

CANADA / JUDGMENT

Masjoody v. Momeni

2024 BCSC 1004

COURT

Supreme Court of British Columbia

DECIDED

21 May 2024

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2024 BCSC 1004 Masjoody v. Momeni

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Masjoody v. Momeni,

2024 BCSC 1004

Date: 20240521

Docket: S240583

Registry: Vancouver

Between:

Masood Masjoody

Plaintiff

And:

Ari Momeni, X Corporation

Defendants

- and -

Docket: S240157

Registry: Vancouver

Between:

Masood Masjoody

Plaintiff

And:

Reza Pahlavi, X Corporation, John Doe 1, John Doe 2, John Doe 3,

John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, John Doe 9, John Doe 10, John Doe 11, Arash Kamancheh, Maryam Lagertha,

Sedigheh Minachi, Azar Khorramshahi

Defendants

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

In Chambers

Counsel for the Defendant, X Corporation:

M. Diskin

No other appearances.

Place and Date of Hearing:

Vancouver, B.C.

May 15 and 21, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2024

[1] THE COURT: I note for the record that Mr. Masjoody is not present in court today. My recollection is that he indicated on May 15 that it was difficult for him to attend by video link. My expectation was that he was going to be here today, but he is not. I am going to deliver my reasons in any case.

Introduction

[2] In two applications heard together on May 15, 2024, the applicant X Corporation ("X Corp."), formerly known as Twitter Inc., seeks orders dismissing the claims against it under action numbers S240157 and S240583, which I will refer to as "the Claims" on jurisdictional grounds, pursuant to Rule 21-8 of the Supreme Court Civil Rules.

[3] The Claims were commenced by Masood Masjoody on January 8 and 29, 2024, and the notice of civil claim under action number S240157 was amended March 22, 2024. The Claims include various allegations of defamation against individual defendants for publications made on X Corp.'s social media platform "X". Mr. Masjoody also alleges, in summary, that X

Corp. is vicariously liable for publication of the defamatory statements made about him by others on "X" or has published these statements, and was involved in a conspiracy to defame him.

- [4] On March 11, 2022, X Corp. filed jurisdictional responses, preserving its right to seek orders dismissing or staying the Claims. In these applications, X Corp. contends that this Court lacks jurisdiction to hear the Claims due to the existence of a valid and enforceable forum selection clause in the terms of service accepted by Mr. Masjoody as a condition of utilizing an "X" account which they contend requires that any disputes between the parties be adjudicated in San Francisco County, California.
- [5] On April 11, 2024, X Corp. filed the applications now before the court. Mr. Masjoody did not file responses but appeared at the hearing before me on May 15, 2024. I rejected Mr. Masjoody's contention that he was not personally served with X Corp.'s notices of application in accordance with the Supreme Court Civil Rules after hearing submissions from the parties on service. Mr. Masjoody was given an opportunity to request an adjournment but advised that he wished to proceed.

Background

- [6] X Corp. is a Nevada company headquartered in San Francisco. It operates "X", which is a real time global communications platform that allows users to create and share content on the platform. "X" was re-branded from "Twitter" after Twitter Inc. merged into X Corp. in 2023.
- [7] Mr. Masjoody is a resident of British Columbia and is an "X" user. He signed up for a Twitter account in or around December 2013 and has been a user, first of Twitter and now "X" since that time.
- [8] To establish an account under Twitter and now "X", a user is required to complete an online sign-up process, which requires them to click on a link. By doing so, users agree to be bound by the platform's terms of service. X Corp. submits that Mr. Masjoody agreed to the terms of service in place from the time he signed up in 2013. Mr. Masjoody did not challenge this submission.

The "X" Terms of Service

- [9] The "X" terms of service in place in 2023 state under the heading "Summary of Our Terms" that the terms "are a legally binding contract governing your use of X."
- [10] The terms applicable in Canada (the "Terms") under the heading "X Terms of Service" state that a user's use of and access to X's services and (in summary) any information appears on the services, (the "Content") is governed by the terms of service. "Services" is defined to include X's various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services, and other covered services.

[11] The Terms are set out under the following topic headings:

- 1) Who May Use Services;
- 2) Privacy;
- 3) Content on the Services;
- 4) Using the Services;
- 5) Disclaimers and Limitations of Liability; and
- 6) General.

[12] Under heading 3, "Content on the Services", a user agrees that they are responsible for any Content they provide to "X", that any reliance on any Content posted on "X" is at the user's own risk, and that the user "may be exposed to Content that might be offensive, harmful, inaccurate, or otherwise inappropriate." This section states that "X" cannot take responsibility for such content.

[13] Heading 5, "Disclaimers and Limitations of Liability" includes a waiver under the subheading "Limitation of Liability," which is as follows:

To the maximum extent permitted by applicable law, the X entities shall not be liable for any indirect, incidental, special, consequential, or punitive damages resulting from ... (ii) any conduct or content of any third party on the services, including without limitation, any defamatory, offensive, or illegal conduct of other users or third parties.

[14] In addition, this section limits liability, in respect of any other claims, to \$100 USD.

[15] Heading 6, "General," contains the following choice of law and forum selection clause:

The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and us. All disputes related to the Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you can consent to personal jurisdiction and waive any objection as to inconvenient forum. [Emphasis added.]

Position of X Corp.

[16] X Corp. submits that the forum selection clause in place when Mr. Masjoody signed up for a Twitter account in December 2013 and later versions are the same in all respects to the forum selection clause described earlier and that Mr. Masjoody, as a user of "X", is bound by this term.

- [17] X Corp. contends that despite agreeing to the Terms, Mr. Masjoody breached them by improperly bringing the Claims in British Columbia. They submit that this Court cannot assume jurisdiction where a party has contractually consented to litigate the subject dispute in a different jurisdiction, in this case California. As a result, X Corp. seeks orders pursuant to Rule 21-8 that this Court dismiss or alternatively permanently stay the Claims against it.

Analysis

- [18] In *Douez v. Facebook, Inc.*, [2017] 1 SCR 751, 2017 SCC 33, the Supreme Court of Canada confirmed a two-part analysis to be applied in determining whether a court should enforce a forum selection clause in a consumer contract.
- [19] First, the party seeking to enforce a forum selection clause must establish that the clause is valid, clear and enforceable, and applies to the causes of action at issue. Next, where this is established, the onus shifts to the party challenging the enforceability of the forum selection clause to establish strong cause why the clause should not be enforced: *Douez* at paras. 28 and 29.
- [20] There is no dispute that the Terms constitute a contract between Mr. Masjoody and X Corp., which incorporated a forum selection clause. For the reasons that follow, I find that X Corp. has not established that the forum selection clause applies to the cause of action against it set out in the Claims. As a result, it is not necessary to address the question of whether Mr. Masjoody has established that there is strong cause not to apply the clause.

Mr. Masjoody's Claims Against X Corp.

- [21] In action number S240157, Mr. Masjoody claims, in summary, that the defendants, which includes X Corp., engaged in defamatory publications in furtherance of a conspiracy (para. 21). In addition, he claims under "Part 3: Legal Basis", that X Corp. is liable for publishing various impugned words against him and failing to remove defamatory publications from "X" (Part 3, para. 7).
- [22] Similarly, in action number S240583, Mr. Masjoody claims that X Corp. is jointly and severally liable for a number of defamatory statements made about him by an individual defendant and published on X.
- [23] The Claims focus on the publication of allegedly defamatory statements by third parties and alleged liability on the part of "X", either vicariously, as a publisher in its own right, or by way of participation in a conspiracy.
- [24] The causes of action set out in the Claims against X Corp. arguably do not set out material facts in support of the claims which are advanced. I note that these applications are brought by X Corp. to dismiss or stay Mr. Masjoody's claims against them solely on jurisdictional grounds and not applications to dismiss based on the merits of his claims, including the sufficiency of his pleadings. That may be the subject of later applications.

Does the forum selection clause apply to Mr. Masjoody's claims against "X"?

- [25] As set out earlier, Mr. Masjoody alleges that X Corp. is either vicariously or directly liable for the publication of defamatory statements about him or was involved in a conspiracy to defame him.
- [26] The onus is on X Corp. to show that Mr. Masjoody's claims against it fall within the scope of disputes to which the forum selection clause applies. They contend that the entirety of his claims falls within the broad scope of the forum selection clause because the claims arise out of alleged content posted on "X" by the individual defendants. They note that the forum selection clause applies to "all disputes related to the Terms or the Services" (emphasis added). They contend that the Claims arise out of alleged defamatory content on "X" published by the individual defendants.
- [27] I note that the preamble to the Terms indicates that they govern a user's access to and use of X Corp's services- for example, posting content on "X". In my view, Mr. Masjoody's claims do not relate to his ability to access and use X Corp.'s services.
- [28] The preamble also provides that they govern a user's access to and use of Content. In my view, Mr. Masjoody's claims do not relate to his use of Content (emphasis added).
- [29] Despite not serving a response to the notices of application of X Corp., given that he is a self-represented litigant, Mr. Masjoody was given an opportunity to provide oral submissions. With respect to whether his claim involves his access to Content, he stated that his case is not about what he has seen on "X" but rather what others have seen or may have seen about him on "X" as a result of publications on that platform. Although his pleadings do not particularize the basis of his claims in this way, with amendments they could do so.
- [30] As a result, I am not satisfied that Mr. Masjoody's claims relate to his access to Content posted on "X", even though they arise from the Content. That is, I find that Mr. Masjoody has not claimed that he was prevented from accessing the Content, but rather that he has sustained compensatory damages resulting from the publication of defamatory content on "X".
- [31] The only reference to defamatory conduct in the Terms is included under the heading 5, "Disclaimers and Limitations of Liability." The first part of this section sets out a waiver of liability for certain classes of damages, including but not limited to indirect, incidental, special, consequential, or punitive damages, resulting from, amongst other things, defamatory, offensive, or illegal conduct of other users. Of note are the opening words of this section, which read "to the maximum extent permitted by applicable law" which suggests that law other than the law of California may apply.

- [32] Reading the Terms as a whole, I do not find that the forum selection clause prevents Mr. Masjoody from bringing his defamation and conspiracy claims against X Corp. in this jurisdiction.
- [33] X Corp. relies on a series of US decisions, including *Yuksel v. Twitter Inc.*, 2022 WL 4367619; *Trump v. Twitter, Inc.*, 2021 WL 8202673; *Brittain v. Twitter Inc.*, 2019 WL 110967; and *Wingo v. Twitter, Inc.*, 2014 WL 7013826. Counsel for X Corp. did not provide the court with copies of these authorities, which is most unfortunate since they sought to rely on them in support of their position that the forum selection clause should be upheld in this case.
- [34] In any case, having reviewed the authorities, I do not find that they assist. In every case, the relevant US Court upheld the forum selection clause in Twitter's terms of service where the plaintiff's Twitter account had been suspended. Clearly, such a dispute would fall within the Terms which apply in this case, but this is not the nature of the claim advanced by Mr. Masjoody. No authority has been provided in which a forum selection clause was upheld in the circumstances of his claims.

Conclusion

- [35] X Corp. has not met its onus to show that the forum selection clause set out in the Terms applies to the causes of action at issue in this case.
- [36] The applications to dismiss the Claims for want of jurisdiction of the BC Courts, under Rule 21-8, is dismissed.

(DISCUSSION)

- [37] THE COURT: I would rather have dealt with costs now. My inclination is to be that there should be no order with respect to costs given that a response was not filed, but I am reluctant to make any order with respect to costs given that Mr. Masjoody is self-represented and is not here in any event. It will have to be dealt with at a subsequent hearing.

"Mayer J."

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