

CV-15-562262

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL J. ELDER

Plaintiff

- and -

TORONTO LIFE PUBLISHING CO. LTD.

Defendant

R U L I N G

BEFORE THE HONOURABLE MR. JUSTICE S. FIRESTONE
on April 20, 2015, at TORONTO, Ontario

APPEARANCES:

P. Robson, Mr.

Counsel for the Plaintiff

P. Jacobson, Mr.

Counsel for the Defendant

J. Lefebvre, Ms.

Counsel for the Defendant

FIRESTONE, J: Orally

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The plaintiff, Michael J. Elder, originally brought this motion for an order restraining the defendants, Toronto Publishing Co Ltd, Sara Fulford, Kenneth Hunt and Michael Posner from publishing or distributing in Toronto Life Magazine, or elsewhere, an article concerning the plaintiff and his business affairs, which he claims maliciously libels him.

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I have been advised that the May edition of Toronto Life magazine containing the article in question has been mailed to its subscribers. It will shortly be available for sale on newsstands and elsewhere.

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In light of this, the plaintiff now brings this motion for an interlocutory injunction preventing any other distribution of the article, in any other format, to any other third parties.

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Given that the article has been released to its subscribers, I directed that a copy of the article be given by counsel for the responding party, to counsel for the moving party, in accordance with a signed undertaking of the plaintiff, which states:

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"In consideration of being provided the May 2015 Toronto Life Magazine, which contains an article entitled, "The Charming Mr. Elder" [the article] I hereby undertake to only make

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use of the magazine and/or article for the purposes of arguing the motion before the court on April 20th, 2015. Accordingly, I undertake not to disseminate, or in any way comment to anyone except my counsel on the magazine or the article until Thursday April 24th, 2015, at nine a.m., at which time the magazine will be offered for sale to the public on newsstands. I obtained independent legal advice and solemnly swear that I will abide by this undertaking."

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The plaintiff, Elder, is a Toronto business man, who in his notice of action issued April 17th, 2015, pleads at paragraph three, that for the past several years he's been engaged full-time in the development of unique and patented paperless mobile sales data devices, designed to assist sales professionals in the compilation, organization and processing of sales related data. The devices are marketed under the registered trademark "Quillmate".

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He further pleads at paragraph four, that he is on the verge of completing a twenty million (USD) dollar financing, which will facilitate the global development of "Quillmate" and is further the defendant in a court action commenced by individuals who are the source of misinformation relied upon and known to be untrue by the defendants in this proceeding, despite such reliance.

The defendant, Toronto Life Publishing Co Ltd, is the owner of Toronto Life, a Canadian magazine, which publishes 12 issues a year.

In the May 2015 edition of Toronto Life, an article was published entitled "The Charming Mr. Elder". It comments on the plaintiff's business dealings.

This is an action which sounds in defamation. In defamation actions, an interlocutory injunction is approached with added caution, given that the granting of same restricts freedom of expression. Such an injunction is only granted in exceptional cases and in the clearest of cases. See *Rapp et al v. McClland & Stewart Ltd. et al.* (1981), 34 O.R. (2d) 452.

The granting of such an interlocutory injunction is generally refused where the defendant(s) states an intention to rely on the defence of justification or fair comment. See Peter A. Downard *Libel*, 2d ed (LexisNexis 2011) at pg. 255.

The test which applies to injunctions in civil litigation as set forth in *American Cyanamid Co v Ethicon Ltd* (1975) AC 396 (H.L.) and adopted by the Supreme Court of Canada in *RJR McDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 does not apply to liable actions. See *Canada (Human Rights Commission) v Canadian Liberty Net* [1998] 1 S.C.R. 626, at paras 48-49.

5 An interim injunction will only be granted in a defamation action if the court is satisfied that the trier of fact (judge or jury) would find the words complained of to be libelous. See *Bonnard v Perryman* [1891] 2 C.H. 269 (C.A. Eng.) at p. 285.

10 In a defamation action, an interlocutory injunction is only granted where the words complained of are so manifestly defamatory that a jury verdict to the contrary would be considered perverse by a Court of Appeal.

15 Further it should not issue where damages would be an adequate remedy. See *Rapp et al v McCelland & Stewart Ltd et al.*

20 An interlocutory injunction is not granted where the defendant expressly states an intention, in the litigation, to rely on a defence of fair comment or justification, unless it is clear that such defenses will fail. See *Canada (Human Rights Commission) v. Canadian Liberty Net*, at para 49.

25 In *Herbage v Pressdram* [1984] 2, All E.R. 769 (C.A) at p. 771 the court confirmed the principle that because of the importance of freedom of speech, the court is more willing to accept that a plaintiff may be adequately compensated in damages if
30 ultimately it is determined that a wrong has been done. *Herbage*, at p. 771.

A damages award is an adequate remedy, unless the defamatory words complained of are particularly grave. See *Rapp v McClland & Stewart et al.*, at p. 456.

I've considered the written record and *viva voce* evidence of Elder and the well-argued submissions of counsel. In my respectful view, the moving party has not, on the record before me, satisfied its onus of demonstrating that the words which appear in the Toronto Life article would be found by the trier of fact (judge or jury) to be libelous and defamatory.

Further the defendants have stated and expressed their intention to rely on the defences of fair comment, responsible journalism and qualified privilege.

The defence of qualified privilege and fair comment are defeated when it is demonstrated that the defendant(s) were motivated by express malice. Malice is a desire to injure the person who is defamed. See *Horrocks v Lowe* [1975] A.C. 135 at 149.

It has further been described as publication for an improper purpose or motive. See *Hill v Church of Scientology of Toronto* [1975] 2. S.C.R. 1130 at p. 1189.

I am not satisfied on the record before me that the words complained of were made with malice on the part of the defendants. The comments made are arguably, at this stage, a matter of public interest.

Further, there is insufficient evidence presented for me to conclude that the plaintiff would not and could not be adequately compensated by an award of damages if ultimately successful in this action.

As a result, I find that the moving party has not met its onus on the record before me of establishing that the words complained of are unarguably defamatory, which would justify such a restriction on free speech in advance of trial.

As stated in *Canada Metal Co Ltd. v Canadian Broadcasting Corp et al.* (1975) 7 O.R. (2d) 261 (Div. Ct) at paras 2-3,

"The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases.

That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. The exceptions to this rule are extremely rare."

5 To use the reasoning of Gauer J. of the Supreme
Court of British Columbia, in *Gant v Berube* 2013
BCSC 1721, I am unable, on the record before me at
this preliminary stage, to conclude that it is
impossible that the defences raised cannot possibly
succeed. As a result, with respect, this motion is
dismissed.

10 I further state that it has not been established
that the defendants have not met the eight part
test set forth in *Quan v Cusson* 2009 3 SCC 62,
[2009] 3 S.C.R. 712.

15 I wish to thank counsel for both their oral and
written submissions, which were of great
assistance.

20 With respect to the issue of costs, it has been
agreed that the successful party would recover from
the unsuccessful party the sum of \$17,000, plus
HST, both with respect today's attendance and the
attendance at motion scheduling court on April
17th, 2015. The record will be endorsed
25 accordingly to be paid forthwith.

30 Motion dismissed.

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))
Evidence Act

5 I, Tara Brown, certify that this document is a true and accurate
transcript of the recording of Michael Elder v Toronto Life
Publishing Co. Ltd., in the Toronto Civil Courts, courtroom 703,
393 University Avenue, taken from recording
4899_703_20150420_142831__10_FIRESTS.dcr, which has been
10 certified in Form 1.


Tara Brown

15 May 14, 2015

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