and would require contractors to register with its new quality assurance provider, Caliber in order to purchase product.

[29] The second email stated:

> So where do you go from here? Well our advice to you is to take stock of what you feel is important. We think you should rightly be concerned by a manufacturer that decides to make radical wholesale changes to their business model that includes the loss of its seasoned sales staff and CUFCA its Trade Association partner.

[30] Demilec does not plead that these emails were somehow defamatory. Thus, this is not a situation in which a plaintiff seeks to hold Mr. Cole personally responsible for a tort he personally committed even though he may have done so in his capacity as a corporate employee.

[31] Instead, Demilec alleges that the emails amounted to intentional interference with economic relations and intentional interference with contractual relations. The statement of claim does not plead underlying elements of either of those causes of action nor have I been taken to any evidence in the record to support either of those causes of action.

[32] Generally speaking, intentional interference with economic relations requires a plaintiff to have a contract with a third party and the defendant have engaged in an unlawful act against the third party (i.e., not against the plaintiff).[2] I was not taken to allegations of any such conduct.

[33] Moreover, the emails were sent as part of Mr. Cole's job duties and were discussed with and approved by the chairman of the CUFCA board before they were sent. Mr. Cole believed the contents of the emails were true when they were sent. I was not taken to any evidence to suggest the contrary.

v. Andrew Cole Corporation

[34] As noted earlier, Demilec named Andrew Cole Corporation as a defendant to the counterclaim. This is a place holder name, much like John Doe, for the corporation through which Mr. Cole is alleged to have held his interest in a competitive foam product. As noted earlier, Mr. Cole has no such interest and that basis for the counterclaim against Mr. Cole has not been made out.

[35] Mr. Cole is, however, the principal of a corporation called Four Four Four through which he receives his income as Executive Director of CUFCA. In addition, Four Four Four has acted as an import agent for spray foam test kit components, disposable personal protective equipment, and test instruments. It has sold those products to CUFCA and its members, including Demilec. Demilec suggests impropriety in this. I see no such impropriety. Mr. Cole's activities in this regard were approved by the CUFCA board. If there is impropriety it is in Mr. Cole's capacity as an employee which is for CUFCA, not Demilec, to raise.

The Test for Summary Judgment

[2] *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12 (CanLII), [2014] 1 SCR 177 at para. 23.

[36] Rule 20.04 provides that the court "shall" grant summary judgment if it is satisfied that there is no "genuine issue requiring a trial." This has been interpreted to mean that a respondent on a summary judgment motion cannot rely on allegations in its pleadings but must set out specific evidence to demonstrate that a trial is required to resolve the issues at hand.[3] The motion judge is entitled to assume that the record contains all evidence the parties will present at trial. Both parties are required to put their best foot forward.[4]

[37] On my view of the record, Demilec has failed to provide an evidentiary record to demonstrate that there are issues involving its claim against Mr. Cole that require a trial to resolve. I can easily resolve those issues on the record before me.

[38] As noted throughout these reasons, the allegations against Mr. Cole raise the issue of whether Mr. Cole is personally liable or whether his employer is liable. I have found that, on the record before me, the allegations are ones for which Mr. Cole is not personally liable. They all involve conduct that Mr. Cole engaged in on behalf of CUFCA. To the extent that Mr. Cole is alleged to have engaged in a tort for which he could be held personally liable even if committed on behalf of the corporation, the tort has not been made out on the evidence or the law.

[39] To resist the motion, Demilec focuses principally on the fact that this is a motion for partial summary judgment. It relies heavily on the decision of the Ontario Court of Appeal in *Butera et al v Chown, Cairns LLP*.[5] In that case, the Court of Appeal set out a number of factors that courts must consider when determining whether partial summary judgment is appropriate. It is not necessary that the court be satisfied in respect of all of those factors. Different factors will assume different degrees of weight in different cases. I review below those factors that Demilec relies on.

[40] **Judicial Efficiency.** Demilec argues that given the very heavy overlap in the allegations against CUFCA and Mr. Cole, the court will need to address against CUFCA at trial, the same issues that it is considering against Mr. Cole on this motion. Demilec argues that this is not an efficient use of judicial resources. This point has merit. It can, however, result in an injustice to refuse to dismiss motions for summary judgment against employees where they have no basis in law *solely* because identical allegations are being made against the corporation. An absolutist approach of that sort in all cases would invite aggressive litigants to join corporate employees in all instances as a pressure tactic and render courts helpless to curb that abuse.

[41] A competing consideration must be the injustice to the employee who is improperly joined. Joining an employee as a defendant has consequences. It can affect an employee's credit

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[3] *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 20, 26, aff'd 2014 ONCA 878; *Chernet v. RBC General Insurance Company*, 2017 ONCA 337 at para. 12

[4] *IML Roofing & Sheet Metal Systems Inc. v. The Regional Municipality of Peel et al.*, 2019 ONSC 908 at para 56; *Arnold Hennessy Holdings Inc. v. Flapperless Inc.*, 2016 ONSC 6341 at paras. 18-19.

[5] *Butera et al. v. Chown, Cairns LLP et al.*, 2017 ONCA 783 at paras. 29-33

rating, ability to get loans, and ability to renew mortgages. That can place considerable pressure on employees. Courts have been alive to this danger and have been prepared to dismiss motions against individual employees where the justice of the case demands it.[6]

[42] **Unsatisfactory Record.** Demilec submits that the court does not have access to a satisfactory record at this point in the proceeding. It notes that: affidavits of documents have not been exchanged and examinations of for discovery have not been held, and that there are differences in the scope and use of cross-examination and discovery. These latter differences could lead an examiner to employ a different strategy on cross-examination than on discovery.

[43] The case law is clear, however, that a respondent to a summary judgment motion cannot simply argue that discovery is needed, or that more or better evidence will be available at trial.[7] The time to introduce that evidence is now. The *Rules* allow a party to brig a motion for summary judgment after a defendant has delivered a statement of defence or a motion record. The *Rules* do not require a moving party to wait for discoveries to have been completed before bringing a motion for summary judgment.

[44] Demilec argues that it is unfair to require it to have introduced evidence from Mr. Dalgleish because he works for another company in the spray foam industry. I do not see how that is a barrier to calling him as a witness. Demilec could have summonsed him pursuant to a Rule 39 examination and could have obtained the assistance of the court if Mr. Dalgleish refused to attend. I hasten to add that there is no evidence to suggest that he would not have attended an examination.

[45] **Risk of inconsistent findings**. The main issue on this motion was whether Mr. Cole was acting in a personal capacity or whether he was acting on behalf of CUFCA in taking the various steps he took. There is no risk of an inconsistent finding at trial on that issue. CUFCA was fully aware of the positions that Mr. Cole took on this motion and did not take issue with any of them. Indeed, CUFCA and Mr. Cole are represented by the same counsel. If there were any inconsistency between Mr. Cole and CUFCA about the capacity in which he was acting, I would have thought it would have been raised during the course of the motion. Given that CUFCA raised no such issue, I would have thought that a trial judge would give short shrift to any attempt by CUFCA to argue that it should not be held liable for Mr. Cole's conduct because he was acting in his personal capacity or beyond his authority as a CUFCA employee.

[46] **Credibility.** Demilec submits that credibility is a principal issue, "particularly on questions related to whether or not [Mr. Cole] acted out of self-interest." I do not accept that submission. As noted earlier, even Demilec's evidence about the possibility of the

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[6] *Liora Fine Arts Inc. v. Malcolm Holdings Inc.*, 2016 ONSC 8103 at paras 33-48; *Kerwin et al v. D'Urso et al.*, 2018 ONSC 5484 at paras. 34-46

[7] *Wang v. Rezapoor*, 2021 ONSC 1466 at para. 13; *Norton McMullen Consulting Inc. v. Boreham*, 2015 ONSC 5862 at paras. 73-75, aff'd 2016 ONCA 778; *Chernet v. RBC General Insurance Company*, 2017 ONCA 337 at para. 12.

pursuit of a competitive product suggests that it was CUFCA that was pursuing the competitive product, not Mr. Cole. As noted, CUFCA appears to accept that Mr. Cole was acting in CUFCA's interests and in his capacity as a CUFCA employee. In those circumstances, it is difficult to see where the credibility issue arises. A responding party cannot merely allege issues of credibility. The respondent must point to a specific issue of credibility and point to specific evidence that creates the credibility issue.

[47] In the foregoing circumstances, I am satisfied that the action against Mr. Cole and Andrew Cole Corporation should be dismissed even though the motion before me is one for partial summary judgment.

[48] Any party wishing to make cost submissions arising out of these reasons may do so by filing written submissions within 14 days of the release of these reasons. Any responding party will have 14 days to respond with a further five days for reply.

Date: April 13, 2023

Koehnen J.