



Boaden Catering v Real Food, 2016 ONSC 4098 (CanLII)

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COURT FILE NO.: CV-15-2530-00

DATE: 20160630

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BOADEN CATERING LIMITED v. REAL FOOD FOR REAL KIDS INC.
AND DAVID STARBUCK FARNELL

BEFORE: Sproat, J.

COUNSEL: Adam Jarvis, for the Plaintiff, Defendant by Counterclaim

John H. Simpson, for the Defendants, Plaintiff by Counterclaim

HEARD: 20160413 and 20160621

ENDORSEMENT

PART I – INTRODUCTION

[1] I am providing my decision by means of endorsement. By that I mean my reasoning will be clear to the parties who are familiar with the evidence before the court. I will not, however, be providing a complete narrative of all of the evidence.

[2] Boaden Catering Limited (“Boaden”) and Real Food for Real Kids Inc. (“RFRK”) are competitors. RFRK specializes in providing catering services geared to young people such as children attending day care or before and after school programs. Boaden has a broader based catering business which has a division called Organic Kids Catering.

- [3] There were three motions before the court on April 13, 2016, as follows:
- a) by RFRK, and its CEO Farnell, for summary judgment dismissing the claims of the plaintiff;
 - b) by Boaden to strike portions of the statement of defence and counterclaim;
 - c) by Boaden for an interlocutory injunction to restrain the defendants from making defamatory comments about the plaintiff.

PART II - BOADEN REQUEST FOR ADJOURNMENT

[4] Boaden requested an adjournment of these motions because it wished to conduct a further cross-examination of the defendant Farnell, and to cross-examine Ms. Terry, a private investigator retained by RFRK. Ms. Terry had, under the pretext of being a prospective customer, met with Mr. Tassone, the General Manager of Boaden, on July 16, 2015 and she swore an affidavit December 15, 2015.

[5] I denied the request for an adjournment. Some history is required. On July 17, 2015 the motions court judge concluded that a long motion date would be needed given that Boaden was claiming an interlocutory injunction and the defendant intended to bring a cross-motion. The matter was adjourned to February 24, 2016 for a four hour long motion. This was later adjourned on consent to March 1, 2016.

[6] The defendants served their motion record for summary judgment on January 6, 2016. Boaden made no effort to cross-examine Mr. Farnell and Ms. Terry between January 6 and March 1, 2016. The motions could not proceed on March 1 because Mr. Jarvis was ill. They were adjourned to a date to be fixed which was April 13, 2016. If he had not been ill then the summary judgment motion would have proceeded on March 1 and without Boaden having the benefit of any additional cross-examination of Mr. Farnell and any cross-examination of Terry.

[7] Mr. Simpson did make arrangements to cross-examine Mr. Tassone on April 5, 2016. On March 30, Boaden made a request to cross-examine Mr. Farnell and Ms. Terry on April 5. Mr. Simpson responded that Mr. Farnell was not available on April 5 but was available on April 8. Mr. Jarvis took the position that this was simply too late to conduct a cross-examination given that the motion was scheduled for April 13. Transcripts can be obtained on an expedited basis so this is not a reasonable excuse for failing to cross-examine Mr. Farnell. Mr. Simpson further advised that Ms. Terry had been involved in a car accident and simply was not available prior to April 13. Boaden then served, on April 4, a 367-page motion record including two affidavits of Mr. Tassone, both sworn on April 1, 2016.

[8] The Superior Court in general, and certainly in Brampton, cannot afford to waste scheduled sitting days. Booking a day for a long motion should not be viewed differently than booking a trial date. Counsel have to do whatever is required to be

ready to proceed. If I had granted the request for an adjournment one sitting day would have been lost. It is easy to see how quickly the administration of justice in Brampton would be in trouble if our 26 judges acceded to this type of request even a few times each year. I also concluded that it would be unfair to RFRK to delay its motion for summary judgment.

[9] Boaden was very clearly in breach of its Rule 39.02(3) obligation to exercise its right to cross-examine with reasonable diligence.

[10] While I would have denied the motion even if the credibility and reliability of Mr. Farnell and Ms. Terry were very much in dispute, most of the facts I rely upon for my decision are not in serious dispute.

PART III – RFRK MOTION FOR SUMMARY JUDGMENT

The Law – Summary Judgment

[11] The leading case is *Hryniak v. Maudlin*, [2014 SCC 7 \(CanLII\)](#), which states:

[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.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

...

[60] The “interest of justice” inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On

the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[12] As will be seen most of the findings I make and conclusions I reach do not involve disputed evidence. Further, I had the benefit of hearing evidence in court from Mr. Tassone. As such I am completely satisfied that I am able to reach a fair and just determination of the merits of this case on this summary judgment application.

Boaden Defamation Claims

[13] The defamatory comments attributed to Farnell, which are somewhat vague, are as follows:

- a) to Amanda Petsis, a Boaden customer, and former RFRK customer, that Boaden is not who they say they are. They say that they are Organic Kids Catering but do not serve organic foods.
- b) to Paula Kendell a Boaden customer, and formerly a RFRK customer, that Boaden are "Bottom Feeders".
- c) to Louis Cimicata, the owner of a repair shop that services Boaden vehicles and used to service RFRK's vehicles, that Boaden is not who they say they are and are "bottom feeders" and "you should see their kitchen". According to his affidavit the statements were made "over the years" that he used to do work for RFRK.

[14] Mr. Farnell's response in his July 10, 2015 affidavit was as follows:

- a) "What I told Ms. Petsis during this phone call was that "Organic Kids Catering" is not a new company but is rather just a trade name being used by Boaden. I expressed my opinion that the trade name is misleading because many if not most of Boaden's products (e.g. all of their meats) are not, in fact, organic, according to their own menu. To me, the average consumer would expect that a company called Organic Kids Catering serves only or almost only organic foods. I note that the Canadian Food Inspection Agency defines an "organic" product as being at least 95% organic".
- b) "I do not specifically recall what I said to Ms. Kendell more than six years ago. If I used the term "bottom feeders" it would have been to express my opinion to Ms. Kendell that Boaden was focused more on offering low prices than it was on offering healthy foods. I also know that I would have provided an explanation to Ms. Kendell for my opinion."
- c) "I do not specifically recall what I have said to Mr. Cimicata about Boaden "over the years" but I know that I would not have stated that "Boaden is not who they say they are" except to say that "Organic Kids Catering" is just a trade name that Boaden is using."

[15] Given that Petsis, Kendell and Cimicata did not file any supplementary affidavits taking issue with Mr. Farnell's further explanation of their conversations, which he provided in July, 2015, I accept Mr. Farnell's evidence which provides additional context and explanation.

[16] In *Motoretta v. Twist & Go Power Sports*, [2014] ONSC 2469, the parties were competing manufacturers of motor scooters. One alleged defamation by the defendant was, in substance, that the Vespa brand which it sold is the "original" modern scooter and that the Stella brand sold by the plaintiff is an inferior version of the Vespa. The Stella model was also referred to by the defendant as the "second grade market". Corbett J. appears to have accepted that this type of statement was "trade banter" or "trade rhetoric" which does not rise to the level of a defamatory statement. The statements attributed to Mr. Farnell, as explained by him, fall into the category of trade rhetoric and do not amount to defamatory statements.

[17] If I am wrong on this, in the alternative, these claims should be dismissed on the basis that the circumstances are such that no damages should be awarded in any event. There is no suggestion that the three individuals to whom Farnell made the allegedly defamatory statements repeated them to anyone else. The statements did not, in any event, affect the relationship that any of the three had with Boaden.

[18] I appreciate that when a person is defamed in relation to her occupation or business damages are presumed. Given that the alleged defamations were not repeated by the three individuals and had no economic consequence, and in light of the circumstances discussed below which suggest to me that Boaden brought this litigation to intimidate a smaller business competitor, and has adopted a number of dubious tactics to gain advantage, I conclude that Boaden has no entitlement to damages.

Boaden Claim for Declaration it is the Lawful Owner of Certain Domain Names

[19] Mr. Farnell incorporated by reference into his affidavit of July 10, 2015, the content of the RFRK complaint regarding the ".ca" domain names. Mr. Farnell's affidavit references numerous articles in major Canadian newspapers and magazines since 2006 which profile RFRK and which contain reference to the fact that it used three marks being Real Food For Real Kids, RFRK and Real Food Lunch Club. For approximately ten years RFRK has operated an internet website at RFRK.com which features the trademarks previously referred to. Commencing in 2007 RFRK distributed to thousands of children, parents, teachers and school administrators promotional material making reference to all three marks. This summary only scratches the surface of the extent of the evidence that RFRK had extensively used these marks prior to 2014.

[20] In the face of this extensive use of the marks by RFRK, in July and December 2014, Boaden registered the following domain names:

- a) realfoodforrealkidss.com [sic]
- b) realfoodforkids.ca [sic]
- c) rfrk.ca
- d) realfoodlunchclub.ca

[21] In December 2014, Boaden registered RFRK and RFRK.CA as business names under the Ontario *Business Names Act*.

[22] Mr. Tassone offered the following justification for registering the domain names:

- (a) in 2014 Boaden transitioned its menu to more organic, farm to table items;
- (b) in 2014 Boaden took initiatives it called “Change Kids Food Now” and “Real Food Real Knowledge” to provide the public with a greater awareness of the food served to children in schools and at daycare;
- (c) in July 2014 Boaden registered the domains Rfrk.ca and Realfoodlunchclub.ca to advance its goal of providing the public with information; and
- (d) in December 2014 Boaden did a business names search and found out that “Real Food Real Knowledge” and RFRK” were not registered and “consequently” Boaden registered those names plus RFRK.CA.

[23] When an applicant is granted a “.com” domain name in the United States, or a “.ca” domain name in Canada, the applicant must agree to submit any disputes regarding the name to arbitration.

[24] In March, 2015 RFRK made a complaint against Boaden regarding the .com domain name it had registered. On May 5, 2015 the arbitrator, a retired Judge, issued a decision finding that Boaden had registered the “.com” domain name, in an effort to exploit the commercial value of RFRK’s registered trademark, in full knowledge of RFRK’s rights in its registered trademark. The arbitrator noted that Boaden had tried to sell the infringing domain names to RFRK. The decision also made reference to the fact that Boaden had not responded to the complaint but that the tribunal had discharged its obligation to employ reasonable means to notify Boaden of the proceedings.

[25] On May 7, 2015 RFRK submitted a complaint concerning the “.ca” domain names registered by Boaden. Boaden did not respond to the complaint and the arbitrator found that Boaden had no legitimate interest in the “.ca” domain names and had registered them in bad faith and for the purpose of disrupting RFRK’s business and seeking illegitimate financial gain. The arbitrator agreed that Boaden

had registered the names to redirect consumers to its own website. The arbitrator ordered that the registration of the offending domain names be transferred to RFRK.

[26] Mr. Tassone acknowledged that Boaden was served with the complaint but stated he believed his counsel had also been served and was dealing with it. This led to confusion resulting in Boaden's counsel requesting an extension of time on May 27. I note that the deadline for Boaden filing material was June 2, 2015 so I am not clear why this alleged confusion prevented the filing of material. In any event, I also note that it appears that the registry that deals with complaints has a somewhat different view of what occurred. In this regard the registry emailed Mr. Jarvis on June 17, 2015 advising in relevant part:

You did request an extension on the deadline date for filing a response which we have discretion to grant in exceptional circumstances. We advised you, that we did not consider these circumstances exceptional. The complaint was served properly and received by the Registrant, that he did not contact you for the first week or so, and that you then decided not to file within the time limit is a decision within your choosing.

[27] In any event, Boaden obviously had the opportunity to file evidence in this court action to establish the basis for its claim to these domain names.

[28] The Canadian Internet Registration Authority ("CIRA"), which administers the .ca Domain Name Dispute Resolution Policy has a policy that it will not implement the decision of an arbitral panel if a Canadian court action is pending in respect of the domain name at issue. As such Boaden has been able to continue its .ca domain name registrations notwithstanding the ruling of the arbitrator that the offending domain names be transferred to RFRK.

[29] After hearing the argument on April 23, and reserving my decision, I advised counsel on May 31 that I had decided it was appropriate pursuant to *Rule* 20.04 (2.1) to have Mr. Tassone give evidence in court addressing:

- a. when and why it came about that Boaden decided to use the words Real Food Real Knowledge to describe the initiative referred to in paragraph 17 of his affidavit of April 1, 2016.
- b. why, and for what purpose, did Boaden decide to select the domain name Rfrk.ca to advance the goal of informing the public concerning "Real Food" as described in paragraphs 29 and 30 of his affidavit of April 1, 2016.
- c. and specifically, was the fact that Boaden selected the words Real Food Real Knowledge, and the domain name, in any way related to the fact that it was aware that the corporate defendant had been using Real Food for Real Kids and rfrk previously.

[30] Mr. Tassone testified in court and read prepared answers to the three questions. He indicated that in 2014 Boaden launched several initiatives with one purpose, which was to bring to the forefront people's perceptions of food and provide the public with information concerning matters such as the food chain, global warming and the effect on future generations. Real Food Real Knowledge was the name given to one of these initiatives and the domain name rfrk was chosen because it was an acronym. He said that he was not aware that the defendant was referred to as RFRK. Before making the registrations a lawyer conduct searches and no one was using the name Real Food Real Knowledge or RFRK. (I note that Mr. Tassone did not really explain when and why the phrase "Real Food Real Knowledge" came to his mind as an apt description of his planned initiative.)

[31] In cross-examination he acknowledged that he was the sole decision-maker at Boaden. He said that the previous owners of Boaden had told him about the defendant and that he should watch the defendant and that they had stolen menus from Boaden. He said that he had his eyes on the defendant and that he monitored the defendant and all of his competitors to see what they were doing. He acknowledged that in his affidavit material he produced dozens of the defendants menus dating back to 2011 some of which referred to the defendant as RFRK.

[32] He acknowledged that the registration of the rfrk.ca domain name was made in July, 2014 and that it was not until December 9, 2014 that Boaden registered realfoodrealknowledge.ca. Boaden has not produced any documentation to support the proposition that Boaden had come up with the phrase "Real Food Real Knowledge" prior to July 2014 when, on Mr. Tassone's evidence, he obtained the rfrk.ca domain name because it was an acronym for "Real Food Real Knowledge".

[33] Mr. Tassone was not an impressive witness. He was often argumentative. In response to simple questions he would often insist upon adding non-responsive information that he perceived would be helpful to Boaden.

[34] The defendant's extensive use of RFRK to identify itself, as previously discussed, and the fact that Mr. Tassone was monitoring the defendant, makes it highly improbable that he was not aware that the defendant was commonly referred to as RFRK.

[35] RFRK is someone Mr. Tassone had been told to watch out for and who he was monitoring. On Mr. Tassone's evidence it never occurred to him when he came up with the phrase "Real Food Real Knowledge" that it bore a resemblance to the name of his competition "Real Food for Real Kids". Again I find that highly improbable.

[36] As such, I find that Boaden registered the domain name rfrk.ca in bad faith with a view to denying RFRK the ability to use the name and in order to direct or

point persons interested in RFRK to the Boaden website by the use of meta-tags. I find that the purported Real Foods Real Knowledge initiative was an after the fact rationalization which Mr. Tassone came up with in order to conceal the true purpose of the rfrk.ca registration.

[37] The evidence before the court strongly supports the conclusion reached by the United States and Canadian arbitrators that Boaden registered the domain names in bad faith for the purpose of exploiting the value of RFRK's trademarks or otherwise for illegitimate financial gain. I reach the same conclusion.

[38] I, therefore, have no hesitation in granting summary judgment dismissing the claims by Boaden for a declaration that it is the lawful owner of the domain names set out above.

Boaden's Claims Related to Theft of "Trade Secrets" and "Corporate Espionage"

[39] This claim is based on the fact that RFRK retained Ms. Terry, a private investigator, and she met with Mr. Tassone posing as a prospective customer.

[40] Mr. Simpson submitted, and Mr. Jarvis agreed, that for this claim to be tenable the plaintiff must establish a breach of confidence. In accordance with *Lac Minerals v. International Corona Resources* 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, at page 635, the plaintiff has to establish three elements:

- a) that the information conveyed was confidential;
- b) that it was communicated in confidence;
- c) that it was misused by the party to whom it was communicated.

[41] This claim cannot succeed based upon the first two elements. The information conveyed was not confidential. It was information that Mr. Tassone was prepared to share with any prospective customer. Further, Mr. Tassone agrees that it was not communicated in confidence. He did not require any confidentiality agreement or even suggest to Ms. Terry that the information was confidential.

[42] The claim for breach of confidence related to alleged theft of trade secrets and corporate espionage is, therefore, dismissed.

Boaden Claims for Passing Off, Copyright and Trademark Infringement and Use of Business Name

[43] Certain of these claims are premised on Boaden's assertion that it has rights to the "RFRK" trade name. Boaden has, however, never carried on business under

that name and does not claim to have suffered any damages. I agree with the submissions of RFRK at paragraphs 61-64 of its Amended Factum. There is no genuine issue for trial and these claims must be dismissed.

[44] Boaden filed the affidavit of its employee Clarence Lim, a graphic designer, in which he claims that RFRK updated its website in March of 2016 by borrowing ideas from Boaden. Mr. Lim highlights points of comparison between the two websites and offers the opinion that RFRK is attempting to pass itself off as Boaden and is causing confusion in the marketplace.

[45] Given the bad faith conduct of Boaden to appropriate the goodwill of RFRK, and to divert persons interested in RFRK to the Boaden website using metatags, as I will later discuss, it is ironic that Boaden is the party complaining of passing off.

[46] I have carefully reviewed the comparison pages. I see very little similarity, and no similarity that could conceivably cause confusion to purchasers. Many of the points of comparison are so generic or trivial that it simply exemplifies Boaden's over-reaching to attempt to secure an advantage. For example the similarities that Mr. Lim sees that are a "bit too coincidental" include:

- a) footers at the bottom of a page with items such as "About Us" and "Contact Us";
- b) Boaden's website allows a video to be accessed on a link "OKTV" while RFRK has a video available on "FMTV";
- c) Boaden has a menu available and RFRK has added a menu to its website";
- d) their contact page "looks almost identical" in that they both have photos of food and both ask for the first and last names and email addresses of persons sending a message;
- e) both websites discuss corporate missions and values; and
- f) Boaden provides an "international" menu selection while RFRK offers a "globally inspired section" .

[47] Much of what Mr. Lim regards as distinctive hallmarks I regard, on the basis of general common sense and experience, as highly generic features commonly seen on websites. The allegation of passing off and confusion has no merit and does not raise a genuine issue requiring a trial.

[48] I have also reviewed the sample menu that Boaden put forward in support of its claim of copyright infringement. First, all menus share certain characteristics in that they list what items are offered on what day and at what time. The Boaden and RFRK menus otherwise have quite different and distinct layouts. Boaden lists on the

side what it says “yes” and “no” to in terms of food quality. RFRK lists the “real food promise” and that it avoids artificial additives and GMOs. I do not see any basis for the allegation of copyright infringement.

[49] Consistent with my earlier findings, I find that Boaden registered RFRK and RFRK.ca under the Ontario *Business Names Act* in bad faith and with a view to harming RFRK by interfering with its use of its own business name.

Other Bad Faith Conduct by Boaden

[50] The Boaden website heralds its commitment to, “always being open, honest and fully transparent”. Regrettably it failed to honour that commitment.

[51] A meta tag is a code that describes some aspect of the content of a web page. A meta tag is used by search engines to index a page so that someone searching for the kind of information the page contains will be able to find it.

[52] Boaden embedded on its web site the following meta tags: RFRK, Real Food for Real Kids, Real Food, RFRK.com, and RFRK Menu as well as the name “Lulu Cohen”, a co-founder of RFRK. In other words, by this deception individuals searching for information on RFRK using a search engine would also be directed to Boaden’s website. Mr. Tassone, when cross-examined on his affidavit, stated that he had no idea why Boaden’s “IT person” put these metatags on the Boaden website. I do not believe for a moment that an “IT person” would have taken it upon himself or herself to not only embed the names of competitors on the Boaden website but to decide which competitors to embed. I find that this was in fact a decision made by Mr. Tassone.

[53] I need not determine whether this use of a competitor’s name in Boaden’s website metatags was strictly legal. It is certainly unethical, deceptive and the antithesis of “open, honest and fully transparent”. Mr. Tassone, however, was unapologetic when cross-examined on his affidavit. He repeatedly stated that, while he did not know about the meta tags prior to the litigation, he “absolutely” saw nothing wrong with embedding RFRK trademarks and the name Lulu Cohen in the Boaden website.

PART IV – BOADEN PLEADINGS MOTION

[54] Boaden’s essential complaint is that certain paragraphs of the Statement of Defence, alleging bad faith acts by Boaden, should instead be included in the Counterclaim section of the pleading. I do not agree.

[55] Bad faith conduct by Boaden is relevant to defending its claims for:

- (a) the equitable remedy of an interlocutory injunction. Unclean hands, such as acting in bad faith, is a ground on which equitable relief can be denied.
- (b) a declaration that it owned the contested domain names. Registering a name in bad faith is clearly relevant to the validity of the registration.
- (c) monetary damages. Boaden's bad faith conduct is particularly relevant to the quantum of damages that it would be appropriate to award Boaden. For example Boaden alleges in its claim that the "bottom feeder" reference suggests that Boaden is "an opportunist who sought a quick profit at the expense of its client". Certain of the bad faith conduct alleged by RFRK supports the conclusion that Boaden is in fact the opportunist who sought a quick profit – only in this case at the expense of RFRK.

[56] The motion is, therefore, dismissed

PART V - BOADEN MOTION FOR INJUNCTION TO RESTRAIN DEFAMATION

[57] Boaden acknowledges that it has no intention of proceeding with its motion for an interlocutory injunction to restrain the defendants from defaming it. Boaden explains this on the basis the RFRK has not to Boaden's knowledge made any further defamatory comments so an injunction is unnecessary. Mr. Jarvis was content that it be dismissed or adjourned indefinitely. The costs need to be dealt with and so I dismiss the motion.

PART VI – CONCLUSION

[58] I, therefore, grant summary judgment dismissing all claims by Boaden.

[59] RFRK shall provide its costs submissions relating to the three motions within 15 days. Boaden shall respond within a further 10 days. RFRK shall reply within a further 5 days.

Sproat, J

DATE: June 30, 2016

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INC. AND DAVID STARBUCK F
ARNELL

BEFORE: Sproat, J.

ENDORSEMENT

Sproat, J.

DATE: June 30, 2016