**CITATION:** DiNunzio v. City of Hamilton, 2010 ONSC 3631
**DATE:** 20100712
**DOCKET:** CV-09-373392



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| **TERESA DINUNZIO AND DANNY DINUNZIO, IN HIS PERSONAL CAPACITY AND ON BEHALF OF *FAMILY LAW ACT* R.S.O. 1990 CLAIMANTS**<br><br>Plaintiffs | *David Keith Alderson*, for the Plaintiffs |
| **- and -** | |
| **CITY OF HAMILTON, HAMILTON POLICE SERVICES BOARD, HAMILTON POLICE SERVICE, BRIAN J. MULLEN, KEN LEENDERTSE, PAUL F. RYAN, MARCO VISENTINI AND DALTON TIMMIS INSURANCE GROUP**<br><br>Defendants | *C. Kirk Boggs* and *Kirk F. Stevens*, for the Defendants except Dalton Timmis Insurance Group |
| | **HEARD:** March 17 and April 15, 2010 |

**L. A. PATTILLO J.**

Introduction

[1] The defendants (except Dalton Timmis Insurance Group) move pursuant to rule 21.01 (3) (a) of the Rules of Civil Procedure to dismiss the plaintiffs' action on the basis that the court's jurisdiction in the dispute is ousted by a collective agreement.

[2] In the alternative, the moving defendants seek to utilize a combination of Rules 5, 20, 21, 24, 25, 30 and 31 relating to parties, pleadings and summary judgment to establish that the plaintiffs' claims are legally untenable and that the action should therefore be dismissed. In that regard the moving defendants submit:

a) The City of Hamilton and the Hamilton Police Service should be deleted as defendants in the action;

b) The claim for defamation is barred by the three month limitation period in s. 6 of the Libel and Slander Act and by the failure to serve a notice of alleged libel, as required by s. 5(1) of the Act;

c) The allegations of conspiracy in the Statement of Claim are prejudicial and frivolous and vexatious;

d) The defendants breached no duty to Teresa DiNunzio to keep her identity confidential;

e) The allegations of conflict of interest between Teresa DiNunzio and the Hamilton Police Services Board and other members of the Hamilton Police Service have no basis in fact or law; and

f) The claims against the defendants Ryan and Visentini give rise to no relief.

[3] At the outset of the argument of the motion on March 17, 2010, the plaintiffs brought a motion to compel the defendants Ryan and Visentini to produce certain files and sought an adjournment of the motion pending delivery of the requested files and an opportunity to review them. After argument, I dismissed the plaintiffs' motion and refused the adjournment request for reasons which I gave briefly in court and subsequently provided in writing. As a result of the plaintiffs' motion, the moving parties' motion could not be completed on March 17 and was adjourned by agreement to April 15, 2010.

[4] At the outset of the return of the motion, the plaintiffs' sought a stay of the moving parties' motion on the ground that they had appealed my decision of March 17, 2010, dismissing their motion and that until the resolution of the appeal, it would be prejudicial to the plaintiffs to proceed with the motion. After argument, I denied the plaintiffs' request for a stay. In my view, there was no basis for a stay. A stay operates to prevent the enforcement of an order and no order had been issued to stay. The plaintiffs were, in effect, seeking to adjourn the moving parties' motion for a second time. Notwithstanding the plaintiffs' submissions, in my view the outcome of an appeal from my March 17, 2010 decision will have no bearing on the moving parties' motion. Further, and in the circumstances, an adjournment was not appropriate.



Background

[5] Ms. DiNunzio is a civilian employee of the Hamilton Police Services Board (the "Board"). Danny DiNunzio is her husband.

[6] The Board is created pursuant to Part III of the *Police Services Act*, R.S.O. 1990, c. P.15 and is responsible for the police force in Hamilton which is the Hamilton Police Service ("HPS"). The defendants Bryan J. Mullan and Ken Leendertse are the HPS' Chief and Deputy Chief of Police respectively. The defendant Paul F. Ryan is a lawyer, employed by the City of Hamilton. He was retained by the Board in respect of certain legal actions hereinafter referred to. The defendant Marco Visentini is also a lawyer and is employed by the Board.

[7] In February 2007, Ms. DiNunzio was a communications operator with the Board's Communications Branch and her duties included taking "911" calls. On February 10, 2007, Ms. DiNunzio took a 911 call from an individual who said he wanted to turn himself in because he was wanted by police. Ms. DiNunzio responded to the call as she was trained to do by, among

other things, advising the caller to come to the police station to surrender and assigning a "Priority 3" status to the matter which required the dispatch of police officers to the caller's location within 30 minutes. When the police arrived at the location of the call, the caller was no longer there and he failed to subsequently turn himself in at the police station. A few days later, prior to being apprehended, the caller fatally stabbed two young individuals and wounded two others.

[8] In late February 2007, Deputy Chief Leendertse responded to questions from a journalist in a manner that led to a series of newspaper articles criticizing the HPS for failing to follow its own policy and not dispatching officers quickly enough to apprehend the caller. The criticism was repeated by other Hamilton area and national media. None of the reports identified Ms. DiNunzio specifically.

[9] In March of 2008, the estate of one of the individuals killed by the caller and his family commenced an action in this Court against the City, the Board and other defendants, including two unidentified police officers, John Doe Officer #1 and Jane Doe Officer #2, and two unidentified civilian employees similarly identified as John and Jane Does in respect of the events. The statement of claim alleged, among other things, negligence on the part of the two unidentified civilian employees in respect of the 911 calls on February 10, 2007. Subsequently three other actions arising out of the tragic events were commenced. The defendants Ryan and Visentini were involved in dealing with the actions of behalf of the City and the Board.

[10] The DiNunzio action was commenced by notice of action commenced February 27, 2009. In the statement of claim dated March 30, 2009, Ms. DiNunzio claims substantial damages against the defendants arising out of the above noted events of February and March 2007 and the

subsequent lawsuits. Many causes of action are alleged including civil conspiracy, breach of fiduciary duty, intentional and/or negligent infliction of nervous shock, defamation, intentional interference with economic relations, negligence and breach of contract. Mr. DiNunzio's claim is on his own behalf and on behalf of Ms. DiNunzio's relatives pursuant to the *Family Law Act*, R.S.O. 1990 c. F. 3.



[11] The claims against the Board and the individual defendants who are either Board employees or agents as set forth in the statement of claim can be summarized into three different aspects:

1. A claim for damages for emotional distress arising out of the actions of the Board, its employees and agents to wrongfully and publicly attempt to attribute blame to Ms. DiNunzio for the tragic events of February 2007 in order to deflect blame from themselves;

2. A claim for damages arising from breach of duties by the Board's employees and/or agents relating to the handling of the four lawsuits commenced by the estates and families of the victims of the February 2007 events and in particular the disclosure of Ms. DiNunzio's name to counsel for the plaintiffs in one of the actions; and

3. Indemnity for legal costs incurred as a result of having to retain independent counsel to deal with the four actions.

Jurisdiction

[12] In support of, among other things, the jurisdictional issue, the moving defendants filed the affidavit of Mr. Visentini, which attached a copy of the Civilian Personnel Collective Agreement 2006-2008 entered into by the Board and the Hamilton Police Association on behalf of the civilian employees (the "Collective Agreement"). Mr. Visentini deposed that, although unsigned, the Collective Agreement governed the relationship between the Board and its civilian employees during the years 2006 to 2008. The plaintiffs filed no evidence to contradict that information.

[13] The Moving Parties submit that all of the claims asserted by Ms. DeNunzio in her statement of claim are subject to the exclusive jurisdiction of the dispute resolution procedures set forth in the Collective Agreement and accordingly the Court has no jurisdiction to deal with them.

[14] The courts have long held that where a dispute between an employee and an employer is governed expressly or inferentially by a collective agreement, the courts have no jurisdiction to entertain an action in respect of the dispute and the matter must be dealt with by arbitration under the collective agreement: *Weber v. Ontario Hydro*, [1995] 2 S.C.R 929 (S.C.C.); *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 (S.C.C.); *Giorno et al. v. Pappas et al.* (1999), 42 O.R. (3d) 626 (C.A.); *Regina Police Association v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 (S.C.C.); *Abbott v. Collins* (2003), 64 O.R. (3d) 789 (C.A.); *Heasman v. Durham Regional Police Services Board*, [2005] O.J. No. 5096 (C.A.); *Richards v. Catney et al*, [2005] O.J. No. 5280 (C.A.).

[15] In *Regina Police Association*, supra, the Supreme Court described the analytical approach as set forth by the Court in *Weber*, supra, that a court must take to determine jurisdiction. Bastarache J., on behalf of the Court, stated at para. 25:

> **25** To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see Weber, supra, at para. 43. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the

> dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g., Weber, at para. 54; New Brunswick v. O'Leary, supra, at para. 6.



[16] In considering the essential character of the dispute, the court does not look to the characterization of the wrong. Rather, it looks to the facts that give rise to the dispute: *Morrissette v. Canada (Attorney General),* [2004] O.J. No. 2327 (C.A.).

Analysis

[17] The moving parties accept for the purposes of the jurisdictional issue that the facts as alleged in the statement of claim are true. Those facts, in my view, clearly indicate that the "essential character" of dispute involves alleged wrongful actions by the Board through its employees or agents which has caused damage to Ms. DeNunzio. Further, such actions took place entirely within the workplace environment and are workplace centered. They involve an alleged conspiracy within the HPS to deflect the blame to Ms. DeNunzio for the events of February 2007 including the alleged defamation by Deputy Chief Leendertse; the handling by the Board, its employees and agents of the subsequent lawsuits arising out of the February 2007 incidents; and the request for indemnification of legal expenses relating to the third party lawsuits.

[18] As noted in *Weber*, supra, at p. 957, the presence of a collective agreement does not necessarily exclude all claims by an employee from the courts. Only those claims which "expressly or inferentially arise from the collective agreement" will be excluded.

[19] In this case, the terms of the Collective Agreement are quite broad. Among other things, the Collective Agreement governs the working conditions of the civilian employees, including Ms. DeNunzio.

[20] Pursuant to the Collective Agreement, the Board has the authority and responsibility to direct the work force (Article 2.1(a)). The Board agrees, among other things, that it will not carry out its functions under the Collective Agreement in a manner that is inconsistent with the Collective Agreement or the Police Services Act and regulations. In the event that the employee's rights are breached or interfered with during the exercise of such authority, the employee's remedy is to grieve pursuant to the grievance procedure in Article 21 of the Collective Agreement.

[21] The Collective Agreement gives power to the Board to, among other things, direct the working force and to discipline its members (Article 2.1 (a)) and provides that management will not discriminate against any person during their employ (Article 2.1(j)). It also provides for indemnification of employees in the defence of a civil action (Article 31).

[22] In my view, regardless of the causes of action asserted, all of the claims as pleaded by Ms. DeNunzio in the statement of claim either expressly or inferentially arise out of the Collective Agreement. As a group, they all relate directly to and arise out of Ms. DeNunzio's employment with the Board and alleged wrongful actions of the Board by its employees or agents in the workplace.

[23] It matters not what the cause of action is. Nor does it matter that the dispute is not specifically delineated in the Collective Agreement. In the present case, it matters not whether

the dispute is characterized specifically as discipline or discrimination. What is important is that it involves alleged interference with Ms. DeNunzio's rights as an employee in the workplace. It also involves indemnification in respect of civil lawsuits. Because the essential character of the dispute arises entirely from the interpretation, application, administration or violation of the Collective Agreement, it is within the sole discretion of the arbitrator.

[24] The plaintiffs submit that their claims are not related to the Collective Agreement but rather are claims in tort for negligence, breach of duty of care and breach of fiduciary duty. As previously noted, in considering the essential character of the dispute the court does not look to the characterization of the wrong. Rather, it looks to the facts that give rise to the dispute.

[25] In support of their position that their claims are outside of the Collective Agreement, the plaintiffs rely on *Piko v. Hudson's Bay Co.* (1998), 41 O.R. (3d) 729 (C.A.) and *McNeil v. Brewers Retail Inc.*, [2008] O.J. No. 1990 (C.A.). In *Piko*, which was followed by *McNeil*, the Court held that where the dispute between the parties is centered on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, the essential character does not arise from the interpretation, application, administration or violation of the collective agreement. In my view, the facts of both *Piko* and *McNeil* are different from the present case where there is no allegation that the Board or its employees or agents took some action in respect of a third party outside the workplace that caused Ms. DeNunzio harm. Rather Ms. DeNunzio's allegations relate to the actions of the Board, its employees and agents during the course of their work within the workplace only.

Conclusion

[26] In my view, therefore, the essential character of the plaintiffs' action arises from the interpretation, application, administration or violation of the Collective Agreement and must be determined by an arbitrator in accordance with the dispute resolution procedure set out in the Collective Agreement. Although the Collective Agreement provides time periods for commencing a grievance which have long passed, counsel on behalf of the Board indicated in argument that any such time periods would not be relied on by the Board if Ms. DeNunzio elects to proceed with her claim by way of arbitration under the Collective Agreement.

[27] In light of my decision in respect of jurisdiction, I need not consider the other alternative grounds for dismissal raised by the moving parties.

[28] Ms. DeNunzio's action is therefore dismissed as against the moving defendants. The claims by Mr. DeNunzio, being entirely derivative, are dismissed as well.

Costs

[29] At the conclusion of the argument on the motion, the parties addressed both the costs for the plaintiffs' dismissed production/adjournment motion brought at the outset of the argument on March 17, 2010 as well as costs in respect of the moving defendants' motion and the action. I received costs outlines from both the plaintiffs and the moving defendants in respect of the costs claimed for each motion.

[30] In respect of the costs arising out of the plaintiffs' motion for production of the files from Messrs. Ryan and Visentini and to adjourn the moving defendants' motion, which I dismissed, the moving defendants claim costs on a partial indemnity basis of $6,340.80 made up

exclusively of fees and GST. While the losing party is not normally entitled to costs, the plaintiffs submit they are entitled to costs on the basis that their motion to obtain the files should have been brought by the solicitors as part of their duty to Ms. DeNunzio as barristers and solicitors. The plaintiffs submitted a costs outline claiming costs on a partial indemnity basis, including GST, of $35,684.25. The difficulty in my view with the plaintiffs' submission is that I found based on the evidence before me on the motion that during the material time, there was never a solicitor/client relationship between Ms. DeNunzio and Mr. Ryan and/or Mr. Visentini. In such circumstances, therefore, neither Mr. Ryan nor Mr. Visentini had a duty to bring a motion to determine whether their files should be produced.

[31] The plaintiffs' motion took the better part of a day to argue. While the plaintiffs filed Ms. DeNunzio's affidavit in support of the motion along with a factum and brief of authorities, the moving defendants filed no additional material in response beyond the material they had filed for their motion.

[32] The moving defendants prevailed on the plaintiffs' motion. While they were put to some additional time and expense to both prepare and argue the motion, in my view the time claimed for the motion is high. I also have some difficulty with the fact that the moving defendants are claiming both preparation and court time for two senior counsel. While the moving defendants are entitled to retain as many lawyers as they wish, it is not appropriate to require that the other side pay the costs. I fix the moving defendants' costs of the plaintiffs' production/adjournment motion on March 17, 2010 at $3,000 inclusive of disbursements and taxes payable by the plaintiffs to the moving defendants.

[33] In respect of the costs of the moving defendants' motion, they were successful on the motion which has resulted in the plaintiffs' action being dismissed. They are therefore entitled to their costs of the motion and the action on a partial indemnity basis.

[34] The moving defendants submitted a costs outline claiming costs for the motion of $37,320.10, inclusive of disbursements and GST and costs for the action of $16,993.21, also inclusive of disbursements and GST for total costs in the amount of $54,313.31.

[35] The plaintiffs submitted a costs outline for the motion claiming costs on a partial indemnity basis of $21,352.14, inclusive of disbursements and GST ($19,112.14 plus $2,240 counsel fee for the argument added at the time of submissions).

[36] There is no question that both sides spent a lot of time in respect of the motion. It is clear from both the material and the argument that the main focus of the motion from the outset was the jurisdictional issue. The balance of the issues raised by the moving defendants were in the alternative and added nothing to the final result. In my view, they served only to increase the costs of the motion. As with the plaintiffs' motion, the moving parties claim costs based almost entirely on the services of two senior counsel throughout to both prepare and argue the motion. I have already commented on my view that the plaintiffs ought not to pay for such services. In addition, it is my view that the hours claimed by the moving defendants' counsel include much duplication. The actual motion itself, after subtracting the time taken by the plaintiffs' motions, took less than a day to argue.

[37] In respect of the costs of the action, beyond the initial receipt and review of the claim and preparation of the statement of defence, no other significant steps have been taken.

[38] The moving defendants have also submitted a costs outline claiming $780 for fees in relation to the plaintiffs' failed stay motion. Rather than award costs separately for that motion, it is my view that such costs should be incorporated as part of the costs for the moving defendants' motion.

[39] In the final analysis, I fix the moving defendants costs of their motion at $15,000 inclusive of disbursements and taxes. I fix the costs of the action at a further $7,500 again inclusive of disbursements and taxes for a total of $22,500 in costs in respect of both the moving parties' motion and the action, payable by the plaintiffs. In my view, having regard to the issues on the motion, the time spent and the expectation of the parties, the costs fixed are both fair and reasonable to both parties.

L.A. Pattillo J.

**Released:** July 12, 2010

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**- and –**

**CITY OF HAMILTON, HAMILTON POLICE SERVICES BOARD, HAMILTON POLICE SERVICE, BRIAN J. MULLEN, KEN LEENDERTSE, PAUL F. RYAN, MARCO VISENTI AND DALTON TIMMIS INSURANCE GROUP**

Defendants

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**REASONS FOR JUDGMENT**

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**PATTILLO J.**

**Released:** July 12, 2010