

CANADA / JUDGMENT

Deline v. Vancouver Talmud Torah Association

2020 BCSC 251

COURT

Supreme Court of British Columbia

DECIDED

21 February 2020

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2020 BCSC 251 Deline v. Vancouver Talmud Torah Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Deline v. Vancouver Talmud Torah Association,

2020 BCSC 251

Date: 20200221

Docket: S196137

Registry: Vancouver

Between:

Toni Eugene Deline

Plaintiff

And

Vancouver Talmud Torah Association

Defendant

In Chambers

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

The Plaintiff appearing on his own behalf:

T. Deline

Counsel for the Defendant:

L. Tsang

Place and Date of Hearing:

Vancouver, B.C.

November 20, 2019

February 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 21, 2020

Introduction

[1] The plaintiff, Mr. Deline, is self-employed as a chess instructor. The defendant Vancouver Talmud Torah Association ("VTT") operates a Jewish day school in Vancouver. For many years, Mr. Deline contracted with VTT to provide chess instruction to its students on a part-time basis. The last time they had this arrangement was in the 2014/2015 school year.

[2] In July 2016, VTT invited Mr. Deline to provide chess instruction again in the 2016/2017 school year. Mr. Deline advised that he could not commit to it and offered to try to find someone who could. VTT invited him to get in touch if he happened to find someone who was interested.

[3] Months later, Mr. Deline learned that an acquaintance, Mr. Chan, was considering the position at VTT. Mr. Deline did not have a good opinion of Mr. Chan. Soon afterwards, he received a text that he thought came from Mr. Chan. In fact, it came from a number that differed from Mr. Chan's telephone number by one digit, but Mr. Deline did not notice the discrepancy. The text stated:

I'm terribly sorry Toni, but I can no longer vouch for the Jewish schooling as I recently converted to the faith of Islam.

[4] Mr. Deline viewed this text as confirming that Mr. Chan should not work for VTT. On January 2 or 3, 2017, he showed Ms. Shecter of VTT the text message. Ms. Shecter took a photo of the text message and telephoned Mr. Chan to discuss it. During the call, Ms. Shecter noticed the discrepancy in telephone numbers. Mr. Chan told her that the telephone number from which the text was sent was not his number, and that he had not sent the text. She believed Mr. Chan.

[5] VTT had retained Mr. Chan as a chess instructor, and it was not persuaded that it should terminate its relationship with him. It did not reply to a succession of emails from Mr. Deline offering to find another chess instructor. In the spring of 2017, Mr. Deline wrote to

the head of school, Ms. Lowenstein, expressing his concerns about Mr. Chan. He described Mr. Chan as "a snake in the grass". He quoted "Chan's anti-Jewish text". In further correspondence, he told Ms. Lowenstein that he planned to sue Mr. Chan and expected that VTT would be named as a third party.

[6] Ms. Lowenstein replied:

As you know, VTT engaged James Chan as our one hour weekly chess instructor after you declined to continue providing after school instruction for our students due to other commitments. We have investigated the concerns raised in your emails, and have determined that to the extent they relate to VTT, they are unfounded. In particular, we are satisfied that James did not send the text message described in your email.

[Emphasis added.]

[7] Mr. Deline now accepts that VTT was correct and he was mistaken. Mr. Chan was not the author of the text message.

[8] Mr. Deline commenced this action against VTT on July 19, 2019. He claims against VTT for negligence. The theory of the claim is that VTT owed Mr. Deline a duty of care while he was helping it to find a replacement chess instructor, and it breached that duty of care by failing to advise him of the discrepancy in telephone numbers forthwith upon learning of it in early January 2017. Mr. Deline maintains that he has suffered loss and damage including money paid to a forensic investigator to establish that the text was not something he had personally concocted. He says that he would not have pursued the matter had VTT disclosed the discrepancy promptly.

[9] VTT applied for summary judgment dismissing the action and the application came on for hearing before me on November 20, 2019. In the course of argument, Mr. Deline advised that he also intended to pursue claims against VTT and Ms. Lowenstein for defamation. In order that all of Mr. Deline's claims arising out of this incident may be addressed at once, I adjourned VTT's application for judgment and required Mr. Deline to deliver a notice of application seeking leave to amend and join Ms. Lowenstein as a defendant within two weeks. Mr. Deline did so and the application was argued before me today.

Mr. Deline's proposed defamation claim

[10] Mr. Deline seeks leave to join Ms. Lowenstein, Ms. Shecter, and four unknown persons as defendants and to claim against all of the defendants for defamation. The proposed defamation claim centres on reports made to the Vancouver Police Department (the "VPD").

[11] There is no dispute that the proposed claim is closely connected to the circumstances that found Mr. Deline's negligence action. The application should be allowed if the proposed pleading states a reasonable cause of action and otherwise complies with the rules governing pleadings. VTT says that it does not.

- [12] The test of a reasonable cause of action is settled. The facts pleaded are taken to be true, and the pleading must be read generously; the claim will only fail if it is plain and obvious that it has no reasonable chance of success; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. At para. 22, Chief Justice McLachlin, giving judgment for the court, observed:

It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated.

- [13] Defamation proceedings are technical in nature and pleading dependent; *Nu Fibre Inc. v. Ishkanian*, 2013 BCSC 1255 at para. 20. The law requires that a pleading of defamation specify "the publication made by each defendant, the words published by that defendant, the time and place of the publication, the manner of the publication and to whom the publication was made."; *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 at para. 108, citing *Cooper v. Hennan*, 2005 ABQB 709 at para. 18 and *Brown on Defamation* (loose-leaf) 2nd ed., vol. 1 (Toronto: Carswell, 1999) at 19-31.
- [14] Defamation is not one tort but two: libel and slander are different. Libel involves a defamatory communication by written words. Slander involves a defamatory communication by spoken words, though if the spoken words are broadcast, the slander becomes a libel; *Libel and Slander Act*, R.S.B.C. 1996, c. 263, s. 2. Libel is actionable without proof of special damage. Slander requires proof of special damage which must be pleaded "unless the words are actionable per se because they accuse persons of unfitness in the way of their work or trade, charge them with a criminal offence, impute to them a loathsome or contagious disease or, in the case of a woman, impute to her unchastity"; *Brown on Defamation* at 1-56; *Sahyoun v. Ho*, 2015 BCSC 392 at para. 116. I should add that social norms have changed enough that I doubt that slanderous imputations of unchastity are still actionable per se.
- [15] For the following reasons, I conclude that Mr. Deline's proposed pleading is deficient and fails to state a reasonable cause of action against VTT or any of the proposed defendants. I begin with the claim against VTT.
- [16] The proposed amendments refer broadly to defamatory comments by VTT and the proposed defendants. They only particularize the defamation by referring to paragraphs in the existing pleading as follows:
47. The occasions of the defamatory words and actions formed a pattern of misconduct and include, but are not necessarily limited to, those referred to heretofore in paras. 14,19, 20 and 23.
- [17] The reference in the proposed paragraph 47 to "a pattern of misconduct" does not satisfy the requirements of a defamation pleading.

[18] Paragraphs 14, 19, 20 and 23 of the existing pleading state:

14. On or about April 6, 2017 VTT contacted the Vancouver Police Department, hereafter the VPD, accusing the Plaintiff of libel. VTT also falsely asserted or inferred that the only possible reason the Plaintiff had raised complaints about Mr. Chan, was that the Plaintiff was mentally ill, paranoid and Islamophobic. VTT failed to adequately, or at all, inform the VPD of the cited text, of VTT's discovery of the one-digit phone number difference, or of VTT's failure to advise the Plaintiff of their discovery of the one-digit difference. The investigating VPD officer, who did not contact the Plaintiff, tagged VPD File VA 2017-62974 as, "Mental Health Related".
19. In or about, September 2017, the Plaintiff mailed a letter to a VTT teacher he has known since 1999, politely complaining VTT was withholding pertinent information about the cited text and leaving him no choice but legal action. The teacher showed the letter to VTT, who then either:
 - a) truthfully and fully advised the teacher about the subject matters related to one-digit phone number difference and then colluded with said teacher to withhold pertinent information from the VPD while asserting the Plaintiff was paranoid, or, alternately,
 - b) by withholding pertinent information deceived the teacher, inducing her into making a misleading police report which alleged the Plaintiff was paranoid.
20. On or about October 4, 2017 VTT complained to the VPD that the Plaintiff was a paranoid Islamophobic who had harassed a VTT teacher (VPD File No. VA 2017-204316). Again, VTT failed to adequately, or at all, inform the VPD of the cited text, of VTT's discovery of the one-digit phone number difference, or of VTT's failure to advise the Plaintiff of their discovery of the one-digit difference.
23. Further, VTT circulated a security alert about the Plaintiff. The Plaintiff, is not now, nor has ever been, a danger to VTT or any person connected to it.

[19] Paragraphs 19 and 23 do not properly plead defamatory communications by VTT to a third party.

[20] Paragraphs 14 and 20 provide the substance of alleged communications of defamatory words. Both paragraphs identify the publisher as VTT and the recipient as VPD. They provide the date and sets out the substance of allegedly defamatory communications. They do not state whether the alleged communication to VPD was oral or in writing. The proposed pleading does not identify whether the claim is for libel or slander. This is a fatal deficiency.

[21] Reading between the lines of paragraphs 14 and 20, it appears likely that the alleged communications were oral and the claim is for slander. It is not specifically pleaded that the communications called into question Mr. Deline's fitness for his work or trade or were otherwise actionable per se. Accordingly, if the claim is for slander, it requires a plea of

special damages. There is a pleading of special damages of \$4,864.04 in expenses incurred by Mr. Deline to retain the forensic investigator and to retain a lawyer to send a letter to VTT. On the face of the pleading, neither expenditure had anything to do with what was said to VPD. These expenditures could not constitute special damages consequent on a slander and it follows that there is no proper pleading of special damages.

- [22] I conclude that the proposed pleading does not state a reasonable cause of action against VTT.
- [23] As for proposed defendants John Doe #2 and Jane Doe #2, they are identified in paragraph 42 of the proposed pleading as the individuals who communicated to VPD. The claim against them fails with the failure of the claim against VTT.
- [24] As concerns the remaining proposed defendants, it is important to bear in mind that a pleading that a defendant is civilly responsible for defamatory words must specify how the defendant published the words in question.
- [25] Proposed paragraph 41 states the claim against John Doe #1 and Jane Doe #1. It states:
41. The Defendants John Doe #1 and Jane Doe #1 are persons whose identities are currently unknown to the Plaintiff and who conducted the investigation referred to in Cathy Lowenstein's email to the Plaintiff dated April 7, 2017.
- [26] This is a reference to a communication pleaded at paragraph 15 of the present pleading, which states:
15. On or about April 7, 2017 the VTT Head of School emailed the Plaintiff. She baldly stated Mr. Chan did not send the text the Plaintiff had "described". She withheld the one-digit phone number difference and made no reference whatsoever to any problem respecting any phone number. This began to cause the Plaintiff to think VTT might believe he had faked, fabricated, or had some other nefarious involvement with the anti-Semitic cited text.
- [27] Ms. Lowenstein's email of April 7, 2017, is not allegedly defamatory. The proposed pleading does not identify John Doe #1 and Jane Doe #1 as participants in a defamatory communication.
- [28] The proposed pleadings only mention Ms. Lowenstein and Ms. Shecter in a few places. First, it is alleged that Ms. Lowenstein sent Mr. Deline the email described in paragraph 15 of the existing pleading, but this email was not defamatory.
- [29] Second, it is alleged that Ms. Shecter "abetted the defamation by wilfully and materially misrepresenting her interactions to Jane Doe 1, John Doe 1 and others". This would not make Ms. Shecter a party to the allegedly defamatory communications pleaded in paragraphs 14 and 20, even if they formed part of a properly pleaded claim for defamation. It is not pleaded that Ms. Shecter's communications to John Doe 1 and Jane Doe 1 were themselves defamatory.

[30] Finally, at proposed paragraph 48, the proposed pleading states:

48. The Defendants acted with ill will and malice. They either knew the defamatory allegations were false or displayed a reckless disregard or indifference for the truth. The Defendants, jointly and severally, sought to wrongfully discredit the Plaintiff in order to protect the reputations of Defendants VTT, Lowenstein and Shecter respecting the hiring of Mr. Chan. The effort was headed by Defendant Lowenstein.

[31] The allegations that Ms. Lowenstein headed the effort and that she and Ms. Shechter "sought to wrongfully discredit" Mr. Deline fails to state how they actually participated in defaming Mr. Deline through allegedly defamatory communications to the VPD.

[32] In short, even if a claim for defamation were properly pleaded against VTT, John Doe #2, and Jane Doe #2, there would not be a properly pleaded claim against any of Ms. Lowenstein, Ms. Shecter, John Doe #1 and Jane Doe #1.

[33] In argument, Mr. Deline accepted that his proposed pleading may not be technically correct. He asked for a second chance to plead, and for an opportunity to examine VTT, Ms. Lowenstein and Ms. Shecter for discovery. If the only deficiency in his pleading were an inability to specify the exact words spoken concerning him, his request would be supported by authority; *Central Minera Corp. v. Lavarack*, 2001 BCSC 349 at paras. 12-14. The deficiencies in this case are more fundamental and concern the nature and existence of a cause of action against VTT and the proposed defendants.

[34] I am mindful that Mr. Deline is representing himself and is not legally trained. He is intelligent and well-spoken. It is clear from the history of this matter that he has been contemplating and researching his proposed defamation action for some time. VTT's application response sets out the governing legal principles and the objections to his proposed pleading, and he had it two or so weeks ago. Mr. Deline tells me that, if his application to bring his defamation claim in this action fails, he can advance it in a separate action. He says that he has looked into and is not concerned by the possibility of a limitations defence. In these circumstances, I do not think that justice requires that he be given an opportunity to revise his pleading for the purpose of this application.

[35] In light of my conclusion that the proposed pleading does not state a reasonable cause of action against VTT or any of the proposed defendants, I need not address VTT's argument that the proposed claims would constitute an abuse of process.

VTT's application to dismiss the negligence action

[36] VTT's application for summary judgment is brought pursuant to Supreme Court Civil Rule 9-6 [Rules]. Rule 9-6 requires me to review the evidence to determine whether Mr. Deline is bound to lose, but I cannot address or resolve factual controversies. Speaking for the Court, Chief Justice Bauman outlined the approach I must take in *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48-49:

- [48] Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10-11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.
- [49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*, 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12.
- [37] In my opinion, there is no material dispute in the evidence bearing on whether VTT owed Mr. Deline a duty of care that required it to notify him of the one digit discrepancy Ms. Shecter noticed between Mr. Chan's telephone number and that of the sender of the text message.
- [38] In Part 1 (Statement of Facts) of his Amended Notice of Civil Claim, Mr. Deline pleads:
3. In 1999, VTT contracted the Plaintiff as a part-time chess instructor. In July 2016, the Plaintiff could not commit for the next school year and offered to try to find a replacement instructor. On or about July 18, 2016, VTT accepted that offer.
- [39] In Part 3 (Legal Basis) of his Amended Notice of Civil Claim, Mr. Deline pleads:
1. VTT owed the Plaintiff a private legal duty of care. No party should allow harm to befall someone engaged in helping them.
 2. Upon accepting the Plaintiff's offer to find a replacement instructor, VTT owed the Plaintiff a similar legal duty of care under the law of agency.
 3. In the circumstances those legal duties of care plainly included informing the Plaintiff of the one-digit phone number difference in a forthwith and forthright manner.
- [40] Mr. Deline's communications with VTT surrounding his "offer to find a replacement instructor" took place by email in mid-July, 2016. The following is obvious from a review of the correspondence. Notwithstanding the pleading of offer and acceptance, Mr. Deline did not contract with VTT to find it a replacement chess instructor. The most that can be said is

that he volunteered, without obligation, to "try to find you someone who can do it asap but it may not be easy or even possible". VTT did not appoint Mr. Deline as its agent to find a replacement chess instructor. By January 2017, half-way through the school year, whatever role Mr. Deline might have taken on in assisting VTT to find a replacement chess instructor for the year was spent.

[41] All this is clear from the following extracts from an email string between Mr. Deline and VTT's Admission Manager, Ms. Kalvari.

July 11, 2016: Ms. Kalvari to Mr. Deline

Our new building will be ready for the 16/17 school year so we will no longer be short of space :)

Please let me know if you or Dale are interested in running a Chess program for students after school - 3:30 pm-4:30 pm. The school is now working on a revenue share of 70% (for your) / 30% (for VTT) with all our school program vendors and most are charging \$12/\$15 per child per session (week).

Get back to me as soon as you can as Jennifer plans on sending out information later this week.

July 11, 2016: Mr. Deline to Ms. Kalvari

As for chess, which day(s)? I was planning on having dinner with Dale this week and will discuss it with him.

July 11, 2016: Ms. Kalvari to Mr. Deline

Jennifer mentioned the revenue share is actually 80 (for you) / 20 (for us) not 70/30 as I previously thought.

July 14, 2016: Mr. Deline to Ms. Kalvari

Dale has advised me he cannot because of health. I will need a few more days to let you know what, if anything, can be done.

July 18, 2016: Ms. Kalvari to Mr. Deline

Just wondered if you'd made a decision regarding Chess at VTT.

We want to sent out our school programs info asap and were just waiting to hear back from you and finalize details if Chess did go ahead.

July 18, 2016: Mr. Deline to Ms. Kalvari

As things are for me as much as I might like to I cannot commit to it. I will try to find you someone who can do it asap but it may not be easy or even possible.

Thanks for the opportunity.

July 18, 2016: Ms. Kalvari to Mr. Deline

Thanks for letting me know.

If you do happen to find someone whose interested, please be in touch.

[Underlining added.]

- [42] Mr. Chan approached and was retained by VTT as a chess instructor for the 2016/2017 school year independently of Mr. Deline. Mr. Deline first expressed his concerns about Mr. Chan in speaking with Ms. Schechter on January 2 or 3, 2017. At that point, he was not assisting VTT to find a replacement chess instructor. He was trying to get VTT to terminate the chess instructor they had hired.
- [43] In these circumstances, Mr. Deline and VTT were strangers in law. They were not parties to any recognized legal relationship, such as principal and agent. They were not in association by any agreement or common understanding. Mr. Deline did not owe VTT a duty to share his concerns about Mr. Chan, whether or not they were well founded. VTT did not owe Mr. Deline a duty to respond to or correct unsolicited communications from him.
- [44] This is a full answer to Mr. Deline's claim. I should add, however, that even if a duty were owed, in my view it must have been satisfied by Ms. Lowenstein's email to Mr. Deline on April 7, 2017, that "we are satisfied that [Mr. Chan] did not send the text message described in your email". In oral submissions, Mr. Deline analogized the situation to that of a teacher with a child, stating that "it is not enough to tell the child that they're wrong, you have to make them understand". But Mr. Deline was not in the position of a child under instruction by VTT. He was an independent adult trying to persuade VTT that it had made a mistake.
- [45] Mr. Deline's negligence claim against VTT is legally misconceived. It is bound to fail and must therefore be dismissed.

Disposition

- [46] Mr. Deline's application and this action are dismissed with costs.

"Gomery J."

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