Federal Court Cour fédérale

Date: 20230925

Docket: T-1452-23

Citation: 2023 FC 1286

Ottawa, Ontario, September 25, 2023

PRESENT: The Honourable Mr. Justice Southcott

SIMPLIFIED ACTION

BETWEEN:

CARYMA SA'D

Plaintiff

and

MORGAN YEW, CANADIAN ANTI-HATE NETWORK, AND JOHN OR JANE DOE

Defendants

ORDER AND REASONS

I. Overview

[1] This Order and Reasons address a motion dated August 28, 2023, filed by the Defendants, the Canadian Anti-Hate Network and Morgan Yew, seeking an order under Rules 221(1)(a), (c) and (f) of the *Federal Courts Rules*, SOR/98-106 [Rules], striking the Statement of Claim in this matter, without leave to amend, and other ancillary relief.

[2] As explained in greater detail below, the Defendants' motion under Rule 221(1)(a) is granted, and the Statement of Claim will be struck without leave to amend, because it is plain and obvious that the Statement of Claim discloses no reasonable cause of action and therefore has no reasonable prospect of success, and the Plaintiff has failed to identify any amendment that might be capable of curing this deficiency. The Defendants' motions under Rules 221(1)(c) and (f) are dismissed, as Rule 298(1) requires that any such motion be brought only at a pretrial conference.

II. **Background**

[3] The Plaintiff, Caryma Sa'd, resides in Toronto, Ontario. She self-describes as being of Muslim upbringing and Indo-Palestinian ethnic descent. Her Statement of Claim pleads that she is a practising lawyer, as well as an independent journalist, regularly documenting public protests and fringe social movements, including by publishing her photographs and videos on social media with her commentary.

[4] The Statement of Claim, filed by the Plaintiff on July 12, 2023, pleads that the Defendant, Canadian Anti-Hate Network [CAHN], purports to be an antifascist and antiracist advocacy group based in Toronto, Ontario, organized as a not-for-profit corporation pursuant to the laws of Canada. CAHN states its mission as being to monitor, research, and counter hate groups by providing education and information on hate groups to the public, media, researchers, courts, law enforcement and community groups.

[5] The Statement of Claim pleads that the Defendant, Morgan Yew, resides in Toronto, Ontario and is an independent journalist who has published with CAHN. The Statement of Claim also names as Defendants John or Jane Doe, described as one or more individuals comprising CAHN's network, acting on CAHN's behalf, acting at CAHN's direction, or otherwise under CAHN's control or influence.

[6] In her Statement of Claim, Ms. Sa'd pleads that she, Mr. Yew, and CAHN are all journalistic entities documenting right-wing politics and extremism.

[7] The principal allegations in the Statement of Claim surround an event that Ms. Sa'd intended to host on July 10, 2021, in Toronto's Chinatown district, described as a comedy night at which Ms. Sa'd would interview and roast an individual she describes as a right-wing personality. In the days leading to the event, CAHN expressed concern about the event. While both parties opposed the views of this individual, they did not agree on whether the event would be effective in countering those views or rather would serve to promote them.

[8] On the evening of July 10, 2021, activists, which Ms. Sa'd describes as styling themselves as community defenders or community protectors, blockaded access to the venue where the event was to be held, and a physical altercation ensued. Ms. Sa'd alleges that Mr. Yew was among these activists. The event was cancelled as a result.

[9] On July 13, 2021, Ms. Sa'd released a statement explaining and apologizing for the event's outcome. Also on July 13, 2021, CAHN and Mr. Yew published an article about Ms.

Sa’d and the cancelled event, on CAHN’s website <antihate.ca>. In the following days, CAHN also tweeted a summary of its article. The Statement of Claim alleges that this article was false and misleading and identifies particular statements in the article, and what Ms. Sa’d describes as missing context, in support of this allegation. The Statement of Claim describes the article overall as misleading its audience to conclude:

A. that Ms. Sa’d supports fascism;

B. that Ms. Sa’d is a racist;

C. that Ms. Sa’d lied about the blockade’s violence; and

D. that Ms. Sa’d jeopardized the Chinatown community’s safety.

[10] Ms. Sa’d pleads that, following correspondence between them, CAHN agreed to minor revisions to a handful of passages in its article. However, she alleges that, while the revised article correlated more closely with some facts, the revisions did not materially change the misleading character of the article. She alleges that, in publishing the updated article, CAHN refused to expressly specify which revisions had been made.

[11] The Statement of Claim further pleads that, from time to time, CAHN publishes materials encouraging counter-protestors to attend events and obstruct what it describes as “fake journalists”. Ms. Sa’d alleges that she has been subjected to: (a) in-person harassment at rallies by counter-protesters employing such tactics; and (b) online sexism and racism, including by online personalities she names as John and Jane Doe.

[12] Based on these allegations, Ms. Sa'd invokes subsections 7(a) and (d) of the *Trademarks Act*, RSC 1985, c T-13 [TMA], and sections 36 and 52 of the *Competition Act*, RSC 1985, c C-34 [CA], and claims against the Defendants declaratory relief, injunctive relief, general damages of $50,000, aggravated and exemplary damages of $50,000, and costs. Details of these statutory provisions will be canvassed later in these Reasons. Ms. Sa'd filed her action as a simplified action under Rules 292 to 299.

[13] In the present motion, the Defendants, CAHN and Mr. Yew, move under Rules 221(1)(a), (c) and (f), to strike the Statement of Claim without leave to amend, and claim ancillary relief including costs. The Defendants filed their motion in writing under Rule 369 including written representations, Ms. Sa'd does not oppose the adjudication of this motion under Rule 369. She has filed written representations in response, and the Defendants have filed written representations in reply.

III. **Issues**

[14] The parties agree that this motion raises the following issues for adjudication by the Court:

A. Whether, pursuant to Rule 221(1)(a), it is plain and obvious that the Statement of Claim discloses no reasonable cause of action;

B. Whether, pursuant to Rule 221(1)(c), the Statement of Claim is scandalous, frivolous or vexatious;

C. Whether, pursuant to Rule 221(1)(f), the Statement of Claim is otherwise an abusive process of the Court;

D. Whether leave to amend the Statement of Claim should be granted; and

E. Whether the Plaintiff should be prohibited from refiling the Statement of Claim against the Defendants.

IV. **Analysis**

A. *Whether, pursuant to Rule 221(1)(a), it is plain and obvious that the Statement of Claim discloses no reasonable cause of action*

(1) General Principles and Arguments

[15] The Defendants' written representations accurately describe the effect of Rule 221(1)(a), being that a pleading will be struck when it is plain and obvious that the claim discloses no reasonable cause of action and therefore has no reasonable prospect of success (see *Knight v Imperial Tobacco Canada Ltd*, 2001 SCC 42 [*Knight*] at para 17). In assessing the presence of a reasonable cause of action, the Court assumes that the facts as pleaded are true (see *Inuit Tapirisiat v Canada (Attorney General)*, [1980] 2 SCR 735 at para 4).

[16] The Defendants further assert that, to disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action that is to be founded on those facts; and (c) indicate the relief sought, which must be of a

type that the action could produce and that the Court has jurisdiction to grant. The pleading must plead material facts satisfying every element of the alleged cause of action (see *Fox Restaurants Concepts LLC v 43 North Restaurant Group Inc*, 2022 FC 1149 at paras 8-9).

[17] I do not understand the Plaintiff to take issue with these general principles.

[18] In arguing that the Statement of Claim fails to disclose a reasonable cause of action, the Defendants assert that the pleading is devoid of the requisite material facts necessary to satisfy a cause of action under any of the statutory provisions invoked therein. The Defendants argue that the Statement of Claim makes bald, vague and ungrounded allegations, representing speculative assumptions and sweeping conclusions in the nature of opinions rather than facts, and does not link these allegations to an actionable wrong under the statutory provisions upon which the Plaintiff relies.

[19] In response, the Plaintiff emphasizes the distinctions between Rules 174 and 175. Rule 174 requires every pleading to contain a concise statement of material facts on which the party relies, but not evidence by which those facts are to be proved. Rule 175 provides that a party may raise any point of law in a pleading. The Plaintiff acknowledges that material facts must be pleaded under Rule 174 but notes that, under Rule 175, the pleading of law is not mandatory. She argues that her Statement of Claim is therefore not required to link every material fact to a legal element.

[20] In their reply submissions, the Defendants assert that the Plaintiff's response has mischaracterized their position. The Defendants argue that they are not suggesting the Statement of Claim should be struck because it fails to include legal conclusions. Rather, they assert that the pleading is insufficient because it fails to include material facts supporting each element of the causes of action pleaded.

[21] Against this backdrop, I will return to the particular statutory causes of action invoked in the Statement of Claim.

(2) Subsection 7(a) of the *Trademarks Act*

[22] The Statement of Claim alleges that the article published by the Defendants and their subsequent tweets represent false or misleading statements actionable under subsection 7(a) of the TMA.

[23] Subsection 7(a) of the TMA provides that no person shall make a false or misleading statement tending to discredit the business, goods or services of a competitor. As explained recently in *Energizer Brands, LLC v Gillette Company*, 2023 FC 804 at para 169, the necessary elements of the statutory cause of action created by subsection 7(a) (in combination with subsection 53.2(1) of the TMA) are: (a) a false and misleading statement; (b) the statement tending to discredit the business, goods or services of a competitor; and (c) resulting damage, causally linked to the alleged wrongful activity, *i.e.*, the false or misleading statement.

[24] Importantly, for purposes of the Defendants' argument, the application of subsection 7(a) of the TMA is limited to creating a cause of action relating to false and misleading statements made about a trademark or other intellectual property of the claimant. While the cause of action created by subsection 7(a) is similar to other torts, its scope has been read down in order to be constitutionally valid, as subsection 7(a) can be a constitutionally valid enactment of the federal Parliament only if it is limited to rounding out the regulatory scheme in the TMA (see *Canadian Copyright Licensing Agency v Business Depot Ltd*, 2008 FC 737 at para 27, citing *Vapour Canada Ltd v MacDonald*, [1977] 2 SCR 134 [*Vapour*] at pp 172-173).

[25] The Defendants argue that the Statement of Claim pleads no material facts to the effect that the Defendants' alleged false or misleading statements were made in association with some intellectual property of the Plaintiff. The Defendants submit that no amendment to the Statement of Claim could cure this deficiency. As the Defendants further argue in their reply representations, the Plaintiff's written representations do not address the obvious deficiency as to what intellectual property is being asserted in support of her claim under subsection 7(a) of the TMA.

[26] I agree with the Defendants that this deficiency is fatal to the Plaintiff having a reasonable cause of action under subsection 7(a) of the TMA and that there is no indication in the Plaintiff's representations of any amendment that might be capable of curing this deficiency.

[27] The Defendants raise several other arguments in support of their position that the Plaintiff's pleading under subsection 7(a) is deficient in material facts. However, having

identified the above fatal deficiency, it is not necessary for the Court to address the Defendants' other arguments.

(3) Subsection 7(d) of the *Trademarks Act*

[28] The Statement of Claim alleges that, as CAHN's activities in fact promoted hateful conduct against Ms. Sa'd, a member of an equity-seeking minority group, CAHN's use of any sign as a trademark that includes ANTI-HATE is a description that is false and likely to mislead the public as to services that CAHN provides, contrary to subsection 7(d) of the TMA.

[29] Subsection 7(d) of the TMA provides that no person shall make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to (i) the character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance, of the goods or services.

[30] Like subsection 7(a), subsection 7(d) requires an involvement with intellectual property (see *Living Sky Waters Solutions Corp v ICF Pty Ltd*, 2018 FC 876 [*Living Sky*] at para 21, citing *Vapour* at para 64). However, subsection 7(d) is intended to prohibit the misuse of the description by a person in association with offering his or her goods or services to the public (see *Living Sky* at paras 26-27, citing *Vapour* at para 22).

[31] As emphasized in her written submissions, the Plaintiff alleges that CAHN's name and web address use or include the term ANTI-HATE as an unregistered word mark element and that

such use represents a false description of the character of CAHN’s services because, in her submission, CAHN’s services actually promote hate.

[32] I am conscious of the Defendants’ argument that the Plaintiff’s allegation, that CAHN promotes hate, represents the Plaintiff’s opinion or an argumentative conclusion and is not a factual allegation of the sort required to support a claim under section 7 of the TMA. Indeed, this claim would be novel territory for the law of trademark. However, I am also conscious of the Plaintiff’s argument that, on a motion to strike, the Court should err on the side of permitting a novel but arguable claim to proceed to trial (see *Knight* at para 21).

[33] In the case at hand, it is unnecessary for the Court to adjudicate that particular set of arguments, as I find that the Plaintiff’s subsection 7(d) claim must fail for more technical reasons. As the Defendants submit, subsection 7(d) requires the claimant to establish a causal link between the use of a false and misleading statement and the claimant’s alleged damage (see *Videotron Ltee v Konek Technologies Inc*, 2023 FC 741 at para 22; *EAB Tool Company Inc v Norske Tools Ltd*, 2017 FC 898 at para 76). The Defendants argue that the Statement of Claim includes no material facts in support of an allegation that the allegedle false description ANTI-HATE resulted in damage to the Plaintiff causally linked to such description.

[34] In response, the Plaintiff argues that there is no factual element to the question of causation. Rather, causation is a matter of law. She relies on *599960 Ontario Inc v Taylor Steel Inc*, 2000 CarswellOnt 432 [*Taylor Steel*] at para 20 (Ont Sup Ct J) (aff’d 2001 CarswellOnt

4102 (Ont CA)), which quoted the following excerpt from Prof. Fleming (*The Law of Torts*, 7th ed (Sydney: The Law Book Company Ltd., 1987) at 675-6):

> Neither actual deception nor actual resulting damage need be proved. It is sufficient that the defendant's practice was likely to mislead the public and involved an appreciable risk of detriment to the plaintiff, whether in diversion of sales or impairment of his credit or commercial repute. …

[35] As the Defendants submit in reply, *Taylor Steel* addressed a claim under the tort of passing off, not an action under subsection 7(d) of the TMA. Neither the Statement of Claim nor the Plaintiff's written submissions on this motion asserts a causative relationship between CAHN's use of the allegedly false description ANTI-HATE and any damages she has suffered. I find that this deficiency is fatal to the Plaintiff having a reasonable cause of action under subsection 7(d) of the TMA and that she has provided no indication of any amendment that might be capable of curing this deficiency.

(4) Sections 36 and 52 of the *Competition Act*

[36] Finally, again referencing the article published by the Defendants and their subsequent tweets as false or misleading statements, the Statement of Claim invokes sections 36 and 52 of the CA.

[37] Subsection 36(1)(a) creates a statutory cause of action in favour of any person who has suffered loss or damage as a result of conduct that is contrary to any provision of Part VI of the CA. Part VI includes subsection 52(1), which provides that no person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting,

directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[38] As the Defendants submit, the test under subsection 52(1) of the CA is the same as the test under subsection 7(a) of the TMA (*i.e.*, a false and misleading statement; the statement tending to discredit the business, goods or services of a competitor; and resulting damage causally linked to the false or misleading statement), with the exception that subsection 52(1) also requires that the representation be made with knowledge of or recklessness as to its falsity (see *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2019 FC 724 at para 79).

[39] Taking into account the Defendants' arguments related to the common elements in these two tests, again the Defendants' submissions raise several arguments in support of their position that the Plaintiff's pleading is insufficient to support a reasonable cause of action under the CA. These arguments include the submission that the Statement of Claim contains no material facts establishing that the Defendants made the impugned statements while knowing them to be false or misleading or with recklessness in relation thereto.

[40] In response to the Defendants' arguments surrounding allegations of their knowledge or recklessness, the Plaintiff references her pleading that CAHN agreed to minor revisions to a handful of passages in the article that was originally published on July 13, 2021, but did not publish an articulation of the scope of the revision. She argues that this conduct shows knowledge or recklessness in connection with a false or misleading representation.

[41] I am not convinced that this response assists the Plaintiff. I understand her argument to be that the Defendants' publication of an updated version of the impugned article demonstrates that the Defendants knew that portions of the original article were false or misleading. However, logically the Plaintiff's submission speaks only to the Defendants' knowledge at the time it published the revision, and the Plaintiff has not explained how the Defendants' alleged refusal to publish an articulation of the scope of the revision speaks to any knowledge or recklessness surrounding false or misleading content.

[42] Again, I find the Plaintiff's pleading fatally deficient in demonstrating a reasonable cause of action and that the Plaintiff has failed to identify any amendment that might be capable of curing this deficiency.

[43] In conclusion under Rule 221(1)(a), I find that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action and therefore has no reasonable prospect of success, and my Order will strike the Statement of Claim in its entirety, without leave to amend.

B. *Whether, pursuant to Rule 221(1)(c), the Statement of Claim is scandalous, frivolous or vexatious*

[44] In addition to its arguments under Rule 221(1)(a), the Defendants submit that the Statement of Claim should be struck under Rule 221(1)(c) on the basis that it is scandalous, frivolous or vexatious. The Defendants note that the Statement of Claim is primarily centred on excerpts from CAHN's July 13, 2021 article and argue that the TMA and CA are not the proper vehicles to pursue relief arising from the article. The Defendants submit that, after missing the

two year limitation period for a libel action, over which the Federal Court has no jurisdiction, the Plaintiff has attempted to warm up a stale libel claim under the guise of TMA and CA principles.

[45] By way of substantive response, the Plaintiff submits that the fact her allegations may have been actionable for defamation does not preclude her having viable claims under the TMA or CA. However, the Plaintiff also raises a preliminary technical argument, noting that this proceeding was brought by way of simplified action and that, pursuant to Rule 298, a motion under Rule 221(1)(c) can be brought only at a pretrial conference.

[46] I agree with the Plaintiff's technical submission. Rule 298(1) provides that a motion in a simplified action shall be returnable only at a pretrial conference. Rule 298(2) provides a limited exception to this principle, for motions to object to the jurisdiction of the Court or to strike a statement of claim on the grounds that it discloses no reasonable cause of action. As such, while the Defendants' motion under Rule 221(1)(a) is properly before the Court, its motion under Rule 221(1)(c) is not.

[47] In its reply submissions, the Defendants argue that the Court has the jurisdiction to remove this action from the operation of Rule 298(1). The Defendants note that their Notice of Motion requested several categories of relief, including such further and other relief as the Court deems just. In their reply submissions, the Defendants request that the Court order that the simplified action provisions of the Rules not apply to this action, so that the Court can adjudicate their Rule 221(1)(c) arguments.

[48] I am not prepared to accede to this request. If the Defendants intended to seek relief from the operation of the simplified action provisions, they should have expressly sought such relief in their Notice of Motion, identifying relevant grounds, and presented evidence and/or argument in support of that relief. The Plaintiff would then have had an opportunity to respond to that request.

[49] As such, my Order will dismiss the Defendants' motion under Rule 221(1)(c).

C. *Whether, pursuant to Rule 221(1)(f), the Statement of Claim is otherwise an abusive process of the Court*

[50] The Defendants also argue that the Statement of Claim should be struck under Rule 221(1)(f) on the basis that it is an abuse of the process of the Court, because it is devoid of any evidentiary foundation. The Defendants also rely on evidence they have filed in this motion, identifying that since June 2023 the Plaintiff has initiated two other actions in the Federal Court against other organizations.

[51] Again, the Plaintiff responds that a motion under Rule 221(1)(f) can be brought only at a pretrial conference. For the same reasons as explained above in relation to the Defendants' motion under Rule 221(1)(c), my Order will dismiss the Defendants' motion under Rule 221(1)(f).

D. *Whether the Plaintiff should be prohibited from refiling the Statement of Claim against the Defendants*

[52] While the parties' list of issues includes whether the Court should grant the Plaintiff leave to amend her Statement of Claim, I have dealt with that issue earlier in these Reasons. As such, the remaining issue is the request in the Defendants' Notice of Motion for an order prohibiting the Plaintiff from refiling the Statement of Claim against the Defendants or, in the alternative, requiring that the Plaintiff comply with any and all costs orders made in respect of this action before refiling the Statement of Claim against the Defendants.

[53] The Defendants have not cited any authority in support of these categories of relief. In their written representations, the Defendants argue that, given the frivolous nature of the allegations contained in the Statement of Claim, the Plaintiff should be prohibited from refiling it. As the Defendants' position appears to be related to their arguments under Rule 221(1)(c) that the Statement of Claim is frivolous, and as I have dismissed the motion under Rule 221(1)(c), I also decline to grant these categories of relief.

V. Costs

[54] The Defendants' Notice of Motion seeks costs of this motion "awarded at the highest allowable basis". However, other than repeating that request, their written representations provide no submissions in support of their claim for costs or its quantification.

[55] The Plaintiff's written representations, seeking dismissal of the motion, argue that costs of the motion should be awarded in favour of the Plaintiff.

[56] The Defendants have not succeeded on all grounds raised in this motion. However, as my Order will strike the Statement of Claim without leave to amend, the Defendants have succeeded in obtaining the principal relief sought, and an award of costs in their favour is therefore appropriate. I find no basis to award such costs at an elevated level. Rather, my Order will award lump-sum costs in the amount of $850.00.

ORDER IN T-1452-23

THIS COURT ORDERS that:

1. The Defendants' motion under Rule 221(1)(a) is granted, and the Plaintiff's Statement of Claim is struck, without leave to amend.
2. The Defendants' motion under Rules 221(1)(c) and (f) is dismissed.
3. The Plaintiff shall pay the Defendants, the Canadian Anti-Hate Network and Morgan Yew, costs of this motion in the lump sum amount of $850.00.

"Richard F. Southcott"
Judge