

CITATION: REBEL NEWS NETWORK LTD. v GILMORE, 2021 ONSC 3490
COURT FILE NO. CV-20-647078-0000
DATE: 20210730

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

REBEL NEWS NETWORK LTD.

Plaintiff

– and –

SCOTT GILMORE

Defendant

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) *Irvin Schein*, lawyer for the Plaintiff
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) *Howard Winkler and Eryn Pond*, lawyers for
) the Defendant
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) **HEARD: May 11, 2021**
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2021 ONSC 3490 (CanLII)

REASONS FOR DECISION

G. DOW, J.

[1] The defendant, Scott Gilmore seeks dismissal of this action under Section 137.1 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43. That is, the defendant claims this action is an attempt to limit his freedom of expression on a matter of public interest.

Background

[2] The defendant is a self-described “opinion” writer (as opposed to a journalist). His engagements include being an Editor at Large for Maclean’s Magazine. He has had articles published in major Canadian newspapers. In addition, the defendant regularly Tweets his

opinions and, it was submitted, has almost 24,000 followers of which some are “verified” and include prominent Canadian politicians and journalists (some of whom are members of the Parliamentary Press Gallery). It may be of note that the evidence indicated this is about one tenth the size of the plaintiff’s following.

[3] It was submitted the plaintiff (“Rebel News”) is the largest independent online media outlet in Canada. It was created in 2015 by Ezra Levant as an alternative to mainstream news outlets. To quote from its website, it “is generally conservative” and posits mainstream media pretending to be impartial “neutral providers of the news when they are anything but” (Exhibit C to Scott Gilmore’s affidavit sworn December 6, 2020). Mr. Gilmore described it as “right wing” and “anti-Islamist” (at paragraph of 13 of his counsel’s factum). It was acknowledged that “Rebel Media” used in the allegedly offending tweet meant the plaintiff.

[4] On August 13, 2020, Justin Ling, a reporter with the National Post, authored an opinion article entitled “Threats to Trudeau and his Cabinet up 30% -- someone is going to get killed”. The article made no mention of the plaintiff. This resulted in the defendant posting the allegedly defamatory statement:

“Responsibility lies at feet of CPC leadership who have tolerated and even welcomed the constant accusations of treason and the violent language from outlets like Rebel Media. They won’t step up and stop it. They are either too scared or too complicit to do the right thing.”

“The recent assassination attempt against the PM, the constant death threats against progressive and female politicians, didn’t “just happen”. The attackers are spoon fed a diet of contestants [sic] outrage and wild accusations. Often coming right from the floor of the House of Commons”.

“When someone is inevitably killed, the blood is on them”.

[5] The parties agree “CPC” was understood to be the Conservative Party of Canada. Mr. Gilmore submits the Tweet was focused on the leaders of the Conservative Party of Canada. However, that did not require specific mention of the plaintiff.

[6] This action is one of nine actions commenced by the plaintiff in Canadian courts against various individuals as contained in the material before me. One of the other actions is against Justin Ling.

Analysis

[7] Under Section 137.1 of the *Courts of Justice Acts, supra*, the first step is for the defendant to establish this litigation arises out of Scott Gilmore’s expression on a matter relating to the public interest. The plaintiff conceded that this test had been met.

[8] As a result, the onus shifted to the plaintiff under Section 137.1(4) of the *Courts of Justice Act, supra* to show the action has substantial merit and the defendant has no valid defences. Further, the harm likely to be suffered by the plaintiff as a result of the defendant’s expression of the matter in the public interest is sufficiently serious that the public interest

in permitting the action to continue outweighs the public interest in protecting the defendant's rights to express his view of how the plaintiff operates.

Substantial Merit Hurdle

[9] This first part of the two-part test in Section 137.1(4)(a) of the *Courts of Justice Act*, *supra* is preceded by the phrase “grounds to believe”. In *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, the court describes what this is not. It is neither a motion to strike out the pleading or summary judgment. It is “an inquiry that goes beyond the parties’ pleadings to consider the contents of the record” (at paragraph 38).

[10] Turning next to “substantial merit”, the Supreme Court of Canada concluded that a plaintiff’s “legitimate claim” should not be “unduly deprived of the opportunity to vindicate that claim” (at paragraph 48). This was alternatively described as a “real prospect of success” or “legally tenable and supported by evidence that is reasonably capable of belief” (at paragraph 49). In this regard, a narrow review of this allegedly offending statement could be construed as Rebel News was making “constant accusations of treason” and using “violent language”. The issue is whether Rebel News, as an alternative media outlet with an acknowledged conservative viewpoint, resulted in it being insulated from what are its own views from the content of what it determined should be reported on.

[11] It is clear that as its creator and lead spokesperson, Ezra Levant, like Scott Gilmore, adds his view to political events. I do not consider determination of that issue to be the

purpose of this motion. Overall, the voluminous material filed by the parties raises a real prospect of success that the defendant has defamed the plaintiff.

[12] The defendant relies on the three elements of defamation and its position that the claim has no substantial merit. It does not rely on whether the impugned words referred to the plaintiff or that they were not communicated to at least one person other than the plaintiff. Instead, it takes the approach that in the entirety of the circumstances:

- a) such expressions are part of the opinion based, digital circulation of points of view; and
- b) the defendant's reputation could not be harmed by what was circulated because all followers have determined their positions or beliefs and either would ignore the statement or champion its position.

[13] I would go no further than note Mr. Gilmore's tweet would raise his stated concern with or without specific reference to Rebel Media. It remains vulnerable to summary judgment and is subject to further analysis detailed below.

No Valid Defences

[14] In this regard, the defendant must first put into play those defences that it intends to present (*1704604 Ontario Ltd. v. Pointes Protection Associations, supra*, at paragraph 56)).

[15] The defendant relied on the defence of fair comment and its five elements. This includes the comment relating to a matter of public interest which has been acknowledged.

[16] Second, the comment must be based on fact that is either stated or known to the readers. Here, there was some evidence of increased security for government officials in response to rising concerns for their safety. Were this the only element of the defence, it would have considerable traction and a basis for this defence to succeed.

[17] Third, whether the comment taken in context is recognized as comment. Counsel for the defendant raised his client is known to his readers to be an opinion writer. I would raise the concern for those accessing the Twitter world that are unaware of this, merely searching for information on the topic and trying to become better informed as to the philosophy or policies of this nation's political parties and those that lead it.

[18] Fourth, the comment must be capable of expression based on proved facts. Here, it appears factual that in August, 2020 there were increased threats to the members of the executive branch of the government. Any outcome to that situation is speculation, open to interpretation and thus not factual. Again, this is a basis for this defence to succeed.

[19] Finally, such an analysis is initiated by proof that it was actuated by express malice. Evidence and references were made to the defendant co-parenting children with a member of the federal cabinet who has been subject to critical comment by the plaintiff. I would agree with the plaintiff's submission from a review of the material filed that Scott Gilmore had developed a negative view of the plaintiff and the decision makers within it. The defendant's own material relies on claims the "sexist, demeaning, vilifying and dehumanizing rhetoric" from Rebel News is "damaging to Canadian Society" (at paragraph 71 of the defendant's factum). However, this was not specifically identified or shown to be

the basis for the impugned statement in issue. As a result, I am left with the factual nature of the allegedly defamatory comment and a basis for this defence not to succeed.

[20] The second defence raised was that of justification. This was described in *Bent v. Platnick*, 2020 SCC 23 (at paragraph 107). It reviews whether the statement was substantially true. This raises what the “sting” or main thrust of the tweet was and whether the defendant’s evidence proves it to be substantially true. The tweet does not opine that Rebel Media’s involvement in the rhetoric may or could lead to actual violence. It concludes with “when someone is inevitably killed”. There was no evidence before me of such an event. As a result, there is a basis on the record and in the law to support that the defence of justification has no real prospect of success.

Weighing Analysis

[21] This involves whether the public interest in continuing the lawsuit is outweighed by the public interest in protecting Scott Gilmore’s right of expression. Counsel for Scott Gilmore submitted this is preceded by the need for Rebel News to show the existence of harm suffered as a result of the statement, having been communicated to others. In this regard, it is first submitted that any damages suffered were so nominal that they are insufficient to warrant continuation of the proceeding. The defendant relies on the absence of evidence from the plaintiff of any pecuniary loss. Further, the defendant submits there must be pecuniary loss because Rebel News, as a corporation, cannot suffer reputational harm.

[22] The plaintiff responds that this stage of this proceeding does not require “a fully developed damages brief”. I agree. However, as stated in *1704604 Ontario Limited v. Pointes Protection Association, supra* (at paragraph 71) to paraphrase, while the harm need not be monetized, there needs to be the “existence” of harm. That is, some harm needs to be identified. Here, the plaintiff has acknowledged that there has been no loss of subscribers. There was no evidence of Rebel News followers thinking less of or contributing less financially to Rebel News as a result of the allegedly defamatory tweet.

[23] An allegation was raised that the comment in issue reduced or eliminated a successful application by employees of Rebel News to the Canadian Parliamentary Press Gallery for membership. However, production of letters to those employees, dated October 29, 2020, from the executive of the Canadian Parliamentary Press Gallery fails to set out any direct or indirect reference to the allegedly defamatory tweet. Rather, it explains that, what Rebel News admitted on this motion to be accurate, that the approach taken by Rebel News of being active participants in their stories and taking partian positions in relation to politicians or political parties, was not in accordance with that organization’s requirement to adhere to its “generally accepted journalistic principles and practices”.

Conclusion

[24] As such, I am prepared to conclude Rebel News has failed to show there is a public interest in continuing this action that is not outweighed by the need to protect Scott Gilmore’s ill advised freedom of expression. The order dismissing the action is granted.

Costs

[25] At the conclusion of submissions, I requested and was advised that neither counsel had prepared Costs Outlines as required by Rule 57.01(6). I was advised this was due to the costs consequences set out in subsections (7) to (9) of Section 137.1 of the *Courts of Justice Act, supra*. As I indicated to counsel, those subsections make no reference to or grant permission to not follow the mandatory direction under Rule 57.01(6).

[26] This is particularly important during the current pandemic and resulting restrictions on court operations. To their credit and with my thanks, counsel requested a few days to prepare and submit Costs Outline which I have received and reviewed.

[27] The Costs Outline of the plaintiff sets out a full indemnity expense of \$69,491.50 for fees with reduced amounts identified for substantial and partial indemnity rates. This compared to the defendant's Costs Outline of \$103,775.00 for full indemnity fees. The hourly rates and times spent of lead counsel were quite similar. The major difference appears to have been the additional time and hours expended by associate counsel and a senior law clerk for the defendant.

[28] The direction under Section 137.1(7) and (8) is to award full indemnity costs and not to award the plaintiff its costs even if it is successful in having the motion dismissed. As stated in *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, this "is an important change to the starting point" (at paragraph 65) of assessing costs in these types of matters but does not remove the judicial discretion to impose an appropriate order.

[29] In this regard, having determined the defendant should be successful on the basis there was insufficient evidence as to harm suffered, there remains a concern for the need by those wishing to opine publicly on national political issues and how to improve Canadian society to do so on a thoughtful, well researched and civil manner.

[30] In this regard, I am mindful of the objective stated in *Boucher et al v Public Accountants Council for the Province of Ontario et al*, [2004] O.J. No. 2634 at paragraph 26 to “fix an amount that is fair and reasonable for the unsuccessful party to pay” rather than “an amount fixed by the actual costs incurred by the successful party”. Having considered the entirety of the circumstances before me, I award the defendant fees of \$69,491.50 plus HST of \$9,033.90 and its disbursements of \$3,422.86 for a total of **\$81,948.26**.

Mr. Justice G. Dow

Released: July 30, 2021

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