Court File No. SC-09-000872782-0000

SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

B E T W E E N:

OTAVNIK, JOSEPH

Plaintiff

v.

SINCLAIR, RITCHIE and
KINSMAN ROBINSON GALLERIES

Defendants

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P R O C E E D I N G S

BEFORE THE HONOURABLE JUSTICE D. GODFREY
on January 11, 2011, at TORONTO, Ontario

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APPEARANCES:

J. Otavnik	On His Own Behalf
R. Sinclair	On Behalf of the Defendants

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SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

T A B L E O F C O N T E N T S

E X H I B I T S

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THE COURT: All right, be seated.

The plaintiff in the main action, Mr. Otavnik, sues the defendant in the main action, Mr. Sinclair, under the tort of injurious falsehood, also known as trade libel or slander of title.

The plaintiff is the owner of a painting entitled "Jesuit Priest Bringing Word". Mr. Otavnik, the plaintiff, claims the painting to be painted by Norval Morrisseau, the said Morrisseau being a renowned Canadian native painter.

Mr. Sinclair, on his website alleges the aforesaid painting is a fake. As a result of the defendant's allegation, Mr. Otavnik claims the painting is worthless.

I find that the plaintiff's claim must fail for a number of reasons.

The tort of injurious falsehood requires that the plaintiff must prove a) that the defendant published words in disparagement of the plaintiff's property; b) that the words were false; c) that they were actuated by malice, and; d) that the plaintiff suffered special damages.

The plaintiff has failed to satisfy me on items b), c) and d). Firstly, the plaintiff has failed to satisfy me on a balance of probabilities that the statements of Mr. Sinclair are false. I am not prepared to accept the evidence of Mr. McLeod for the plaintiff over that of Mr. Robinson for the defendant as to the authenticity of the painting. Both witnesses are reputed art dealers who gave their respective opinions, but the plaintiff's evidence did not sufficiently tip the scales in the plaintiff's favour.

Secondly, I am not satisfied that the defendant acted with malice. The defendant appears to have worked with Norval Morrisseau for many years. His statements regarding the plaintiff's painting, in my opinion, have been made without malice and for the purpose of reiterating previously made statements in newspaper articles and through statements made by or attributed to Morrisseau, himself.

Finally, the plaintiff has failed to prove he suffered special damages. I do not accept the plaintiff's position that his painting is worthless, even accepting that it is an original Morrisseau. Although common sense alone suggests that an article claiming a painting to be a fake may lessen the number of

people interested in the painting, I cannot accept the plaintiff's position that he could not even give the painting away as being credible.

As acknowledged by Mr. McLeod, the plaintiff's own witness and expert, the defendant's website would not affect an institutional or sophisticated buyer. Mr. Otavnik's apparent worst-case scenario is that he would be put to a greater degree of authenticity or authenticating the painting due to the negative publicity.

He seeks, however, not the potential increased cost of authenticating, but the market value of the painting which he sets at $10,000.

It is further not clear to me to what extent the defendant's comments might have affected the price in light of the fact that the issue of fake Morrisseau art existed before the defendant's website. I am not persuaded by the plaintiff's evidence that the defendant's blog put the final nail in the market value of the painting.

Lastly, the plaintiff clearly indicated he is not in the market to sell his painting. As such, I find that his claim is premature since he has not established an actual loss. The

plaintiff candidly testified that the painting could be worth money in the future if the market turns around. That being the case, it seems to me that the plaintiff will be potentially unjustly enriched today if damages were granted prior to any actual loss.

Despite claiming slander of title throughout, Mr. Otavnik, in final written submissions argued the *Libel and Slander Act*. I am not prepared to accept submissions in this regard as damages to Mr. Otavnik's reputation were not claimed. Even if I were prepared to accept his submissions, the evidence discloses no damage to Mr. Otavnik's reputation since he was not identified as the owner of the painting in issue.

Based on the foregoing, the plaintiff's claim is dismissed.

Turning to Mr. Sinclair's defendant's claim, Mr. Sinclair in his defendant's claim claims harassment and defamation by Mr. Otavnik.

The harassment claim relates to a history of litigation involving Mr. Sinclair and others as defendants. Mr. Otavnik is a party plaintiff to some but not all of these actions. All these actions relate to one fundamental common issue, being the allegations of fake Morrisseau

paintings.

Mr. Sinclair also alleged that Mr. Otavnik has deleted many references on the Wikipedia website relating to Norval Morrisseau and defamed Mr. Sinclair under the screen names of "123 The Habs" and "123 Maddie", M-A-D-D-I-E. Mr. Otavnik denies using these screen names, although Mr. Sinclair established by Exhibit Eight that Mr. Otavnik has used the screen name "Maddie 123CA".

It is interesting to note that in Exhibit Three, tab three, page one, that Mr. Otavnik, in an email indicates that he will be forced to post Mr. Sinclair's last address and phone number in the public record and offer a reward to anyone that can find Mr. Sinclair.

Exhibit Nine is an extensive "Norval Morrisseau blog". At page nine a person using the screen name "The Habs One" states in part, "I am now offering a reward for the whereabouts of Ritchie Sinclair. I already have his last known address at" and then dot, dot, dot, it goes on to the end of the quote. The wording in this blog is almost identical to the email of Mr. Otavnik.

As such, I am satisfied on a balance of probabilities that Mr. Otavnik is one and the

same as "The Habs One". I also find it is more than a coincidence that Mr. Otavnik also has the screen name of "Maddie 123CA" with AOL and that the screen names used on the Wikipedia alterations and comments are "123 Maddie" and "123 Habs". I find that all those screen names are probably Mr. Otavnik.

Turning to the issue of harassment, it appears to me that the law is unclear in Canada whether harassment can be an independent tort or whether such behaviour is considered under the tort of intentional infliction of mental suffering. In this regard I would ask the parties to reference the case of *Lynch v. Westario Power Inc.*, the citation being 2009, CarswellOnt 4057.

In either case, Mr. Sinclair is required to show 1) outrageous conduct, 2) intent, 3) proximate causation, and as a minimum 4) severe or extreme emotional distress and possibly a visible and provable illness.

To be short and to the point, even if the facts satisfy 1), 2) and 3) aforesaid, the evidence falls well short of number 4), being the obligation of Mr. Sinclair to establish severe or extreme emotional distress and possibly a visible and provable illness. There was no medical evidence presented by Mr. Sinclair to

support his position in this regard.

As to the issue of defamation, I cannot conclude on the evidence that Mr. Sinclair has been defamed. Some comments made by Mr. Otavnik are clearly insensitive and in bad taste, but have been directed solely to Mr. Sinclair and therefore do not satisfy the publication requirement of the tort of defamation.

Those comments that can be attributed to Mr. Otavnik that have been published as described in the evidence do not specifically discredit Mr. Sinclair. In any event, it is my opinion that such comments are protected under the defence of qualified privilege in the tort of defamation. As such, I can make no finding of defamation in regard to the allegation set out in the defendant's claim.

Accordingly, the defendant's claim will also be dismissed.

Since both sides were unsuccessful in the main action and the defendant's action, each side will bear its own costs.

Thank you.

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