

CITATION: 1373366 Ontario Inc. v. Hayman et al., 2020 ONSC 4666
COURT FILE NO.: CV-19-00622746
DATE: 20200731

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1373366 ONTARIO INC. OPERATING)	
AS FILMORES HOTEL)	
)	
Plaintiff/Responding Party)	<i>A. Zweig, for the Plaintiff</i>
)	
-and-)	
)	
JAREN HAYMAN, NOOREZ LALANI,)	
BRAD KEAST, MIKE BEAN, SARIT CHANDARIA,)	
STEVE CAMERON, STEVE KEYZER,)	
NORTHERN BANNER RELEASING INC. and)	
RAVEN BANNER ENTERTAINMENT INC.)	
)	
)	
Defendants/Moving Parties)	<i>A. Gonsalves and C. Milne for the Defendants</i>
)	
)	
)	HEARD: July 29, 2020

LEIPER J.

REASONS FOR DECISION

I. INTRODUCTION

[1] The defendants brought a motion to dismiss the plaintiff’s claim in defamation for a scene in a trailer and documentary entitled, “This is North Preston.” The statement of claim sought relief including \$1 million in damages against the defendants and an injunction preventing the distribution of the film.

[2] The defendants moved for dismissal under Ontario’s “anti-SLAPP” legislation (“SLAPP” stands for “Strategic Lawsuits against Public Participation). Anti-SLAPP legislation exists to balance the harm from defamatory speech with a broad, but not unlimited, interest in protecting public interest expression.

[3] I found that the documentary and the trailer concern public expression. I concluded that the plaintiff has not established it has a claim in defamation that has substantial merit. For the reasons provided below, I dismissed the claim and ordered the plaintiff to pay damages of \$25,000.

II. AMENDMENT TO THE PLEADINGS

[4] On consent of the parties, I ordered an amendment to the pleadings to correct the name of the plaintiff to “1373366 Ontario Inc. Operating as Filmores Hotel.”

III. OVERVIEW

The Documentary and the Scene in Front of Filmores Hotel

[5] “This is North Preston” is a 73-minute documentary about a rural community in Nova Scotia. The film describes the oldest Black community in Canada and the challenges faced by this community. The subject matter includes the history of the community, racism, police stereotyping, gang culture, sex trafficking, poverty, violence against women and economic insecurity. The film includes interviews with historians, community leaders, religious leaders, victims of sex trafficking and members of the community who lived a “gang” lifestyle. It also tells the stories of community members who have had success in music and other vocations.

[6] The plaintiff operates a hotel and strip bar under the name “Filmores Hotel” at the corner of Dundas Street and George Street in Toronto. It claims it was defamed by a scene in the documentary. The scene takes place during a “voice over” from an advocate for women victimized by sex trafficking. During the voice over, the speaker is shown standing in front of the plaintiff’s premises. She is talking about North Preston and sex trafficking or “pimping.” Some of the letters in the sign “FILMORES HOTEL” can be seen on either side of the speaker. Her head and shoulders block the letters, “ORES.” Overhead, a marquee can be seen with the words “Appearing Tonight, XXX, GIRLS GIRLS GIRLS”. The scene is three seconds in length. It occurs at minute 50 of the 73-minute documentary.

[7] After the scene in front of Filmores Hotel, the camera view shows a group of men playing cards for money. The same speaker continues speaking over this image: “A pimp will use manipulation. Force intimidation. He’ll play on our vulnerability.”

[8] Approximately 90 seconds later in the film, there are several stock images taken in strip bars. These scenes were not taken inside Filmores Hotel and there is no reference to Filmores Hotel then or at any time during the film. The film draws no connection between the Filmores Hotel or its strip bar and sex trafficking or pimping. The majority of the film is shot in North Preston with a few scenes, including the impugned scene, shot in Toronto.

The Scene in the Trailer

[9] The trailer was produced to advertise the documentary. The scene is two seconds long and appears at the 50 second mark of a two-minute trailer. Just prior to the shot, various people from

North Preston discuss the topic of pimping. A voice over can be heard just before the image appears of the speaker in front of Filmores Hotel: “North Preston’s gangs [are] known as one of the largest pimp gangs.” The rest of the trailer includes scenes taken in North Preston, inside homes and in a cemetery. This latter image introduces the story of a young musician from North Preston who saw his best friend shot and chose to change his life by pursuing music.

[10] The plaintiff’s owner viewed the trailer but not the documentary prior to launching its claim. The plaintiff wrote to the defendants prior to issuing the claim. It alleged that the use of the image of Filmores Hotel was “unauthorized trademark infringement, defamatory and theft.” The plaintiff demanded that all images be removed. The plaintiff stated it would report the matter to its attorneys and to the “authorities.”

IV. THE ISSUES ON THE MOTION

[11] The issues arise from the anti-SLAPP provisions in s. 137.1-137.5 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*CJA*). The issues are:

1. Was the Statement Made by the Defendants in the Public Interest?
2. If the Statement was made in the Public Interest, has the Plaintiff shown:
 - i. Its claim of defamation has substantial merit, because:
 - (a) The defendants published the words;
 - (b) The words refer to the plaintiff; and
 - (c) The words complained of, in their natural and ordinary meaning, or in some pleaded extended meaning, were defamatory of the plaintiff;
 - ii. That Defendants have no valid defence;
 - iii. That the harm likely to be or have been suffered by Plaintiff as a result of the Defendants’ expression is sufficiently serious that the public interest in permitting the proceedings to continue outweighs the public interest in protecting that expression?

V. DISCUSSION OF THE ISSUES

1. Was the Statement Made by the Defendants in the Public Interest?

[12] The parties agree that the subject matter of “This is North Preston” is in the public interest.

Public interest is determined by reviewing the entire expression and its context. It is useful to ask whether the subject matter concerns a matter that invites public attention, is controversial or in which the public has substantial concern: *Grant v. Torstar*, 2009 SCC 61 at para. 105.

[13] The subjects in “This is North Preston” include Black history in Nova Scotia, racial and economic inequality, policing, poverty, and cycles of violence and exploitation. These are demonstrably issues that are in the public interest. The defendants have established that the documentary and trailer concern expressions made in the public interest. The first part of the test is met.

2. *Has the Plaintiff demonstrated on a balance of probabilities that its claim of defamation has substantial merit?*

[14] Once the expression is found to constitute a matter of public interest, the onus shifts to the plaintiff to establish on a balance of probabilities that its claim in defamation has substantial merit. I must examine whether the claim is legally tenable and whether there is evidence that supports the claim: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras. 79-81. I turn next to the three elements of a claim in defamation to consider whether the plaintiff has established that its claim has substantial merit.

Did the Defendants Make the Statement?

[15] The defendants distinguishes the role of the director Jaren Hayman, from the other named individual defendants, who have been described as passive investors: Noorez Lalani, Brad Keast, Mike Bean, Sarit Chandaria, Steve Cameron and Steve Keyzer. The defendants submit that only Mr. Hayman can be said to have published the statement, because he was involved with all aspects of the production. In contrast, the passive investors made financial contributions, but were not involved with active editorial choices or filming. Most had no prior involvement in film projects. The investors received various forms of credit as producers by way of recognition of their investment. However, Mr. Hayman testified that they had no input or control over the content. The plaintiff did not cross-examine or challenge Mr. Hayman on this evidence.

[16] The defendants argue that the passive investors cannot be said to have authorized the publication given that they were given no creative control over the content of the documentary. They submit that the plaintiff has failed to establish on a balance of probabilities that the passive investor defendants were actively involved in the content and publication of the impugned words: *Crookes v. Newton*, 2011 SCC 47 (CanLII), [2011] 3 SCR 269; Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. (Toronto: Thomson Reuters, 2019).

[17] The plaintiff concedes there was no cross-examination on the affidavit concerning creative control and the relative roles of the investors and the director. It submits that because the passive investors did not give evidence about their role, the record is incomplete.

[18] Publication requires a deliberate or positive act that leads to the publication of the alleged defamatory words *Crookes v. Newton*, 2011 SCC 47; *Kent v. Postmedia Network Inc.*, 2015 ABQB 461 (CanLII).

[19] I conclude that the evidence of Mr. Hayman should be accepted: he has explained the producer credits, the roles of the passive investors and the way the documentary was made. He was responsible for publication of the documentary. The investors provided funding. They did not have control over the content, or the images chosen in the film. None of this evidence was challenged. I find that the plaintiff has not established that the passive investors acted deliberately or specifically to publish the alleged defamatory words.

[20] I conclude that the plaintiff has failed to establish that the defendants Noorez Lalani, Brad Keast, Mike Bean, Sarit Chandaria, Steve Cameron and Steve Keyzer published the expression.

Do the words complained of refer to the Plaintiff: Do the words, in their natural and ordinary meaning, or in some pleaded extended meaning, defame the Plaintiff?

[21] I will consider these questions together. The plaintiff submits that it is defamed by the impugned scene because it associates Filmores Hotel somehow with serious criminality, such as pimping, human sex trafficking, prostitution, and violence against women. This association would tend to lower its reputation in the eyes of a reasonable person. The plaintiff submits that talking about sex trafficking while standing in front of its hotel and strip bar, a recognizable Toronto landmark, leads to “the attendant connections” that a reasonable viewer might draw.

[22] The plaintiff stopped short of submitting that a reasonable viewer would conclude that the film suggests that Filmores Hotel engages in human trafficking or pimping. It does not challenge the accuracy of the voice over about pimping and North Preston. It also agrees that Filmores Hotel is not mentioned by name. Counsel submitted that by juxtaposing the words about North Preston’s pimp gangs with the image of the Filmores Hotel, a reasonable viewer would draw a negative connection between the place and the activity described in the voice over. Counsel for the plaintiff did not articulate what that precise connection would necessarily be. He suggested there are several possibilities: he noted that “nobody [in the film] said what the connection is.”

[23] The defendants submit that the words, “North Preston’s gangs known as one of the largest pimp gangs” cannot be reasonably connected to the plaintiff’s business: this is so because the overall context and scenes in the film are about North Preston. They argue that the scene in question does not connect Filmores Hotel to that subject matter. Instead, the hotel/strip bar functions as a backdrop for three seconds of a 70-minute documentary about the history and intersecting social issues which have affected North Preston, Nova Scotia for decades.

[24] Where the plaintiff’s name does not appear in the defamatory statement, “it must be shown that the words used, or the circumstances attending the publication are such as, would lead reasonable persons to understand that it was the plaintiff to whom the defendant referred.” *Grant v. Cormier-Grant*, 2001 CanLII 3041 (ONCA), 56 O.R. (3d) 215, at para. 19.

[25] The plaintiff must also show that the statement was defamatory that is, it would tend to injure the reputation of the person to whom it refers. This is an objective test, assessed from the perspective of a reasonably thoughtful and informed member of the public. The overall context of the expression must be considered and in a television or film medium, one must consider the entire context including the words spoken, the visual backdrop, intonation, gesture, and sequencing: *Canadian Broadcasting Corp. v Color Your World Corp.*, 1998 CanLII 1983 (ON CA).

[26] As a matter of law, can the statement, having regard to its language, be regarded as defamatory and capable of referring to the Plaintiff? I conclude that a reasonable viewer would not connect the description of pimping activity in North Preston to the Filmores Hotel or that the use of its façade in the way that would tend to lower its reputation. I say that for the following reasons.

[27] Filmores Hotel, located in Toronto, is not the subject of the documentary. The principal setting is North Preston, Nova Scotia. Strip bars are not the subject of the documentary. While the owner of Filmores Hotel and the employees who swore affidavits may feel sensitive about its inclusion in the film, their subjective perspective is not relevant to the test for whether the words together with the image refers to Filmores or is defamatory of Filmores. The words spoken during the scene refer specifically to North Preston and to gang activity there. The film's title, subject matter, and settings are unambiguous that the focus is on the issues that this community has faced, and the stories of those connected to North Preston. The opening scenes in the trailer are overhead images of North Preston: the speakers are connected in some way to this community and they fix the action and attention on this community. The shot of Filmores Hotel in the trailer is two seconds long: it can be fairly described as "fleeting." The same scene used in the documentary is only three seconds in length. The documentary is 73 minutes long, making this shot a tiny part of the film.

[28] In the scene itself, the viewer sees the speaker in the foreground, dressed for a cold day. Her body obscures part of the name of the hotel and the visible letters are off to either side of the frame. The words, "GIRLS GIRLS GIRLS" are directly overhead. There are no gestures or words that connect Filmores Hotel, or strip clubs in general, to the content of the voice over. The length of the scene is brief. It appears only once in the film. The text GIRLS GIRLS GIRLS is one of the strongest visual elements in the scene because of its centrality above the speaker. This text could be seen to be as related or descriptive. Yet, I find that it would require a leap of logic to take this brief scene, the overhead words and connect the words spoken regarding pimping activity by North Preston gangs to Filmores Hotel.

[29] On the basis of the images, the overall context of the documentary and trailer, and the words spoken, I conclude that a reasonably well-informed viewer would not connect Filmores Hotel to pimping activity and North Preston gangs. The plaintiff has not established that its claim in defamation has substantial merit.

3. *Has the Plaintiff established that Defendants have no valid Defence?*

[30] The defendants do not rely on this portion of the test. Given my finding on the merits of the plaintiff's claim in defamation, it is unnecessary to consider the validity of any defences.

4. *Is the harm likely to be or suffered by the Plaintiff as a result of the Defendants' expression sufficiently serious that the public interest in permitting the proceedings to continue outweighs the public interest in protecting that expression?*

[31] Given the findings on the strength of the plaintiff's case in defamation, the balancing of the harm suffered by the plaintiff from the publication against the public interest in the expression is unnecessary.

VI. FINDINGS

[32] The defendants' motion is granted. The plaintiff's claim is dismissed. The pleadings are amended to change the name of the plaintiff to 1373366 Ontario Inc. operating as Filmores Hotel.

VII. DAMAGES

[33] Section 137.1 (9) of the *CJA* provides the court with jurisdiction to consider and order damages. The defendants seek damages of \$25,000 from the plaintiff.

[34] Damages in an anti-SLAPP context are appropriate where a plaintiff has brought its proceedings in bad faith or for an improper purpose: *United Soils Management v. Mohammed*, 2019 ONCA 128, paras. 34-36.

[35] Although damages may follow without evidence of the stress or anxiety caused by litigation, damages do not follow in every successful anti-SLAPP motion: *United Soils Management*, paras. 36-37.

[36] The defendants submitted that suing all passive investors for \$1 million claim and an injunction to ban distribution and exhibition of the entire film were intimidation tactics by the plaintiff. The claim put the entire project at risk. It placed every investor in financial jeopardy.

[37] The defendants submit that the evidence of pressure can also be seen by the plaintiff's decision to continue the action against the passive investors, despite the evidence that they had no editorial control. Finally, the defendants point to the disproportionality between the \$1 million claimed and the absence of evidence of any harm to the plaintiff's economic interests or goodwill. The defendants invite the court to draw an inference from these facts that the plaintiff pursued a legally untenable claim against them to silence the defendants to control any depiction of its business premises. The defendants submit that an award of damages of \$25,000 divided among the passive investors is warranted.

[38] The plaintiff submits that the defendants should not receive any damages, because they offered no apology, nor did they remove the disputed scene from the documentary. This submission is not relevant to the test on damages: it assumes that the plaintiff was wronged by the inclusion of the scene. The damages assessment relates to the plaintiff's actions in bringing the claim.

[39] The plaintiff also argues that because it had modified its position to seek removal of the impugned scene, this request cannot be linked to any fear of “libel chill.” This submission misses the point. Using litigation to threaten the entire project over a three second scene, while seeking \$1 million in damages risks creating a chill in an industry that is engaged in public interest matters. The plaintiff has not withdrawn its request for \$1 million in damages. Responding to such conduct is part of the underlying policy rationale for the anti-SLAPP legislative regime.

[40] I would award damages to the defendants in this case. The lawsuit was brought for significant relief over a fleeting glimpse of the plaintiff’s premises. The plaintiff chose to involve multiple individuals. It continued the litigation against the passive investors after learning they took no active role in producing or editing the film. I infer from the nature of the claim, the tenor of the correspondence sent in advance of the claim, the ongoing inclusion of the investors and the lack of any evidence of harm to the plaintiff’s financial position, that it did so for the improper purpose of putting pressure on the greatest number of individuals associated with the film as possible. This is the kind of conduct for which damages may be contemplated under the anti-SLAPP provisions.

[41] I order damages to be paid by the plaintiff to each of the individual investors, Lalani, Keast, Bean, Chandaria, Steve Cameron and Keyzer in the amount of \$4,166.66 each for a total of \$25,000 in damages.

VIII. COSTS

[42] If the parties are unable to agree as to costs, they may make brief written submissions on or before August 21, 2020.



Leiper J.

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Defendants/Moving Parties

REASONS FOR DECISION

Leiper J.

Released: July 31, 2020