

**ONTARIO
SUPERIOR COURT OF JUSTICE
Toronto Small Claims Court**

Court File No.: # SC-10-109226-00

BETWEEN :

James WHITE

Plaintiff

and

Ritchie SINCLAIR

Defendant

JUDGMENT

This trial commenced on November 14, 2014, continued January 19, 2015 and finished on May 20, 2015. Written submissions were to be provided and were provided by the parties by June 15, 2015. The Plaintiff was represented by counsel while the Defendant represented himself. The Plaintiff sues for slander of title and defamation in the amount of \$25,000.

BACKGROUND:

1. The Plaintiff is in the business of selling works of art and more particularly works of Norval Morrisseau, a Canadian artist whose works have been sold around the world and apparently are displayed in Art Galleries and Museums.
2. In 2008 the Defendant operated a website www.morrisseau.com where he posted over 1000 Morrisseau paintings claiming them to be fakes. In Exhibit #1 Tab. A, Photo #974 which he calls an "Inferior Counterfeit", he describes himself as "Norval Protégé Ritchie"Stardreamer" Sinclair". In his evidence, he testified that he had studied with Morrisseau for some time and considered it his obligation to protect the legitimate works of the artist and expose the many fakes circulating.
3. This case centers mainly on Photo #944 called "Thunderbird Envoke Into After Dimention" and the write-up by the Defendant. It starts with a heading in bold black type: "Inferior counterfeit auctioned off by Jim White". Further down, in bold, beside Tags: "copy forgeries imitation fakes inferior Jim White liveauctioneers". It goes on as follows: *Description: Did you buy this 70s style forgery from Jim White? >>>> Titled:>>> Thunderbird Envoke Into After Dimention(suddenly Norval has no idea how to spell)>>>>Framed acrylic on canvas, signed in syllabics and on verso signed, titled and dated 1979 (I was there....this wasn't).>>>>Provenance: Gallery Sunami(ARTCUBE), Toronto (as noted by present owner Jim White)>>>>From his Private Collection of fake Morrisseaus, Richmond Hill, Ontario>>>>Condition: DANGEROUS.....>>>>Inferior counterfeit.* It goes on to define inferior counterfeit as "counterfeit, fake, false, falsified, unauthorized, ungenune, unreal, forged, forgery, descending into the inferior regions of the earth, poor in

quality, substandard, less important valuable or worthy, bottom-rung, less, lesser, lower, nether, peon, subordinate, under, underneath, bent, bogus, copied, crock, deceptive, delusive, delusory, faked, fishy, fraudulent, imitation, misleading, mock, pseudo sham." (My italics & underline). There was also the Defendant's "The Wall of Shame" which lists the names of persons and businesses that allegedly sell Morrisseau forgeries, which includes the Plaintiff's name as well as Morrisseau family members.

4. The Plaintiff testified that he discovered the website on November 11, 2008. He stated that he never owned this particular picture. The Defendant could not recall how he obtained his website picture of the painting or explain why he believed the Plaintiff owned this painting.
5. The Plaintiff stated that he has no fake Morrisseaus and because of allegations that the signatures on some of the paintings were fake he had the signatures of 11 paintings including three Thunderbird paintings forensically examined by Dr. Atul Singla of World Forensic Services Inc. (Exh.1 Tab.V) who compared the signatures with that of nine objects known to have the signature of Morrisseau. His conclusion was that it was highly probable the person who signed the nine objects signed the eleven paintings. His resumé is found in Tab.W of Exh.1.
6. An earlier lawsuit in the Superior Court was commenced to obtain an injunction to remove the website which resulted in the Defendant having to place a disclaimer on the website stating that the opinions are his alone and the opinions are alleged to be defamatory and the subject of a court action. The action was abandoned and a new action was commenced in this court on October 25, 2010. The website was taken down by the Defendant sometime later.
7. Much evidence was given by the Defendant about fake Morrisseaus and that one of the sons of Morrisseau; David Morrisseau under the pseudonym of Ookuk Derain was painting counterfeit Morrisseaus. On cross-examination it became clear he did not know that there was an actual artist named Ookuk Derain. He relied mainly on two letters allegedly written by Norval Morrisseau (Exh. #3 Tab.6). The first is unsigned stating that he did paint the 23 pictures attached while the second purportedly has his signature on it and states he did not paint the 23 pictures attached. No expert evidence was produced of the validity of the signature and falls far short of proof that the Plaintiff sold fake paintings. Furthermore, he acknowledged that in the past he had labelled paintings original Morrisseaus only to reverse himself later and vice versa, called some fakes only to call them genuine at a later time. He also made several other errors in authentication. In the past he had claimed that well-known art galleries and Museums were showing forgeries.
8. The Plaintiff testified that since the information was posted on the website in 2008, his business went from \$223,000 in 2007, \$664,000 in 2008 to \$28,000 in 2009 and \$18,000 in 2010.

THE PARTIES POSITIONS:

9. The Plaintiff: a. The article on the website is clearly defamatory and meets all the elements required to prove defamation; b. the defendant has failed to submit any evidence to support any of the defenses available for defamation; c. slander of title has been committed.

The Defendant : a. His statements are true; b. the action is past the limitation period; c. The action is duplicitous being a repeat of the Superior Court Action.

THE ISSUES:

10. i) Is the action Res Judicata?
- ii) Are the words beside picture #944 defamatory?
- iii) Has the Defendant provided evidence of justification, fair comment, qualified privilege, truth or that it is in the public interest?
- iv) Is the action statute barred?

REASONS:

11. This action is not res judicata. The Superior Court Action was commenced to obtain an injunction and never went to trial on the substantive issues but was discontinued. Hence the issues raised in this action were never litigated.
12. I have no doubt that the statements written beside picture #944 are defamatory. They are statements of fact, not opinion and clearly identify the Plaintiff. Particularly damaging are the words " From his private collection of fake Morrisseaus". The words in their ordinary context leave the impression that the Plaintiff is knowingly perpetrating a fraud on the public by selling fake Morrisseau paintings. It was communicated to anyone who goes to the website.
13. The Defendant has not shown any valid defenses to the libel. The Defendant justifies his actions as a means to protect the public from the many fraudulent works circulating. While there may be forgeries of Morrisseau paintings in the market, he presented no evidence of any experts to substantiate his assertion. The fact that he had worked with Norval Morrisseau does not automatically make him an expert and his testimony clearly showed he is not. Furthermore, it does not justify falsely accusing the Plaintiff of selling fake Morrisseaus in a public forum when he had no evidence that the Plaintiff owned it or that it was a fake. Nor can his actions with regard to the Plaintiff be considered privileged, fair comment or innocent. His comments were made recklessly with total disregard for the truth or their consequences. The Defendant placed no apology or retraction on his website nor did he apologize during the trial.
14. When I reviewed the case to write this judgment, it soon became clear that defamation had been established and no viable defenses had been proven. I left the limitation issue, which was raised in the defence, to the end on discovering that the key issue revolved around the determination of whether such a website fits under the definition of newspaper or broadcast as defined in s.1 of the Libel and Slander Act and therefore subject to the notice provisions of s.5 (1) and the limitation period in s.6. No evidence of notice was given and the Plaintiff testified that he discovered the website on November 11, 2008. The claim was issued on October 25, 2010. Therefore if the website is determined to be a broadcast or a newspaper, the claim fails for failure to give notice and failing to issue the claim in time. If it does not fit within the definition, then s.4 of the Limitation Act applies and the claim is in time.
15. Three Ontario Court of Appeal decisions touch this issue; none of them resolve the issue. They are: Weiss v. Sawyer 2002 CanLII 45064 (ON CA); Bahlieda v.

Santa 2003 CanLII 2883 (ON CA) and Shtauf v. Toronto Life Publishing Company 2013 ONCA 405 (CanLII).

16. In Weiss, the Plaintiffs sued a magazine for defamation for publishing a defamatory letter written by the Defendant Sawyer in their print magazine and on their website. The letter was e-mailed to the magazine and faxed to two other publications that did not publish the letters. The Plaintiff had given notice under s.5 (1) to the magazine but not to Sawyer. The Defendant brought a motion for summary judgment dismissing the claim against him for failing to give notice to him as required by s.5 (1) and the decision in Watson v. Southam 2000 CanLII 5758 (ON CA). The judge granted the motion and dismissed the claim. On appeal the court reversed the decision stating that the faxes were separate publications and since the newspapers did not publish them, s.5 (1) does not apply. The same reasoning was applied to the e-mail letter sent to the magazine. The court agreed with the motion judge that a newspaper published on the Internet is a newspaper within the definition of s.1 (1) and is entitled to notice and the limitation in the Act.
17. In Bahlleda, the Plaintiff pleaded that the Defendant had placed defamatory remarks on his website. The Defendant moved for partial summary judgment dismissing the claim for failing to comply with s.5 (1) and 6 of the Libel and Slander Act based on the argument that the placing of the material on the internet constitutes a broadcast as defined in s. 1(1) of the Act. The judge heard evidence of two experts who gave conflicting evidence on the issue of whether it is a broadcast. The judge ruled based on the expert evidence heard that it is a broadcast and allowed the motion. The appeal was allowed and returned for trial on the grounds that there were several triable issues regarding whether dissemination via the internet is a broadcast nor was it established whether the broadcast, if it is one, originated in Ontario as required by s.7 of the Act in order for ss. 5(1) & 6 to apply.
18. In Shtauf, the Plaintiffs sued Toronto Life for defamation and negligence regarding an article written about them. The article was published in the print magazine and at a later time was posted on the magazine's website. The Plaintiffs did not sue the magazine based on the printed article but did sue on the later Internet article. The magazine moved for summary judgment to dismiss the claim as barred by the limitation period in the Act and the Plaintiffs cross-motivated to amend their claim to allow them to sue on the printed article under the recapture clause in s.6 which allows the commencement of an action within one year of any other defamatory material from the same newspaper. The judge allowed the amendment and then dismissed the claim in the print version. He dismissed the Defendant's motion on the basis that the website does not fall within the definition of newspaper or broadcast. On appeal, the court answered several questions posed under three categories: 1.) The Internet version; 2.) The print version and 3.) The Negligence claim.
19. In this case, I need only concern myself with #1. With respect to the question if the Internet version is subject to the provisions of the Libel and Slander Act, the answer was that it is a genuine issue for trial.
20. Having reviewed the available cases and found they offer no solution to the issue at hand since this is not a newspaper article nor an e-mail, the only assistance gleaned from the decisions is that at trial, expert evidence is required to determine if an internet website is a broadcast as defined in the Act.

No such evidence was produced. Without it I cannot determine that a website on the Internet is a "broadcast" and that s.5 (1), s.6 or s.7 of the Act apply. By default, s.4 of the Limitation Act applies pursuant to which no notice is required and the limit to bring an action is two years. The action is therefore not statute barred.

DAMAGES:

21. While I am cognizant of the major decline in commerce during the 2009, 2010 years, I am satisfied that the drastic drop in the Plaintiff's business was in large part due to the Defendant's website. It is very probable that people searching for Morrisseau paintings on the Internet would run across the Defendant's website and as a result be very hesitant to buy from the Plaintiff or his company. I award the Plaintiff \$25,000 in general damages for defamation and slander of title. Because of his reckless false allegations disseminated on a world wide media and his failure to mitigate the damages by retracting the defamatory statements or offering an apology, I would have awarded \$10,000 in punitive damages were it within the jurisdiction of this court.

JUDGMENT:

Judgment for the Plaintiff of \$25,000 and costs of \$3,750 all-inclusive.

Dated at Toronto this 5th day of August 2015.


C.W. Kilian, Deputy Judge

Mailed/faxed out to the litigants this 10th day of August 2015.