

Real Estate Agent's Defamation Claim Survives Anti-SLAPP Motion

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In *Niu v. Cao*, 2020 ONSC 5407 (CanLII), an Ontario real estate agent was permitted to proceed with a defamation claim stemming from online postings maligning her professional reputation. The decision was released on the same day as two decisions by the Supreme Court of Canada involving Ontario's anti-SLAPP legislation which addressed the underlying legal test at issue in the case: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII); *Bent v. Platnick*, 2020 SCC 23 (CanLII).

The Plaintiff, Niu, was a well-known, Chinese-speaking, real estate agent in Oakville, Ontario, with a base of Chinese-speaking clientele. The Defendant, Cao, had used Niu's services to find and purchase a home. A sore point arose between Cao and Niu over whether wire shelving in the home ought to have been included. Niu discounted her commission and offered to assist Cao with the installation of new wire shelving. Cao sold the home some four years later.

After moving, Cao published two online articles on her "WeChat" account in the Chinese language (entitled "Joys and Sorrows of Life in Canada"). Cao's WeChat Comments were posted in a WeChat group consisting of approximately 500 members in Oakville and other cities across Ontario and other Canadian provinces.

WeChat is a popular instant communication app in China and is used around the world to connect with other Chinese users. WeChat also contains member groups that serve as a discussion board to share personal experiences living in Canada. As a business tool, WeChat is used as a referral source where people can make recommendations for services, including real estate agents.

Cao's first article related primarily to her home-buying experience with Niu, as well as repair and renovation issues related to the property after the purchase. The second article related primarily to her sale and moving experiences, although there were some references to Cao's prior experience purchasing the property. After being published, the two articles were shared in other WeChat groups beyond the initial group. Further, in the WeChat Comments, Cao encouraged readers to share the articles. While Niu was not identified by name in the first two articles, she was specifically identified and discussed in the chat group.

The two articles remained on Cao's account for six months during which time she defended the truth of her statements in response to Niu's threats of litigation. The apology Cao eventually posted at the time of deleting the articles was insufficient to dissuade Niu from seeking damages for defamation.

In August, 2020, Cao brought a motion before Mr. Justice Glustein of the Ontario Superior Court of Justice to dismiss Niu's lawsuit under Ontario's anti-SLAPP legislation in 137.1 of the *Courts of Justice Act*, which provides that a defamation lawsuit shall be dismissed where the content of the expression relates to a matter of public interest. However, the lawsuit shall not be dismissed when the plaintiff can show:

- there are grounds to believe the proceeding has substantial merit,
- there are grounds to believe the defendant has no valid defence, and
- the harm suffered by the plaintiff is sufficiently serious, such that the public interest in protecting freedom of expression, is outweighed by the public interest in permitting the lawsuit to continue.

As a starting point, Justice Glustein found that Cao's publications met the threshold of being an expression relating a matter "of public interest" in that she was attempting to advise Canadian immigrants about the purchase and sale of a home in Canada, including the role of a real estate agent in that process. The fact that Cao's statements may have contained defamatory statements did not disqualify them from being expressions of public interest.

As a result, Niu had to demonstrate, firstly, that her defamation claim had "substantial merit." Justice Glustein agreed with Niu that the statements could be construed as defamatory rather than being mere expressions of dissatisfaction. The statements in issue were specifically directed at Niu's professional services,

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including that she distracted Cao during the home inspection, had untrustworthy advertising, and failed to explain the process. Similarly, WeChat Comments about Niu included statements that she had “no conscience”; didn’t stand up for Cao’s interests; gave preferential service to wealthy clients; was part of a group who “tricked” Cao; and was part of a group of “bad people.”

The anti-SLAPP motion was not the time to determine whether or not the above statements were ultimately defamatory. Rather, the test was whether it was within the “range of conclusions” reasonably available on the record that those statements lowered Niu’s reputation in the eyes of a reasonable person.

Although Niu was not mentioned by name in the two articles, they referred to a very experienced “female Chinese agent” who “knew a lot about the local area” and had a “blog” “on a local Chinese forum.” Even if there was doubt that the articles were directed at Niu, in the WeChat Comments, Cao explicitly identified Niu and posted a link to the articles. Accordingly, Niu established that there was substantial merit to the claim.

Having met the first part of the test, Niu had to establish that there were grounds to believe Cao had no valid defence. Cao relied on proposed defences of (i) justification, (ii) fair comment, and (iii) qualified privilege.

Justice Glustein reviewed the record and determined that the statements could be shown by Niu to be false. Accordingly, the defence of justification (i.e. that the statements were true) could fail.

The proposed defence of fair comment was also not assured to succeed, because Cao’s statements were not simply “comments” but were potentially either false statements of fact, or opinions based on false factual information. As an example, Justice Glustein pointed out that after advising the WeChat Group of Niu’s request that Cao remove the articles and stop posting “fake” information, Cao responded by posting that “[e]verything I said was the truth, and there are witnesses to a lot of things.”

Finally, Cao argued that her statements met the threshold of “qualified privilege” as she had an interest or a legal, social, or moral “duty” to make the impugned statements to the person to whom those statements were made: *e.g. Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), at para. 143. Justice Glustein noted that the impugned statements were sent to the initial 500 members of the WeChat group, as well as posted on Cao’s blog, and were shared by group members at Cao’s request, so a trier of fact could reasonably conclude that the broad distribution vitiates any defence of qualified privilege, even if it were available. Further, Niu might be able to establish malice on the part of Cao which would vitiate the qualified privilege defence.

For the third part of the anti-SLAPP test, Niu was able to demonstrate that the harm suffered was sufficiently serious, such that the public interest in protecting freedom of expression, was outweighed by the public interest in permitting the lawsuit to continue.

Niu’s evidence raised more than bald assertions of financial damage. Unlike another recent case of online reviews, *910938 Ontario Inc. v. Moore*, 2020 ONSC 4553 (discussed in *Online Reviews, Freedom of Expression and Anti-SLAPP Legislation: 910938 Ontario Inc v Moore*), the publications were not obviously motivated by a personal vendetta without any shred of credibility. Cao’s own comments defending the objectivity and truth of her statements were contrary to the tone in *910938 Ontario Inc. v. Moore*. Further, Niu led evidence as to her financial, reputational and emotional damage which established harm that was sufficiently serious to outweigh any public interest in Cao’s expression.

Consequently, on the facts of the case, Justice Glustein found that Niu met her onus to defeat the anti-SLAPP motion. The decision provides a good illustration of the rigorous gauntlet that plaintiffs must pass in order to pursue a claim for damages resulting from online statements maligning their professional reputation. However, such claims may well be worth pursuing when the publisher of the impugned statements has refused to retract them from being widely disseminated online.

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