

Lawyer's defamation action allowed to proceed in Small Claims Court

Courts of Justice Act | Litigation | Litigation & Dispute Resolution | Small Claims Court

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Ontario's Small Claims Court is intended to provide litigants with a cost-effective forum for civil claims up to \$35,000, including claims for defamation. Defamation claims in the Ontario Superior Court of Justice can be subject to an "anti-SLAPP" motion under [section 137.1](#) of the *Courts of Justice Act*. However, the Court of Appeal has determined that anti-SLAPP motions are precluded in the Small Claims Court: *Laurentide Kitchens Inc. v. Homestars Inc.*, 2022 ONCA 48 (CanLII).

In *Macdonald v. Feldman*, 2022 ONSC 4818 (CanLII), the Superior Court of Justice addressed the issue of whether a party could force the transfer of an action out of the Small Claims Court in order to avail themselves of the [section 137.1](#) motion procedures.

The plaintiff was a lawyer who practiced civil litigation. Prior to the defamation claim, he had commenced a civil action on behalf of a client arising from the construction of a small cottage or "bunkie" in Muskoka, Ontario.

In March 2021, a process server retained by the lawyer served a statement of claim and certificate of action by leaving copies with the defendant's mother at the contact address indicated on the building permit for the bunkie.

The defendant took the position that such service did not comply with the *Rules of Civil Procedure* as he should have been served at his home address (in Turks & Caicos). He also took umbrage at the service of the documents on his mother.

The day after the documents were served, the defendant published a review of the plaintiff which appeared on the Google search page for the law firm, calling the lawyer "unprofessional and none too bright" and stating that he has also worked as a real estate agent "to give him something to fall back upon should he be disbarred".

The plaintiff posted a response under the Google review, advising that it was a fake and malicious review and that the poster was a defendant in a lawsuit commenced by his client. The response stated that the review was an attempt to intimidate and bully the lawyer for representing his client against the defendant.

The defendant then added an additional response to his Google review, stating that the plaintiff was "the lowest form of lawyer," "a loser as a person and as a lawyer," and that his review of the plaintiff was not false.

The plaintiff served a notice of libel on the defendant, who refused to retract the Google review, and then commenced a Small Claims Court claim for general damages for defamatory statements published by the defendant in the amount of \$35,000. The claim alleged that the Google review contained false, defamatory comments that were circulated and published by the defendant with a view to injuring the plaintiff's reputation in the Ontario legal community and the public.

The defendant sought to dismiss the action under the anti-SLAPP in [section 137.1](#) of the *Courts of Justice Act*. The parties had a case conference in the Superior Court of Justice for the purpose of scheduling the hearing but the presiding judge declined to schedule the motion as a result of the decision of the Court of Appeal in *Laurentide* which precluded motions under [section 137.1](#) of the *Courts of Justice Act* in a Small Claims Court action.

Instead, the court scheduled a motion to address the defendant's request to transfer the defamation action to the regular Superior Court of Justice.

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In support of the motion, the defendant argued that the Small Claims Court was currently experiencing a significant two-year backlog in scheduling trial dates and that transferring the action to the Superior Court of Justice would permit the anti-SLAPP motion to dispose of the claim in a more timely fashion. [subsection 137.2\(2\)](#) requires that the motion be heard no later than 60 days after the notice of motion is filed with the court. The defendant argued that without a transfer he would be denied an important legal defence to the claim.

In the motion judge's view, however, the unavailability of an anti-SLAPP motion was not, in and of itself, sufficient to show that the defamation action was not capable of being justly and fairly resolved using the procedures available in the Small Claims Court.

The court's discretion to transfer an action out of the Small Claims Court is exercised sparingly as a transfer can involve negative consequences, including the higher costs of pre-trial discovery and trial, both in terms of counsel fees and potential costs awards. A transfer at the request of a defendant deprives the plaintiff of their choice of court. Further, the court noted that permitting a transfer may undermine the jurisdictional legitimacy of the Small Claims Court, "which is a dangerous assumption in an era where access to justice is a significant problem."

In assessing the defamation action, the court reasoned that it did not raise complex factual or legal issues and concerned a short Google review. None of the parties suggested that expert evidence would be involved that required any specific Superior Court of Justice procedures.

The motion judge also reasoned that the importance of the issues raised in the defamation action did not go beyond the specific interests of the parties. Aside from the arguments related to the bringing of an Anti-SLAPP motion, the defendant had not argued that the defamation action was not capable of being justly and fairly resolved using procedures available in the Small Claims Court.

As to the issue of delay, the defendant was comparing "apples and oranges" since this involved the delay to schedule a trial in the Small Claims Court and the 60-day deadline to hear an anti-SLAPP motion in the Superior Court of Justice. Aside from that difference, the motion judge noted that there are delays in every court as a result of the COVID-19 pandemic and that there was no evidence that the delay to schedule a trial would be shorter in the regular Superior Court of Justice than in the Small Claims Court.

As a result, the motion to transfer was dismissed and the defamation action will continue in the Small Claims Court. Plaintiffs who are considering a defamation action may be inclined to pursue the claim in Small Claims Court in cases where the damages are likely to be \$35,000 or less as they will likely avoid the prospect of being faced with a costly and time-consuming anti-SLAPP motion.

In this regard, while defamation actions often gain notoriety when they entail large damage awards, in many cases the courts assess the actual damages figure within the jurisdiction of the Small Claims Court in any event. A PDF version is available to download [here](#).

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