

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Busch v. Yelp Inc.*,
2019 BCSC 1746

Date: 20190912
Docket: S194723
Registry: Vancouver

Between:

**Peter Thomas Busch, doing business as
Law Office of Peter T. Busch**

Plaintiff

And

**Yelp Inc., Darwin Social Marketing Inc., doing business as
Yelp, and Jane Doe**

Defendants

Before: The Honourable Mr. Justice A. Ross

Oral Reasons for Judgment

In Chambers

The Plaintiff, appearing in
person:

P.T. Busch

Counsel for the Defendants
Yelp Inc. and Darwin Social
Marketing Inc.:

D.W.P. Moriarty

Place and Date of Hearing:

Vancouver, B.C.
September 11-12, 2019

Place and Date of Ruling:

Vancouver, B.C.
September 12, 2019

[1] **THE COURT:** For the sake of expediency, I am providing these reasons orally. I reserve the right to edit them for clarity and completeness. Further, these reasons constitute an application of law to a very specific set of facts. It is not my intention that this decision be of general application.

[2] In this application, the defendants Yelp Inc. and Darwin Social Marketing Inc. seek the following orders that:

- a) this proceeding be dismissed or stayed as against the applicants, on the grounds that the court does not have jurisdiction over the applicants in respect of the claims made against them by the plaintiff in this proceeding;
- b) in the alternative, this proceeding be dismissed as against the applicants on the ground that the notice of civil claim does not allege facts that, if true, would establish that this Court has jurisdiction over the applicants in respect of the claims herein;
- c) in the further alternative, the notice of civil claim be struck as against the applicants on the grounds that the notice of civil claim does not allege facts that, if true, would establish that this Court has jurisdiction over the applicants in respect of the claims herein.

Background Facts

[3] The plaintiff is a lawyer who operates a law practice in Vancouver, British Columbia.

[4] The defendant Yelp Inc. is a company organized under the laws of Delaware with its headquarters in San Francisco, California.

[5] Yelp Inc. has no offices in Canada. Yelp Inc. was founded in 2004. It owns and operates Yelp.com and Yelp.ca. (collectively, “Yelp”). Those are social networking sites for users to share information about their communities.

[6] Yelp, among other things, provides and publishes a forum for members of the public to read and write reviews about local businesses, services, and other entities, including non-profits and government agencies. The defendant Darwin Social Marketing Inc. is a company incorporated pursuant to the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 with a head office in Toronto and an address for delivery in Vancouver, British Columbia. Darwin is a subsidiary of Yelp and employs a single employee in British Columbia.

[7] On or about August 8, 2013, the plaintiff created a business owner account with Yelp, using an email address. The plaintiff then claimed the Yelp business page for the law office of Peter T. Busch. Since October 8, 2013, the plaintiff has used his business account to add information about his law office such as its location, special areas of practice, and other information. In order to create his business account with Yelp, the plaintiff was required to agree to Yelp's terms of service. Those terms of service are publicly available on the internet. The plaintiff agreed to the terms of service when he signed up for his business account. He further agreed to those terms of service each time he has logged in to the Yelp site.

[8] The material provisions of the terms of service, for the purpose of this application, include the fact that "Yelp" is defined to mean the company Yelp Inc. and all of its subsidiaries, including Darwin. The specific provision we are dealing with today states as follows:

California law will govern the terms of service as well as any claim, cause of action or dispute that may arise between a user and Yelp without regard to conflict of law provisions and that: For any claim brought by either party you agree to submit and consent to the personal and exclusive jurisdiction in and the exclusive venue of the state and federal courts located within San Francisco County, California.

[9] Yelp refers to this as the "forum selection clause".

[10] On April 22, 2017, a user posted a review on the Yelp site page for the law office of Peter T. Busch. I will not repeat that review here. Suffice it to say that the plaintiff, Mr. Busch, claims that the review was defamatory. Upon reading the

negative review, the plaintiff took several steps with Yelp to attempt to have it removed. He did not receive any satisfactory response from Yelp.

[11] On April 18, 2019, the plaintiff commenced this proceeding. In the notice of civil claim, he seeks, among other things, damages for defamation, slander, and loss of reputation; damages for civil contempt; punitive and exemplary damages; and a declaration that one or more of the defendants committed a hate crime.

[12] In response, the defendants filed jurisdictional responses on May 8, 2019. It is on the basis of those jurisdictional responses that they apply today.

[13] The applicants, Yelp Inc. and Darwin, seek to have this action stayed on one of three grounds:

- (1) first, the forum selection clause; or
- (2) territorial competence; or
- (3) *forum non conveniens*.

[14] For the reasons set out below, I find that the forum selection clause applies, and I do not need to deal with the remainder of the issues.

[15] The applicants say that the plaintiff agreed to the forum selection clause. Pursuant to that clause, Yelp argues that the plaintiff agreed that California law would govern the terms of service, and that any claim or cause or action or dispute between himself and Yelp would be resolved in San Francisco, California. The filing of the notice of civil claim, Yelp argues, was a breach of the forum selection clause.

[16] Yelp submits that the Supreme Court of Canada has set out the test to be applied in relation to forum selection clauses. Yelp notes that that Court has recently declared that such terms have a valuable purpose and are commonly used and regularly enforced. Such clauses, they argue, are generally to be encouraged as they create certainty and security in commercial transactions. Yelp also conceded that there are negative elements to such clauses.

[17] In short, the applicants argue that the plaintiff's agreement with Yelp under the terms of service are commercial contract. The plaintiff is a lawyer and is sophisticated. He should be bound by his agreement. Further, Yelp argues that there is no reason for the court in British Columbia to accept jurisdiction in this case. The applicants point to two cases: *Douez v. Facebook, Inc.*, 2017 SCC 33; *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 [*Pompey*].

[18] As noted, the applicants argue that the terms of service in this case are a commercial contract. They describe the test under *Pompey* as follows:

- (1) At the first step, the party seeking the stay of proceedings must establish that the forum selection clause is valid, clear, and enforceable and that it applies to causes of action before the court. At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause.
- (2) Second, if the court is satisfied that the clause is valid and binding, the court must grant the stay unless the plaintiff can show sufficiently strong cause to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of service clause.

[19] Yelp argues that the forum selection clause is valid, clear, and enforceable. It says that the plaintiff is a commercial venture, a lawyer, and a sophisticated individual; hence, he should be held to the contractual terms to which he agreed. Based on the principles of contract law, Yelp argues, the plaintiff agreed to litigate any disputes between the parties in California.

[20] Mr. Busch's arguments on the validity issue can be summarized as follows:

- (1) First, although he is sophisticated, his relationship with Yelp falls into a grey area, somewhere between that of a consumer and that of a commercial enterprise.

- (2) Second, he says that the forum selection clause is unconscionable. He notes that the terms were forced upon him when he claimed the business site for his law practice. He did not have a chance to negotiate those terms. Hence, he is not in the same position as a business that is contracting, for example, for the delivery of goods, as were the parties in the *Pompey* case. He says that he is closer to the consumer situation discussed in the *Douez* case and, as a result, he should not be bound by the clause.
- (3) Third, he says that he would have a juridical advantage by litigating within British Columbia and, as a result, that should be preferred. In that regard, he says that a jury in British Columbia would be more sympathetic to his claim than a jury in San Francisco.

[21] In assessing the first part of the test, I find the forum selection clause in the Yelp terms of service is binding on the parties for the following reasons. Mr. Busch and his law practice were seeking to advertise on Yelp. Hence, they were clearly a commercial enterprise. I was not provided with any authority to suggest that there are degrees of commercial enterprise or a “grey zone” somewhere between the “consumer” and the “commercial” contractor. Second, Mr. Busch is a lawyer. He concedes that he is sophisticated. This is not a case like *Douez* where an unsophisticated party signed onto a social networking site without any idea of the consequences. Third, Mr. Busch acknowledges that he read the terms of service before deciding to claim the business page. He said that he was comforted by the processes within the terms of service at the time he read them. Although he now argues that Yelp has been in breach of those terms, he cannot seek to enforce only part of the contract. He read the contract, and he is bound by it, subject to the second part of the test.

[22] Finally, on the validity question, I note that the cases do not support the argument that an allegation of breach of the contract, by Yelp in this instance, affects the validity of the form selection clause itself. The cases are clear that allegations of

breach of the contract do not affect the forum selection clause and its application. For these reasons, I find that the forum selection clause is valid and enforceable.

[23] I now turn to the second part of the *Pompey* test. Here, the onus is on the plaintiff to convince the court that there are sufficient reasons to keep jurisdiction despite the fact that he had agreed to another jurisdiction hearing the dispute. In this respect, it is his onus to show sufficiently strong cause to support the conclusion that it would not be reasonable or just in the circumstances to require him to adhere to the terms of the clause that he agreed to. The second part of the test is referred to as the "strong cause" test.

[24] In *Pompey* at paras. 30-31, the Court indicated that the strong cause test requires the court to take all circumstances into account. Those circumstances include, but are not limited to, the convenience of the parties, the fairness between the parties, and the interests of justice. Further, the law is clear, this is a discretionary order.

[25] In assessing this case, I have taken into account the following circumstances:

- a) First, regarding the convenience of the parties, not surprisingly, the convenience of the plaintiff favours British Columbia. The convenience of Yelp and Darwin obviously favours California. These factors balance and do not favour either party. Apart from one employee of Darwin, Yelp has no employees in British Columbia and would have to make travel arrangements for all of its witnesses. Similarly, the plaintiff would have to do the same in California. This factor is evenly balanced.
- b) Second, dealing with fairness between the parties, the plaintiff says that he is going to call a number of witnesses, although, not surprisingly, he has not yet identified them. The plaintiff indicates that he would not be able to afford to bring this action in California because of the expense of his potential witnesses travelling for the purposes of trial.

- c) Conversely, in order to defend the claim, Yelp would be required to call numerous witnesses, including an expert on the law of the State of California. Although Yelp clearly has more financial resources than the plaintiff in this case, I cannot find that criterion is on its own determinative. However, the fairness factor does favour the plaintiff simply because of financial concerns. The plaintiff has lower financial ability than Yelp.
- d) Having said that, I note that the currently unnamed defendant Jane Doe has undetermined financial ability to appear in either jurisdiction.
- e) The third factor in the *Pompey* test refers to the interests of justice. I consider this "factor" to be a catch-all phrase, meaning that the judge hearing the application can consider the individual traits of each fact scenario. I stress, at this point, that my decision is limited to the peculiar factual matrix which forms the background to this case.

[26] I find that the plaintiff has provided insufficient evidence to satisfy the second part of the *Pompey* test. In his affidavit material in response to this case and in his submissions, the plaintiff has directed me to a number of irrelevant events that, he suspects, are related to the persons or organizations having read the negative Yelp review and, as a result, treating him with less respect. However, there is no evidentiary basis for those allegations, nor are they relevant to the issues before me.

[27] In addition, the plaintiff alleges that Jane Doe, who is the defendant in this matter and who posted the negative review, might be a Yelp employee, in which case Yelp would be vicariously liable for her actions. However, in his affidavit material, the plaintiff indicates that he can identify, with significant probability, the former client who provided the negative review. Rather than suing "Jane Doe" and then seeking disclosure of her identity from Yelp, it would seem far more reasonable to contact his former client and seek confirmation whether she wrote the review. He could also ask her to remove the review. For a reason that is unclear, he has not contacted that person. On that basis, I discount completely the allegation or the prospect that someone employed by or retained by Yelp posted the negative review.

[28] Further, the plaintiff says that if Jane Doe was, in fact, a former client, then she likely has insufficient financial resources to pay the damages that he may be awarded. I find this prospect not to be a consideration that assists the plaintiff in supporting this jurisdiction application. It does not affect Yelp's argument regarding jurisdiction, nor the court's jurisdiction over Yelp. In short, the plaintiff here has not set out any cogent reasons why the action against Yelp should be heard in British Columbia.

[29] The second factor I am considering in all of the circumstances is that wherever this matter proceeds to trial, Yelp will argue that the terms of service contain a choice of law clause. The law selected by the terms of service is the law of the State of California. Yelp submitted an expert report in the form of the affidavit of Mr. Flammell [phonetic], a California attorney. The expert report says, in effect, that the *Communications Decency Act*, codified at 47 USC chapter 230(c)(1), or the "CDA," would immunize Yelp from a defamation action or liability to pay damages because Yelp would not be liable for the content contained on its web site. In effect, Yelp would not be considered a "publisher."

[30] I find this argument compelling. While the British Columbia court could certainly apply the foreign law, the practical result of that application could be devastating for the plaintiff. Yelp could be put to the expense of defending this action in British Columbia and be completely successful based on the application of the CDA and California law. In that case, the plaintiff, whether or not he was successful against the individual defendant, could be liable to pay the costs of Yelp. Those costs would be significant. Hence, this factor, for the benefit of the plaintiff, strongly suggests that the action should not proceed in British Columbia.

[31] The final factor I am taking into consideration relates to the strength of the plaintiff's case. The alleged defamation in this case was in the form of a negative review on Yelp. I make no finding on whether the posted Yelp comment was or was not defamatory. However, the venue of the statement does inform its impact. The comment was posted on a site that is constructed specifically for reviews, both

positive and negative. The plaintiff signed up for Yelp. He received a negative review.

[32] I find the comments of Murray J. in *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961 to be apposite in these circumstances. The facts in *Acumen* are very similar to the current case. A law firm sued a former client for defamation because of a negative review on an online platform. The law firm did not sue the publisher. The defendant did not defend the action. Default judgment was taken, and the issue of damages proceeded unopposed. Justice Murray awarded damages of \$1.

[33] In *Acumen*, Murray J. commented upon the propriety of a lawyer commencing an action on the basis of a displeasing review. In that respect, the judge commented on the imbalance of power that occurs when a lawyer sues a former client in defamation. She wrote:

[34] In this time when virtually everyone has instantaneous access to the internet, many use the internet to express their feelings without pause or reflection. Business people with Google Plus profiles or the like invite comments from customers. Surely no one can expect to receive all favourable reports. When choosing a lawyer or other professional or service provider, prospective customers reading such reviews would be naive to think that anyone or any business would receive all positive reports. As the adage goes, you can't please everyone all the time.

[35] I add here that a lawyer must exercise restraint when it comes to launching legal action when they receive a review that displeases them. It takes little for them to commence a lawsuit as they are familiar with the law and can represent themselves. Defendants on the other hand are often not so fortunate. They will have to incur expense to defend themselves, or they can do as this defendant did and ignore the claim — in which case default judgment may be entered against them. This is particularly problematic in the context of defamation actions where a defendant must actively raise the available defences, such as the defence of truth or justification. It is likely that they will suffer significant anxiety about being sued by a lawyer.

[36] In my view this action should never have been brought.

[37] The plaintiffs signed up for Google Plus and through their profile invited online comment from their clients. The review in question lacked any semblance of credibility or polish, and is unlikely to have impacted their reputation or business.

[34] I find these comments to be applicable to this action. There is a reasonable prospect that the plaintiff will proceed to trial and receive a nominal damage award.

Although I do not decide the issue and this decision will have no impact on the eventual trier of fact, the *Communications Decency Act* may well govern the liability of Yelp. Hence, there is a substantial likelihood that Yelp and its subsidiary Darwin will be immunized from any liability in this case.

[35] So, in the particular and peculiar factual matrix of this case, I have a significant concern that the plaintiff may proceed through trial and obtain nominal damages. Further, Yelp may be able to avail itself of the immunity provided by California law to internet providers and web sites. Hence, the primary consideration that I am taking into account in the second part of the *Pompey* test is protecting the plaintiff from the prospect of a nominal damage award for him and a large award of costs against him.

[36] For the reasons set out above, I order that the plaintiff's action against Yelp and Darwin be and are hereby stayed.

[37] Subject to submissions on costs, there will be no costs for this application or the defence of this action by the Yelp defendants.

“A. Ross J.”