CITATION:. Massoudi v Vice Media Inc. 2021 ONSC 8174
COURT FILE NO.: CV-14-500238
MOTION HEARD: 20211130

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Amin Massoudi, Plaintiff

AND:

Vice Media Inc. and Patrick McGuire and John Doe, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Douglas Best, counsel for the moving party defendants

Ryan Naimark and Sandy Williams, counsel for the responding party plaintiff

HEARD: 30 November 2021

REASONS FOR DECISION

Overview

[1] The defendants seek leave to amend their statement of defence to plead two limitation defences found in sections 5 and 6 of the *Libel and Slander Act*, R.S.O. 1990, c.L.12 (the "Act"). The proposed amended defence is attached as Schedule A to their notice of motion.

[2] Section 5 of the Act provides that "no action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown up person at the chief office of the defendant".

[3] Section 6 of the Act provides that "an action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed".

[4] The defendants argue that the applicability of these sections of the Act to online publications was only clarified by the Court of Appeal in July 2017 in the decision of *John v. Ballingall* 2017 ONCA 579. Once defendants' counsel reviewed the released decision, they advised the plaintiff in October 2017 that they were seeking instructions to bring this motion and they confirmed those instructions in December 2017. No party relies on the extensive delay between that date and the argument of the motion, some four years later.

[5] The defendants argue that they are entitled to amend their pleading unless the plaintiff is able to demonstrate actual prejudice that would arise were leave granted. The defendants deny that the plaintiff has proven any such prejudice and further argue that they have rebutted any presumed prejudice.

Background Facts

[6] On 5 November 2013 the defendant Patrick McGuire wrote and Vice Media published an article entitled "Rob Ford's Office Hired a Hacker to Destroy the Crack Tape", detailing what it said were the plaintiff's efforts to hire a computer hacker to destroy a video of Mayor Doug Ford using crack cocaine.

[7] That same day, the plaintiff emailed Vice denying the contents of the article and alleging that it was defamatory.

[8] On 14 March 2014, the plaintiff issued this claim. The defendants served their defence on 20 November 2014. Examinations were held in December 2015 and continued in October 2016. Mediation took place in July 2017.

[9] The defendants now wish to amend their defence to plead that the claim is out of time as the plaintiff neither gave notice within the time period and in the manner required by section 5 of the Act nor commenced his action within the time period required by section 6.

Analysis

[10] It is trite law that the court is required to grant leave to amend a pleading at any stage of an action on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment (rule 26.01). The plaintiff bears the onus of establishing that permitting the amendment will cause him non-compensable prejudice.

[11] The plaintiff first argues that *John v Ballingall* does not represent a change in the law but was simply a reiteration of a decade-old principle that the Act applies to online publications. Even if the plaintiff's position is correct, it does not follow that the defendants are now precluded from pleading a defence that was available to them at the time but which they omitted to plead. The defendants' position that this case represented a change in the law goes to explain their delay, which is raised in the context of prejudice. It is open to the plaintiff to demonstrate prejudice whether the proposed defence is old or new.

Will the plaintiff suffer actual prejudice?

[12] In order to avail themselves of the defences in section 5 and 6 of the Act, the defendants must first satisfy the requirements of sections 7 and 8. The plaintiff argues that he will suffer actual prejudice if the amendment is granted because he is now hampered in demonstrating that the defendants do not meet the requirements of either section 7 or section 8.

Section 7

[13] Section 7 requires the defendants to demonstrate that the article was "printed and published" in Ontario. The plaintiff argues that, between the time of the original defence and this proposed amendment, the computer that McGuire used to write the article was wiped and the Vice computer system has changed. Both of these intervening events leave him now unable to have an expert review the computer and the Vice system and demonstrate that the publication was not printed and published in Ontario.

[14] I find that, if, indeed the computer was wiped, something the defendants deny even occurred, it is the defendants that may be prejudiced as their expert evidence about where the article was printed and published may not be accepted. It also remains open to the plaintiff to retain his own expert to refute the conclusion of the defendants' expert on where the article was printed and published.

[15] This same analysis applies to the change in Vice's computer system. The impact of any change in the system will foremost affect the defendants' ability to prove where the article was printed and published. But the evidence before me is that the system never designed recorded the edits themselves so that information would never have been preserved. What is known now is what would have been known then – the number of edits made, by whom and on what date.

Section 8

[16] In order to avail themselves of the section 5 and 6 defences, the defendants must that prove that "the names of the proprietor and publisher and the address of the publication are stated either at the head of the editorials or on the front page of the newspaper". The plaintiff also argues that he will be prejudiced because the website that appeared on 5 November 2013 was not preserved. The snapshot of the website that the defendants have produced is from 16 November 2013 and was obtained via the waybackmachine. The defendants depose it is reflective of what the masthead looked like on the date of publication.

[17] If the defendants are unable to prove the elements of section 8 because they cannot produce a snapshot of the website from the date of publication, it will be to the prejudice of the defendants, not the plaintiff.

Other Actual Prejudice

[18] The plaintiff also argues that he is prejudiced in that McGuire is no longer employed by Vice and has not confirmed he is available for any continued discoveries. McGuire is a personal defendant and has confirmed he remains available for any continued discovery that is required.

[19] I find that the plaintiff will not suffer actual prejudice were I to grant the amendment.

Is there presumed prejudice?

[20] As for presumed prejudice due to the passage of time, the defendants argue there can be no prejudice to the plaintiff as a result of the timing of this motion or the proposed amendment sought as these limitation and notice periods had already both expired by the time the plaintiff commenced this action. In other words, the plaintiff would have been in the same position as he is now had the defendants included these defences in their original pleading back in November 2014. This is akin to the position taken before Arnell, J. in the matter of *Free v. McPherson* 2013 ONSC 7416. While the plaintiff in that case argued that he would have taken a different approach to internet republication had he known that notice would be an issue, the court held that there would have been nothing the plaintiff could have done, as all pleaded limitation periods had already expired by the time the statement of claim was issued.

Is the defence untenable?

[21] The court on an amendment motion does not delve into the merits of the amendment beyond ensuring that it is tenable at law and *prima facie* meritorious. Whether the allegations will succeed is a matter to be determined at trial.

[22] The plaintiff takes the position that the proposed amended defence is untenable and should not be allowed on that basis. He argues that, if the website as it appeared on the date of the publication is the same as the one the defendants have produced through the waybackmachine, the proposed section 8 defence cannot succeed and is, therefore, untenable. First, the names and addresses are not at the "head of the editorials", as whatever information does appear is at the bottom. Second, they are not on the "front page", as the "About Us" page on which the defendants rely is itself a separate page from the main website address. The test for determining compliance is a strict one (*Hermiston v. Axford Holdings Inc.* [1994] O.J. No. 2467 (Div. Ct.) at paragraph 8.

[23] Considering these arguments, I cannot say that the defence is untenable. Given the Act was written in the language of print publications, it should be left to the trial judge to determine how sections 7 and 8 are to be interpreted in the case of online publications.

[24] The plaintiff may prove at trial that his email to Vice on the date of publication did satisfy the notice provisions of section 5 of the Act. He also remains free to argue that the limitation and notice periods in the Act do not apply to online communications or that Vice does not meet the pre-conditions of sections 7 and 8 to obtain their protections.

[25] The fact that the amended defence may succeed at trial cannot constitute prejudice. As noted by the Court of Appeal, such a proposition would leave only unmeritorious amendments granted, something it understandably described as "an obviously ludicrous proposition" (*Hanlan v Sernesky* [1996] O.J. No. 4049 (C.A.).

Conclusion

[26] I am prepared to grant leave to the defendants to amend their statement of defence in the form attached as Schedule "A" to their notice of motion, on terms. The defendants agree that the plaintiff should be entitled to justifiable costs thrown away in the event the motion is granted. The parties disagree on what is "justifiable".

[27] The plaintiff seeks costs of the motion because of the defendants' lateness in bringing it, costs of preparing a reply or amended reply and costs of further productions and discoveries on this new issue.

[28] The defendants argue that they should receive costs of this motion in the amount of $25,000 on a partial indemnity scale. Costs include the cross-examination of the lawyers on both sides who swore affidavits in respect of the motion as well as answers to numerous undertakings given on the examinations. The plaintiff sought costs of $15,000 had he been successful on the motion.

[29] I fix the motion costs at $10,000 which I find fair and reasonable for a motion to amend a pleading. There is no reason for these costs not to follow the event. The motion was not brought on the eve of trial. It has not caused wasted steps other than those costs thrown away, which I will address below.

[30] As for costs thrown away, the defendants suggested that costs in the range of $5,000 - 6,000 would be sufficient to cover the time the plaintiff will spend to update the pleading, deal with any additional productions and conduct discovery on the new issues. The plaintiff seeks $1,500 to review and respond to the amended pleading, and $10,000 for fresh productions and discoveries. I find the amount suggested by the defendants for these steps to be inadequate, given they spent $39,000 on this motion alone and the plaintiff spent almost $35,000.

[31] I fix the costs thrown away at $10,000 payable by the defendants to the plaintiff as a condition of the amendment. While the existing statement of defence is still germane, the plaintiff will expend time to review the amended pleading and determine his response. It is unlikely that the plaintiff will have new documents but the defendants will have additional productions including, but not limited to those reviewed by its expert and further discoveries will be required.

[32] As in *Belsat Video Marketing Inc. v. Zellers Inc*. [2003] O.J. No. 3168, I leave it open to the trial judge to adjust these costs if it appears that they were not sufficient to compensate the plaintiff for his costs thrown away as a result of this amendment.

Associate Justice Jolley

Date: 13 December 2021