Court of Queen's Bench of Alberta

Citation: Stringam Denecky LLP v Sun Media Corporation, 2017 ABQB 687

Date:
Docket: 1403 13657
Registry: Edmonton

Between:

Stringam Denecky LLP

Respondent/Plaintiff

- and -

Sun Media Corporation, Kevin Thornton and Mary-Ann Kostiuk

Appellants/Defendants

Reasons for Decision
of the
Honourable Madam Justice B.A. Browne

Appeal from the Order by
W.S. Schlosser, Master in Chambers
Filed on the 6th day of January, 2017
(2016 ABQB 692)

Introduction

[1] This is an appeal from a Master's order compelling a columnist to answer questions that would reveal the identity of his source.

[2] A former client of Stringam Denecky LLP sought to have the accounts she received from the law firm reviewed by a Review Officer. As some of the accounts were dated, she applied to

the Court for an extension of the time limit on reviewing a lawyer's fees. She filed an affidavit in support of her application (the "Affidavit").

[3] The Affidavit was provided to Kevin Thornton, who wrote three opinion columns based on the information it contained. The columns were published in the Fort McMurray Today newspaper, on the newspaper's website, and elsewhere online.

[4] In response to the columns, Stringam commenced a defamation action against Thornton, Sun Media Corporation (the owner of Fort McMurray Today), and Mary-Ann Kostiuk (a Sun Media employee).

[5] During his questioning, Thornton refused to answer questions about the individual who provided him with the Affidavit. That is, he refused to answer questions that would reveal the identity of his source.

[6] Stringam applied for an order compelling Thornton to answer the questions. A Master allowed Stringam's application and granted the requested order. In so doing, the Master determined that:

(i) the questions are relevant and material, as information about Thornton's source, including his or her identity, could significantly help resolve the issues of malice, recklessness, or improper purpose (or assist in determining the motive for the columns); and

(ii) Thornton could not rely on journalist-source privilege to avoid the questions because the public interest in getting at the truth outweighed the public interest served by protecting his source's identity (that is, the fourth Wigmore criterion was not met).

See ***Stringam Denecky LLP v Sun Media Corporation***, 2016 ABQB 692.

[7] Thornton, Sun Media, and Kostiuk (collectively the appellants) appeal from the Master's order.

Standard of Review

[8] The parties agree that the applicable standard of review on all issues is correctness: ***Bahcheli v Yorkton Securities***, 2012 ABCA 166 at para 30, 524 AR 382.

Relevant Rules

[9] Rule 5.25 of the *Alberta Rules of Court* provides that:

(1) During questioning, a person is required to answer only

(a) relevant and material questions, and

(b) questions in respect of which an objection is not upheld under subrule (2).

(2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:

(a) privilege;

(b) the question is not relevant and material;

(c) the question is unreasonable or unnecessary;

(d) any other ground recognized at law.

...

(4) If an objection to a question cannot be resolved the Court must decide its validity.

...

[10] Rule 5.2(1) speaks to when something is relevant and material. It provides that:

> For the purposes of this Part [Part 5: Disclosure of Information], a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Are the questions relevant and material?

[11] Thornton is only obliged to answer relevant and material questions posed during questioning: Rule 5.25. Accordingly, the first issue for me to determine is whether the questions Stringam wants answered are relevant and material.

Relevant Caselaw

[12] In ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2014 ABCA 244 at para 17, 577 AR 335, the Court of Appeal said that, for the purposes of Rule 5.2(1), "relevance is primarily determined by the pleadings, whereas materiality relates to whether the information can help, directly or indirectly, to prove a fact in issue".

[13] Specifically regarding materiality, the Court said:

> 19 ... There is no fixed standard of what is "material". An element of judgment is required, and questioning is not permitted just because some remote and unlikely line of analysis can be advanced.
>
> ...
>
> 21 It is not sufficient for a litigant to show some theoretical line of argument in order to establish "materiality". [A] judge is fully entitled to reject lines of pretrial discovery that are unrealistic, speculative, or without any air of reality. ... At an interlocutory stage of proceedings, the court should not measure counsels' proposed line of argument too finely: *Weatherill* at para 16. But that does not mean that a proposed line of questioning must be accepted at face value.

[14] Earlier, in ***NAC Constructors Ltd v Alberta Capital Region Wastewater Commission***, 2006 ABCA 246, [2006] AJ No 1051 (QL) at para 13, the Court of Appeal explained materiality this way:

> The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1 [now Rule 5.2(1)], but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue.

Pleadings

[15] Stringam's Statement of Claim alleges that Thornton's columns contain a number of false and defamatory statements about the law firm. More specifically, Stringam alleges that the columns "state or imply that [it] and its lawyers are unethical, dishonest, corrupt, overcharging for legal services and guilty of exploiting and defrauding clients", all of which "is unequivocally false": para 14.

[16] Stringam also alleges that the appellants published the columns "maliciously, with an improper purpose and with intent to harm [its] reputation": para 15. Alternatively, the law firm alleges that the appellants published the columns "with a reckless and willful indifference as to whether the [columns] were true or false, and they knew or ought to have known that the publication of the [columns], if false, would undoubtedly result in harm to [Stringam's] professional reputation": para 15.

[17] The appellants' Statement of Defence raises these defences: truth or justification, privilege, fair comment, and responsible communication on a matter of public interest. Among other things, the appellants claim that Stringam's former client's court application, and the information in the Affidavit, "were matters of public interest and attracted media attention because they concerned the high cost of legal representation in family law matters and the recourse available to clients to use the court process to have lawyers' accounts reviewed and adjusted": para 10. Finally, the appellants "deny that they acted maliciously, recklessly, or for any improper purpose in publishing the words complained of": para 20.

[18] There is no mention of Thornton's source in the pleadings.

Relevant Evidence

[19] In the affidavit he filed in response to Stringam's application to compel answers, Thornton swore that:

- at all relevant times, he was working as a columnist for the Fort McMurray Today;
- a friend put him in touch with the source, who was unknown to him;
- before the source provided him with any information, he promised the source that he would keep the source's identity confidential;
- an editor at the Fort McMurray Today approved of him providing confidentiality to the source;
- the source told him there was a matter before the Court and provided him with the Affidavit;
- that was the extent of the source's involvement in the columns;
- his columns were based on the Affidavit;
- the source did not suggest what he should write in the columns;

- the opinions expressed in the columns (including the opinion that Stringam charged its former client too much) were his own; and
- in writing the columns, he hoped to persuade Stringam to give its former client a reduction on legal fees.

[20] During his cross-examination on affidavit, Thornton said that:

- the source did not provide him with any details regarding the matter before the Court; and
- he did not know why the source wanted confidentiality.

Parties' Arguments

[21] Stringam says the questions regarding the identity of Thornton's source are relevant and material.

[22] The law firm's theory is that Thornton's source was someone with a special interest in the outcome of the former client's court application, who acted maliciously in supplying Thornton with the Affidavit. Stringam believes the source provided Thornton with the Affidavit to harm the law firm's reputation, or pressure it to make concessions on the court application.

[23] Stringam argues that, if its theory is correct, the questions it wants answered will elicit evidence that will significantly help determine whether Thornton (i) published the alleged defamatory statements maliciously and/or (ii) failed to make sufficient efforts to verify the information his columns were based on. It is Stringam's position that, if the source was someone with a special interest in the outcome of its former client's Court application, acting maliciously, that information will help it establish that Thornton (i) acted with malice in publishing the columns and/or (ii) had a heightened obligation to ensure that the information he was relying on was accurate before he published the columns.

[24] Stringam provided these cases in support of its argument: ***Bouaziz v Ouston***, 2002 BCSC 1297, [2002] BCJ No 2014 (QL); and ***Hodgson v Canadian Newspapers Co*** (2000), 49 OR (3d) 161, [2000] OJ No 2293 (QL).

[25] The appellants say the questions Stringam wants answered are not relevant and material. It is their position that Stringam has failed to show how identifying Thornton's source will assist in resolving any of the issues in this action. According to the appellants, all Stringam has done is speculate about the interest the source may have had in its former client's court application.

[26] The appellants acknowledge that the pleadings raise the issue of malice, but say that issue is confined to whether there was any malice on their part; that is, it is confined to whether there was any malice on the part of those alleged to have defamed Stringam. It is the appellants' position that the source's intention or motive in providing the Affidavit to Thornton is irrelevant and immaterial.

[27] In support of their argument, the appellants rely on Thornton's evidence that his columns were based on the information contained in the Affidavit, not on any information originating from the source. They suggest that, in these circumstances, evidence of any potential malice on the part of the source could not be used to infer or establish malice on Thornton's part.

[28] The appellants also suggest that, as Thornton's real source of information was the Affidavit, not the individual who supplied the Affidavit, it is the status and reliability of the

Affidavit (or the affiant) that is relevant to an assessment of Thornton's diligence in trying to verify the information his columns were based on. The status, knowledge and perspective of the individual who supplied Thornton with the Affidavit are irrelevant and immaterial.

[29] The appellants provided these cases in support of their argument: ***Canwest Publishing Inc v Wilson***, 2012 BCCA 181, 321 BCAC 193 [***Wilson***]; ***Saggu v Canwest Publishing Inc***, 2009 BCSC 362, 2009 CarswellBC 694; and ***Charman v Canadian Newspapers Co***, [1991] 6 WWR 710, 1991 Carswell BC 216 (SC Master).

Analysis

[30] In ***Wilson***, the British Columbia Court of Appeal explained the role that the presence or absence of malice plays in a defamation action. At paras 36-38, the Court noted that:

- malice is not an element of the tort of defamation,
- proof of malice on the part of a defendant will defeat the defences of qualified privilege and fair comment,
- the absence of malice is woven into the responsible communication on a matter of public interest defence, and
- a successful plaintiff might obtain an aggravated damages award if he or she proves malice on the part of a defendant.

[31] In ***Kent v Martin***, 2016 ABQB 314, 34 Alta LR (6th) 290, Strekaf J (as she then was) discussed how malice is established in a defamation action. At paras 229-230, she said:

> ... The Supreme Court of Canada in *Hill* provided direction with respect to what constitutes malice in the context of a defamation action at paragraph 145:
>
> > Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, [1979] 1 S.C.R. 10 *supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v Despard*, [1956] OR 963 (CA). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, [1979] 2 S.C.R. 311 *supra*, at pp. 323-24, and *Netupsky v Craig*, [1973] SCR 55, at pp. 61-62.
>
> In *Mann v I.A.M & A.W*, 2012 BCSC 181, the Court identified four categories of malice at paragraph 98:
>
> > In *Smith* (CA) at para 34, Kirkpatrick J.A. writing for the Court adopted the framework for the categories for establishing malice, as articulated in Roger D. McConchie & David A. Potts, Canadian Libel and Slander Actions (Toronto: Irwin Law, 2004) at 299. A defendant is actuated by malice if her or she publishes the comment:
> >
> > i. Knowing it was false; or
> >
> > ii. With reckless indifference whether it is true or false; or

iii. For the dominant purpose of injuring the plaintiff because of spite or animosity; or

iv. For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one of which might be found in a given case.

[32] The pleadings in this case clearly raise the issue of whether the appellants acted with malice in publishing the alleged defamatory statements (the malice issue). Accordingly, a question will be relevant and material if the answer to it could reasonably be expected to significantly help determine the malice issue, or ascertain evidence that could reasonably be expected to do so.

[33] The questions Stringam wants answered seek information about Thornton's source, including the disclosure of the source's identity. Can that information reasonably be expected to significantly help determine the malice issue, or ascertain evidence that could reasonably be expected to do so? In my view, it cannot.

[34] Even if the disclosure of the source's identity led to the discovery of information suggesting that the source acted with malice in supplying Thornton with the Affidavit (as Stringam suggests it might), that information would not significantly help determine the malice issue. It is malice on the part of the appellants (in publishing the alleged defamatory statements), not any malice on the part of the source, that will have to be shown to (i) negate some of the appellants' defences, if they are otherwise made out; and/or (ii) support a claim for aggravated damages, if Stringam is successful: ***Wilson*** at para 42.

[35] In light of Thornton's evidence that:

- the source merely told him there was a matter before the Court, and provided him with the Affidavit;
- the source did not provide him with any details regarding the matter before the Court;
- his columns were based on the information in the Affidavit;
- the source did not suggest what he should write in the columns;
- the opinions expressed in the columns were his own; and
- he did not know why the source wanted confidentiality,

I fail to see how demonstrating malice on the part of the source, in providing Thornton with the Affidavit, would help Stringam establish malice on the part of the appellants (or any one of them), in publishing the alleged defamatory statements. There is no indication in the evidence before me that Thornton was aware of, or influenced by, his source's motives.

[36] Specifically regarding the responsible communication defence raised in the pleadings, I acknowledge that "the status and reliability of the source" is relevant to a determination of whether a "publisher was diligent in trying to verify the allegation": ***Grant v Torstar Corp***, 2009 SCC 61, [2009] 3 SCR 640 at para 126. However, in this case, the source Stringam seeks to have identified was not the source of the impugned allegations. Accordingly, it is the status and reliability of the Affidavit (or the affiant) that are relevant, not the status and reliability of the individual who supplied Thornton with the Affidavit. (It is clear from Thornton's evidence that

the affiant, Stringam's former client, was not the individual who supplied Thornton with the Affidavit.)

[37] At the end of the day, I am not satisfied that the questions Stringam seeks answers to are relevant and material. That is, I am not satisfied that information about Thornton's source, including the disclosure of the source's identity, can reasonably be expected to significantly help determine an issue raised in the parties' pleadings, or ascertain evidence that could reasonably be expected to do so. Accordingly, Thornton is not obliged to answer the questions.

Should Thornton's objection to the questions on the basis of journalist-source privilege be upheld?

[38] As a result of finding that Stringam's questions regarding the source are not relevant and material, and, consequently, need not be answered, there is no need for me to consider whether Thornton's objection to the questions on the basis of journalist-source privilege should be upheld. There is no need for me to consider the applicability of the Wigmore test: ***Globe and Mail v Canada (Attorney General)***, 2010 SCC 41, [2010] 2 SCR 592 at paras 1, 24, 56 and 65.

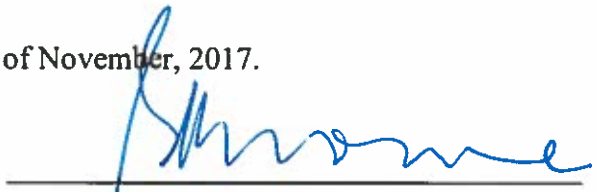
Result

[39] The appellants appeal is allowed, the Master's order is set aside, and Stringam's application to compel answers is dismissed.

Costs

[40] If the parties cannot agree on costs, they may speak to the issue of costs within 60 days.

Heard on the 17th day of October, 2017.
Dated at the City of Edmonton, Alberta this 9th day of November, 2017.



B.A. Browne
J.C.Q.B.A.

Appearances:
Barry Zalmanowitz, QC and Sara E. Hart
for the Appellants/Defendants

James Heelan, QC
for the Respondent/Plaintiff