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Defamation basics and pre-trial disposition motions

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We have written a lot about defamation cases on this blog and the pre-trial disposition of defamation actions under section 137.1 of Ontario's *Courts of Justice Act*. This provision permits an action for damages based on an expression on a matter of public interest to be dismissed at an early stage. However, the Ontario *Rules of Civil Procedure* also permit the pre-trial disposition of these kinds of actions under either rule 20, the summary judgment rule, or rule 21, the striking of claim on the grounds that it does not disclose a reasonable cause of action rule. Although few Canadian provinces have "anti-SLAPP" provisions, the respective rules of civil procedure in each common law province permit a party to strike a claim that does not disclose a reasonable cause of action or to seek dismissal by way of summary judgment where there is no genuine issue requiring a trial.

The recent British Columbia case of *Martin v. Tangerine Bank*, 2021 BCSC 2545, is instructive in how these kinds of rules can be used to dismiss a defamation action at an early stage. As well, the case highlights the basic requirements of a defamation action.

In *Martin*, the plaintiff was a former employee of Global Capital Finance (**"GCF"**). The plaintiff alleged that she lost her job with GCF because she told them that Tangerine Bank had frozen her bank account and that the Bank was conducting an investigation into potential fraudulent transactions that occurred in her account. One of the plaintiff's duties as GCF's employee was to make electronic transfers of funds that could be used to buy Bitcoin and deposit them in a Bitcoin wallet that GCF assigned to her.

More specifically, the evidence showed that the plaintiff would receive an email from someone who would provide details of a transfer of money into the plaintiff's bank account. The plaintiff was then instructed to withdraw the money and use it to buy Bitcoin for purported GCF customers. After buying the Bitcoin, the plaintiff would deposit her purchase into Bitcoin wallets.

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The bank became suspicious of the transactions and opened an investigation. The bank advised the plaintiff of its suspicion that the transfers were fraudulent. However, the bank never said that the plaintiff was a fraudster.

In turn, the plaintiff told her employer about what the bank had said and spoke to other customer service agents at the bank to discuss the matter upon learning that her account had been frozen. GCF terminated the plaintiff from her job and she sued the bank for defamation. The bank sought to dismiss the plaintiff's claim under rules 9-5(1) and 9-6(5)(a) of the British Columbia Supreme Court Civil Rules.

Rule 9-5(1)(a) permits a claim to be struck out at any stage of the proceedings on the grounds that it discloses no reasonable claim. With respect to the plaintiff's action, the bank contended that her action did not satisfy the requisite elements of the tort of defamation.

One of the leading cases in the law of defamation is *Grant v. Torstar Corp.*, 2009 SCC 61. In this case, the Supreme Court of Canada stated, at paragraph 28, that to succeed in a defamation action, a plaintiff is required to prove three things:

1. that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. that the words in fact referred to the plaintiff; and
3. that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

While the plaintiff submitted that the bank's accusation that the transactions in her account appeared to be fraudulent meant, falsely, that she was a fraudster, the bank argued that at no point did its suspicion impugn the plaintiff's reputation. The court agreed with the bank, holding that the bank's suspicion and statements made to the plaintiff impugned those who were depositing money into her account, not the plaintiff herself.

The second element of the tort was also not met by the plaintiff because the bank's suspicion and words did not refer to her. Comments made by the bank were directed at the transactions.

The third element of the tort requires that the impugned words be published to a third party. Since the bank's comments were made only to the plaintiff herself, no publication was made to a third party. Publication was only made to a third party when the plaintiff spoke to GCF and customer service agents of the bank about the bank's suspicion.

It has been stated, however, in *Pinkerton v. Victoria Saanich Canadian Dressage Owners and Riders Society*, 2020 BCSC 1838, at para. 54, that a defendant can be liable for defamation where the defendant knew or reasonably believed that the defamatory words communicated only to the plaintiff would be communicated to a third party.

The plaintiff essentially argued that it was reasonably foreseeable to the bank that she would be compelled to tell her employer about the bank's suspicion.

To resolve this issue, the court relied on rule 9-6. Under this rule, a defendant bears the onus of proving that a plaintiff's claim raises no genuine issue for trial. If the onus is met, the burden shifts to the plaintiff to refute or counter the defendant's evidence.

In the circumstances, the court found that it would not have been reasonable for the bank to believe that its suspicion that the transactions were fraudulent would result in the plaintiff telling her employer that the bank had accused her personally of fraud or had allowed fraudulent transactions to occur in her bank account.

The court noted as well that since the bank's comments related to the nature of the transactions, the plaintiff's communications with GCF merely alerted the employer to the bank's belief about the transactions. This could not have changed GCF's views about the plaintiff or suggested that she was doing something that GCF did not already know that she was doing. In this regard, even accepting the plaintiff's argument on the third element of the tort about reasonable foreseeability in communicating the bank's comments to the third party employer, the plaintiff's action was destined to fail.

Similarly, the plaintiff's action was bound to fail in connection with her communications with the bank's customer service agents. There was simply no arguable case that a communication was being made to a third party where the bank's alleged defamatory words were published to the bank.

This case demonstrates that a plaintiff must carefully consider the three required elements of the tort of defamation before starting a defamation action. If one of the three required elements cannot be met, the action can be struck on the grounds that it discloses no reasonable cause of action. Alternatively, even where there might be doubt whether the factual circumstances disclose a reasonable cause of action, the action can be struck on a summary judgment motion, particularly in cases where the evidence supporting the three required elements is frail.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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