CITATION: Ferreira v. Da Costa, 2019 ONSC 1853
COURT FILE NO.: CV-18-599118
DATE: 20190423

ONTARIO
SUPERIOR COURT OF JUSTICE

Between:

VICTOR FERREIRA and
FERREIRA INSURANCE & INVESTMENT CONCEPTS INC.

Plaintiffs/Defendant by Counterclaim

- and -

MANUEL DA COSTA aka MANUEL DACOSTA, JOSE ALEXANDRE FRANCO aka JOSE FRANCO and ALEXANDRE FRANCO, JOSE MARIA EUSTAQUIO aka JOSE M. EUSTAQUIO and JOSE EUSTAQUIO, DAVID GANHAO, MILENIO STADIUM INC., MDC MEDIA GROUP INC. and **S.I.T. PROPERTIES LTD.**

Defendants/Plaintiff by Counterclaim

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Lorne Honickman* for the Moving Parties / Defendants

Howard W. Winkler and Eryn Pond for the Responding Parties / Plaintiffs

HEARD: March 22, 2019

Anti-SLAPP Motion to Dismiss Defamation Actions

[1] The defendant owners and publishers of a Portuguese-language newspaper serving the Portuguese-Canadian community in the GTA bring this motion to dismiss the

plaintiffs' defamation actions. The defendants say the plaintiffs' actions are SLAPP suits[1] that should be dismissed under s. 137.1 of the *Courts of Justice Act*.[2].

[2] Ontario's anti-SLAPP law, enacted in 2015 and set out in s. 137.1 of the CJA has an important but limited rationale: the early dismissal of purely strategic litigation that is brought primarily to discourage or derail expression on matters of public interest. The "aggrieved" plaintiff is typically a powerful entity that hasn't sustained any real damage but brings a defamation claim to intimidate a much weaker defendant and stop any further discussion of a matter of public interest.

[3] The anti-SLAPP legislation is not intended to preclude legitimate defamation claims.

[4] In my view, the plaintiff's defamation actions are not SLAPP suits but genuine defamation claims that should proceed to trial.

[5] For the reasons that follow, the defendants' motion is dismissed.

Background

[6] The plaintiff, Victor Ferreira, is a financial advisor who provides insurance and investment advice largely in the Portuguese-Canadian community. He conducts his business through his closely-held company, co-plaintiff Ferreira Insurance and Investment Concepts Inc.

[7] The defendants are sufficiently described for the purposes of this motion as the owners and publishers of the Portuguese-language Milenio Stadium, a newspaper that serves the Portuguese-Canadian community. The paper is free and has a weekly distribution of some 6000 to 8000 recipients. The articles published in the newspaper are also published on line on the newspaper's website. Depending on the article, the website itself can attract thousands of viewers. The defendant Manuel Da Costa is the publisher of the impugned articles and the author of all but one of the impugned articles. Although the primary antagonists are Mr. Ferreira and Mr. Da Costa, I will refer to the parties as the plaintiffs and the defendants.

[8] In February and March 2018, the defendants published two articles about the dangers of investing in syndicated mortgages. A syndicated mortgage lender invests in a

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[1] Strategic Litigation Against Public Participation

[2] *Courts of Justice Act*, R.S.O. 1990, c C.43 ("CJA").

single property with other private investors and stands subordinate to the first or second mortgagee, typically a bank that refuses to provide any further financing. The dangers of syndicated mortgage lending arise, as in almost any investment, if the investor relies on a financial advisor and the financial advisor misstates the risks or overstates the rewards.

[9] The first two articles published by the defendants discussed the risks of syndicated mortgages and did not mention the plaintiffs.

[10] In April and May 2018, the defendants published four more articles about syndicated mortgages, this time referring to the plaintiffs by name. As Mr. Da Costa admitted on cross-examination, "The only reason I identified Mr. Ferreira was because he was the person within the Portuguese community that was selling this [syndicated mortgage] product."

[11] In due course, the plaintiffs commenced three actions for defamation. The first action focused on the four April and May 2018 articles:

- *April 20, 2018:* "Portuguese-Canadians feel that they were misled by financial advisors."
- *April 27, 2018:* "Trustee to take over the operations of the lead mortgage broker for beleaguered real estate developer Fortress Real Developments Inc."
- *May 4, 2018:* "Syndicated mortgages grew $3 to $6 billion in 3 years".
- *May 11, 2018:* "Syndicated mortgages development consultant agreements not disclosed to investors."

[12] The April and May articles appear to suggest that Mr. Ferreira fraudulently induced and deceived disabled, elderly, and non-English speaking Portuguese Canadians to make investments in certain syndicated mortgage loans; engaged in criminal activities; is the subject of a criminal investigation; and is facing arrest for criminal fraud.

[13] Mr. Ferreira's uncontroverted evidence is that once these articles were published, the news spread quickly in the Portuguese community and he started to receive telephone calls from business associates, clients, friends and family asking what was going on and whether he was going to be arrested. One client who had read the articles thought that Mr. Ferreira was being investigated by the RCMP.

[14] The second defamation action focused on the three articles that were published in June 2018:

- *June 8, 2018:* "The danger of syndicated mortgages: Why the story must continue to be told."

- *June 22, 2018:* "A Porkchop's Opinion" (the "Fat Pig Article").

- *June 22, 2018:* "Victor Ferreira sues Milenio Stadium."

[15] The plaintiffs were named in the first and third of the June articles. The plaintiffs were not named in the Porkchop or Fat Pig article. However, it is arguably clear from the placement of the articles (the Fat Pig Article was sandwiched between a headline about Mr. Ferreira and an article about Mr. Ferreira) that the Fat Pig article was aimed at the plaintiffs and could reasonably be understood both by Milenio Stadium newspaper readers who read only this particular edition or by those who were following the series on syndicated mortgages that this was indeed the case.

[16] According to Mr. Ferreira's uncontroverted evidence, after the Fat Pig article was published people contacted him about it and associated him with the article. In his affidavit, he provided the names of people who contacted him and included messages from a client's son who texted him about it. Mr. Ferreira recounted one embarrassing incident where someone asked him "how is the drill under my belly" in reference to the statement in the article, "These filthy pigs, who eat too much, are left without any tools because the drill [i.e. the pig's penis] remains hidden under the weight of their belly."

[17] The third defamation action focused on the editorial published in August 2018:

- *August 17, 2018:* "There are people who take advantage of the weakness of those who come here (...)"

[18] Here again, although the plaintiffs were not mentioned by name, it is reasonably arguable that the August article could only have been understood by the newspaper readers as referring to Mr. Ferreira and his financial advisory company, and indeed would not have made much sense otherwise. The August article is the one impugned article that was not written by Mr. Da Costa but by another (part-time) columnist.

[19] The defendants do not take much issue with the proposition that the impugned articles may well be defamatory. Their primary submission is that the defamation actions should be dismissed under s. 137.1 of the CJA.

Section 137.1 of the CJA

[20] Over the last nine months, the Court of Appeal has released a dozen decisions interpreting s. 137.1 of the CJA - six were released in August of last year[3] and six more in

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[3] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685; *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686; *Platnick v. Bent*, 2018 ONCA 687; *Veneruzzo v. Storey*, 2018 ONCA 688; *Armstrong v.*

the year to date.[4] The leading cases, in my view, are *Pointes, Platnick, Lascaris* and *Bondfield.*[5] Taken together, they provide an analytical template for the judges of this court. In essence, s. 137.1 of the CJA as explained by the Court of Appeal requires the following four-step analysis.

[21] The defendants must first satisfy the motion judge that the publications in issue relate to a matter of public interest.[6] If the defendants do so, the onus shifts to the plaintiffs to establish three things on a balance of probabilities.

[22] First, that there are reasonable grounds to believe that the plaintiffs' claim has substantial merit.[7] Second, that there are reasonable grounds to believe that the defendants do not have a "valid defence."[8] And third, that the harm suffered or likely to be suffered by the plaintiffs as a result of the impugned publications is sufficiently serious that the public interest in allowing the lawsuit to continue outweighs the public interest in protecting the defendants' expression.[9]

[23] I have set out the applicable sub-sections of s. 137.1 in the Appendix for easy reference.

Analysis

[24] As I have already noted, the defendants' motion is dismissed. My reasons, applying the required four-step analysis, are set out below.

(1) A matter of public interest

Corus Entertainment Inc., 2018 ONCA 689; and *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690.

[4] *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128; *New Dermamed Inc. v. Sulaiman*, 2019 ONCA 141; *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163; *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166; *Levant v. Day*, 2019 ONCA 244; and *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246.

[5] *Supra*, notes 3 and 4.

[6] Section 137.1(3).

[7] Section 137.1(4)(a)(i).

[8] Section 137.1(4)(a)(ii).

[9] Section 137.1(4)(b).

[25] The first step – do the impugned publications relate to a matter of public interest – is a relatively low hurdle that is generally cleared by the defendant. All the defendant has to show is that some segment of the public has a genuine interest in knowing about the published information.[10] The published information can be a matter of public interest even if the information is demonstrably false and the language used is intemperate or "even harmful to the public interest."[11]

[26] On the facts herein, the defendants have easily established that the impugned publications, which deal with the dangers of syndicated mortgage lending, and are clearly of interest to actual or potential investors in this area, relate to a matter of public interest. As the Court of Appeal noted in *Fortress Realty*,[12] "[A]lerting the investing public to risks associated with the purchase of certain products in the public marketplace is a matter of public interest."[13]

[27] The onus now shifts to the plaintiffs to show that there are reasonable grounds to believe that the plaintiffs' claim has substantial merit; that there are reasonable grounds to believe that the defendants do not have a valid defence; and that the harm suffered or likely to be suffered by the plaintiffs as a result of the impugned publications is sufficiently serious that the public interest in allowing the lawsuit to continue outweighs the public interest in protecting the defendants' freedom of expression.

[28] I am satisfied that the plaintiffs have cleared each of these hurdles, as outlined below.

(2) Substantial merit

[29] The "substantial merit" requirement under s. 137.1(4)(a)(i) refers to the facts the plaintiffs must establish to prove the claim.[14] A claim has "substantial merit" if the claim is shown to be legally tenable, is supported by evidence and could lead a reasonable trier to conclude that the claim has a real chance of success.[15]

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[10] *Pointes, supra* note 2, at para. 58.

[11] *Ibid.* at paras. 55 and 65.

[12] *Fortress Realty Developments v. Rabidoux*, 2018 ONCA 686.

[13] *Ibid.*, at para. 40.

[14] *Platnick, supra* note 2, at para. 50.

[15] *Pointes, supra* note 2, at para. 80.

[30] In a defamation case, the plaintiff must establish three things:

- The words complained of were published to at least one other person;
- The words complained of referred to the plaintiff; and
- The words complained of in their natural and ordinary meaning or in some other meaning pled by the plaintiff, were defamatory.[16]

[31] If a plaintiff establishes the three elements, then the falsity of the statements and the damages caused to the plaintiff are presumed. The defamation claim will succeed unless the defendant can successfully advance a defence.[17]

[32] Here, except for the Fat Pig article and the August article, there is no suggestion in the affidavit of Mr. Da Costa that the words complained of were not published by the defendants or did not refer to the plaintiffs or could not be understood in their natural and ordinary meaning as being defamatory of the plaintiffs. It is true that neither the Fat Pig nor August articles mention the plaintiffs by name but, as already noted, a newspaper reader could reasonably conclude that both articles were aimed at Mr. Ferreira and his financial advisory company. And, further that the latter two articles contained defamatory material.[18]

[33] In sum, on the basis of the record before me, the plaintiffs have established reasonable grounds to believe that, defences aside, the defamation claims have a "real chance of success."[19]

(2) No valid defence

[34] The defendants rely on the defences of truth, fair comment and qualified privilege.

[35] In order to clear the "no valid defence" hurdle in s. 137.1(4)(a)(ii), the plaintiffs have to show that it is reasonably possible that a trier could conclude that the defence would not succeed.[20]

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[16] *Platnick, supra* note 2, at para. 51.

[17] *Ibid* at para. 52, citing *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, at para. 1.

[18] Recall the discussion above in paras. 16 to 18.

[19] *Platnick, supra* note 2, at para. 55.

[20] *Bondfield, supra* note 3, at paras. 15, 17 to 18; *Pointes, supra* note 2, at para. 84; *Lascaris, supra,* note 3, at para. 33; and *New Dermamed, supra,* note 3, at paras. 12 to 13.

[36] In my view, the plaintiffs have done so with respect to each of the asserted defences - truth, fair comment and qualified privilege.

Truth and fair comment

[37] The impugned articles are largely based on information provided to the defendants by confidential sources, whose identities have not been disclosed. The plaintiffs submit that where the truth needs to be proven from alleged confidential sources, whose identities the defendants refuse to disclose, the defendants cannot have valid defences of truth or fair comment. The defendants cannot rely on untested hearsay evidence from unknown individuals. The plaintiffs say, correctly, that there is no evidence on the record to corroborate the existence of the confidential sources, the statements attributed to them, or the truth of the defendants' allegations, which include criminal and fraudulent conduct.

[38] The plaintiffs submit further that, aside from untested, hearsay evidence from unnamed sources (the number of sources and the reliability of the information provided, including whether any of the sources actually lost any of their investments remains unclear), the defendants have no evidence of any criminal or fraudulent or other serious wrongdoing by the plaintiffs, as alleged in the impugned articles.

[39] In contrast, say the plaintiffs, Mr. Ferreira has offered a detailed explanation about how he referred clients to the syndicated mortgage broker, a company called FFM Capital Inc. ("FFM"). His explanation involved a description of his role, his relationship with FFM and the interactions he had with clients who invested in syndicated mortgages. Mr. Ferreira explained that FFM was responsible for the sale of the syndicated mortgages, that his role as referral agent was disclosed to clients, and that it was FFM's responsibility as the licensed mortgage broker to outline the risks of the investment and to offer independent legal advice, which it did. I note that the nature of the referral relationship also appears to have been confirmed by the Ontario regulator, the Financial Services Commission, in a signed agreed statement of facts.

[40] The plaintiffs submit that a reasonable trier could find Mr. Ferreira's "explanation sufficiently credible" to conclude that the defendants have not established that the "sting" of the allegations are true.[21] This is especially so in light of the fact that the defendants on the motion have provided no direct evidence from any investors referred by Mr. Ferreira to FFM or any particulars of the unnamed sources or evidence of the sources' investments and alleged losses.

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[21] See *Platnick, supra* note 2, at para. 73.

[41] I accept the plaintiffs' submissions. In my view, the plaintiffs have cleared the hurdle of showing reasonable grounds to believe that the defence of "truth" in respect to the allegations of dishonesty, fraudulent and criminal conduct might not succeed as a "valid defence".[22] Failing to establish any of the underlying facts, which support any alleged opinion in the impugned articles, there are also reasonable grounds to believe that the defendants might not have a valid fair comment defence.

Qualified Privilege

[42] The plaintiffs make two points about qualified privilege. First, as per the Supreme Court's comment in *Grant v. Torstar,*[23] that the defence of qualified privilege has "seldom assisted media organizations" and it "remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege." Qualified privilege "attaches to the occasion upon which the communication is made, and not to the communication itself."[24] By publishing to the world at large in print and online, the defendants may be unable to establish the requisite and essential reciprocity necessary to attract the protection of the qualified privilege defence.[25]

[43] Even if a privileged occasion existed, say the plaintiffs, the defendants exceeded the privilege by singling out the plaintiffs and by including false allegations of criminal, fraudulent and other serious misconduct, statements that can defeat the privilege.[26] The defendants may have wanted to reveal the dangers of syndicated mortgages for the benefit of its newspaper readers but in doing they exceeded the privilege by targeting and defaming the plaintiffs as they did.[27]

[44] Given these submissions, each of which in my view have some merit, I am satisfied that the plaintiffs have met their burden under s. 137.1(4)(a)(ii) to show that a reasonable trier could conclude that the defence of qualified privilege not would succeed.

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[22] *Ibid.*

[23] *Grant v. Torstar Inc.*, 2009 SCC 61 at paras. 34 and 37.

[24] *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3 at para. 78.

[25] *Lascaris, supr,* note 3, at para. 36.

[26] *Ibid.* at para. 87, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras. 144 to 147 and *Botiuk, supra* note 24, at paras. 78 to 80.

[27] *Ibid.* at para. 93. Also see *Hill, supra* note 26 at para. 156 and *Botiuk, supra* note 24, at para. 85.

(4) Balancing the interests

[45] As already noted, the last step, s. 137.1(4)(b), requires the plaintiffs to show that the harm suffered or likely to be suffered by the plaintiffs as a result of the impugned publications is sufficiently serious that the public interest in allowing the lawsuit to continue outweighs the public interest in protecting the defendants' freedom of expression.

[46] In *Platnick*,[28] the Court of Appeal suggested that the public interest balancing in s. 137.1(4)(b) could begin with the question "Does this claim have the hallmarks of a classic SLAPP?"[29]

[47] The three defamation actions herein have none of the following SLAPP hallmarks. There is no history of the plaintiffs using litigation or the threat of litigation to silence critics. There is no financial or other power imbalance that favours Mr. Ferreira and his company over Mr. DaCosta and the other defendants. There is no evidence of any punitive or retributory motivation behind the defamation actions. Nor is this a case where the plaintiffs have sustained only nominal or insignificant damage.

[48] The plaintiffs have led evidence of business and reputational loss that if connected in whole or in part to any of the allegedly defamatory statements would result in a significant damage award in their favour. More specifically, the uncontroverted evidence before me is that Mr. Ferreira's income declined substantially, on a quantifiable basis, in the weeks and months following the impugned publications. The defendants argue causation but as the Court of Appeal noted in *Bondfield,* the s. 137.1 motion is "not the place to resolve the causal connection issue as it relates to the alleged damages."[30] It is enough if a temporal connection can be established as it was here.[31]

[49] Mr. Ferreira provided direct evidence in his affidavit that members of the Portuguese community contacted him directly after the impugned articles were published and that he lost clients and quantified revenue. He provided direct evidence about the negative impact of the publications on his emotional and psychological health and his family life.

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[28] *Platnick, supra* note 2.

[29] *Ibid.* at para. 98.

[30] *Bondfield, supra* note 3, at para. 25.

[31] *Platnick, supra* note 2, at paras. 105 and 106.

[50] The plaintiffs have also led credible evidence of a significant reputational loss, particularly in the Portuguese-Canadian community in and around Toronto. Indeed, in this case, say the plaintiffs, the nature of the defamatory statements (that the plaintiffs are fraudsters and criminals) are on their face so obviously injurious to their reputation that the likelihood of reputational harm can be inferred.[32]

[51] Finally, say the plaintiffs pointing to the Court of Appeal's decision in *Lascaris*,[33] whatever public interest there may have been in the publication of the articles relating to the dangers of investing in syndicated mortgages was undermined and diminished by the defendants' resort to personal attacks and *ad hominem* slurs. The defendants could have continued to publish their critique of syndicated mortgages without engaging in speech that is arguably defamatory.[34]

[52] I accept the plaintiffs' submissions. Mr. Ferreira has established a temporal connection and has provided potentially credible evidence that the impugned articles caused significant and quantifiable financial losses and significant reputational harm.

[53] On balance, I am satisfied that the plaintiffs have established that the harm likely to be suffered, or which has been suffered, is sufficiently serious that the public interest in allowing the defamation actions to continue outweighs the public interest in protecting the defendants' expression.

[54] The defamations actions may continue in the ordinary course.

[55] Tracking the language of the Court of Appeal in *Bondfield*,[35] this as a case in which the plaintiffs have a legitimate argument that they have been defamed and suffered significant damages as a result of the defendants' articles. "Unlike SLAPP suits which reek of the plaintiff's improper motives, claims of phantom harm, and bullying tactics, this litigation smells of a genuine controversy. It should be tried on its merits."[36]

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[32] *Lascaris, supra* note 3, at paras. 40 to 41.

[33] *Ibid.* at para. 44.

[34] *Ibid.*

[35] *Bondfield, supra* note 3.

[36] *Ibid.* at para. 26.

Disposition

[56] The defendants' anti-SLAPP motion is dismissed. The plaintiffs' defamation actions may proceed.

[57] At the hearing of this motion, counsel for the plaintiffs generously suggested that this may not be a case for costs even if the defendants' anti-SLAPP motion were dismissed. Unless the plaintiffs have changed their position in this regard (and if so, they should advise me forthwith) I am prepared to accept their suggestion and direct that no costs be payable by either side.

[58] Order to go accordingly.

Justice Edward P. Belobaba

Date: April 23, 2019

Appendix

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Dismissal of proceeding that limits debate

Purposes

137.1

(1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

[...]