No. S202460
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SEANN LYNCASTER

PLAINTIFF

AND:

METRO VANCOUVER KINK SOCIETY, ADRIAN ESTERGAARD, BEVERLY GUNN, TERRA HUNTER, PAUL JONES, SARA KNAPPE, DAPHNE KOWALCZYK, ERIN KYLE, VICKY MONTERROSA, ANDREA PAINTER and VICTOR SALMON

DEFENDANTS

APPLICATION RESPONSE

Application response of: The plaintiff

THIS IS A RESPONSE TO the notice of application of the defendants filed May 27, 2019.

Part 1: ORDERS CONSENTED TO

The plaintiffs do not consent to the granting of any of the orders sought in Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The plaintiffs oppose the granting of the order set out in paragraphs 1-3 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The plaintiffs take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: *nil.*

Part 4: FACTUAL BASIS

1. The plaintiff is a long-standing member of the kink community in the Lower Mainland. He has held events and workshops at his house for many years, and has worked hard to spread the values of ethical, consensual, safe play at his events and throughout the community generally.

Affidavit of Seann Lyncaster, made June 17, 2019 at paras 11-12, 21-39

2. In December 2016, the plaintiff was the subject of an internet posting which made a number of incendiary allegations against him. This was the first time the plaintiff had, to his knowledge, been the subject of any allegations in the kink community since he first became a part of the community in 2005.

Lyncaster affidavit at para 41

3. Since 2010, the plaintiff had been the head of the local chapter of an organization named Masters And slaves Together ("MAsT"), a position he enjoyed. Unbeknownst to the plaintiff, after the December 2016 allegations arose, the defendant Sarah Knappe wrote to MAsT and initiated an investigation into the plaintiff which culminated in his removal from his position. Ms. Knappe stated to a friend that she never thought the plaintiff should have been granted his position with MAsT in the first place. The defendants have disclosed text messages between Ms. Knappe and others in the kink community which indicate that Ms. Knappe actively encouraged members of the kink community to speak to the investigator as the first necessary step to "shut [the plaintiff] down".

Lyncaster affidavit at paras 48-58, Exhs R-U

4. At all material times prior to July 2016, the Metro Vancouver Kink Society ("MVK") had focused, both in its constating documents and in practice, on education and awareness surrounding kink issues. MVK had never taken any steps to target particular members of the kink community, nor had they ever made any communications to the kink community at large regarding the conduct of any members of the kink community. In fact, MVK had a loose system in place whereby allegedly problematic behaviour was addressed by putting the individual in question on a "watch list", followed by a private warning to the alleged transgressor if the allegedly problematic behaviour was not corrected. MVK had refrained from acting in such a way as to "police" the actions of the kink community.

Affidavit of Nadia Parks, made June 18, 2019 at Exh A

5. The defendants did not follow any of the above practices or protocols with the plaintiff. Instead, in July 2017, the defendants published an open letter (the "Open Letter") in which they levied numerous unfounded allegations of sexual and emotional abuse, and other predatory behaviour against the plaintiff. The statements in the Open Letter were later read out at an MVK-organized meeting and summarized in the minutes of that meeting. This was the first time that MVK had ever made a public statement containing allegations against a member of the kink community. MVK has never made any similar public statements against any other members of the kink community.

Parks affidavit at Exh A

6. Prior to publishing the Open Letter, the defendants made no effort to speak with the plaintiff and obtain his response to the allegations and/or his side of the story. Moreover, the defendants' response to document requests made by the plaintiff in this litigation demonstrate that the defendants did little to no investigation into the underlying allegations before publishing the Open Letter.

Lyncaster affidavit at para 70; Parks affidavit at Exhs B-C

7. The defendant Daphne Kowalcyzk, for example, had no idea who the complainants were whose allegations gave rise to the Open Letter, with the exception of one complainant who goes by the name of Aurora. Ms. Kowalczyk spoke to Aurora prior to the publication of the Open Letter and Aurora specifically told Ms. Kowalczyk that she (Aurora) had neither been the subject of abuse or consent violations by the plaintiff, nor had she witnessed the plaintiff abusing or violating the consent of any others.

Parks affidavit at Exh A

8. Those who reached out to MVK in an attempt to support the plaintiff or request further information were ridiculed by the defendants, who refused to consider any contrary perspectives and refused to revisit the conclusion they had reached that the plaintiff was a sexual predator.

Lyncaster affidavit at paras 63-68, Exhs V-W

9. The plaintiff is an undischarged bankrupt. He is not wealthy. He has commenced and pursued this claim in an attempt to salvage his reputation within the kink community, which is a significant part of his social circle. As a result of the defendants' statements, attendance at his events has plummeted, he has lost friendships, he has suffered mental and physical health problems and he lives in fear of losing his home.

Lyncaster affidavit at paras 89-101

Part 5: LEGAL BASIS

1. As with any legislation, the words of the *Act* must be read in their entire context and in their grammatical and ordinary sense, consistent with the scheme of the *Act*, the object of the *Act* and the intention of Parliament.

Rizzo v Rizzo Shoes [1998] 1 SCR 27 at para 21, citing E.A. Driedger, The Construction of Statutes (2nd Ed., 1983) at p 87

2. The intention of the *Protection of Public Participation Act* (the "*Act*") is to remedy a particular problem – the practice of powerful and wealthy individuals initiating or threatening lawsuits against those critical of them in an attempt to stop participation in a public debate, lawsuits typically known as "SLAPP" (strategic litigation against public participation) suits. A related object of the *Act* is to prevent the chill of journalistic speech. There is no suggestion in the plain language of the *Act* or the Hansard debates surrounding the *Act*'s introduction that it was intended to apply to disputes between private individuals of equal means. Should the *Act* be interpreted in this manner, it will dramatically curtail the availability of the defamation tort and associated remedies to private citizens in British Columbia.

British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Parliament, 4th Session, Issues No. 198-199 (14 February 2019) 7018-7033 (Hon David Eby)

3. SLAPP suits typically "reek" of improper motive and contain specific readily identifiable hallmarks, such as bullying tactics and claims of phantom harm. These are the lawsuits

that the *Act* was designed to curtail. By contrast, lawsuits which contain genuine controversies should be tried on their merits rather than dismissed under the *Act*.

Bondfield Construction Company Limited v The Globe and Mail Inc, 2019 ONCA 166 at para 28

4. The scope of the *Act* is limited to expressions which relate "to a matter of public interest".

Protection of Public Participation Act, SBC 2019, c 3, s 4(b)

5. To be a matter of public interest, a communication must relate to a subject which invites public attention, or about which the public has a substantial concern because it either affects the welfare of citizens or has attracted significant notoriety or controversy. Mere curiosity or prurient interest is not sufficient. Some segment of the public must have a genuine stake in knowing about the subject matter.

Grant v Torstar Corp, 2009 SCC 61 at para 105

6. Where the pith and substance of a communication is a defamatory personal attack veiled as a discussion of matters of public interest, the court must determine the true nature of the statement and rule accordingly.

Able Translations Ltd v Express International Translations Inc, 2016 ONSC 6785 at para 25

7. Anti-SLAPP legislation does not allow immunity from liability for elected members of voluntary organizations who embed defamatory comments within political, economic or social commentary which touches upon matters of public interest.

McCarthy-Oppedisano v Muter, 2018 ONSC 2136 at para 48

8. In this case, interpreting the *Act* consistent with its purpose, the plaintiff submits that the communications at issue in the present case do not relate to a matter of public interest. The communications relate to alleged incidents which took place in the plaintiff's own

home at privately held events. The subject of the communications has not attracted significant notoriety or controversy. As outlined below, the statements appear to have been part of a strategy by the defendants to "shut down" the plaintiff, and were defamatory attacks disguised as attempts to protect members of the kink community.

9. In the event that the court determines that the impugned statements relate to a matter of public interest, the burden under the *Act* shifts to the plaintiff to establish that the claim has substantial merit and the defendant has no defence in the proceeding. The plaintiff must also establish that the harm suffered by the statement is serious enough that any public interest in continuing the proceeding outweighs the public interest in protecting that expression. The plaintiff will address each of these in turn.

10. These provisions address the potential merit of the plaintiff's claim. The applicable analysis is whether a trier of fact could reasonably conclude that the claim has "substantial merit" and the defendant has "no valid defence". If the judge hearing the application decides that both of these elements fall within the range of reasonable conclusions available on the application record, the plaintiff has met the onus.

1704604 Ontario Ltd v Pointes Protection Association et al, 2018 ONCA 685 at paras 73-75

11. In applications of this type, the parties are not expected to put their "best foot forward", as they would on a summary trial application. The judge hearing an application cannot approach the application record as though it is a trial or summary trial record. Rather, the merits inquiry must reflect the preliminary nature of the application and the limits of the application record.

Ibid at para 77

12. The plaintiff submits that it is clear on his face that his claim has substantial merit. The statements in question make serious allegations against the plaintiff, including that he has engaged in sexual and emotional abuse of vulnerable people, and is both a sexual predator and has taken steps to facilitate the sexual predation of others. It is difficult to imagine statements that would have a greater defamatory "sting" in modern society.

13. At trial, the plaintiff will be successful establishing that these statements were made by the defendants. Indeed, the defendants could not bring the present application if they did not admit that they made the statements. The plaintiff will also be successful in establishing that the statements are defamatory, as they clearly have the potential to lower his reputation within his community. The plaintiff's claim will therefore be successful unless the defendants are able to establish one of the affirmative defences to defamation that they have pleaded.

14. With respect to defences, the defendants have raised three defences on the pleadings: qualified privilege, fair comment and responsible communication on a matter of public interest. Despite certain statements in the affidavit of Ms. Knappe, the defendants have not pleaded truth and are not maintaining in this action that the statements are true.

15. With respect to qualified privilege, the evidence establishes that the defendant MVK has and had a mandate predominantly focused on education around kink issues. Policing the kink community and publicly ostracizing alleged abusers were not part of MVK's mandate, either before the situation regarding the plaintiff or since.

16. The defendants did not have a legal, social or moral duty to convey any information relating to the plaintiff, either to MVK's own membership or the kink community at large. Qualified privilege is found in an established relationship between speaker and recipient, where the position or status of the publisher creates a duty on the publisher to publish the information to the intended recipients. Here, the evidence establishes that the defendants imbued MVK with a mandate and role it had never previously held, solely so that it could attack the plaintiff. Put another way, there was no "established relationship" between the defendants and the kink community through which the defendants could have any duty to publish alleged safety concerns about specific persons to the kink community at large. The claim to qualified privilege is likely to fail at trial.

Wang v BC Medical Association, 2014 BCCA 162 at paras 85-86

17. With respect to fair comment, putting aside the issue of whether the impugned statements relate to matters of public interest, the defence of fair comment cannot succeed in any

event, as the majority of the impugned statements are not comment at all. The defendants published unsubstantiated allegations of serious misconduct against the plaintiff. These are allegations of fact, and cannot be protected by a fair comment defence.

WIC Radio Ltd v Simpson, 2008 SCC 40 at para 1

18. Even if the defences of qualified privilege or fair comment were made out on their face, both are defeated by evidence of malice. Here, the evidentiary record strongly suggests that the defendants were actuated by malice. In particular:

    (a) Ms Knappe had an animus toward the plaintiff dating back to his appointment as the head of the local MAsT chapter in 2010;

    (b) Ms Knappe instigated an investigation by MAsT into the plaintiff and encouraged witnesses to speak to the investigators in an effort to "shut [the plaintiff] down", because she needed "all the help [she could] get";

    (c) The defendants refused to engage with any members of the kink community who spoke out in favour of the plaintiff after the Open Letter, discussed how best to shut these individuals down and viciously ridiculed these individuals in private correspondence;

    (d) Mr. Salmon discussed making an anonymous complaint about the plaintiff to the City of Burnaby, and disguising the timing of that complaint so as to conceal the fact that it came from the defendants;

    (e) The defendants' statements about the plaintiff were not consistent with MVK's mandate at the time, went beyond the limited "policies" they had discussed (but not implemented) for dealing with similar situations and have never been repeated in any other circumstance.

19. In addition, malice may be either intentional or reckless. Recklessness rises to the level of malice when the defendant shows indifference to the truth of the statement. The defendants' willingness to rely on unsubstantiated hearsay (including double or triple hearsay), refusal to listen to those who had competing information and failure to contact

the plaintiff for his side of the story all suggest a complete indifference to the truth or falsity of the statements made. The plaintiff submits that it is reasonable for a trier of fact on this evidence to determine that the defendants were actuated by malice, defeating both fair comment and qualified privilege.

Smith v Cross, 2009 BCCA 529 at paras 30-34

20. The defendants also rely on the defence of responsible communication on a matter of public interest. The elements of this defence, which was designed to apply to journalists, are as follows:

A. The publication is on a matter of public interest, and

B. The publisher was diligent in trying to verify the allegation, having regard to:

(a) the seriousness of the allegation;

(b) the public importance of the matter;

(c) the urgency of the matter;

(d) the status and reliability of the source;

(e) whether the plaintiff's side of the story was sought and accurately reported;

(f) whether the inclusion of the defamatory statement was justifiable;

(g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and

(h) any other relevant circumstances.

Grant, *supra* at para 126

21. As noted above, the plaintiff disputes that the impugned statements in this case related to a matter of public interest as that term is defined in *Grant*. Moreover, and in any event,

the defendants did not show the requisite diligence to fall within the responsible communication defence. Allegations were published based on unreliable sources and no effort was made to speak to the plaintiff and obtain his side of the story, nor to report his side of the story in conjunction with the allegations. In fact, the defendants failed to speak to the plaintiff and then lied in the Open Letter that they had attempted to work with him. The plaintiff submits there is no basis upon which the responsible communication defence can apply in this case.

22. The last step in the analysis under the *Act* is whether the harm suffered by the statement is serious enough that any public interest in continuing the proceeding outweighs the public interest in protecting the impugned expression. Here, the harm to the plaintiff is not a trivial or passing harm. The statements have profoundly impacted his standing within the kink community, the success of his events, his mental health, his physical health and his personal security. By contrast, the defendants' expression is of low value and there is limited public interest in protecting it. The plaintiff submits that the public interest is best served by permitting his claim to proceed to a hearing on its merits.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Seann Lyncaster, made June 17, 2019;
2. Affidavit #1 of Nadia Parks, made June 18, 2019; and
3. The pleadings and proceedings herein.

The application respondent(s) estimate(s) that the application will take one day.

☑ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: June 20, 2019

Lawyer for the plaintiff
Greg J. Allen
Allen / McMillan Litigation Counsel

This Application Response is given by the plaintiff, whose address for service is c/o Allen McMillan Litigation Counsel, 1550 - 1185 West Georgia Street, Vancouver, BC V6E 4E6.