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Plaintiffs ordered to pay costs of $164,186 after trying to bully defendants into removing negative online reviews

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Plaintiffs who commence a defamation action would be well-advised to consider the potential consequences of having the claim dismissed at an early stage under Ontario's anti-SLAPP legislation. Once a defendant makes a motion to dismiss the action, a plaintiff may not be able to discontinue the action without substantial costs being ordered.

In *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555 (CanLII), the plaintiff business sold patented windows which they claimed were virtually impervious to water. After the defendants purchased a new glass door from the plaintiffs, they became embroiled in a dispute over whether the plaintiffs' products caused leaks in the defendants' home.

In November 2020, the defendants published a one-star review on a Google Review webpage, stating they developed a major water leak due to a "defective product" installed by the plaintiffs, amongst other things. The owner of the plaintiff business was described as being "extremely rude and defensive." This review was removed after the plaintiffs' lawyers served a libel notice.

However, a nearly identical review was posted on the website of HomeStars, a Canadian network of "verified and community-reviewed home services professionals". A third negative review was published on the Yelp website, which is an online service that connects consumers with local businesses.

The plaintiffs then sued the defendants for defamation, alleging that the reviews incorrectly stated that their products were defective and caused the defendants' leaks and that they were unprofessional and unresponsive to the concerns of their customers.

In response, the defendants sought to schedule a motion to dismiss the action under Ontario's anti-SLAPP legislation in section 137.1 of the *Courts of Justice Act* (the "Act"), which provides that a defamation lawsuit shall be dismissed where the content of the expression relates to a matter of public interest.

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On April 20, 2021, the parties were scheduled to appear in Toronto's Civil Practice Court to schedule the anti-SLAPP motion. However, the night before the CPC appearance, the plaintiffs served a notice of discontinuance of the lawsuit.

The defendants then sought costs under ss. 137.1 (7) and (9) of the *Act*, which provide that a moving party may be entitled to costs on a full indemnity basis as well as damages if the court finds that a defamation action was brought in bad faith or for an improper purpose.

The motions judge adjourned the matter and directed counsel to find a way to resolve the costs issue summarily. They were unable to do so and re-attended to argue costs. As noted by the motions judge, both sides had highly technical arguments as to why each was or was not entitled to costs. By the time they reattended, the costs sought by the defendants had increased from $35,000 to $165,000. Instead of capitulating to a demand for costs, the plaintiffs "doubled down" and sought to withdraw the notice of discontinuance entirely and proceed to trial.

At a hearing in September 2021, the first issue was whether the plaintiffs could, as a matter of procedure, discontinue the action in the face of the anti-SLAPP motion.

The defendants argued that s.137.1(5) of the *Act* prevented the plaintiffs from doing so on the basis that once a motion under this section "is made" no further steps may be taken in the proceeding by any party until the motion has been finally disposed of. The defendants had served a notice of motion and booked a CPC appointment before the plaintiffs sought to discontinue the action. The defendants argued that they had "made" their motion and the plaintiffs could not discontinue the action and avoid the cost consequences of the *Act*.

The plaintiffs responded that a motion is not "made" under s. 137.1(5) until a date for the anti-SLAPP motion has been scheduled by the court and a notice of motion is served. Therefore, they remained free to discontinue the claim because s. 137.1(5) did not apply until a return date of the motion was set.

The court reviewed the applicable *Rules of Civil Procedure* and Practice Directions along with the applicable wording of the *Act* and reasoned that it was the intention of the Legislature that "a motion is 'made' under s. 137.1 (5) when the moving defendant takes the last step unilaterally available for it to do so under the applicable *Rules* and practice directions." Specifically, a defendant's formal and unilateral step under an applicable practice direction "makes" the motion and thereby brings into force the stay in s. 137.1(5).

In the case at hand, it did not matter that the defendants delivered a notice of motion before they had obtained a motion date. Rather, the motion was "made" and the stay was brought into force by the defendant delivering a Requisition to Attend Civil Practice Court under Part D.20 of the applicable *Practice Direction*.

The court found that it was inappropriate for a plaintiff to sue someone for defamation while maintaining the option to discontinue if the defendant has the wherewithal to bring an anti-SLAPP motion. That strategy is itself an abuse of the court's process, and a plaintiff who implements that type of strategy likely has the type of motivation that the anti-SLAPP legislation was meant to address.

The court then turned to the merits of the anti-SLAPP motion, based on the guidance

provided by the Supreme Court of Canada in *704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 (CanLII).

The first step is to consider whether the proceeding arises from an expression made by the defendants related to a matter of public interest. There was little question that they did, due to the fact that there were thriving internet review sites and that the plaintiffs adduced evidence about the importance of those sites to their business. The court rejected the plaintiffs' attempts to parse the review into "personal" rather than "public" matters.

As the defendants established that the lawsuit arose from expressions made on a matter of public interest, the plaintiffs had the burden to show that there were grounds to believe that their claim had "substantial merit" and that the defendants have "no valid defence in the proceeding".

The court reasoned that it was perfectly apparent that the defendants published their reviews about the plaintiffs and their business. The criticisms, justifiable or not, were intended to impair the plaintiffs' reputations. The goal of one-star reviews is "to alert people of risks of doing business with the target." There were therefore grounds to believe that the words were defamatory.

However, the plaintiffs had to show grounds to believe that the defendants had no valid defences raised regarding the truth of the statements made and fair comment.

As to truth, the court could not determine on the evidence whether or not the plaintiffs' products were in fact the cause of the leaks. No expert evidence was filed. No cross-examinations were conducted. The defendants may have been in a position to prove that their statements were true, which defeats a defamation claim.

Further, the defendants relied on the defence of "fair comment," namely that if the stated facts were correct, then their opinions, if honestly held, were protected and defeated only by bad faith or malice. Since the validity of this defence turned on the truthfulness of the underlying facts, the court could not say that the defence of fair comment was not valid.

Lastly, the court briefly weighed the potential harm suffered by the plaintiffs against the public interest in the defendants' expression.

The corporate plaintiff alleged that it suffered a dramatic loss of revenue in December 2020, stemming from the defendants posting their reviews in mid-November.

The court was skeptical about the plaintiffs' claims in this regard. The plaintiffs offered no evidence of any resulting net income loss or their expenses during the timeframe, which was marked by the COVID-19 pandemic. More importantly, the defendants' online posts were neither the first nor the only negative reviews about the plaintiffs' business. Other highly negative reviews referred to the offensive manner of the plaintiff's owner and echoed the defendants' concerns that the plaintiffs would not admit any possibility of their windows leaking.

In the court's view, the plaintiffs' case had the *indicia* of a SLAPP suit discussed at para. 78 of *Pointes*. There was evidence that the plaintiffs used threats of lawsuits against others who wrote negative reviews. The plaintiffs had the economic power of a successful and growing business as compared to that of retail consumers. The plaintiffs likely suffered little provable loss. The litigation was likely retributive in design.

The action was therefore dismissed. Under s. *137.1 (7)* of the *Act*, the defendants were

presumptively entitled to full indemnity for their legal costs. This presumption was upheld.

The court found that in the unusual circumstances of the case, it was reasonable and intended by the *Act* that the plaintiffs pay the defendants' costs of the proceeding on a full indemnity basis. The defendants were entitled to their full indemnity costs of $164,186.76.

Lastly, in light of the express finding that this was a SLAPP suit in its motivation and implementation, the court awarded nominal damages of $2,500 since the plaintiffs sought to use the lawsuit to bully the defendants to take down public reviews that they did not like.

One imagines that the amounts the plaintiffs were ultimately ordered to pay dwarfed the potential impact of the defendants' negative reviews on their business.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628, or jcook@grllp.com.

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