CITATION: Ekpenyong v. Versacold Logistics 2012 ONSC 5530
COURT FILE NO: CV-11-431741
DATE: 20121001

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JOHN DAVID EKPENYONG	)	*John David Ekpenyong*,
	)	In Person
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
VERSACOLD LOGISTICS	)	*Frank Cesario*,
	)	for the Defendant/Moving Party
	)	
Defendant/Moving Party	)	
	)	
	)	
	)	
	)	
	)	
	)	**HEARD**: August 17, 2012

GOLDSTEIN J.:

[1] The Plaintiff worked at the defendant Versacold for less than one month. He says he was injured by a box of ice cream that fell off a shelf. He does not sue the Defendant for the resulting minor injury. Rather, he sues the Defendant for several events arising out of the injury. He seeks $100,000 in actual damages, and $1.1 million in punitive damages. The Defendant brings a motion to strike the statement of claim pursuant to Rule 21.01(1)(b) on the grounds that it does not disclose a reasonable cause of action, and because it is frivolous vexatious, and an abuse of process. For the reasons that follow, the claim is struck and the action is dismissed.

FACTS

[2] The Plaintiff was placed at the defendant by a temporary employment agency, StaffPlus. The amended statement of claim makes a number of disjointed allegations that are difficult to follow. Some of the allegations that are pleaded include:

- He was placed by StaffPlus at the defendant's facility in Brampton in May 2011.
- On June 8, 2011 he was injured by a box of ice cream that fell off a shelf.
- He attempted to report the injury to a supervisor, who told him to report it later. He was later approached by the defendant's Health and Safety Supervisor, who asked him about the injury.
- His supervisor accused him of "snitching" on him.
- He saw a collision between a racking structure and a powered pallet jack and attempted to report it.
- His supervisor had personal animosity against him.
- He was discharged by the defendant in retaliation for "snitching" on a supervisor who failed to comply with the *Occupational Health and Safety Act*, R.S.O. 1990 c. O.1 ("**OSHA**").
- He entered into an implied contract of employment with the defendant. Based on that implied contract, and based on the necessity of being able to get to work expeditiously, the plaintiff contracted to purchase a vehicle and obtained a loan.
- He suffered humiliation, embarrassment, and mental anguish.
- The defendant committed the acts alleged in the statement of claim maliciously, fraudulently and oppressively with the intent of injuring the plaintiff. He states that the defendant committed the acts alleged for an improper and evil motive amounting malice, in conscious disregard of his rights.
- The defendant told StaffPlus that he had been an incompetent operator of a powered pallet jack.

[3] The Plaintiff brought an action against StaffPlus as well. The Plaintiff's statement of claim in that matter was struck by Chapnik J. in 2012 on the grounds that the allegations were

scandalous, frivolous, and vexatious. She also held that the allegations of improper motives on behalf of the defendants are speculative and inflammatory.

ANALYSIS:

[4] The test on a Rule 21.01(1)(b) is whether, assuming the facts pleaded to be true, it is plain and obvious that the claim cannot succeed. In my view, it is plain and obvious that the claim here cannot succeed.

[5] The Plaintiff claims for breaches of violations of OSHA and the *Employment Standards Act 2000*, S.O. 2000, c. 41 ("**ESA**"). Although the language of the claim is very imprecise, it amounts to an argument that Defendant committed free-standing breaches of the two statutes. Breach of a statute does not in and of itself give rise to an individual cause of action in the absence of a provision expressly authorizing one. At most, evidence of a breach of a statute in this context can potentially be evidence of negligence: *R. v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205. In any event, the OSHA and the ESA are regulatory schemes providing for complaints and inspections.

[6] The Plaintiff also claims a "breach of implied contract" on the grounds that he had an implied contract of employment with the Defendant because he was employed by StaffPlus. There is simply no cause of action available to the Plaintiff, since his employer was StaffPlus: *ESA*, s. 74.3, s. 74.4.

[7] The Plaintiff also claims for defamation. In my view, the very specific rules for pleading this tort have not been complied with. The claim fails to set out how the allegedly defamatory statements were published or even, in most cases, who uttered them. It is a claim that the Defendant is repeating innuendo. The Plaintiff also says that the negative report on his work performance constituted defamation. This is simply not defamation because the report has not been published. It is a report from a client to a temporary help agency regarding the work performance of the temporary employee that the Plaintiff simply does not agree with.

[8] Finally, the Defendant argues that this lawsuit is simply frivolous and vexatious. I agree. The claim speaks of "evil motives" and intentions on the part of the Defendant to deprive the

Plaintiff of his human rights, but cites no facts that would actually give rise to a cause of action. That is the essence of a frivolous claim.

DISPOSITION

[9] The claim is struck and the action is dismissed. Costs are awarded to the Defendant. If the Plaintiff and the Defendant are unable to agree on quantum, the Defendant may submit, within 14 days, a brief costs submission (not exceeding 2 pages). The Plaintiff may submit, within 10 days after that, a brief costs submission (also not exceeding 2 pages) in reply.

GOLDSTEIN, J.

DATE: October 1, 2012

CITATION: Ekpenyong v. Versacold Logistics 2012 ONSC 5530
COURT FILE NO: CV-11-431741
DATE: 20121001

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOHN DAVID EKPENYONG

Plaintiff

- and -

VERSACOLD LOGISTICS

Defendant

JUDGMENT

GOLDSTEIN J.

Released: October 1, 2012