Court of King's Bench of Alberta

Citation: Issa v BMB Inc, 2024 ABKB 159

Date: 20240319
Docket: 2301 02040
Registry: Calgary

Between:

Jayden Issa

Plaintiff

- and -

BMB Inc. also known as Bombshell Party Strippers Inc., Elite Entertainment Events Inc., Ashley Selina, also known as Ashley Darling, Amanda Fuenzalida, Shawna Billie and Jane Does 1-10

Defendants

Reasons for Decision
of the
Honourable Justice M.A. Marion

Appeal from the Order by
The Honourable Applications Judge Prowse
Filed on the 18th day of July, 2023

I. Introduction

[1] This is an appeal of two orders of an applications judge, in this action involving a defamation claim brought by the Plaintiff, Jayden Issa (**Issa**), against a number of defendants, including the defendant Ashley Selina (also known as Ashley Darling)(**Selina**) and her company Elite Entertainment Inc (**Elite**). Elite is in the business of offering promotional models to discrete clientele for various events.

[2] After receiving a notice (**Notice**) from a "private blacklist" on February 6, 2023, which contained negative content (**Content**) about Issa, Selina/Elite refused to do business with Issa or to book him a promotional model. Issa asserts the Content is untrue and that Selina/Elite and others defamed him by creating, posting, publishing, repeating, circulating, and disseminating the

Content. He commenced this action on February 14, 2023 and filed an amended statement of claim on February 15, 2023.

[3] Selina/Elite are represented by the same counsel, who asked Issa not to note Selina/Elite in default without giving counsel prior written notice. On March 15, 2023, Elite filed a defence but Selina was not included in the defence due to an apparent counsel error. On April 6, 2023, Selina/Elite filed an application for summary dismissal (**Summary Dismissal Application**) on the ground that they did not create or publish the Content, they only received it from the private blacklist and passed it along to Issa.

[4] On May 5, 2023, Issa questioned Selina on her affidavit and, on May 29, 2023, Issa filed a cross-application (**Cross-Application**) for summary judgment against Selina/Elite or, in the alternative, an interim injunction preventing Selina/Elite from circulating the Content pending trial.

[5] On June 19, 2023, notwithstanding counsel's request that Issa provide written notice prior to taking steps to note Selina in default, Issa noted Selina in default.

[6] On June 28, 2023, Selina filed an application to set aside the noting in default (**Setting Aside Application**).

[7] On July 10, 2023, Applications Judge Prowse (**Judge**) granted two orders:

(a) an order setting aside the noting in default against Selina (**Setting Aside Order**); and

(b) an order granting summary dismissal (**Summary Dismissal Order**) of Issa's claim against Selina and Elite.

[8] Issa appeals both orders.

[9] For the reasons set out below, the appeal of the Setting Aside Order is dismissed and the appeal of the Summary Dismissal Order is allowed.

[10] With respect to the Setting Aside Order, Issa attempted to take advantage of counsel's slip in failing to include Selina in the statement of defence, Selina has an arguable defence, Issa knew Selina always intended to defend, and Selina moved quickly to set aside the noting in default.

[11] With respect to the Summary Dismissal Order, Selina/Elite have failed to meet the threshold burden to show there is "no merit" to *all* of Issa's claim against them and that there is no genuine issue requiring a trial. While Selina testified that she did not recall circulating the Notice (other than to Issa), there remains a genuine issue requiring a trial about whether she otherwise posted or communicated the Notice, or the Content, after receiving it. The court does not have confidence in the record at this stage of the proceedings to summarily determine that issue. Further, and in any event, granting partial summary dismissal in favour of these two defendants in the context of this entire action will give rise to a danger of duplicative or inconsistent findings and will not serve the objectives of proportionality, efficiency and cost effectiveness.

II. Background and Procedural History

[12] Selina is the sole director, owner and representative of Elite, which offers promotional models to discrete clientele. Elite uses an internet website and Instagram as a social media platform. Selina handles Elite's client intake requests, which come mostly from texts or the "WhatsApp" messaging platform. When she receives a request, she goes to her "subcontractors" to see who is available. In January and early February, 2023, Issa contacted Selina about potentially booking models, although the bookings were unable to be accommodated for various reasons. The discourse between Selina and Issa was friendly and non-problematic.

[13] On February 6, 2023, Selina deposed that she received the Notice, which she described as an unsolicited notice "through a private blacklist in the industry" that is used to warn other businesses like Elite about potential clients that have been "blacklisted" or cause trouble. Selina described it as "a black list group" that she was not a part of and did not have access to. The Notice included the Content that is the subject matter of this action. Based on the Content, Selina advised Issa that he could not book through Elite. Issa immediately responded by stating that the Content was false and defamatory.

[14] On February 7, 2023, Issa wrote to Elite and requested that "these postings be retracted" immediately and that Elite cease and desist from "posting, commenting and harassing" Issa with false allegations, statements and defamatory accusations.

[15] On February 8, 2023, Issa received a text from an anonymous person advising him he was "marked" in Vancouver, and that "all the clubs on Circuit have your legal, alias & headshots". There is no evidence tying these texts to Selina/Elite.

[16] On February 8, 2023, Issa reported the Content to the Vancouver police and, on February 10, 2023, he provided Vancouver police with a statement.

[17] On February 14, 2023, Issa commenced the action and filed the amended statement of claim on February 15, 2023.

[18] On February 23, 2023, Selina was contacted by a Vancouver police officer. She deposed: "I was told they would not be taking any further steps and advised **to continue to spread this information to other businesses in the industry for the safety of other girls"** (emphasis added).

[19] On February 25, 2023, Issa emailed Selina and others advising, among other things, that he was proceeding with legal proceedings.

[20] On March 5, 2023, Issa received texts from an anonymous person indicating that there were forthcoming criminal charges against him and that "the authorities are asking all woman [sic] to come forward". Again, there is no evidence tying these texts to Selina/Elite. There is no evidence any criminal charges were made against Issa.

[21] On March 6, 2023, defendants, other than Selina/Elite, filed their statement of defence in the action.

[22] On March 9, 2023, Robertson LLP, counsel for Selina/Elite, wrote to Issa and advised they were retained by Elite and Selina. They requested that Issa direct all future communications to that firm, and also said:

> We are in the process of reviewing this matter. Our clients intend to defend in the above referenced action. Please take no steps to note them in default without prior written notice to me.

[23] On March 15, 2023, Elite filed its statement of defence. As noted, Selina was omitted from the defence.

[24] On March 20, 2023, Issa filed a reply to Elite's statement of defence.

[25] On April 6, 2023, Elite and Selina filed the Summary Dismissal Application.

[26] On May 5, 2023, Issa questioned Selina on her affidavits sworn in support of the Summary Dismissal Application.

[27] On May 29, 2023, Issa filed the Cross-Application, returnable on June 20, 2023.

[28] On June 19, 2023, notwithstanding Robertson LLP's request to provide written notice prior to taking steps to note Selina in default, Issa noted Selina in default.

[29] On June 28, 2023, Selina filed the Setting Aside Application.

[30] On June 30, 2023, Issa filed a letter addressed to the Judge which included written submissions on the three applications and copies of affidavits.

[31] On July 10, 2023, the Judge heard the Summary Dismissal Application, the Cross-Application and the Setting Aside Application, and granted the orders that are now under appeal.

[32] On July 18, 2023, Issa filed a notice of appeal. It was originally returnable September 22, 2023.

[33] On October 23, 2023, Justice Nation ordered the filing of briefs and set the appeal down to be heard on December 12, 2023 in two civil chambers slots. Issa filed his brief on November 4, 2023 and Selina/Elite filed their brief on December 4, 2023.

[34] On December 12, 2023, I heard submissions from the parties. I reserved my decision and ordered Issa to file the transcript of his cross-examination of Selina, along with responses to undertakings and records produced as part thereof that form an integral part of the substantive factual answer to the question asked, as per ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 at para 41. I also required Issa to serve notice of the order, the appeal, and the appeal record on other named defendants in the action. Those parties were given until January 12, 2024 to provide a position or submissions on the appeal. I provided the parties the opportunity to provide a supplemental written brief by January 5, 2024 to address the responses to undertakings.

[35] Since the attendance on December 12, 2023, the Court has not received any position or submissions from other defendants or any supplemental briefs from the parties.

III. Record

[36] An appeal from an applications judge is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11. The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

[37] Rule 6.14(3) of the *Alberta Rules of Court*, Alta Reg 124/2010, provides that an appeal from an applications judge's judgment or order is "an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material."

[38] The evidentiary record on this appeal is:

(a) an April 5, 2023 Selina affidavit (filed April 6, 2023);

(b) a May 3, 2023 Selina affidavit (filed May 11, 2023);

(c) the transcript of Issa's questioning of Selina on her April 5 and May 3, 2023 affidavits, together with Selina's undertaking responses and documents referenced therein;

(d) a May 28, 2023 reply Issa affidavit (filed May 29, 2023);

(e) a May 28, 2023 Issa affidavit in support of his Cross-Application (filed May 29, 2023);

(f) a June 18, 2023 Issa affidavit of service and affidavit to note in default (filed June 19, 2023);

(g) a June 20, 2023 affidavit of Barb Menear, paralegal employed by Robertson LLP (filed June 28, 2023);

(h) a June 29, 2023 supplemental Issa affidavit (filed June 30, 2023); and

(i) a June 29, 2023 reply Issa affidavit (filed June 30, 2023).

IV. Issues

[39] The issues on this appeal are:

(a) Did the Judge err in granting the Setting Aside Order?

(b) Did the Judge err in granting the Summary Dismissal Order dismissing Issa's claim against Selina and Elite?

(c) Did the Judge err by not granting Issa's Cross-Application?

V. Analysis

A. Did the Judge Err in Granting the Setting Aside Order?

[40] Rule 9.15(3)(a) provides the court discretion to allow a defence to be filed by a party noted in default. The test the court is to apply has been set out by the Court of Appeal in ***Yehya v Thomas***, 2019 ABCA 164 at para 11:

> [11] The tests for setting aside a default judgment are different depending on whether or not there is a flaw in the procedure leading up to the default judgment. Where there is a procedural flaw, a defendant, proceeding promptly, is entitled to open up the judgment as of right. In the absence of a procedural flaw, a defendant must demonstrate that there is an arguable defence, he did not deliberately let judgment go by default and has a valid excuse for the default, and he promptly attempted to open up the default judgment: ***Anstar Enterprises Ltd v Transamerica Life Canada***, 2009 ABCA 196 at para13, 457 AR 68.

[41] The court also retains a discretion to grant relief where fairness requires it to be granted: ***Kraushar v Kraushar***, 2019 ABCA 186 at para 6; ***Poloma Investments Ltd v Yuen***, 2016 ABCA 93 at para 4.

[42] In granting the Setting Aside Order, the Judge said (emphasis added):

> ... I am going to allow the setting aside of the noting in default. I am not going to award costs.
>
> It was obvious from the [Summary Dismissal Application] that [Selina] was intending to defend the matter. Her affidavit in support shows - - sets out, essentially, what her defences were. So, she did not allow herself to be noted in default. She did not make a decision under the case law not to defend. That is very clear from her conduct and the filings she made. She moved – moved as quickly as possible to set aside the noting in default. And on the question of costs, when you just stand back, **it really was a highly technical, non-meritorious thing to do to note her in default** - - as opposed to just saying, oh, by the way, I have noticed – I have now noticed that you forgot the only defendant on behalf of the one and not the other. Clearly, Mr. Issa, ... you previously had not noted that because when you first filed your reply to the statement of defence ... you filed the reply to both defendant's statement of defence mistakenly believing that both had [defended] and then you filed another reply a few days later just ....to the one defendant.
>
> **So, in any event to me it was a non-meritorious position for you to take that, essentially, wasted everyone's time and went contrary to Rule 1.2**...

[43] I agree with the Judge. The Setting Aside Order was properly made. Selina had an arguable defence (as illustrated by the Summary Dismissal Order). Selina did not deliberately let judgment go by default but rather it was caused by counsel's slip or a misunderstanding. Issa acknowledged before the Judge that the failure of Selina to file a defence "was the basic failure or mistake by [Selina's counsel] to file the statement of defence on behalf of [Selina] at the same time she was

filing the Elite Entertainment defence". Further, Selina's counsel's March 9, 2023 correspondence and the Summary Dismissal Application made Selina's intention to defend very clear, and the noting to default was done notwithstanding a clear request not to note Selina in default without prior written notice to Robertson LLP.

[44] Once Issa became aware of the slip, rather than just clarifying matters, Issa unfairly attempted to take advantage of the situation. Selina moved immediately to set aside the noting in default once she became aware of what was happening.

[45] It would be unfair, in these circumstances, to give Issa the advantage of noting Selina in default. His approach is discouraged.

[46] The appeal of the Setting Aside Order is dismissed. The Setting Aside Order is confirmed.

B. Did the Judge Err in Granting the Summary Dismissal Order?

[47] Rule 7.3(1)(b) provides that a defendant may apply for summary judgment in respect of all or part of a claim on the basis that there is no merit to a claim or part of it.

[48] Summary judgment or summary dismissal cannot be granted if the application presents a genuine issue for trial: ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 13; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2023 ABCA 96 at para 5.

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: ***Hryniak v Mauldin***, 2014 SCC 7 at para 49; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 21.

[50] The proper approach to summary dispositions in Alberta has been laid out by the Court of Appeal in ***Weir-Jones*** at para 47 (emphasis in original):

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or

the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

(c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

(d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[51] The court has a duty to take a "hard look" at the merits of the claim or defence on a summary judgment application: ***Weir-Jones*** at para 44.

[52] In this case, the issues raised in the appeal of the Summary Dismissal Order are:

(a) Have Selina and Elite met the burden to show no merit to Issa's claims, and that there is no genuine issue requiring a trial?

(b) If Seline and Elite met the burden, has Issa demonstrated from the record that there is a genuine issue requiring a trial?

(c) Is it possible to fairly resolve the claims against Selina and Elite on a summary basis and, if so, is the court prepared to exercise its judicial discretion to do so?

[53] I address these issues below.

1. Have Selina and Elite Met the Burden to Show No Merit to Issa's Claims, and that there is No Genuine Issue Requiring a Trial?

[54] A defendant applicant for summary judgment (dismissal) has the initial burden to prove the factual elements of its defence (that is, the facts on which it relies), on a balance of probabilities, that there is no merit to the claim, and that there is no genuine issue requiring a trial: ***Weir-Jones*** at paras 31-35 and 47(b); ***Giustini v Workman***, 2021 ABCA 65 at paras 22-24; ***P & C Lawfirm***

Management Inc v Sabourin, 2020 ABCA 449 at paras 38-39; ***Hannam*** at paras 145-151; ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2023 ABKB 659 at para 9.

[55] The resisting party "need not prove the opposite in order to send the matter to trial": ***Weir-Jones*** at paras 32-33. This means that an applicant-defendant seeking to dismiss a claim cannot simply file its application and then point to the inability of the plaintiff to prove its claim in response. The defendant applicant must adduce some positive evidence, on a balance of probabilities, that the claim has no merit. Where the defendant's defence is a denial of alleged conduct or relies on a negative proposition, it may be sufficient for them to adduce some evidence supporting their sworn denial that they did not engage in the conduct that founds the claim: ***H2 Canmore*** at para 22.

a. Issa's Defamation Claim

[56] Issa's claim alleges that the defendants falsely and maliciously posted the Content via various social media platforms, and aggravated his damages by way of publishing and circulating the Content "in postings among the Defendants' chat groups and various other social media platforms" and "repetition and recirculating of" the Content through various social media platforms in Calgary, Edmonton and Vancouver. He seeks general, aggravated and punitive damages as well as an injunction restraining the defendants from making, posting, publishing or disseminating the Content, or words and images of the like or similar effect, interest and costs.

[57] In his reply to Elite's Statement of Defence, Issa pleads that Elite re-posted the Content and communicated it to third parties, including other Elite employees and contractors and others in the same industry in Vancouver.

[58] The test for defamation was recently summarized by Justice Devlin in ***Durand v Higgins***, 2024 ABKB 108 at para 64 (also in the context of summary judgment):

> The plaintiff in a defamation action bears the burden of proving three things: (i) that the words complained of were defamatory, meaning they would tend to lower the subject's reputation in the eyes of a reasonable person; (ii) that the defamatory words in fact referred to the plaintiff; and (iii) that the words were communicated by the defendant to at least one other person. Once these three elements are established on a balance of probabilities, damages are presumed and the onus shifts to the defendant to justify their defamatory publication: ***Grant*** [***v Torstar Corp***, 2009 SCC 61] at paras 28-29; *Defamation Act*, RSA 2000, c D-7, s 2.

[59] See also the very recent case of ***Peterson v McNallie***, 2024 ABKB 127 at para 8, citing ***Grant*** and ***Peyrow v Kaklin***, 2022 ABKB 832 at para 46.

[60] Selina and Elite's argument before the Judge, and on this appeal, is that there is no merit to Issa's allegation that Selina/Elite made, published, communicated or distributed the Content. They did not argue that the Content were not defamatory or that the Content did not refer to Issa.

[61] Issa acknowledges, for the purpose of the appeal, that the record shows that Selina/Elite did not make or publish the Notice or Content originally. However, he argues they received it and

there is a genuine issue requiring a trial on the question of whether they then published, distributed or communicated the Content. Among other things, Issa argues that Selina/Elite may have left the Content posted and available online to be viewed by others. Issa points to ***Weaver v Corcoran***, 2015 BCSC 165, at para 284 (overturned on other grounds: 2017 BCCA 160), a case that he did not put before the Judge. In ***Weaver***, the court noted that if an entity engaged in a passive role in dissemination of content on a website, they may not be considered to have published the content, however, once the content is brought to their attention and they do not take immediate action to remove defamatory material they may be considered the publisher as of that date: ***Weaver*** at paras 267-287. Issa also argues Selina/Elite may be considered internet intermediaries, relying on Laidlaw, Emily B. and Young, Hilary, "Internet Intermediary Liability in Defamation", (2019) Osgoode Hall Law Journal 56.1 112, 2019 CanLII Docs 3965 [Laidlaw and Young], and the cases cited therein.

b. Assessment of the Evidentiary Record

[62] In order to show there is no merit to Issa's claim against them, Selina/Elite must adduce evidence which, on the balance of probabilities, establishes there is no merit to all of Issa's claims and there is no genuine issue requiring a trial. While Selina/Elite did provide some evidence they did not *circulate* the Notice, I find that they have not established the threshold that there is no merit to all of Issa's claims and no genuine issue requiring a trial. My reasons for this conclusion are set out below.

[63] Selina's affidavits do not positively state that she did not circulate, post or otherwise communicate the Content to third parties after receiving the Notice. It was only upon questioning on her affidavit that further information about what she did or did not do with the Notice and Content became available. However, in my view, the evidence in her questioning did not establish on a balance of probabilities that she did not circulate, post or otherwise communicate the Content to third parties after receiving it.

[64] When asked if she circulated a copy of the Notice to any other persons after she received it, Selina said "no, not that I know of", and later confirmed that "I didn't circulate it". However, she never stated she did not "post" it or the Content, or otherwise communicate it after receiving it, even though the Amended Statement of Claim alleges she did so. Further, with respect to circulating the Content, she was not clear about whether she had ever circulated the Content. When asked whether she had circulated "the information that was in the notice" to others since February 25, 2023, she stated:

> Not that I remember, no. No. Oh, definitely not since the beginning of this. Hell no. I've kept this all secret.

[65] Selina appeared certain she had not circulated the Content after Issa's February 25, 2023 email threatening litigation, but less clear in her answer about the period prior to February 25, 2023. The lack of clarity about whether she had circulated the Content before February 25, 2023 was elsewhere in her evidence:

(a) in her May 3 affidavit, Selina deposed that she was told by police to "continue to spread this information to other businesses in the industry for the safety of other

girls". The reference to "continue to spread" implies that she had been spreading information about Issa before February 23, 2023 when she spoke to police;

(b) in her questioning, Selina said that the police told her "I should be very aware that you are dangerous and that I should, you know, be very careful of you and that - - you know, to keep - - if I haven't told girls that you're dangerous, to tell girls that you're dangerous and that you're crazy...", that police advised her to "make other girls aware to stay away from you", and that police told her "I should make other people aware that you are dangerous". Again, the reference to "keep" implies that she may have already been telling others that Issa was dangerous and crazy; and

(c) Selina never testified that she did *not* spread the information she says the police told her to spread. She did testify that she said to the police: "How do I **keep circulating** this if he is going to go against me civilly?". The reference to "keep circulating" again implies that Selina may have already been circulating the Content, or some of it, to others.

[66] In my view, Selina's evidence does not prove that Selina actually *was* communicating or actually *did* communicate the Content to third parties. However, it leaves unaddressed and unproven whether Selina/Elite actually *was not* communicating and actually *did not* communicate the Content to third parties in any way. This a key requirement to show that there is no merit to Issa's claim. It would have been a simple matter for Selina to depose to that, if it were the case. She did not. And her answers in questioning were unclear on this point. As per ***Weir-Jones***, at para 47(b): "At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail." In my view, for this reason, the Summary Dismissal Application must fail.

[67] I disagree with the Judge's conclusion that the evidence shows "that the clearly defamatory remarks were [not] published by these defendants". Based on the evidence before me, I find that there is a genuine issue requiring trial as to whether or not Selina/Elite communicated the Content to third parties after receiving it.

2. If Selina and Elite Met the Burden, has Issa Demonstrated from the Record that there is a Genuine Issue Requiring a Trial?

[68] Since I have found that Selina/Elite have not met their threshold burden, and that there is a genuine issue requiring a trial about whether Selina/Elite communicated the Content to third parties, Issa need not independently or otherwise establish a genuine issue requiring a trial.

3. Is it Possible to Fairly Resolve the Claims against Selina and Elite on a Summary Basis and, if so, is the Court Prepared to Exercise its Judicial Discretion to Do So?

[69] Even if I had found that Selina/Elite had discharged the threshold burden to show the claim against them had no merit, for the reasons above and below, I would not have been prepared to exercise my discretion in favour of summary dismissal in this case. A primary consideration is the lack of reliable evidence about whether Selina/Elite communicated the Content to third parties in some way other than "circulating" it. But there are other reasons.

[70] First, the record is unclear as to what exactly is a "private blacklist" or how it functions. Selina testified that she is not a member of the private blacklist and does not have access to it, but she somehow received the Notice and the Content "through" a private blacklist.

[71] Second, it is unclear where the Notice and Content resided, or whether it continues to reside, in Selina/Elite's possession, on their devices or in their online platforms in some way, or whether it has been deleted. Both parties attempted to provide the Court with their own statements about how the WhatsApp application functions, without any evidence. If Selina/Elite received the Notice and Content through WhatsApp, and passed it to Issa using that application, and it remains in Selina/Elite's WhatsApp application, it is unclear whether this remains available to others, potentially engaging ***Weaver*** or possible defences discussed in Laidlaw and Young. The court is not satisfied that the functionality of WhatsApp is something that can be proven by way of judicial notice, or that it is the Court's function to do its own research about the functionality of social media or messaging applications. At a minimum, it would have been possible for the parties to explain, in their own evidence, the functionality of WhatsApp based on their own experience in this case.

[72] Third, it is early in this action. Neither Selina or Elite have produced an affidavit of records. While it is not always required for an applicant for summary dismissal to produce an affidavit of records before applying for summary dismissal, the failure to do so can affect the court's confidence in the record and the fairness of dealing with the matter summarily. This is particularly so when critical records, if they exist, are in the exclusive control of the applicant-defendant: ***P Burns Resources Limited v Honourable Patrick Burns Memorial Trust***, 2015 ABCA 390 at para 8; ***Weir-Jones*** at para 167.

[73] Fourth, Selina's affidavits did not say that she attached all records relating to the Notice or the Content. In fact, she refused to provide full copies of records which are relevant and material to the action, which causes the court some concern. If Selina was worried about confidentiality of records, she could have brought an application to address these concerns rather than simply refusing to provide the information.

[74] Fifth, it is likely that Selina/Elite will continue to be involved in this action in some form even if they are no longer defendants. For example, an issue in the action is the identification of Jane Does 1-10, which are currently unknown but which are pleaded as being individuals "providing entertainment services as an employee or agent" of Elite. Even if Selina/Elite are no longer parties, it is likely Issa will seek a third-party production order from the Selina/Elite to obtain full copies of records showing the communication of the Notice and Content to them, so that the original source of the Content can be identified.

[75] Sixth, the court must consider fairness as between Issa and Selina/Elite, but also in respect of the action as a whole: ***Hryniak*** at para 60. Partial summary determination of partial claims for or against a particular plaintiff or defendant, or only dealing with claims against one party where there are numerous other parties involved, risk inefficient and duplicative proceedings or the potential for inconsistent findings: ***Hryniak*** at para 60; ***Malik v Attia***, 2020 ONCA 787 at paras 61-62. It must be demonstrated that partial summary judgment would achieve a just result: ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 140 at para 50; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 54; ***Calgary Co-op v Federated Co-op***, 2023 ABKB 735 at paras 62-

63. Summary judgment is not meant to encourage inefficient litigation by instalment: ***Pure Environmental Waste Management Ltd v Lonquist Field Service (Canada), ULC***, 2022 ABQB 30 at para 100.

[76] Considerations of the potential difficulties of partial summary judgment on an action, as a whole, was comprehensively reviewed by Justice Sidnell in ***DIRTT Environmental Solutions Ltd v Falkbuilt Ltd***, 2021 ABQB 252 at para 23, summarizing factors raised by the Ontario Court of Appeal in ***Butera v Chown, Cairns LLP***, 2017 ONCA 783:

> (a) there is a danger of duplicative or inconsistent findings: para 28;
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> (b) a partial summary judgment application may result in the main action being delayed and may even be used as a delay tactic: para 30;
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> (c) an application for partial summary judgment may be very expensive: para 31;
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> (d) judges are required to spend time hearing partial summary judgment applications and may be required to write comprehensive reasons on an issue that does not dispose of the action: para 32;
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> (e) the record available at the hearing of a partial summary judgment application will likely not be as extensive as the record at trial, therefore increasing the danger of inconsistent findings: para 33;
>
> (f) a partial summary judgment application should be considered to be a rare procedure that is reserved for issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner: para 34;
>
> (g) a summary judgment application may result in the disposition of the entire action (unless the judgment is dismissed or only successful in part and partial summary judgment is granted); on the other hand, a partial summary judgment application does not finally resolve the action and a trial proceeds on the remaining issues: para 35;
>
> (h) it must be asked if:
>
> (i) there is any efficiency by granting partial summary judgment given that the action is proceeding to trial on other matters; and

(ii) the claims to be determined on the partial summary judgment application are intertwined with those proceeding to trial: para 36; and

(i) it must be asked if the partial summary judgment is appropriate in the context of the litigation as a whole and will it serve the objectives of proportionality, efficiency and cost effectiveness: para 38.

[77] In this case, the action will continue as against other defendants. Additional "Jane Doe" defendants may be identified and later added. There will be records production by all parties. Some explanation of how a private blacklist works and the functionality of WhatsApp is likely to be available at trial. The record before the trial judge will likely be much more robust than it is now and the court may come to different conclusions at trial about whether Selina/Elite communicated the Content to third parties.

[78] Accordingly, even if I am wrong on my assessment of whether Selina/Elite met their threshold burden, I would nonetheless not exercise my discretion in favour of the Summary Dismissal Application.

C. Did the Judge Err in Dismissing the Cross-Application?

[79] As I have found that there is a genuine issue requiring a trial on the question of whether Selina/Elite communicated the Content to third parties, Issa's cross-application for summary judgment against Selina/Elite was properly dismissed or not granted.

[80] In the Cross-Application, Issa also claimed alternative relief in the form of an interim injunction preventing Selina/Elite from circulating the Content pending trial. This aspect of the appeal was not argued before me. The restrictive test for an interim or interlocutory injunction in the context of a defamation claim was recently discussed by Justice Feasby in ***Peterson*** (a case that was issued after this appeal was argued before me). ***Peterson*** illustrates that, among other things, the applicant must establish whether it is "beyond doubt" that any defence raised by the respondent is not sustainable: ***Peterson*** at para 11.

[81] Elite's defence raises lack of publication, fair comment, and qualified privilege, none of which were addressed in argument. The non-Selina/Elite defendants also assert that the Content is not defamatory and justified as true. Further, Selina has not yet filed her defence and in Selina's questioning she asserted that the Content was true. Selina's evidence also indicates that she does not have any intention of publishing or communicating the content pending trial.

[82] Given the lack of submissions on the injunction, and the positions of the parties, it is appropriate for me to adjourn this aspect of the Cross-Application, *sine die*, to allow Selina to file her defence and then to give the parties the opportunity to see if they can resolve the request for interim or interlocutory injunctive relief by consent. If so, they may provide me a form of consent order for my signature in due course. If they cannot agree, then Issa may advise my office and I will set a process to consider his injunction application against Selina/Elite.

VI. Conclusion

[83] The appeal of the Setting Aside Order is dismissed and that order is confirmed (including the order of no costs to either party).

[84] The appeal of the Summary Dismissal Order is granted. The Summary Dismissal Order is set aside (including the costs award). There shall be no costs awarded in respect of the Summary Dismissal Application before the Judge.

[85] The Summary Dismissal Application and the Cross-Application (in respect of summary judgment) are both dismissed.

[86] The application for an interim injunction against Selina/Elite is adjourned *sine die* as per my directions above.

[87] As the parties have had mixed success, neither party is awarded costs of the appeal, subject to any further submissions either party wishes to make. If either party wishes to make such submissions, they will notify my office within 30 days of this decision.

Heard on the 12th day of December, 2023. Supplemental materials filed and submissions received on January 5, February 15 and 16, 2024.

Dated at the City of Calgary, Alberta this 19th day of March, 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Madison Steenson
for Elite Entertainment Inc and Ashley Selina, also known as Ashley Darling

Jayden Issa
Self-represented Plaintiff