

CITATION: Luc Crawford Design Inc., et al v. Mullooney et al., 2021 ONSC 7849
COURT FILE NO.: CV-20-00084511
DATE: 20211129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Luc Crawford Design Inc. and Cyrus Construction & Renovations Inc., Plaintiffs
(Responding Parties)

AND:

John Leonard Lee Mullooney and Tonya Bender, Defendants (Moving Parties)

BEFORE: Muszynski J.

COUNSEL: Anthony J. Imbesi, for the Plaintiffs

Katie Gauthier, for the Defendants

HEARD: October 21, 2021

REASONS FOR DECISION (ANTI-SLAPP MOTION)

[1] This case involves allegedly defamatory online reviews of the plaintiff businesses posted by the defendants arising from a residential construction project gone wrong.

[2] The defendants bring this motion to dismiss the defamation claim against them pursuant to the anti-SLAPP provisions of s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the “CJA”).

ISSUE

[3] To determine whether the plaintiffs’ defamation claim against the defendants should be dismissed at this preliminary motion, the following inquiries must be made:

- a. Have the defendants demonstrated that the proceeding arises from an expression relating to a matter of public interest?
- b. If so, have the plaintiffs demonstrated that there are:
 - i. Grounds to believe that,
 - The proceeding has substantial merit, and
 - The moving party has no valid defence in the proceeding; and

- ii. The harm likely to be or having been suffered by the plaintiffs as a result of the defendants' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

RESULT

- [4] For the reasons that follow, the defamation claim shall be allowed to continue. The defendants' anti-SLAPP motion is dismissed.

POSITION OF THE PARTIES

- [5] The defendants take the position that their online reviews of the plaintiffs' businesses relate to a matter of public interest. The defendants acknowledge that the plaintiffs will likely establish that the claim has substantial merit but submit that they have valid defences in truth/justification and fair comment, and that the publications in issue were made in good faith and without malice. Finally, the defendants state that there are no grounds to believe the harm alleged by the plaintiffs is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.
- [6] The plaintiffs take the position that the defendants' online reviews do not relate to a matter of public interest, but rather a private commercial dispute. The plaintiffs submit that statements of facts asserted in the defendants' reviews are patently false and there is evidence of malice, both factors which can defeat the identified defences. Further, at the balancing stage, the plaintiffs submit that the harm sustained as a result of the defendants' expressions and the public interest in allowing the proceeding to continue outweighs any negative effects on expression and public participation in these circumstances.

BACKGROUND FACTS

- [7] The defendants, John Leonard Lee Mallowney and Tonya Bender, are married to one another and reside at 4 Briarcliffe Drive in Ottawa (the "Property").
- [8] In October 2019, Mr. Mallowney and Ms. Bender contracted with the plaintiff, Luc Crawford Design Inc. ("Crawford"), to renovate the exterior of the Property. The design contract was signed on October 23, 2019. The total cost for the project was quoted at \$122,887.50 inclusive of taxes. The work was expected to take 4-6 weeks in total. There is no dispute that the defendants paid a deposit of \$61,443.76 to Crawford as was required under the terms of the contract.
- [9] Crawford subcontracted the construction work to the defendant Cyrus Construction & Renovations Inc. ("Cyrus").
- [10] The original completion date was December 17, 2019. By that date, the project was far from complete and the work that had been done, according to the defendants, included deficiencies. The most significant alleged deficiency relates to the installation of the "John Hardie" siding. The defendants allege that first Cyrus, then Crawford, ultimately

abandoned the project in or about June of 2020 and failed to provide a refund of the initial deposit.

[11] There is no dispute that on June 16, 2020 Mr. Mallowney posted a series of reviews about the plaintiffs on YouTube and on review sites including Homestars.com, TrustedPros.com and Google Reviews.

[12] The reviews at issue in relation to Crawford include:

- a. Homestars.com: “My wife and I made a \$60,000.00 deposit toward this abandoned contract, but received no refund and no support from Luc Crawford Design inc. The work which was attempted must be removed and new materials reinstalled. Our award winning home has been in shambles for over 6+ months. We suffered significant losses as a result of negligence by Luc Crawford Design Inc. Avoid this company at all costs.”
- b. Trusted pros.com: “Started off well, but things ended terribly. Homeowners are now forced to sue to recover the \$60,000.00+ deposit they made in relation to exterior work on this modern heritage home. Contractor: Luc Crawford Design; subcontracted to: Cyrus Renovations Inc. What a disaster: <https://youtu.be/rV5inwiiuDo>. Homeowners received no refund and no support from Luc Crawford (aka Luc Desjardin) owner of Luc Crawford Design Inc. or the owner of Cyrus Renovations Inc., Mr. Morrice Ramani. The work which was attempted must be removed and new materials reinstalled. The homeowners have suffered significant losses as a result of negligence by Luc Crawford Design Inc. & Cyrus Renovations Inc. <https://youtu.be/rV5inwiiuDo>.”
- c. Google Reviews: “Started off well, but things ended terribly. Homeowners are now forced to sue to recover the \$60,000.00 + deposit they made in relation to exterior work on this award winning modernist heritage home. What a disaster. Be sure to read the...”

[13] The reviews at issue in relation to Cyrus include:

- a. Trustedpros.com: “Cyrus took on more than they could handle with this exterior project. Homeowners are now forced to sue to recover the \$60,000.00+ deposit they made in relation to exterior work on this modern heritage home. Contractor: Luc Crawford Design; subcontracted work to Cyrus Renovations Inc. What a disaster: <https://youtu.be/rV5inwiiuDo>. Homeowners received no refund and no support from Luc Crawford (aka Luc Desjardin) owner of Luc Crawford Design Inc. or the owner of Cyrus Renovations Inc., Mr. Morrice Ramani. The work which was attempted must be removed and new materials reinstalled. The homeowners have suffered significant losses as a result of negligence by Luc Crawford Design Inc. & Cyrus Renovations Inc. <https://youtu.be/rV5inwiiuDo>.”
- b. Google Reviews: “Cyrus took on more than they could handle with this exterior project and abandoned the contract. Homeowners are now forced to sue to recover

the \$60,000.00+ deposit they made in relation to exterior work on this award winning modernist...”

- [14] The YouTube video referenced in the reviews is titled “Ottawa Contractor Nightmare: Luc Crawford Design Inc. & Cyrus Renovations Inc.” The video is 1 minute and 28 seconds in duration. There is no audio. The video purports to show deficient workmanship and includes captions such as: “improper anchoring”; “insect screen installed improperly”; and “house left in shambles”.
- [15] Mr. Mallowney’s evidence on this motion is that the plaintiffs’ failure to refund the deposit, their lack of communication, and the state of the Property caused him concern about the way the plaintiffs would treat other customers. Mr. Mallowney claims that he felt that it was necessary to voice his concerns and detail his experiences with the plaintiffs publicly by making the YouTube video and posting the reviews.
- [16] Crawford and Cyrus deny that they abandoned the project. Instead, they claim that the defendants terminated the contract. While the plaintiffs acknowledge that the project was delayed, they attribute the delay to the defendants’ inability to make timely decisions and to secure products that they elected to purchase themselves. Crawford and Cyrus further deny that there are deficiencies in the work completed at the Property but do acknowledge that it was incomplete due to the early termination of the relationship by the defendants. With respect to the deposit, the plaintiffs’ position is that it was not returned as it was used for goods and services that were expended on the defendants’ construction project.
- [17] On September 18, 2020, the within statement of claim was issued under the simplified procedure. The statement of claim seeks damages for defamation, as well as, with respect to Crawford, damages for loss of profits arising from the defendants’ breach of contract.
- [18] The defendants have not yet defended the action, but rather brought this motion to dismiss the defamation aspects of the claim. The defendants concede that the breach of contract claim by Crawford survives the outcome of this motion regardless. The defendants also acknowledge that they will be asserting a counterclaim for a return of their deposit when they ultimately file a statement of defence.

ANALYSIS

- [19] This motion has been brought pursuant to s. 137.1 of the CJA which provides a regime for early dismissal of strategic lawsuits against public participation (“SLAPPs”). In *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 55 C.P.C. (8th) 1, at para. 2, SLAPPs are described as:

...lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPS are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others.

[20] The purpose of this regime is to encourage public participation in debates and expression on matters of public interest, and to discourage lawsuits focused on limiting such expressions and participation: CJA at s. 137.1(1)(a)-(d).

[21] Subsections 137.1(3) and (4) set out the procedure for anti-SLAPP motions:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Does the proceeding arise from an expression relating to a matter of public interest?

[22] On a motion brought under s. 137.1 of the CJA, the moving party must first demonstrate that an impugned statement is an expression relating to a matter of public interest.

[23] The parties concede that the online reviews posted by Mr. Mullowney are expressions as contemplated by s. 137.1 but disagree as to whether the expressions relate to a matter of public interest.

[24] In *Pointes*, it was confirmed that “the question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one”: at para. 28.

[25] There have been several recent decisions that squarely address whether online reviews of businesses can constitute “any matter of public interest” in the context of s. 137.1 of the CJA: *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, at paras. 31-32; *Niu v. Cao*, 2020 ONSC 5407; *910938 Ontario Inc. v. Moore*, 2020 ONSC 4553, at paras. 19-21; *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, at para. 89.

- [26] Online reviews serve an important function by offering the public information about consumer experiences dealing with professionals or businesses. As noted by De Sa J. in *Bradford Travel*, at para. 31:

Comments or conversations relating to corporations or businesses will more obviously have a public dimension to them. Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services.

- [27] The expressions posted in this case were on review websites where the public can access information about businesses they are considering engaging. In this case, the expressions provide the public information about the defendants' experience working with the plaintiffs' businesses. This is commonplace on review websites.

- [28] Mr. MULLOWNEY's motivation for posting the online reviews will certainly be addressed in more details later in these reasons; however, it is not a relevant consideration at the threshold public interest stage of the inquiry.

- [29] **I find that the impugned expressions relate to a matter of public interest.**

Are there grounds to believe that the proceeding has substantial merit?

- [30] A helpful review of the "grounds to believe" standard is contained in the recent decision of W.D. Black J. in *Sikhs for Justice v. The Macdonald-Laurier Institute*, 2021 ONSC 7063, at paras. 14-18. In that decision, W.D. Black J. confirmed that in "determining whether there are 'grounds to believe', I need not be persuaded on a balance of probabilities. I must, however, possess more than a mere suspicion": at para 16.

- [31] With respect to the substantial merit leg of the inquiry, in *Pointes*, it is noted that the plaintiff must "satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have real prospect of success": at para 54.

- [32] At the hearing of this motion, counsel for the defendants essentially conceded that the plaintiffs would be able to meet this hurdle. I agree.

- [33] To ultimately succeed in a defamation claim, a plaintiff must demonstrate that the impugned expressions refer to the plaintiff, were communicated to at least one person other than the plaintiff, and would tend to lower the plaintiff's reputation in the eyes of a reasonable person: *CUPW v. B'nai Brith Canada et. al*, 2020 ONSC 323 [*CUPW*], at para. 18, aff'd 2021 ONCA 529.

- [34] In this case, there is no question that the impugned expressions relate to the plaintiffs and were communicated to at least one other person. **While there are divergent opinions as to whether the reviews would tend to lower the plaintiffs' reputation, the "grounds to believe" standard only requires that I have more than a mere suspicion that this could be the case.**

On this basis, I accept that the negative online reviews have the potential to lower the plaintiffs' reputation.

- [35] Accordingly, I find that there are grounds to believe that the proceeding has substantial merit.

Are there grounds to believe that the moving party has no valid defence in the proceeding?

- [36] At the oral hearing, defendants identified two key defences they claim are applicable in this case: justification and fair comment. The burden now shifts to the plaintiffs to "show that there are grounds to believe that the defences have no real prospect of success": *Pointes*, at para. 60.
- [37] In the context of s. 137.1(4)(a), the "grounds to believe" standard involves only a preliminary assessment on the likelihood of an outcome, but not "a conclusive determination of the existence of a defence": *Pointes*, at para. 37. Further, the early stage of litigation and the limited record must be considered when determining whether a defence is "valid".

Justification

- [38] At this stage, the plaintiffs must demonstrate there are grounds to believe that the defence of justification is not valid. Again, to reach this conclusion, I must only have more than a mere suspicion that the defence is not valid.
- [39] The defence of justification is premised on the notion that a defamation claim cannot succeed if the impugned statements are true. The truth of a statement is determined based on an objective standard. An honest belief in the truth of the statement is not sufficient to establish the defence of justification: *Daboll v. DeMarco*, 2011 ONSC 1, 81 C.C.L.T. (3d) 145, at para. 26.
- [40] In this case it is conceded that the online reviews contain some truthful information, such as the fact that the plaintiffs were hired to complete an exterior renovation project at the Property and that the defendants paid a deposit of over \$60,000. However, the reviews go on to make more contentious statements that are not admitted, including:
- a. The plaintiffs abandoned the contract;
 - b. The work that was completed by the plaintiffs must now be removed and new materials installed; and
 - c. The Property has been in "shambles" for over 6 months.
- [41] There were four affidavits filed on this motion, one from each party. Not surprisingly, the evidence put forward by the two plaintiffs conflicts with the evidence of the two defendants.

- [42] In support of their position that the defence of justification is not valid, the plaintiffs have filed evidence on this motion to dispute the contentious statements. Representatives of both plaintiffs depose that the siding was not installed incorrectly but also underline that the defendants terminated the contract before the work could be completed. On that note, the plaintiffs vehemently deny that they abandoned the contract and filed correspondence from Mr. Mallowney dated June 3, 2020 into evidence. In this correspondence, Mr. Mallowney appears to be the one to terminate the relationship. Further, the affidavit evidence filed by the plaintiffs includes communication between the parties that demonstrates that at least some of the delays were attributable to the defendants or suppliers engaged directly by the defendants.
- [43] In support of their defence of justification, the defendants filed affidavit evidence that attached text message communication, supposedly demonstrating that the contract was abandoned by the plaintiffs. I am unable to conclude, based on the text message communication filed, that the plaintiffs abandoned the contract with the defendants. In fact, the evidence on this motion suggests the contrary.
- [44] I am not the ultimate trier of fact, but at this stage, I am persuaded that there are grounds to believe that the defence of justification will fail at trial.

Fair Comment

- [45] Negative or unflattering public commentary is not actionable if it reflects an honestly held belief, is based on fact, is in respect of matters of public interest, and is not made with malice: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 [WIC], at para. 28.
- [46] The defendants submit that the following expressions are protected by the defence of fair comment:
- a. The statement that the defendants did not receive any support from the plaintiffs;
 - b. The recommendation that others should avoid the plaintiff businesses at all costs;
 - c. The description of the state of the Property as a ‘disaster’ and/or a ‘horror’; and
 - d. The conclusion that the defendants had suffered significant losses because of the negligence of the plaintiffs, leaving them with only one option – i.e. to sue to recover the amounts paid in deposit.
- [47] The plaintiffs take the position that the impugned expressions either include statements of fact, as opposed to comments, or, are comments that lack sufficient factual foundation. Further, the plaintiffs submit that there is evidence of malice that defeats the defence of fair comment.
- [48] In my view, the analysis of the defence of fair comment begins and ends with the consideration of malice.

- [49] A defence of fair comment can be defeated by a finding of malice, which includes an improper, indirect, or ulterior motive behind the expressions: *WIC* at para 63 and *CUPW* at para 31.
- [50] Mr. Mallowney swore an affidavit in support of this motion wherein he claims that he posted the reviews because he became “very concerned about the way in which the Plaintiffs treat current and future customers. I therefore felt it was necessary to voice my concerns and detail my experiences with the Plaintiffs’ publicly.”
- [51] There is evidence on this motion, however, that provides insight on another motivation Mr. Mallowney had for making the reviews. On July 31, 2020, which is after the impugned reviews were posted, Mr. Mallowney sent an email to counsel for the plaintiffs which states, in part:

We reserve the right to publish your letter as part of our next series of reviews/videos and add it to any of the past reviews/videos we may choose to amend. I note that unlike the reviews we have posted to date, the review sites we will be posting to in the coming weeks do not permit amendment or removal once the reviews are posted. As such, if these reviews are causing your clients grief, I would respectfully suggest that your clients turn their efforts towards settlement.

On the subject of settlement: please note that if a full refund is received within one week’s time we are amenable to removing the reviews we have posted and will refrain from posting any further reviews.

- [52] It is difficult to reconcile Mr. Mallowney’s purported concern for the public with his offer to remove the reviews upon a return of his deposit. Further, I find the threat of posting additional reviews and the comment about “causing your clients grief” concerning. This evidence is suggestive of an ulterior or indirect motivation.
- [53] **At this threshold motion, although I am not making a finding of malice on the part of Mr. Mallowney, I find that there is evidence of malice on the part of Mr. Mallowney that could defeat the defence of fair comment. Accordingly, I have grounds to believe that the defence of fair comment will ultimately fail.**

Is the alleged harm suffered by the plaintiffs as a result of the defendants’ expression sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression?

- [54] *Pointes* confirms that the crux of the analysis occurs at this stage of the inquiry, which “serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue”: at para. 62.
- [55] To determine whether the alleged harm is “sufficiently serious”, a plaintiff must put forward something more than bald allegations of harm, but a fully developed damages brief

is not required: *Pointes*, at para. 71. The harm may be quantifiable or reputational. Beyond the existence of harm, the plaintiff must also establish, on a balance of probabilities, that the alleged harm was suffered as a result of the moving party's expression: *Pointes*, at para. 68.

- [56] In this case, the plaintiffs' evidence of harm includes the following:
- a. Both companies rely on review sites to attract clients and market their businesses;
 - b. The defendants' reviews have reduced the image of the companies;
 - c. A Google search of "Luc Crawford Design Inc." reveals the defendants' reviews on the first page of search results;
 - d. The one-star ratings have dropped the overall rating of the businesses;
 - e. Based on Crawford's corporate financial statements, there was a 40.7% drop in revenue between the years 2019 and 2020, which is directly attributable to the defendants' publications;
 - f. Cyrus was retained to perform 20 residential construction projects in 2019 versus 9 construction projects in 2020, which resulted in an approximate 66% decrease in sales;
 - g. The decrease in revenue should not be attributable to COVID-19 as the construction industry as a whole has performed well during the pandemic
 - h. Prospective clients of Cyrus expressed concerns about the negative online reviews, and it is impossible to know how many other possible clients simply never contacted Cyrus after seeing the negative reviews.
- [57] Whether the plaintiffs will ultimately succeed in proving their claim for damages is not for me to decide. The defendants have suggested, for example, that other negative reviews about the plaintiffs, not authored by them, could be the cause of the decline in revenues. At this stage, I am satisfied that the plaintiffs have put forward sufficient evidence to support the existence of harm and the relevant causal link to the impugned expressions.
- [58] The particular harm alleged in this case must now be weighed against the public interest in protecting the expression. At this stage of the inquiry, motivation for making the expression is a relevant consideration: *Pointes*, at para. 74.
- [59] As I have already stated, online reviews of businesses serve an important public function. Negative reviews are a reality and, when made honestly and fairly, will not result in a successful lawsuit simply because the reviewee does not agree with the contents.
- [60] But not all reviews are created equal. In this case, I have concerns about the truthfulness of the expressions made by the defendants as well as the motivation for making the reviews

in the first place, which appears to be primarily an attempt to bully the plaintiffs into returning the deposit. In my view, there is not a significant public interest in protecting *this* kind of expression.

- [61] I further consider the plaintiffs' motivation in bringing this litigation. **This litigation does not bear the hallmarks of a typical SLAPP suit.** For example, there is no evidence that the plaintiffs have previously used litigation to silence critics or that there is a power imbalance between the parties.
- [62] I find that the plaintiffs have shown on a balance of probabilities that they likely have suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation.

CONCLUSION

- [63] **The defamation claim against the defendants shall be allowed to continue.** The defendants' anti-SLAPP motion is dismissed.

COSTS

- [64] Costs of this motion are reserved. If the parties cannot come to an agreement on costs of the motion on or before December 17, 2021, counsel shall file cost outlines in accordance with the following schedule: the plaintiffs shall serve and file their cost outline on or before January 7, 2022; the defendants shall serve and file their cost outline on or before January 21, 2022; after which time I will determine the issue of costs based on the material filed.
- [65] Counsel shall file their respective cost outlines by sending them by email to the Superior Court of Justice civil motion coordinator in Ottawa assigned to this matter.



Muszynski J.

Date: November 29, 2021