Court of Queen's Bench of Alberta

Citation: West Edmonton Mall Property Inc v Proctor, 2020 ABQB 477

Date: 20200820
Docket: 1903 23107
Registry: Edmonton

Between:

West Edmonton Mall Property Inc and David Ghermezian

Plaintiffs

- and -

Dana Proctor A.K.A. Debbie Dana Marie Proctor A.K.A. Dana Cole A.K.A. Dana Cole Proctor A.K.A. Dana Graham A.K.A. Jane Doe

Defendant

Corrected judgment: A corrigendum was issued on August 21, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

Decision
of the
Honourable Mr. Justice Douglas R. Mah

A. Background

[1] I am providing this written version of the reasons I delivered orally on August 12, 2020 in order to provide a clearer record, as much as I can, of the decision I gave on that date. The hearing, including the delivery of the oral reasons, was conducted by way of WebEx (an online video conferencing program utilized by this Court) with several participants. While I was giving

my reasons, there were occasions of interruption where one participant, the Defendant Ms. Proctor, was talking at the same time that I was talking.

[2] As judge, I explain at the outset of a WebEx hearing that when participants are not speaking, they should put their computer microphones on "mute" so as not to create audio feedback, which adversely affects the live audio and the quality of the audio recording. I also explain that only one party should talk at a time since two (or more) parties talking at the same time makes it difficult for other participants to hear or follow what is being said and may make the recording incomprehensible. As the person responsible for managing the hearing, I will call upon or ask specific persons to speak. The Clerk of the Court acts as the session host or facilitator in a WebEx hearing, and has the ability to mute (using the word as a verb) a participant if a participant has not muted himself or herself.

[3] During the course of the hearing, and in particular during the delivery of the oral reasons, I had cause to ask the clerk to mute Ms. Proctor on several occasions. In four months of doing hearings by WebEx (brought about by the pandemic), this is the first time I ever had someone involuntarily muted. This proved less than satisfactory as a means of controlling the proceedings because a participant has the ability to unmute himself or herself, which Ms. Proctor freely did.

[4] At various points in the hearing, it was also necessary for me to interrupt Ms. Proctor when she launched into extended rhetorical speechifying on largely irrelevant topics (more on that later).

[5] My overall impression of the resulting audio recording (and any transcript that may be derived therefrom) is that the quality and clarity may well be lacking in certain spots during the reasons portion.

[6] In writing these reasons, I hew as closely as I can to the original by relying on the notes I used when delivering the oral version. I have inserted some formatting and added some background information to enhance clarity and understanding for readers who were not present at the hearing or otherwise unfamiliar with the case. I have also added some caselaw and proper legal citations. Because I am working from less than fulsome handwritten notes, this written version is not an exact rendition of the oral version. However, as I said in Court, in the event a written decision was necessary, I would not expand upon the core of the reasons and I have not.

[7] I am concerned that the recording of the reasons part of the hearing, and therefore any resulting transcript, might not be as tidy and comprehensible as one would like. Hence, this written version should be taken as the Court's official decision.

[8] This whole sorry litigation has its genesis in West Edmonton Mall shutting down Ms. Proctor's beach and swimwear store and seizing and disposing of its inventory for arrears of rent, in 2017. Since then, Ms. Proctor has waged a vast, concerted and relentless internet campaign of vengeance and vilification against the Plaintiffs, their related businesses, family members and employees, thereby behooving the Plaintiffs to commence this defamation action and seek injunctive relief. My previous decision in this matter on March 2, 2020, reported at 2020 ABQB 161, provides full background and context and should be read in conjunction with this decision for a full appreciation of the case. The particulars of Ms. Proctor's internet smear campaign against the Plaintiffs are described in paras 21-26 of the previous decision.

B. Relief sought

[9] The Plaintiffs, WEM and David Ghermezian, apply for a permanent injunction following my previous decision to prevent Ms. Proctor from making further defamatory comments about them on the internet. They also seek costs for the whole of the proceedings on a full-indemnity basis, or alternatively on a party-and-party basis, using Column 5 with a multiplier applied.

[10] In addition, they seek to have the various social media platforms released from an earlier court-ordered requirement to maintain an archive of Ms. Proctor's online postings.

[11] Finally, there is a residual issue of what responsibilities the social media platforms should have going forward with regard to receiving notification in the event that Ms. Proctor posts further offending material despite the permanent injunction.

C. Permanent Injunction

[12] The permanent injunction application follows a series of temporary injunctions that prohibited Ms. Proctor from posting or publishing any material regarding the Plaintiffs and what counsel has described as their natural extensions, namely a number of persons and entities associated with the Plaintiffs. The last of the temporary injunctions (issued by me in my previous decision) has continued until the day of this hearing.

[13] It is totally apparent that a permanent injunction is the only adequate remedy in this case, for the reasons recounted by Mr. Dhir in the brief filed for this application and his oral submissions, that is, because of my findings in the previous decision and then Ms. Proctor's conduct since March 2, 2020. That conduct, which was also amply demonstrated at the hearing on August 12, 2020, shows that Ms. Proctor:

- has no remorse;
- is as unrepentant and defiant as ever;
- remains committed to the truth of and justification for her statements that the Plaintiffs are criminals and terrorists;
- is adamant about continuing the propagation of the defamatory statements; and
- does not regard this Court as having any authority over her.

[14] Ms. Proctor persists in propounding the statements despite my express findings that her statements concerning the Plaintiffs are not true (see paras 81 - 85 of 2020 ABQB 161) and that she has no other possible defences to the defamation action (para 129).

[15] I have considered these factors:

- There is a likelihood of recurrence of the offending behavior: ***Paramount v Johnston***, 2019 ONSC 31 at para 84 (history of ignoring or breaching court Orders) and ***Astley v Verdun***, 2013 ONSC 6734 (continuing to assert truth of defamatory remarks). As recounted in the affidavits of Ms. Culic, filed July 29 and 31, 2020, Ms. Proctor has not taken down much of the offending material and continues to propagate it.
- The plaintiffs have and will suffer irreparable harm: both ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at pg 341 and ***Bruderheim Community Church v***

Board of Elders, 2017 ABCA 343 at paras 101-102 speak to how a permanent injunction may be granted where damages are not an adequate remedy.

[16] There is danger in engendering conspiracy theories on the internet, as Ms. Proctor has about the Ghermezian family. This leads not just to damage to reputation, but I accept also what Mr. Dhir has said about how spreading these deranged notions could result in actual physical attacks on the subject targets. Ms. Proctor is aware of and, through her actions, implicitly encourages this possibility. I recognized and commented specifically on this risk of harm at para 96 of my previous decision.

[17] I previously found that Ms. Proctor has no defences to the defamation action. This is one of those clearest of cases warranting a permanent injunction: ***Pan v Go,*** 2018 BCSC 2137 (CanLII) at para 464; ***Holden v Hanlon***, 2019 BCSC 622 (CanLII) at paras 337-338; and ***Hudson v Myong***, 2020 BCSC 517 (CanLII) at paras 211-213.

D. Ms. Proctor's response to the permanent injunction application

[18] In response to the permanent injunction application, Ms. Proctor made three principal arguments:

- First, that her statements concerning the Plaintiffs are true. She proposes proving the truth of the statement that the Plaintiffs are criminals by relitigating her business' eviction from WEM and the seizure and sale of the inventory for rental arrears, even though those matters are the subject of a Final Order of the Court in a totally separate action. This separate litigation is described at paras 16-18 of my previous decision. I noted at para 51 of the previous decision that an attempt to relitigate a matter finally decided is an abuse of process.
- Second, she insists that she has a right to a jury trial and has been deprived of this right. In Alberta, there is no right to a civil jury trial. Furthermore, the processes undertaken by Plaintiffs' counsel (applying for summary judgement and striking out Ms. Proctor's pleadings) are provided for in the Rules of Court and a perfectly legitimate way of disposing of this litigation. Indeed, the Supreme Court of Canada in ***Hryniak v Maudlin***, 2017 SCC 7 encourages this approach. Moreover, Ms. Proctor actively and enthusiastically engaged in those processes, having filed a brief and some 1000 pages and eighty videos worth of evidence in response.
- Third, Ms. Proctor disputed the jurisdiction of this Court. She says that the social media platforms she uses are located in the United States and no one can prove that she posted her content while she was in Edmonton.

[19] Strictly speaking, it is not necessary for me to address the jurisdiction argument. That is because Ms. Proctor has obviously accepted jurisdiction. She not only defended but filed a counterclaim and, as noted, participated fully in the proceedings. Moreover, any dispute as to jurisdiction or whether this Court is the proper forum for adjudicating the dispute should have been made at the outset of the litigation, not at its conclusion. Nonetheless, I will address the argument for the sake of completeness.

[20] In ***Banro Corp v Editions Ecoscoiete Inc***, 2012 SCCC 18, the Supreme Court of Canada commented on the risk of transborder legal liability in defamation cases. ***Banro*** concerned a

defamation action brought in Ontario against a Québec-based publisher that had published a book in French alleging the plaintiff had committed human rights abuses and fraud in furtherance of its mining activities in Africa. Some ninety-three copies of the book had been distributed in Ontario and was also available for sale from the publisher's website.

[21] In determining whether there is proper forum *per* ***Banro***, the Court applies a two-step test. The first step is to determine jurisdiction under the "real and substantial connection" test. Here, the Plaintiffs are in Alberta and Ms. Proctor, at the time of posting the material, lived in Alberta. (She professes to not living in Edmonton currently and suggests that no one can prove she was in Edmonton at the time the offending material was posted, as if that is determinative of jurisdiction.) If a substantial connection is found to exist, the defendant can then engage in the second step, which is to argue that the chosen forum is inappropriate, a doctrine known as *forum non conveniens*. As I said, the entire jurisdictional argument should be made at the beginning of the lawsuit, not at the end. She has made no attempt to argue that another forum is more convenient, only that the platforms she uses are owned in the US. Applying ***Banro***, there is little doubt that the correct forum was chosen in this case and the chosen court has jurisdiction.

[22] I grant the permanent injunction.

E. Scope of permanent injunction and enforcement mechanism

[23] In terms of the scope of the permanent injunction, the proposal by Plaintiffs' counsel strikes the appropriate balance between protecting the Plaintiffs and allowing Ms. Proctor her right to use the internet. She can still stream from the internet, do online banking, make purchases on the internet, surf the net, participate in online forums and whatever else one is capable of lawfully doing on the internet. She can use social media platforms however she likes (provided she is permitted to do so by the social media companies, but that is up to them), and provided that she abides by this injunction Order, which requires her only to refrain from posting about the Plaintiffs and associated persons and entities, and nothing more.

[24] The mechanism for enforcement proposed in the draft Order seems harsh, that is, obtaining a warrant from a judge of this Court for the arrest of Ms. Proctor upon proof by affidavit of her non-compliance with the injunction Order, and thereafter to be brought before the Court to show cause. During argument, I questioned Mr. Dhir about the implications of a Canadian resident being detained for posting something on the internet. However, based on Ms. Proctor's behavior since my last Order and her demonstrated behaviour today, I am at a loss as to what else would work.

[25] An enforcement mechanism at the lowest end of the enforcement spectrum, simply taking a personal undertaking from Ms. Proctor that she not engage in the offending behaviour, would obviously be futile. Giving her notice of a contempt application, says counsel, would simply start another cycle of litigation. In the end, the risk of arbitrary detention is adequately mitigated by the requirement that another judge first be satisfied that a breach has occurred before the warrant issues when balanced against the risk of Ms. Proctor breaching the injunction Order, which is substantial based on past conduct.

F. Costs

[26] As to the request for costs, I note that costs are always in the discretion of the Court so long as that discretion is exercised judicially. In making a costs order, I have regard to some of the factors listed in ***Jackson v Trimac Industries Ltd,*** 1993 CarswellAlta 310 at paras 29-37, cited and adopted in ***Blaze Energy Ltd v Imperial Oil Resources***, 2014 ABQB 509 at para 72:

- blameworthy conduct during the course of litigation, which in this case would refer to Ms. Proctor's stunt in creating a digital image of Plaintiffs' counsel intended to demean and humiliate him and slipping it into his copy of her affidavit.
- insisting on the truth of the offending statements, even after a finding by the Court that they are untrue. I note here that my earlier decision was not appealed.
- engaging in positive misconduct – Ms. Proctor sent an email to several individuals calling the Court's decision "an absolute disgrace" and accusing the Court of being "paid-off" and "bribed" (see Exhibits "B" and "C" of Ms. Culic's July 31, 2020 affidavit), the very day after being expressly ordered not to publish anything about the court proceedings (see para 126 of 2020 ABQB 161). To be clear, para 126 of my previous decision is not vacated or replaced by the Order of permanent injunction made today.
- acting out of malice (express findings of malice at paras 92-97 of 2020 ABQB 161).

[27] I also take note of the vexatious litigant-like character of her participation in this litigation (see paras 120-123 of the previous decision).

[28] The Plaintiffs have incurred actual legal costs of close to $70,000 and estimate that by the end of this, they may have incurred costs of up to $90,000. While setting an actual number may seem arbitrary in a sense, I do see a need to send the message that this type of conduct (both giving rise to the litigation and during the course of the litigation itself) should not be tolerated in a civil society or by a properly functioning justice system.

[29] I fix the full-indemnity costs payable by Ms. Proctor to the Plaintiffs at an amount halfway between the actual legal costs incurred to date and the anticipated final legal costs, or $80,000.

G. Maintenance of archive

[30] A requirement that certain social media platforms preserve Ms. Proctor's content, for purposes of this litigation, was part of the temporary injunction Orders previously granted. Now that this litigation is concluded, the Plaintiffs seek to vacate that part of the Order and release the social media platforms from any further obligation in that regard. The social media platforms, of course, consent to this release. Ms. Proctor objected to it.

[31] The primary reason for her objection is her stated intention to bring litigation in the United States, whether it is a relitigation of these matters now concluded or some other type of litigation concerning the same parties, and she requires the archive to be maintained for that purpose. The archive was created in the first place solely for the reason of preserving evidence for this lawsuit. Ms. Proctor cannot deny the jurisdiction of this Court and at the same time seek a remedy from it. If she wants the archive to be preserved for her US litigation, she should apply for her remedy in a US court.

[32] I therefore direct that the social media platforms represented at this hearing are not required to maintain the archive any longer.

H. Continuing obligations of social media platforms

[33] The last matter I need to consider is the length of time under which Facebook and Instagram are obligated to receive notice from the Plaintiffs that Ms. Proctor has posted further material contrary to the injunction granted. The other social media platforms involved, namely Google, YouTube, Blogspot, and Twitter do not oppose the notion that the obligation should be indefinite. Facebook and Instagram, through counsel, submitted it should be only six months in duration, given that Ms. Proctor has not reoffended on their platforms since the granting of the original Order. Counsel also made the Court aware of an online portal that can be used to make complaints about offensive content.

[34] Mr. Dhir, on behalf of the Plaintiffs, submitted that Facebook in particular was reticent in responding to complaints advanced on behalf of the Plaintiffs, which he says led to the necessity of this litigation. He also said the complaint portal, based on experience, was ineffective in addressing his client's concerns regarding Ms. Proctor's postings.

[35] I do not mean to impose punitive measures upon Facebook and Instagram for shortcomings that the Plaintiffs may have experienced with the complaint process. However, I am concerned about Ms. Proctor's persistence and unrepentance and I do not wish to give her a "loophole" of sorts that she might interpret as allowing her offending posts to remain in place if she waits six months from now before posting.

[36] Accordingly, I am going to put Facebook and Instagram on the same footing as the other social media platforms in this regard and make the duty to receive notification from the Plaintiffs indefinite.

I. Coda

[37] While I was delivering my reasons, Ms. Proctor persistently held up to her computer camera a full-page colour photo of a young woman in a bikini, apparently as a gesture of protest. During the hearing and the interruptions that occurred, Ms. Proctor engaged in what I can only describe as rants, consisting of:

- a demand that she be afforded her rights under the First Amendment to the United States Constitution;
- insistence that the Ghermezians and WEM are criminals for confiscating her store's inventory of beach and swimwear;
- decrying that she has been labelled a "racist" without a fair trial. (Note: I did not make a finding that she is a racist, only that not being a racist is not a defence to defamation – see paras 87-91 of 2020 ABQB 161];
- declaring her intention to litigate (or relitigate) her grievances in a US court; and
- warnings about a "globalist" conspiracy and declaring that she is only trying to protect her country from a globalist takeover.

[38] After giving my reasons, I attempted to politely suggest to Ms. Proctor that it was doing her no good to constantly relive events (the loss of her store) that had concluded more than three years ago and that it may be time for her to let go of her grievances and move on with her life. She was having none of it. I was barely able to start imparting my message before I was interrupted again with another excited and overwrought tirade.

[39] Ms. Proctor's worldview is impervious to reason. There being no point in continuing, I adjourned.

Heard on the 12th day of August, 2020.
Dated at the City of Edmonton, Alberta this 20th day of August, 2020.

Douglas R. Mah
J.C.Q.B.A.

Appearances:

Sandeep K. Dhir and Michael A. Murray
Shourie Bhatia LLP
for the Plaintiffs

Dana Proctor
Self Represented Litigant
for the Defendant

Matthew Latella
Baker Mckenzie
for the Twitter Party

Emily Paplawski
Osler Hoskin & Harcourt LLP
for the Google, YouTube and BlogSpot Parties

Robert A. Farmer
Bishop & Mckenzie LLP
for the Facebook and Instagram Parties

Marko Vesely
Lawson Lundell LLP
for the LinkedIn Party

Corrigendum of the Decision
of
The Honourable Mr. Justice Douglas R. Mah

In paragraph 33 LinkedIn was removed as a party.

Michael A. Murray was added as counsel who appeared for the Plaintiffs.