IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
DAMAGES AND COMPENSATION
DEFAMATION DIVISION

Case No. CI-09-04054

SHERRY HOLBROOK — First-named Plaintiff

and

ORPHANCARE INTERNATIONAL INC — Second-named Plaintiff

v

JODIE ANN McPHEE — Second Defendant

JUDGE:	HIS HONOUR JUDGE SACCARDO
WHERE HELD:	Melbourne
DATE OF HEARING:	30 March 2011
DATE OF RULING:	12 April 2011
CASE MAY BE CITED AS:	Holbrook and Orphancare International Inc v McPhee
MEDIUM NEUTRAL CITATION:	[2011] VCC 501

RULING

Catchwords: PRACTICE AND PROCEDURE – Default judgment – Application to set aside judgment regularly entered – Defamation proceeding.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr J Catlin	George Konidaris & Co
For the Defendant	Mr P Hayes	Clayton Utz

HIS HONOUR:

1 In this application, the defendant seeks an order under *Rule 21.07* of the *County Court Civil Procedure Rules* 2008 that the interlocutory judgment entered against her on 12 August 2010 be set aside.

2 In the proceeding, the plaintiffs allege that the defendant has authored and published defamatory statements about them and claim damages against her.

3 There is no issue that the judgment was validly entered against the defendant by reason of her failure to file an appearance in the proceeding.

4 The chronology relevant to this application may be summarised as follows:

(i) The Writ and Statement of Claim in this proceeding were filed by the plaintiffs on 28 August 2009 and served upon the defendant on 10 November 2009;

(ii) The service of the Writ had been preceded by a Letter of Demand served by the plaintiffs upon the defendant on 12 December 2008 and correspondence passing between the solicitors acting for the plaintiffs and those acting for the defendant, which included the provision by the plaintiffs to the defendant of a draft Statement of Claim on 13 August 2009;

(iii) Between the Letter of Demand of 12 December 2008 and the service of the Writ, negotiations were conducted between the parties in an attempt to resolve the matter; however, those negotiations broke down and the Writ was filed and served

(iv) On 7 December 2009, the solicitors for the plaintiffs advised the defendant's solicitors that a default judgment would be entered unless an appearance was filed within seven days;

(v) On 10 December 2009, the defendant's solicitors delivered an unsigned and unsealed Appearance in the proceeding by letter to the plaintiffs' solicitors, advising that they proposed to file the Appearance;

(vi) On 22 December 2009, the defendant's solicitors advised that they no longer acted for the defendant;

(vii) On 17 February 2010, the plaintiffs' solicitors personally served a letter upon the defendant, warning her that unless an appearance was filed within seven days, a default judgment would be entered against her;

(viii) Interlocutory judgment was entered in the proceeding on 12 August 2010;

(ix) On 22 October 2010, the defendant served the Summons in the present application.[1]

5 There is no issue between the parties that in exercising my discretion as to whether the default judgment should be set aside, I should take into account:

(a) whether the defendant has disclosed that she has a defence on the merits;

(b) the reason for the default of the defendant in failing to ensure that an appearance was filed in the proceeding;

(c) the promptness with which this application was brought after the judgment came to the knowledge of the defendant;

(d) whether, if the judgment was set aside, the plaintiffs would be prejudiced in a way which could not adequately be compensated for by a suitable award for costs:[2]

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1 See the affidavit of George Konidaris dated 9 November 2010

2 *Rosing v Ben Shemesh* [1960] VR 173.

The Timing of the Application

6 The application was brought within five weeks or so of the entering of interlocutory judgment. Having regard to the fact that at the time at which the judgment was entered the defendant was not represented by a solicitor, and that her present solicitors agreed to act on the defendant's behalf as a result of a referral made by the Public Interest Law Clearing House, I consider the application made by the defendant to be a timely one.

The Reason for the Default in Entering an Appearance

7 In her affidavit dated 23 September 2010, the defendant deposes:

(i) that upon the service of the Writ, her then solicitors ceased acting for her;

(ii) that she had no previous experience with litigation and did not know how to respond to the Writ;

(iii) that she was, at that time, unaware of the possibility of obtaining pro bono legal advice to defend the claims made against her;

(iv) that proceedings were commenced against her by her previous solicitors for the recovery of their legal costs, which costs were eventually met by her in May 2010;

(v) that it was not until the judgment had been entered against her in this proceeding that she became aware that she may be entitled to pro bono legal assistance; and that having gained that awareness she shortly thereafter made contact with the Public Interest Law Clearing House and was referred to her present solicitors.

8 Notwithstanding the fact that the defendant was unrepresented at the time judgment was entered against her, I consider that the plaintiffs' solicitors acted very reasonably in delaying the entry of judgment until some six months after notifying the defendant of their intention to enter judgment if an appearance

was not filed. Whilst I take into account that during this period the defendant was:

- involved in litigation with her previous solicitors
- unaware that she could seek representation on a pro bono basis

I am nevertheless of the opinion that the defendant's delay in filing an appearance in this matter was excessive.

Prejudice

9 Having considered the affidavits of the first-named plaintiff, I am not satisfied that the plaintiffs have established that, should the judgment be set aside, they would be prejudiced in any way which could not adequately be compensated for by a suitable award of costs.

Has the Defendant made out that she has an Arguable Defence on the Merits?

10 In her draft Defence in the proceeding, the defendant raises defences:

(i) Asserting that the words of which the plaintiffs complain are incapable of conveying a defamatory meaning; alternatively, that they involve fair comment and honest opinion;

(ii) Under the *Communications Decency Act*, 47USC (USA);

and seeks a trial by jury.

11 It is submitted on behalf of the plaintiffs, that the proposed defences raised by the defendant are totally without merit, having regard to the content of the material published by her.

12 In the present case, it is not in issue that the defendant managed, controlled, edited, administered, moderated and owned a website known as

www.idletard.com ("Idletard").[3] Whilst publication of the material the subject of complaint by the plaintiffs in this proceeding is not admitted by the defendant in her proposed defence, no issue as to the publication of the material is taken by the defendant in the two affidavits filed by her in support of this application.

13 In her first affidavit, the defendant deposes to having become suspicious of the first-named plaintiff's bona fides in soliciting money via the internet:

- for the purpose of providing a gift to Jason Castro, an amateur entertainer; for the purpose of assisting him to "*get started with his desired career as a popular music recording artist and* performer".[4]

- on behalf of the second-named plaintiff in support of its charitable works.

The defendant deposed to the fact that these suspicions were aroused by reason of her receipt "*as the administrator of www.idletard.com*"[5] in which capacity she "*received various messages from people who said that they had unsatisfactory dealings with the first-named plaintiff in relation to money they had donated at her request*".[6]

14 In her second affidavit dated 24 December 2010, the defendant exhibits a copy of two "posts" which she described as examples of complaints made to Ideltard as to unsatisfactory dealings with the first-named plaintiff in relation to the gift card donations the first-named plaintiff accepted over the internet for the purpose of funding the gift to Mr Castro.

15 As to the *Communications Decency Act* defence the defendant relies upon the affidavit of an American lawyer[7] who opines that the proceeding is governed by the Law of California by which the defendant is entitled to potential

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3 See paragraph 4 of the Statement of Claim and the admission as to the allegation made therein in paragraph 4 of the defendant's proposed Defence

4 paragraph 27 of the defendant's affidavit dated 23 September 2010

5 paragraph 28 of the defendant's affidavit dated 23 September 2010

6 paragraph 30 of the defendant's affidavit dated 23 September 2010

7 See the affidavit of Rena Chng dated 8 November 2010

defences of the type raised by her in her Defence.

16 In response to the Chng affidavit, the plaintiffs have filed an affidavit from an American lawyer who asserts that the question as to whether Californian or Australian law applies to the proceeding is a moot point and that "*there is no way to predict with certainty whether a Californian court would apply Californian law in this case. Under the facts presented here, a Californian court could well choose to apply Australian law*".[8]

17 Other than for the material to which I have referred above, no other factual material has been provided by the defendant to establish the existence of a defence to this proceeding on the merits.

18 I am of the opinion the material published by the defendant, including as it does:

(i) With respect to the first plaintiff:

- a depiction of a t-shirt bearing the words "*Sherry Holbrook is a Cunt*"
- statements that the first plaintiff "*took money for a gift that never happened*"
- repeated references to the first plaintiff as being a "*tard*";[9]

(ii) With respect to the second plaintiff,[10] the statement: "*I sure hope TZM are investigating the supposed charity she's running, I bet that's a scam too"*

is such that it is incapable of being considered otherwise than defamatory.

19 Having regard to the content of both the material published by the defendant

8 See the affidavit of Adrianos Facchetti dated 22 March 2011

9 This being slang for retarded

10 The second plaintiff is a public charity which conducts fund raising activities for orphanages in Africa

and the two affidavits which she has sworn in support of this application, I am of the opinion that the defendant has made out only the barest case to support a finding that her proposed Defences could be made out and that she has a defence on the merits.

20 The question which arises as to the law which is to be applied to the proceeding is one which in my opinion cannot be determined conclusively in the absence of evidence. This fact gives rise to a strong argument in favour of setting aside the judgment notwithstanding the plaintiff's position, which I accept, that even if the laws of California apply to the proceeding s.230 of the *Communications Decency Act* does not provide a defence to the provider of the information which gives rise to the complaint.[11]

21 It is clear that in an application to set aside a judgment in default in a defamation proceeding, the circumstances in which the Court could be satisfied in that a *prima facie* defence was not available to the defendant are rare.

22 In deciding whether I should grant the leave sought by the defendant, I am cognisant of the statement and reasoning of:

- Murray J. in *Roberts v David Syme & Co Ltd & John Fairfax & Sons Limited*;[12]
- Bongiorno J. in *French v Triple M Melbourne Pty Ltd & Ors*;[13]

in which their Honours:

(i) commented that an application to set aside a default judgment in a defamation trial fell into a unique category and that such an application

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11 Namely someone who is "responsible in whole or in part for the creation or development of information provided through the internet" See the definition of "information content provider" within s.230(f) of the *Act*

12 (unreported) VSC, 26 November 1975

13 [2006] VSC 36

would be rarely refused.

(ii) adopted the statement of Hunt J in *Altarama Ltd v Forsyth*,[14] namely:

> "… in defamation litigation, a plaintiff can rarely if ever hold a judgment by default where the issue of defamation itself remains for the jury to determine. This is because it is a rare case in which the matter complained of is of such a nature that a jury's finding that it is not defamatory could be set aside as perverse. … ."

23 In the circumstances of this case; notwithstanding the scandalous nature of the words which have been published by the defendant and my finding as to the delay on her part; given the issue which arises as to the law which is to be applied in determining the proceeding, and the finding which I have made as to the existence of an arguable defence; I am satisfied that I should set aside the default judgment which has been entered by the plaintiffs in this proceeding.

24 Having regard to the finding which I have made, I propose to make an order as to the costs of this application in favour of the plaintiffs. I will hear the parties further at a convenient time as to:

(i) The terms of the costs order to be made;

(ii) Further orders which should be made as to the management of the proceeding including the filing by the defendant of her Defence and Jury Notice;

(iii) The injunctive relief sought by the plaintiffs;

(iv) The defendant's security for costs application

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[14] [1981] 1 NSWLR 188