

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burke v. John Doe*,
2013 BCSC 964

Date: 20130531

Docket: S133008

Registry: Vancouver

Between:

Brian Burke

Plaintiff

And

**John Does #1 to #18, a.k.a. “Nofixedaddress”, “Cambarkerfan”, “Lavy16”, “Mbskidmore”,
“Tulowd”, “Loob”, “Naggah”, “Mowerman”, “Aaronp18”, “Steve”, “Kaboomin8”,
“Thezbrad”, “Slobberface”, “Poonerman”, “Isolatedcircuit”, “Kanada Kev”, “Ncognito”
and “Sir Psycho Sexy”**

Defendants

Before: Master MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

R. Grant, QC

Counsel for the Defendants:

No Appearances

Place and Date of Hearing:

Vancouver, B.C.

May 28, 2013

Place and Date of Judgment:

Vancouver, B.C.

May 31, 2013

The Application

[1] Brian Burke applied for a without notice order permitting him to serve seven of the defendants to this defamation action by a method other than personal service. The seven defendants in question are John Does 1, 2, 3, 4, 5, 7 and 13. They are also known as “NoFixedAddress”, “CamBarkerFan”, “Lavy16”, “Mbskdimore”, “Tulowd”, “Naggah”, and “Slobberface”. I will refer to these defendants as the “Message Board Defendants” as they were referred to in the application materials. Mr. Burke has not served any of the defendants with the notice of civil claim. I granted the order with reasons to follow.

[2] The alternate method suggested by Mr. Burke was that the Message Board Defendants would be sent a private notification to their message board account advising them that they are named as a defendant in Mr. Burke’s defamation action and telling them how to access the notice of civil claim, and a copy of the substituted service order, at a dedicated page on the Heenan Blaikie LLP website.

[3] Pursuant to Rule 4-3 of the *Supreme Court Civil Rules* documents must be personally served unless the court orders otherwise. Mr. Burke’s application is brought pursuant to Rule 4-4(1) which provides for service by an alternate method in two distinct circumstances:

If it is impracticable to serve a document by personal service or if the person to be served by personal service

- (a) cannot be found after a diligent search, or
- (b) is evading service of the documents,

the court may, on application without notice, make an order for substituted service granting permission to use an alternative method of service.

[4] In this case, Mr. Burke submits that it is impracticable for him to personally serve the defendants.

[5] The meaning of “impracticable”, in the context of applications for substituted service, has been the subject of some discussion in cases decided under the former *Supreme Court Civil Rules*. For example, in *Credit Foncier Franco-Canadian v. McGuire* (1979), 14 B.C.L.R. 282 (S.C.), the court reviewed dictionary definitions of impracticability and concluded that, while each case depended on its own circumstances, impracticability meant “incapable of being done usefully or capable of being done but at too great a cost”. The interpretation of impracticability in *Credit Foncier*, and other like cases, was applied by Burnyeat J. in *Luu v. Wang*, 2011 BCSC 1240, a case decided under the current Rules.

The Factual Background

[6] Mr. Burke filed a civil claim alleging that defamatory statements were published by the Message Board Defendants, and others, on various Internet message boards. Message boards are online discussion forums that permit individuals to hold conversations in the form of posted messages. Conversations occur on a message board through “threads” relating to a specific topic and messages in the thread are available to be searched and read for some time after a comment is posted. Internet users may view the discussion threads without registering with the message boards.

[7] The identity and residence of the Message Board Defendants are not known to Mr. Burke and, although they were asked, the administrators for each of the message boards have not provided information about the identities of the Message Board Defendants.

[8] Heenan Blaikie LLP, the law firm representing Mr. Burke, has registered accounts with the message boards on which the Message Board Defendants posted messages. They are: forums.redflagdeals.com; hockeybroads.com; forums.Prosportsdaily.com; Torontogolfnuts.com; gtamc.com; hfboards.hockeysfuture.com; and Torontojungle.com.

[9] According to the affidavit of Gordon Brandt, filed in support of Mr. Burke’s application, in order to post a message to the message boards, an individual must: provide an email address; verify that email address by following a link sent to the email address by the message board; and select a username that is unique to the message board. Once registered, the individual need not use or maintain the email account which they used to register.

[10] Mr. Brandt’s affidavit confirms that the message boards on which the Message Board Defendants posted allow for private messages. They all convey a personal notification to a user when he or she receives a private message. He attaches screenshots from the various message boards which show the various forms of notification for a personal message on each. The form of notification is standard unless a user opts for a different notification method. The default notification for a personal message is not the same on all of the message boards. On gtamc.com, the default notification copies the body of the private message, incorporates it into an email which is then sent to the email address the user provided at registration. On Torontogolfnuts.com, the default notification advises the user that he or she has received a private message, with a link to the private message. The notification is sent to the email address the user provided at registration. On redflagdeals.com, the default notification is an inbox icon, visible in the browser window while a user is logged into their message board account. The inbox icon indicates the number of unread private messages for the user. On Prosportsdaily.com, hockeybroads.com and Torontojungle.com, the default notification is a notice of “notification” on which the user can click. The message board then indicates the type of notification the user has received including that they have received a private message.

[11] Mr. Brandt says in his affidavit that, using the Heenan Blaikie accounts, he has reviewed the accounts registered to the Message Board Defendants. His evidence establishes that all of the Message Board Defendants are frequent posters to the message boards. In addition, all have

posted within the past three months, some as recently as May 2013, with the oldest post being in March 2013. The number of posts posted by each of the Message Board Defendants range from a low of 137 (mbskidmore) to a high of 13,040 (slobberface).

Analysis

[12] Personal service provides certainty that a party has notice of a proceeding. However, it has long been understood that is not necessary for the court to be certain that a method of substituted service ensure that notice will be received. It is sufficient if the alternate method is reasonably likely to bring the process to the attention of the person served.

[13] The particular method of service proposed by Mr. Burke has not been the subject of any decisions of this court, although substituted service through active email accounts and other social media sites such as Facebook has been permitted both in this court, elsewhere in Canada, and in other Commonwealth countries.

[14] Many such applications are not reported. They are granted on affidavit evidence which confirms that the person proposed to be served maintains an active email or profile on social media sites. They reflect the reality of today's methods of communication which are increasingly electronic.

[15] In *Knott Estate v. Sutherland*, [2009] A.J. No. 1539 (Alta. Q.B.), Master Breitkreuz ordered service of a statement of claim and notice to a defendant by sending a notice of the action to the defendant's Facebook page. Similarly, in *Bryne v. Howard*, [2010] FMCAFAM 509 (Fed. Mag. Ct.), service of a child support application via Facebook, and other electronic means, was deemed effective and in *Mothership Music Pty Ltd. v. Darren Ayre (T/As Vip Entertainment & Concepts Pty Ltd)*, [2012] NSWDC 42, service of an injunction application was permitted by email transmission and by Facebook.

[16] In a case involving facts similar to this, *Blaney v. Persons Unknown*, (1 October 2009) IHQ/12/0653 (Ch.), a journalist and commentator who operated the "Blaney's Blarney" website, obtained an injunction against an anonymous internet poster who was impersonating him through a Twitter account. Counsel was unable to provide me with a copy of the case despite efforts to obtain it from various sources. However, according to reports of it published in the Canadian *Lawyer's Weekly* (Leonard Polsky and Stacey Wade, "Status update: service by Facebook" September 30, 2011) and in "Online defamation: confronting anonymity" a paper written by Anna Vamialis and published by the Oxford University Press, the High Court granted the plaintiff leave to serve the defendant poster with an injunction by sending a message to his Twitter account which included a link to a website on which the injunction order was displayed.

Conclusion

[17] In this case, I am satisfied that personal service on the Message Board Defendants is impracticable. Mr. Burke does not know the identity of the Message Board Defendants nor where they are located.

[18] I am also satisfied, on the material filed, that there is no cost-effective means of discovering this information. It would be possible to seek this information by applying for production orders against the various internet service providers or the hosts of the message boards. Such orders have become known as *Norwich* orders after they were granted in *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133 (HL).

[19] In this case, if *Norwich* orders were granted and complied with, they would only yield the email addresses provided by the Message Board Defendants when they opened their accounts as this is the only identification that is required to open such an account. Slobberface registered for his account in 2004, the earliest date and Mbskidmore registered in April 2012. The email accounts they, and the other Message Board Defendants, used when they registered may no longer be active. As a result, applications for service on those email addresses would arguably be less effective because there is more likelihood of the proceedings coming to the attention of the Message Board Defendants on an active message board account.

[20] In addition, given the number of the Message Board Defendants, all of whom posted the allegedly defamatory statements on different message boards, proceeding in this manner would be lengthy, and time consuming. While these factors alone would not be sufficient to meet the test of impracticability, the fact is that proceeding in that manner may also be ineffective because it is unlikely to yield any more certainty of notice than the currently proposed method.

[21] In my view, it is reasonably likely, or probable, that notice of the proceedings will come to the attention of the Message Board Defendants by the proposed method. Mr. Brandt's affidavit establishes that, according to their profiles on the message boards, the Message Board Defendants regularly log into the very accounts on which they posted the allegedly defamatory statements and use message boards and the Internet as a regular means of communication. They will be notified that they have received a personal message upon logging into their account in an online forum in which they have chosen to participate.

[22] In all these circumstances, I order that Mr. Burke may serve the notice of civil claim, filed April 26, 2012, on the Message Board Defendants by sending them a private message to the internet message board accounts maintained by them in the form attached to the notice of application. I required the form of the message to be amended to include the name and contact information of the lawyer at Heenan Blaikie from whom the Message Board Defendants may obtain the notice of civil claim and a copy of this order. In addition, I ordered that a similar notice be published in one edition of a national Canadian newspaper.

“Master MacNaughton”