



No. S128358
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHN FURLONG

PLAINTIFF

AND:

LAURA ROBINSON, DANIEL MCLEOD, CHARLIE SMITH
and VANCOUVER FREE PRESS PUBLISHING CORP.

DEFENDANTS

APPLICATION RESPONSE

Application Response of: The Plaintiff, John Furlong

THIS IS A RESPONSE TO the Notice of Application of the Defendant, Laura Robinson, filed November 22, 2013.

Part 1 – ORDERS CONSENTED TO

The Application Respondent consents to the granting of NONE of the orders set out in Part 1 of the Notice of Application.

Part 2 – ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out ALL of the paragraphs of Part 1 of the Notice of Application.

Part 3 – ORDERS ON WHICH NO POSITION IS TAKEN

Nil.

Part 4 – FACTUAL BASIS

1. The underlying action is an action in defamation arising from the publication of an article written by the defendant Robinson and published on September 27, 2012 as well as further defamatory statements made by the defendant Robinson subsequent to the publication of the article.

2. In the article, the defendant Robinson states that the plaintiff physically abused, bullied and racially taunted students in his care during his time as a teacher. The article also states that the plaintiff was dishonest in recounting his personal history in his book *Patriot Hearts*, and made intentional omissions regarding his personal history for the specific purpose of avoiding discovery of his abuse of students.

Affidavit of John Furlong, made December 5, 2013 at Exh A

3. Following the publication of the article, the defendant Robinson made further defamatory statements about the plaintiff, referring to him as "violent" and "a racist" with a history of and/or predilection for "violence against women and children".

Furlong affidavit at Exh A

4. The plaintiff takes the position that the allegations made in the article are false and defamatory, and that the allegations were actuated by malice. Further, the plaintiff takes the position that the defendant Robinson did not undertake the necessary due diligence to verify the allegations prior to publication of the article. In fact, the defendant Robinson had been advised that there were inconsistencies in the story of Beverly Abraham, one of the individuals on whose recollection the article was based, but took no steps to investigate these inconsistencies prior to publication. Subsequent to the publication of the article, the RCMP determined that there was nothing to substantiate the complaint or allegation made by Beverly Abraham.

Furlong affidavit at Exh B

5. The plaintiff's income from his public speaking business has precipitously dropped as a result of the publication of the article in September 2013. Given the damage to his income as a result of the article, the plaintiff is not in a position to post security for the costs of this action. He requires all available funds to rebuild his business and vindicate his reputation from the damage caused by the

defendant Robinson. If an order for security is made, it is likely to stifle his opportunity to seek vindication of his reputation in open court.

Furlong affidavit at para 36

Part 5 – LEGAL BASIS

6. This Court has an inherent jurisdiction to order that a plaintiff post security for costs, but where the plaintiff is an individual, the Court's discretion should be exercised only in exceptional circumstances.
7. A recent detailed consideration in this Court of the nature of the Court's discretion can be found in *Han v Cho*, 2008 BCSC 1229. In a thorough review of the jurisprudence, Dillon J. made the following comments:

The longstanding basic rule that has applied with respect to an order for security for costs against an individual is that a natural person can sue without giving security for costs in any but excepted [sic] cases. ... More recently, this basic principle has been enunciated as the right of citizens to have access to the courts, a fundamental theme of recent debate surrounding changes to the Rules of Court (*Fraser v. Houston* 1997 CanLII 3227 (BC SC), (1997), 36 B.C.L.R. (3d) 118 at para. 11, [1997] B.C.J. No. 1537 (QL) (B.C.S.C.); Effective and Affordable Civil Justice, Report of the Civil Justice Reform Working Group to the Justice Review Task Force, B.C. Justice Review, November 2006).

Han v Cho, 2008 BCSC 1229, at para 14

8. Dillon J. references the earlier judgment in *Gill v Pacific Newspaper Group Inc.*, 2006 BCSC 650, the decision cited by the defendant on this application, as an illustration of the distinction between individual and corporate plaintiffs being "blurred", and cited a subsequent decision of this Court, *Bronson v Hewitt*, 2007 BCSC 1751, as correctly recognizing the distinction and concluding that "with respect to orders for security for costs against individuals, the order should only be made in egregious circumstances."

Han v Cho, 2008 BCSC 1229, at para 22-25
Fraser v Houston (1997), 36 BCLR (3d) 118 (SC)

9. The analysis of Justice Dillon was approved by Smith J.A. in these terms:

Security for costs in the trial court may be awarded pursuant to the court's inherent jurisdiction – there is no longer a rule of court dealing with the matter. It is a rule of long standing that security for costs should be awarded against individual litigants, as opposed to corporate litigants, only in exceptional cases. The rule flows from the principle that poverty is not a bar to access to the courts and from the right of citizens to have access to the courts. Thus, the burden is on the applicant to demonstrate that he or she will be unable to recover costs if security is not posted. These principles are set out by Dillon J. in her comprehensive survey of the law relating to security for costs in *Han v. Cho*, 2008 BCSC 1229 (CanLII), 2008 BCSC 1229, 62 C.P.C. (6th) 235 at paras. 12-27. She captures the essence of the proper approach in the following apt passage, in para. 27:

[27] The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

Meade v Armstrong (City), 2010 BCCA 87 (in Ch.) at para 26

10. It can hardly be said that Mr. Furlong has a weak claim – the defamation is clear. Mr. Furlong has not failed to pay costs before, or refused to follow any court orders.
11. Mr. Furlong does not assert that he is impecunious, only that as a result of the article, he is not in a position to post security for the costs of this action. He requires all available funds to rebuild his business and vindicate his reputation from the damage caused by the defendant Robinson.
12. The circumstance where a plaintiff's financial hardship is due to the very actions of the applicant seeking an order that the plaintiff post security for costs is another factor against an order for security for costs.

Integrated Contractors Ltd v Leduc Development Ltd, 2009
BCSC 965 at paras 14, 36-40

13. The provision in the *Libel and Slander Act* relied upon by the defendant adds additional hurdles before security for costs may be ordered in a libel action. The defendant must show that she has a good defence on the merits, that the statement complained of was published in good in good faith and that the grounds of the action are trivial or frivolous. Each of these propositions is strongly disputed by Mr. Furlong.

Libel and Slander Act, RSBC 1996, c 263, s. 19(d), (e) and (f).

14. The statements made by the defendant are unquestionably defamatory, alleging that Mr. Furlong abused children while a teacher at their school. Whether the defendant has a good defence will be determined at trial, but the onus will be on her to establish that the statements are true as she alleges and Mr. Furlong denies. She has that onus on this application and cannot discharge it by simple assertions.
15. Whether the statements were published in good faith is also strongly disputed by Mr. Furlong. His affidavit sets out several instances in which the defendant has made irresponsible and false allegations against male authority figures in sport. Mr. Furlong's position is that the defendant has a vendetta against him and there is ample evidence to support that position. The correctness of this position will be determined at trial but given that the defendant has the onus of proving that the statements were published in good faith on this application, it cannot be said that she has met that burden simply by asserting it to be the case. Her good faith will be a central issue at this trial.
16. Finally she cannot meet the burden of proving that the grounds of this action are trivial or frivolous. The article that has caused the loss to Mr. Furlong was highly publicized and caused him significant damage. On this ground also she cannot meet the burden required on an application of this kind.

- 17. The defendant has the burden of proving all three of these tests and cannot meet that burden with respect to any of them.
- 18. For any and all of these reasons, this application should be dismissed with costs.

Part 6 – MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of John Furlong, made on December 5, 2013.
- 2. The pleadings and proceedings filed herein; and
- 3. Such further and other material as counsel may advise and this Honourable Court may permit.

The respondent estimates that the application will take one and a half hours.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

The Application Respondent has not filed in this proceeding a document that contains an address for service.

Dated December 5, 2013



 Signature of
 Application Respondent
 Lawyer for Application Respondent

John J.L. Hunter, Q.C.
Hunter Litigation Chambers
Solicitors for the Plaintiff

This Application Response is prepared and delivered by Hunter Litigation Chambers (John J.L. Hunter, Q.C. / Claire E. Hunter), solicitors for the Plaintiff John Furlong: 2100 - 1040 West Georgia Street, Vancouver, British Columbia, V6E 4H1, Telephone: (604) 891-2400, Fax: (604) 647-4554.

To be completed by the court only:

Order made

<input type="checkbox"/> in the terms requested in paragraphs _____ of Part 1 of this notice of application
<input type="checkbox"/> with the following variations and additional terms:

Date: _____
_____ Signature of Judge/Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts