Court File No. SC-14-003872-00

ONTARIO
SUPERIOR COURT OF JUSTICE

BRAMPTON
SMALL CLAIMS COURT

B E T W E E N:

GOLDI PRODUCTIONS LTD.,
JOAN GOLDI and JOHN GOLDI

Plaintiff(s)
(Respondents)

- and-

BELL MEDIA INC.

Defendant
(Moving Party)

REASONS FOR ORDER ON MOTION

MARTEL, DEPUTY J:

Motion Heard: February 16 and March 14, 2016

Appearing:

For the Plaintiffs: John Goldi
For the Defendant: Julia Lefebvre, Counsel

Background

1.This is an action brought by the plaintiffs for defamation, negligence and slander of title.

These allegations are set out in the Amended Amended Claim. The defendant's motion is for an order striking out the Amended, Amended Claim, without leave to amend, on the basis that the pleading discloses no reasonable cause of action. Bell Media Inc. has also alleged that portions of the Amended Amended Claim constitute an abuse of process and might delay or make it difficult to have a fair trial.

2.The motion is brought under Rule 12.02 of the Rules of the Small Claims Court, which provides as follows:

> The court may, on motion, strike out or amend all or part of any document that,
> (a) discloses no reasonable cause of action or defence;
> (b) may delay or make it difficult to have a fair trial; or
> (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:
>
> 1. In the case of a claim, order that the action be stayed or dismissed.
> 2. In the case of a defence, strike out the defence and grant judgment.
> 3. In the case of a motion, order that the motion be stayed or dismissed.
> 4. Impose such terms as are just.

3. I heard oral argument from John Goldi on behalf of the plaintiffs and Julia Lefebvre, counsel for Bell Media, on February 16 and March 14, 2016.

4. In reaching my decision I relied on the oral argument presented, the Motion Record of the defendant containing the Affidavit of Grace Shafran including 11 exhibits, the Supplementary Affidavit of Grace Shafran, the Affidavit of Joan Goldi , the Supplementary Affidavit of Joan Goldi including 33 exhibits, the document titled 'Arguments Against Motion to be Dismissed'

by Goldi Productions Ltd. which referenced 21 exhibits, written submissions of the moving party and the cases to which I was referred, including the Briefs of Authorities filed by both the plaintiffs and the defendant. In addition, I watched the DVD of the two broadcasts that are referenced in the Amended, Amended Claim.

5. The moving party, Bell Media Inc., is a Canadian corporation that owns and operates television channels in Canada. The responding parties are a husband and wife who operate Goldi Productions Ltd. The Goldis are documentary filmmakers and the owners of Morrisseau paintings.

6.The precipitating event was a television broadcast on Canada Am, a show produced by CTV, which is a division of Bell Media Inc. The first broadcast was aired February 7th 2014. A second broadcast was aired April 23rd 2014. About the same time as the February broadcast an article was posted on a Bell Media website called "The Loop", dealing with information arising out of the interview of one Ritchie Sinclair who was interviewed on the February broadcast. The article included a link to Mr. Sinclair's website. This article was online and available to the public for less than eight weeks and was removed from the website on April 2nd, 2014. The broadcast and article on The Loop dealt with Mr. Sinclair's allegations that certain paintings allegedly painted by Morrisseau were in fact forgeries.

7. The Goldis maintain that the broadcast and article on The Loop have caused injury to them as owners of Morrisseau paintings. The defendant's positon is that none of John Goldi, Joan Goldi, Goldi Productions Inc. or any paintings owned by any of them were mentioned during the February 7th 2014 broadcast. The February broadcast focused on John McDermott, a singer with the group The Barenaked Ladies. Mr. McDermott sued an art gallery that had sold him an allegedly fake Norval Morrisseau painting. Norval Morrisseau was a native Canadian artist whose work had generated some controversy. Several news articles describing the controversy were included in the defendants' motion material.

8. Ms. Shafran's affidavit sworn October 8th 2015 in support of this motion references as Exhibit "D" an article from the Globe and Mail dated October 25th 2013 which stated: "Reports of fake Morrisseaus in the art market have been circulating – and have been strenuously contested – for years, even before Mr. Morrisseau death at 75 in 2007… Lawsuits over the controversial legacy of Mr. Morrisseau, who painted more than 10,000 works in a lifetime sometimes plagued by homelessness, poverty and drug and alcohol abuse, are nothing new".

9. The February 7th broadcast featured an interview with one Ritchie Sinclair, a self-described expert on Morrisseau paintings. Mr. Sinclair had appeared as a witness in prior litigation in *Hatfield v. Child*, 2013 ONSC 7801 (CanLII) concerning a painting called 'Wheel of Life'. In court Mr. Sinclair testified that the painting was a fake. The court however took exception to Mr. Sinclair's opinion and found the painting to be authentic. During the interview Mr. Sinclair continued to maintain that the painting was a fake but acknowledged that the court had found otherwise.

10. The Plaintiffs John and Joan Goldi are the owners of two Morrisseau paintings, 'Soma' and 'Fish'. Neither of these paintings was mentioned during the CTV broadcast. None of John Goldi, Joan Goldi or Goldi Productions Ltd. was mentioned during this broadcast.

11. As I have already noted, at the same time as the February broadcast, 'The Loop' posted information about the interview with Mr. Sinclair. This article included a hyperlink to Mr. Sinclair's website. A follow-up show was broadcast April 23rd 2014 containing another segment about Morrisseau paintings. The purpose was to give the other side of the story in Hatfield v. Child. Dr. Atul Singla, a signature expert who testified at the trial was interviewed, as was Donna Child, the owner of the art gallery that sold 'Wheel of Life' to Ms. Hatfield. Unlike the testimony of Mr. Sinclair, Dr.Singla's testimony was accepted by the Court. Dr. Singla testified that the signature on the back of the painting 'Wheel of Life', done with a dry brush, was in fact authentic.

12. Both the February and April broadcasts acknowledge that the 'Wheel of Life' painting by Norval Morrisseau was held by the court to be authentic. Sinclair's position throughout has been that Morrisseau did not sign any of his paintings in black with a dry brush. Both paintings owned by John and Joan Goldi, 'Soma' and 'Fish', are signed in black with a dry brush.

13. In addition to maintaining that the Amended, Amended Claim discloses no reasonable cause of action for defamation, negligence or slander of title, the moving party has also asked the court to strike the plaintiffs' Claim as an abuse of process. Bell Media Inc. maintains that the Amended Amended Claim discloses confidential settlement information, which is inflammatory and inappropriate. It alleges this information would make it difficult to hold a fair trial.

The Law

14. The leading case on a motion to strike under Rule 12.02 is that of *Van de Vrande v. Butkowsky* 2010 ONCA 230 (CanLII). The Ontario Court of Appeal conducted a thorough analysis of that Rule in paragraphs 17 through 21 of that decision set out below:

> "[17] There are several important differences between rule 21.01 of the Rules of Civil Procedure and rule 12.02 of the Small Claims Court Rules.
> First, where a Rule 21 motion can be brought to strike a pleading, a rule 12.02 motions can be brought to strike any document. Second, the prohibition on admitting evidence contained in rule 21.01(2) is absent from rule 12.02. Third, where rule 21.01(3) allows an action to be struck on the very narrow grounds of its being frivolous, vexatious, or an abuse of process, rule 12.02(1)(c) adds the criteria of inflammatory, waste of time, and nuisance.
>
> [18] Further, rule 12.02 applies in a somewhat different context than the Rules of Civil Procedure. Section 25 of the Courts of Justice Act, provides that in Small Claims Court proceedings the court is to "hear and determine in a summary way all questions of law

and fact." The court can make "such order as it considered just and agreeable to good conscience". In addition, rule 1.03(1) of the Small Claims Court Rules provides that the rules shall be "liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merit in accordance with s. 25 of the Courts of Justice Act.

[19] Conceptually, I view rule 12.02 as being situated somewhere between the rules 20 and 21 of the Rules of Civil Procedure. It is not a summary judgment motion involving extensive affidavits and a requirement such as contemplated in Rule 20 of the Rules of Civil Procedure where the responding party must put his "best foot forward". It is more akin to a Rule 21motion, although it is worded more broadly and does not have the same prohibition on the filing of affidavit evidence. It is a motion that is brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether a reasonable cause of action has been disclosed or whether the proceedings should be ended at an early stage because its continuation would be "inflammatory", a "waste of time" or a "nuisance".

[20] In my view, the references to actions that are inflammatory, a waste of time, or a nuisance was intended to lower the very high threshold set by rule 21.01(3)(d)'s reference to actions that are frivolous, vexatious, or an abuse of process.

[21] It bears remembering that rule 12.02 motions will often be brought and responded to by self-represented litigants who lack the extensive training of counsel. The test to be applied on such a motion ought to reflect this, and avoid the somewhat complex case law that has fleshed out the Rules of Civil Procedure."

15. The applicable test for dismissal under rule 12.02 (1) is "no meaningful chance of success at trial" as set out in *O'Brien v. Ottawa Hospital* [2011] O.J. No. 66 (Div. Ct). I agree with the argument of the moving party that in this situation a trial would not serve to clarify any facts.

The content of the first and second broadcasts, both of which were watched by me, is clear. The argument of the plaintiffs that The Loop's link to the website of Ritchie Sinclair constitutes defamation is clear. There are no further facts that could be adduced at trial that would assist the court in making a determination as to whether the Plaintiffs should succeed in their action against Bell Media Inc. There are no issues of credibility to be weighed. The facts speak for themselves.

Defamation

16. To be successful on a claim for defamation it must be established that the allegedly defamatory words are "of and concerning" the plaintiffs. I quote from *Bai et al v. Singh Tao Daily Ltd.* et al, 2003 CanLII 24013 (Ont. S.C.S.M.) wherein the Ontario Court of Appeal stated in paragraph 10; "An action in libel is a personal action based upon injury to one's own reputation. Thus, it is necessary to show that an allegedly libelous publication points to the plaintiff as a particular individual. However, the appellants submit that this does not mean that an individual cannot be defamed as a member of a group that is targeted by a publication."

The Court continues as follows:

> "[13] In Seafarers International Union of Canada, et al v. Lawrence (1979) 24 O.R. (2d) 257, MacKinnon A.C.J.O. at 263 underlines the personal nature of a libel action as follows:
>
> The words to be actionable must be understood as being published of and concerning the plaintiff. It is pointed out in *Gatley, supra*, p.139, para 283:
>
> > Where the words complained of reflect on a body or class of persons generally, such as lawyers, clergymen, publicans or the like, no particular member of the body or class can maintain an action. "If" said Willes J. in

> *Eastwood v. Holmes*, [(1858) IF & F347 at 349] "**a** man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual."

17. None of the plaintiffs were mentioned by name or referred to in either the February or April broadcasts. The Goldis have argued that they belong to a group of all those who own Morrisseau paintings signed on the back with a black dry brush. However, there is nothing that distinguishes the Goldis from all owners of any Morrisseau paintings similarly signed.

18. The Amended Amended Claim has also alleged that the February broadcast and the article posted on 'The Loop' defamed and demeaned the quality and reliability of their work as documentary film makers. There was nothing in the February broadcast or 'The Loop' that identified the Goldis as filmmakers, or at all, or their production company.

19. Bell Media argues that no reasonable member of the public watching the February or April broadcast would conclude that anything said during the broadcast relates to the Goldis as individuals or to their corporation. I must agree. Similarly, there is no mention directly of Mr. or Mrs. Goldi or Goldi Productions in 'The Loop'.

20. Following the approach of the Court in *Bai et al v Singh Tao Daily Ltd.* the moving party maintains this is a sufficient basis on which to strike the Amended, Amended Claim.

21. The moving party also maintains that the plaintiffs' Claim for defamation is out of time. Section 6 of the Libel and Slander Act imposes a three-month limitation period within which a party must commence an action for defamation. It is accepted that the first broadcast was February 7th 2014 and the article on 'The Loop' referencing this broadcast was removed April 2nd 2014. On this basis, under section 6 of the Libel and Slander Act, the Goldi's Claim for defamation should have been brought by July 2nd 2014 at the latest. It was not. The initial

Claim, issued May 28th 2014, was framed in negligence and pleaded "injurious falsehood". The tort of slander of title was not raised until the Amended Amended Claim was issued on August 24th 2015.

'The Loop' Article

22. The Goldis maintain that hyperlinking in 'The Loop' to the website of Ritchie Sinclair constitutes a cause of action for defamation. The moving party relies on the decision of the Supreme Court in *Crookes v. Newton* 2011 S.C.C. 47 which establishes that calling attention to a website by means of a hyper link reference does not constitute publication under the Libel and Slander Act. "I would conclude that a hyper link by itself would never be seen as publication of the content to which it refers". The phrase that is linked is "Morrisseau.com". The plaintiffs maintain that it is the text of the article on 'The Loop' that is defamatory. The Loop states; "Sinclair has set up Morrisseau.com, a website that helps art collectors differentiate between fake Morrisseaus and the real thing. Bell Media maintains that there was no republishing or repetition of the content of www.morrisseau.com and that the above referenced description is simple communication of the location of Mr. Sinclair's site on the Internet. Bell Media argues that the description identified Mr. Sinclair's purpose for the site but does not repeat or adopt the site's actual content.

23. At paragraph 26 of the *Crooks v. Newton* decision the Supreme Court clarifies that:

> "A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content. Communicating something is very different than communicating that something exists and where it exists…Even where the goal of the person referring to a defamatory publication is to expand that publications audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the

> initial publisher or publisher's acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition."

24. It is quite clear that "The Loop" did not create or control the content of Mr. Sinclair's website. The Sinclair website itself contains a warning: "The opinions expressed on this website and on this page are those of Ritchie Stardreamer Sinclair and of no other person. These opinions are alleged to be defamatory and are the subject matter of an action in Ontario Superior Court in the above referenced Court file number." That caveat was included on the website pursuant to a court order.

Negligence

25. The plaintiffs have also founded their cause of action in negligence. The moving party argues that the Amended Amended Claim does not disclose a reasonable cause of action in negligence. To find negligence I must find the defendant owed a duty of care to the plaintiffs. The plaintiffs had no prior relationship with Bell Media Inc. and there was no relationship of proximity between them. In *Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405 (CanLII) the Court of Appeal held that a negligence claim could proceed alongside a defamation claim if the necessary elements of a cause of action in negligence had been established. The court stated: "Proximity and foreseeability are the elements necessary to establish a prima facie duty of care. In words now well-known in Canadian negligence law, a prima facie duty of care requires "a sufficiently close relationship of proximity between the parties such that, in a reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff." In that case the court granted summary judgment, dismissing the plaintiffs' negligence claim on the basis that the plaintiff had not established a sufficiently close relationship of proximity to give rise to the duty of care.

26. It is equally clear in this situation that no such proximity or duty of care existed between any

of the plaintiffs and the defendant.

27. The moving party goes so far as to argue that even if a duty of care existed between the defendant and the plaintiffs there was no breach of such duty and that in fact the two broadcasts affirmed the authenticity of a disputed Morrisseau painting signed with a black dry brush. In that regard the moving party is correct. It was made clear to the television audience that the court had held to be authentic a Norval Morrisseau painting signed with a black dry brush. The paintings owned by the Goldis, 'Fish' and 'Soma', are signed with a black dry brush. The moving party notes as well that to prove their claim the plaintiffs would have to show a decrease in value of Soma and Fish. No evidence of such decrease was provided in the voluminous material filed by the plaintiffs.

Slander of Title

28. The plaintiffs also allege slander of title. The elements of slander of title are identified by the court in *Captain Developments Ltd. v. New West Group Ltd.* (1982) 37 O.R. (2d) 697. To prove slander of title in this case the plaintiffs must prove: i) that words were published in disparagement of their title to property, namely Soma and Fish, ii) that the words were false and published with expressed or actual malice, and iii) that they suffered special damages. This defendant was unaware of the Goldis' ownership of Soma and Fish. The February broadcast could not have been created with an intention to harm. Neither Soma nor Fish were discussed in the broadcast. In fact, the February broadcast discussed only one particular painting, 'Wheel of Life'.

Responsible Journalism and Fair Comment

29. The plaintiffs rely on two decisions of the Supreme Court of Canada; *Grant v Torstar* [2009] 3 SCR 640 and *Quan v Cusson* [2009] 3 SCR 712 which set out the test for responsible communication by journalists. The plaintiffs argue that the defendants "did not follow a single

one of the steps listed" *(by the court)* and therefore ask me to conclude that the defence of responsible communication should not be available to the defendant. The plaintiffs also argue that the defence of fair comment has not been established. *Grant v Torstar* sets out the test for the defence of fair comment as well. I need not consider whether either of these defences have been made out by the defendant, as I have found no defamation occurred.

Conclusion

30. I conclude the plaintiffs have not established the elements necessary to prove a cause of action based on negligence. I find as well that their claim for defamation fails because none of the plaintiffs were defamed. For those reasons it is unnecessary for me to determine if the claim fails because of the limitation under section 6 of the Libel and Slander Act. The case for slander of title has not been made as the elements necessary to prove slander of title are clearly not present. As the claim fails because it does not disclose a reasonable cause of action it is unnecessary for me to rule on whether certain paragraphs of the pleading constitute an abuse of process or would make it difficult to have a fair trial.

31. For the foregoing reasons I order:

a) the motion is granted,

b) the Amended Amended Claim is struck out without leave to amend, and

c) the action is dismissed.

32. If the parties wish to make written submissions as to costs, they may do so as follows: The defendant's submissions are due 15 days from the date of this Order and the plaintiffs' are due 15 days thereafter. Any Reply is due 10 days after that. I would ask that written submissions be restricted to 3 pages each. If there were any written offers to settle pursuant to the Rules, then I would ask that they be attached to the costs submissions. If I do not receive these submissions within this time frame, then there will no order as to costs.

Dated this 21 day of June 2016.

B. Martel

B. MARTEL, DEPUTY J.