

CITATION: Duncan v. Buckles, 2020 ONSC 3219
COURT FILE NO.: CV-18-594616
DATE: 20200525

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

TINA JAYNE DUNCAN

Plaintiff

)
)
) *Gwendolyn L. Adrian*
) Plaintiff (moving party)
)

– and –

MARNEE BUCKLES AND ROBERT
LEPP AKA BOB LEPP

Defendants

)
) No one appearing for Marnee Buckles
)
) Robert Lepp, representing himself
) (respondent on the motion)
)

HEARD: January 10, 2020

FAVREAU J.:

Overview

[1] The plaintiff, Tina Jayne Duncan, brings a motion for default judgment against the defendant, Robert Lepp.

[2] Ms. Duncan claims that Mr. Lepp defamed her in a continuing series of blog posts and other publicly disseminated statements about her dispute with her neighbour about a fence.

[3] For the reasons that follow, I find that Ms. Duncan has established that Mr. Lepp defamed her. She is entitled to general damages of \$50,000, aggravated damages of \$10,000 and punitive damages of \$10,000. She is also entitled to an injunction requiring Mr. Lepp to remove any defamatory posts from the internet and precluding him from making or posting any further defamatory statements about Ms. Duncan.

[4] In addition, I am making an order requiring Mr. Lepp to attend an examination in aid of execution arising from an unpaid costs order on a date to be fixed by Ms. Duncan’s lawyer.

Background

[5] When a defendant is noted in default under Rule 19.01 of the Rules of Civil Procedure, Rule 19.02(1) provides that the party "is deemed to admit the truth of all allegations of fact made in the statement of claim". Under Rule 19.05(1), where the claim is for unliquidated damages and the motion for default judgment is brought before a judge, the motion is to be supported by an affidavit. In this case, in addition to the statement of claim, Ms. Duncan has filed affidavit evidence in support of her motion for default judgment. Accordingly, the background below is based on the statement of claim and the affidavits filed by Ms. Duncan

Dispute between Ms. Duncan and Ms. Buckles

[6] In early 2017, Ms. Duncan bought a house located at 43 Wells Street, Aurora, Ontario.

[7] Ms. Duncan's immediate neighbour to the south is the defendant Marnee Buckles, who lives at 47 Wells Street, Aurora. Ms. Buckles's house is eight inches from the property line between the two properties and abuts Ms. Duncan's driveway which runs into her backyard.

[8] After Ms. Duncan purchased the property, she placed a gate between the two houses to prevent her puppy from leaving her backyard. Ms. Buckles objected that the gate encroached on her property. Ms. Duncan then obtained a survey that confirmed that one of the gate's posts was on Ms. Buckles's property. Ms. Duncan removed the gate. Ms. Duncan then had a fence built on her side of the property to close in her yard. The fence is made of wood and is built alongside Ms. Buckles's house.

[9] Ms. Buckles objected to the fence, saying that it was too high, that it was too close to her house and that it blocked the view from some of her windows. Ms. Buckles complained to the Town of Aurora that the fence contravened the Town's by-laws. By-law inspectors attended Ms. Duncan's house and advised her that the posts to the fence were too high. She then took steps to reduce their height. Otherwise, the Town did not accede to Ms. Buckles's complaints that the fence was illegal.

[10] When it became evident that the Town would not require Ms. Duncan to remove the fence, Ms. Buckles spoke to the press about her dispute with Ms. Duncan, and also used social media platforms such as Facebook, to make critical comments about Ms. Duncan and the fence.

Mr. Lepp's involvement in the dispute

[11] In early January 2018, Ms. Buckles engaged Mr. Lepp to assist in her dispute with Ms. Duncan and the Town over the fence.

[12] In his blog, Mr. Lepp describes himself as a "Trusted Street View Photographer and Municipal Activist".

[13] After Ms. Buckles engaged Mr. Lepp, he attended Ms. Duncan's property and took photos of the fence.

[14] Mr. Lepp then embarked on a continued public campaign in which he made numerous negative statements about Ms. Duncan and the fence. These include the following:

- a. In early 2018, Mr. Lepp posted a petition online in which he made the following statements:

It is repugnant to live in a Town where the "rights" of an obvious offensive neighbour are supported by the Mayor, Council and Staff are supported BEFORE those of the innocent bystander who just had her property value eliminated.

...

Aurora, a town of 55,000 in Southern Ontario, allowed a person with no prior (or subsequent even) negotiation or warning, to have an ugly, solid pressure treated board on board fence built just 8 inches from her neighbour's wall and 3 large windows without negotiation or knowledge of the neighbour. The Town now supports the rights of the offending neighbour in all matters over the obvious violations of the neighbour's property rights.

...

Without notice, the over 2 meter high fence was built by the owner of 43 Wells St, and it was built RIGHT ON the property line so half of it is on the land owned at 47 Wells St...

The petition was signed by at least 300 people.

- b. On January 10, 2018, Mr. Lepp posted a letter on his blog written by Ms. Buckles in which Ms. Buckles accused Ms. Duncan of not following the Town's by-laws when she built the fence.
- c. On January 12, 2018, Mr. Lepp widely disseminated an email addressed to the Town that included the following statements:

Yes, we have 2 questions, Mike

...

5) Who does this person know politically that allows her to act this way?

6) Who called you and told you to back off and find an excuse for this woman?

There is no excuse for a woman who would do this to her neighbour.

This Town Is All About Politics... Even When It Is An Illegal Fence.

It is all who you know, and not what is legal and what is moral.

If you know someone powerful the earth moves for you!

In this case, the woman who wanted a driveway gate at the FRONT of her house to be over 2 meters high gets special treatment.

She is allowed to build a fence over 2 meters tall just 8 inches from her neighbour's wall and block access to the entire wall and the three windows in it.

She did not give 14 days advance notice by registered mail.

She did not negotiate for payment.

She did not even tell the neighbour the fence was coming.

She built it over the 2 meter limit.

She built it "board on board" in violation of the Town's own landscaping rules!

She put the "bad" side towards the neighbour and the "good side" toward herself... IN VIOLATION OF PROVINCIAL LAWS.

She blocked access to the gas line and furnace entry.

She made it impossible to maintain the entire side of Marnee's house to meet property standards.

She caused snow and ice to build up against the entire wall to cause damages.

...

In the same email, over a photo of the fence, Mr. Lepp stated:

I had to shoot from above. This SECOND FENCE keeps her dog from getting BEHIND the main fence it defines a "POOP AREA" for her dog

RIGHT BEHIND MARNEE'S DECK. It crosses Marnee's property going right up to and touching the corner of Marnee's home. See the shovel? How rude can one person be? This is not some over-privileged millennial, this is an older woman. She should know better and so should her family.

[15] In addition to the specific public statements referred to above, throughout January and February 2018, Mr. Lepp made several other blog posts, sent several other emails and made at least two YouTube videos in which he made similar comments about Ms. Duncan and the fence.

Libel notice and Mr. Lepp's subsequent conduct

[16] On February 9, 2018, Ms. Duncan gave notice to Ms. Buckles and Mr. Lepp under the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The notice gave the defendants thirty days to remove the posted statements from the internet.

[17] After the notice was sent, Ms. Buckles removed the posts she had made on Facebook. However, Mr. Lepp did not remove his posts and he continued to post public statements about Ms. Duncan and her fence.

[18] For example, on the day the notice was served, Mr. Lepp posted the following statements on his blog:

Note: To those cc'd... This is the kind of thing Municipalities put the taxpayers through when they do not do their jobs. This lawyer has Marnee in tears and in fear of losing her home. You just do not think far enough ahead. This was inevitable. Tina Duncan is demonstrably a spiteful woman, that is a fact, she built the fence to spite Marnee when she did not let her bolt the gates to her wall. She had no need for a fence. She wanted to spite Marnee, block her windows, cut off access to her land and gas line.

...

OK, so now we ALL have a benchmark of what we are discussing, this effing fence. And Tina's unreasonable desire to stick it to Marnee.

What kind of person starts this kind of war with a neighbour?...

[19] After making this post, Mr. Lepp continued making many posts on his blog about Ms. Duncan and the fence. He also made comments about Ms. Duncan's lawyer at the time, challenging his competence and even suggesting that he was not properly qualified as a lawyer.

Issuance of statement of claim and subsequent conduct

[20] On March 23, 2018, Ms. Duncan commenced this action in defamation against Ms. Buckles and Mr. Lepp.

[21] Following the issuance and service of the claim, Ms. Buckles defended the action, but Mr. Lepp did not serve a statement of defence.

[22] M. Lepp was noted in default on April 20, 2018.

[23] After he was noted in default, Mr. Lepp did not immediately bring a motion to set aside the noting in default. Instead, he escalated his negative public statements about Ms. Duncan and her lawyers. For example:

- a. On July 2, 2018, he made a blog post that included a statement that Ms. Duncan “has been proven to have lied since day one”; and
- b. On August 21, 2018, he wrote to Ms. Duncan’s new lawyer stating, amongst other things, that Ms. Duncan is a liar, that she built the fence illegally, that she was “a bit of a nut case” and that she would not pay her lawyers.

Small Claims Court Action

[24] Before the issuance of Ms. Duncan’s claim, Ms. Buckles brought a separate action against Ms. Duncan in Small Claims Court, claiming that the fence was illegal and seeking damages in nuisance.

[25] There were several procedural motions in Small Claims Court over whether the matter should proceed in that Court or be joined to the action in the Superior Court. Ultimately, Ms. Buckles’s action proceeded in Small Claims Court on October 29, 2018.

[26] The action was dismissed and Ms. Duncan was successful.

[27] The Small Claims Court made the following findings:

- a. The fence was lawful;
- b. The fence was on Ms. Duncan’s side of the property and there was insufficient evidence of subterranean encroachment;
- c. Ms. Duncan was not liable in nuisance; and
- d. Ms. Buckles’ property did not lose any value due to the fence.

[28] Even after the Small Claims Court found that the fence was legal, Mr. Lepp continued making posts on his blog into 2019 about Ms. Duncan and stating that the fence was illegal.

Motion to set aside noting in default

[29] Mr. Lepp finally brought a motion to set aside the noting in default on August 26, 2019. In a decision dated September 27, 2019, reported at 2019 ONSC 5044, Schabas J. dismissed the

motion, based on what he described, at para. 16, as “Mr. Lepp’s behaviour, the extraordinary length of his delay in bringing the motion to set aside, and the absence of a credible or acceptable explanation for the delay”, Schabas J. ordered Mr. Lepp to pay \$18,000 in costs to Ms. Duncan.

Preliminary issue raised by Mr. Lepp

[30] Despite Mr. Lepp’s unsuccessful motion to set aside the noting in default, Ms. Duncan’s lawyer served Mr. Lepp with the motion for default judgment.

[31] Mr. Lepp appeared at the motion. At the hearing, I cautioned Mr. Lepp that he was not allowed to file evidence or give any evidence because he was noted in default. However, I allowed him to make oral submissions and to file written submissions.

[32] At the hearing, Mr. Lepp raised a preliminary objection to the motion. He argued that, prior to the hearing of the motion for default judgment, he should be permitted to bring an anti-SLAPP motion pursuant to section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[33] Given that Mr. Lepp has been noted in default and that he was unsuccessful in setting aside the noting in default, pursuant to Rule 19.02(1)(b), Mr. Lepp is not permitted to take any steps in the action. Notably, this was addressed directly by Schabas J. at para. 28 of his decision wherein he stated that Mr. Lepp would not be permitted to schedule an anti-SLAPP motion given that he was not successful in setting aside the noting in default.

[34] Accordingly, there is not merit to this objection.

Test on a motion for default judgment

[35] In order to succeed on a motion for default judgement, Rule 19.06 requires the judge to inquire into whether the deemed factual admissions resulting from the default support a judgment on liability as well as damages.

[36] As held by Himel J. in *Fuda v. Conn*, [2009] OJ 188 (Sup. Ct.) at para 16:

[A]lthough the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and damages. If the court finds the evidence to be lacking in credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of fault.

Whether Ms. Duncan has established that Mr. Lepp defamed her

[37] In order to succeed in a claim for defamation, as held in *Grant v. Torstar*, 2009 SCC 61, at para. 28, a plaintiff must demonstrate that:

- a. That the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
- b. That the words in fact referred to the plaintiff; and
- c. That the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[38] As held in *Grant*, at paras. 29 to 31, once the plaintiff proves the required elements, the onus shifts to the defendant to advance a successful defence to the claim of defamation. Available defences include that the statement was substantially true or that it was a fair comment. Fair comment is not a defence where the defendant was motivated by malice.

[39] Based on the materials filed on the motion, I am satisfied that Ms. Duncan has established that Mr. Lepp defamed her.

The impugned words were defamatory

[40] Cumulatively, the public statements made by Mr. Lepp about Ms. Duncan would negatively impact her reputation:

- a. His statements suggested that she intentionally acted unlawfully;
- b. His statements suggested that she received preferential treatment from the Town because of an improper political connection;
- c. He directly stated that she was a liar; and
- d. He used a number of direct derogatory terms such as that she was rude and vindictive.

[41] In isolation, some of the statements made by Mr. Lepp may not be sufficient to affect Ms. Duncan's reputation. However, the cumulative and relentless barrage of communications and statements about Ms. Duncan's honesty and integrity would no doubt affect her reputation. In this case, this is made clear by the fact that many people signed the petition circulated by Mr. Lepp and posted negative responses about Ms. Duncan and the fence in response to Mr. Lepp's posts.

The words referred to Ms. Duncan

[42] I am satisfied that Mr. Lepp's words referred to Ms. Duncan.

[43] The initial posts did not identify her by name, but clearly identified her address. It would have been easy for anyone to know that Mr. Lepp was referring to Ms. Duncan.

[44] In any event, later public statements do identify Ms. Duncan by name.

The words were published

[45] The courts have recognized that online dissemination is a form of publication for the purpose of defamation: *Crookes v. Newton*, 2011 SCC 47, at para. 37.

[46] As reviewed above, the words were widely communicated to others through Mr. Lepp's blog, through the dissemination of emails and through YouTube videos.

No valid defences

[47] At the hearing, Mr Lepp argued that the claim for defamation should fail because the statements he made about Ms. Duncan are true.

[48] Mr. Lepp did not file any evidence in support of his contention that the statements were true nor would he have been permitted to do so given that he was noted in default.

[49] In any event, there is no merit to Mr. Lepp's contention that his statements about the fence being unlawful are true. As reviewed above, the Small Claims Court have already found that the fence was lawful.

[50] I am also satisfied that, if Mr. Lepp had defended the action on the basis of the defence of fair comment, he would not have succeeded in this defence. Mr. Lepp's unrelenting spate of negative comments about Ms. Duncan, the nature of the personal attacks on Ms. Duncan and his persistence in those attacks even after the Small Claims Court found that the fence was lawful demonstrate malice.

Damages and injunctive relief

[51] Ms. Duncan seeks \$50,000 in general damages, \$20,000 in aggravated damages and \$10,000 in punitive damages. Ms. Duncan also seeks a permanent injunction requiring Mr. Lepp to remove all defamatory blogposts and other public statements about her.

General Damages

[52] I am satisfied that \$50,000 in general damages is appropriate in this case.

[53] At the motion, Mr. Lepp argued that Ms. Duncan should not receive any damages because she has not demonstrated any harm to her reputation. However, in the context of an action for defamation, the plaintiff is not required to prove damage to her reputation. Rather, damages are presumed and are at large.

[54] As held in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para. 187:

each libel case is unique... The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

[55] Given the ongoing nature of Mr. Lepp's verbal attacks on Ms. Duncan and their broad public dissemination over the internet, I am satisfied that \$50,000 is an appropriate amount for damages.

Aggravated damages

[56] Aggravated damages are "awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation arising from the libelous statement": *Hill*, para. 188. As further held in *Hill*, at para. 189:

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

[57] In this case, I am satisfied that Mr. Lepp's conduct has been sufficiently high-handed and oppressive to cause additional harm to Ms. Duncan and to warrant aggravated damages.

[58] In her affidavit on the motion, Ms. Duncan provided evidence of the impact Mr. Lepp's actions have had on her. She has had to endure the humiliation of an onslaught of disparaging public comments. She has felt afraid for her safety because the comments publicly identify where she lives. This has caused her stress and had an impact on her health.

[59] In all the circumstances, I am satisfied that an award of \$10,000 in aggravated damages is appropriate.

Punitive damages

[60] As held in *Hill*, at para. 196, in the context of a defamation action, punitive damages are awarded for the purpose of expressing the Court's outrage at conduct that is particularly malicious and as a deterrent:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive

by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[61] Mr. Lepp's conduct warrants an award of punitive damages.

[62] After he was contacted by Ms. Buckles, Mr. Lepp immediately undertook a relentless campaign against Ms. Duncan and her fence. As reviewed above, he implied that she deliberately broke the law, that she misused political connections, that she was a liar and that she was motivated by vindictiveness. After Ms. Duncan gave Mr. Lepp notice under the *Libel and Slander Act*, he redoubled his campaign. He continued to attack Ms. Duncan and sought to undermine her lawyers. He continued these efforts after the claim was commenced, and even after Ms. Buckles lost her Small Claims Court action and that Court found that the fence was lawful. Mr. Lepp had no personal stake in the situation, yet he took Ms. Buckles's cause on as though it were his own, and maliciously pursued Ms. Duncan. He had no motive other than what appears to be a history of disagreement with the Town's politics. His actions were malicious and completely unfounded.

[63] Given these circumstances, I am satisfied that an award of punitive damages in the amount of \$10,000 is appropriate.

Injunctive relief

[64] In *St. Lewis v. Rancourt*, 2015 ONCA 513, at para. 16, the Court of Appeal held that a permanent injunction in the context of a defamation action "is an extraordinary remedy which should be used sparingly". However, such an order is appropriate "where there has been a campaign of defamation and a likelihood that it will continue".

[65] I am satisfied that this is one of those rare cases where a permanent injunction is appropriate.

[66] As reviewed above, Mr. Lepp's defamation of Ms. Duncan has been unrelenting. He did not stop his campaign in the face of a libel notice, after the action was started or even after the Small Claims Court found that Ms. Duncan's fence was lawful. At the time the motion was argued, he continued to maintain his earlier blogposts about Ms. Duncan and refused to remove them from his website.

[67] Accordingly, an injunction is granted requiring Mr. Lepp to remove all blogposts, YouTube videos or internet content he has made that refer to Ms. Duncan, her fence and her property, including comments made by others on these online posts. He is also to permanently

refrain from publishing any defamatory statements about Ms. Duncan in the future, including on the internet and on any online platform.

Order for attendance at examination in aid of execution

[68] In addition to the relief sought arising from the motion for default judgment, Ms. Duncan requests an order compelling Mr. Lepp to attend an examination in aid of execution. The request arises from the unpaid costs order following the motion before Schabas J.

[69] One of the affidavits filed on the motion details the steps taken by Ms. Duncan's lawyer to enforce the costs order and Mr. Lepp's efforts to avoid payment.

[70] These include service of a Notice of Examination in Aid of execution in December 2019. By email dated December 20, 2019, Mr. Lepp advised Ms. Duncan's counsel that he would not attend the examination.

[71] Ms. Duncan is entitled to examine Mr. Lepp given the unpaid costs order.

[72] At the time of the motion, Ms. Duncan's lawyer asked that the examination be schedule for a specific date. Since that time, there has been a temporary suspension of court operations due to the COVID-19 pandemic. Accordingly, it is not practical to fix a specific date for the examination. However, I will make an order that Mr. Lepp is to attend an examination in aid of execution on a date to be arranged by Ms. Duncan's lawyer. I leave it to Ms. Duncan's lawyer to determine if the examination can be scheduled by teleconference or videoconference before the resumption of normal court operations or whether she will await the resumption of normal court operations.

Conclusion

[73] In accordance with the reasons above, I make the following orders:

- a. The motion for default judgment is granted;
- b. Mr. Lepp is to pay damages in the total amount of \$70,000 to Ms. Duncan;
- c. By no later than May 29, 2020, Mr. Lepp is to remove all blogposts, YouTube videos and all other internet content he has posted that refer to Ms. Duncan, her fence and the property at 43 Wells Street, Aurora, Ontario, including comments made by others on these online posts;
- d. Mr. Lepp is to permanently refrain from publishing any further defamatory statements about Ms. Duncan starting today and at any future time, including on the internet and on any online platform; and

- e. Mr. Lepp is to attend an examination in aid of execution on a date to be set by Ms. Duncan's lawyer.

[74] At the conclusion of the motion, I requested submissions on costs. Ms. Duncan's lawyer asked that she be permitted to make written submissions on costs after the release of the decision because she made an offer to settle. Accordingly, Ms. Duncan can file written costs submissions by sending them via email to my assistant by no later than June 8, 2020. The submissions are to be no longer than three pages, excluding the costs outline and offer to settle. I will give Mr. Lepp an opportunity to make responding submissions on costs. The submissions are to be no longer than three pages and are to only address the issue of costs and respond to Ms. Duncan's request for costs. Mr. Lepp is to file his submissions by no later than June 22, 2020.

[75] Notwithstanding Rule 59.05, the order in these reasons is effective from the date it is released and is enforceable without any need for entry and filing. In accordance with Rule 1.04, no formal order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this endorsement may nonetheless submit a formal order for original signing, entry and filing when the Court returns to regular operations.

FAVREAU J.

RELEASED:

May

25,

2020

CITATION: Duncan v. Buckles, 2020 ONSC 1476
COURT FILE NO.: CV-1800605661
DATE: 20200525

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

TINA JAYNE DUNCAN

Plaintiffs

– and –

MARNEE BUCKLES AND ROBERT LEPP AKA
BOB LEPP

Defendants

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: May 25, 2020