COURT OF APPEAL FOR ONTARIO

CITATION: Bangash v. Patel, 2022 ONCA 763
DATE: 20221109
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Pepall, Trotter and Thorburn JJ.A.

BETWEEN

Zafar Bangash

Plaintiff
(Appellant)

and

Mustafa Patel

Defendant
(Respondent)

Stephen Ellis, for the appellant

Charles Daoust, for the respondent

Heard: October 31, 2022

On appeal from the order of Justice R. Cary Boswell of the Superior Court of Justice, dated November 23, 2021 with reasons reported at 2021 ONSC 7620.

REASONS FOR DECISION

[1] The appellant, an Imam at the Islamic Society of York Region, sued the respondent, Mustafa Patel, for defamation arising from a petition that the respondent shared in the form of leaflets and postings on Facebook and Change.org. The petition complained about the appellant's leadership. In his statement of claim, the appellant confined his defamation claim to one excerpt in

the petition found under the heading “Lack of Transparency and Accountability”. It stated: “A portion of the property was sold by members of [the appellant’s] family, and no one in the community was consulted about this - where did the funds from that transaction go?” In fact, a portion of the property was not sold by family members of the respondent.

[2] The respondent brought an anti-SLAPP motion to dismiss the appellant’s defamation action pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The motion judge granted that motion.

[3] He found that the respondent had made an expression that related to a matter in the public interest, satisfying the criteria of s. 137.1(3). The appellant contended, however, that his claim met the requirements of section 137.1(4), which states that the proceeding will not be dismissed where the plaintiff satisfies the judge that,

> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) there is no valid defence to the claim; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[4] In considering the substantial merit prong of the analysis, the motion judge found that when read in the broader context of the petition, the impugned passage

only suggested that the appellant lacked accountability and transparency. This was defamatory but not to the degree alleged by the appellant. In addition, the passage related to the appellant's family, and the claim that the expression was about the appellant was therefore "tenuous, but arguable".

[5] Despite finding that the claim was "generally legally tenable" when considered independently of the statement of claim, the motion judge concluded that there were not grounds to believe that the action had substantial merit. The pleadings alleged that the impugned passage painted the appellant as "dishonest, untrustworthy and as having engaged in criminal activity" whereas the more reasonable interpretation was that he was accused of insufficient communication and accountability and a lack of inclusivity in decision-making. The motion judge therefore concluded that it was unlikely that the claim would succeed. This conclusion was sufficient to allow the motion and dismiss the appellant's action, but he went on to address the remainder of the s. 137.1(4) analysis.

[6] In considering the valid defences prong, he stated that the notice requirement under s. 5(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L.12, may well apply and may not have been satisfied by the appellant. As such, he was unable to conclude that there were grounds to believe that there was no valid defence under s. 5(1). The motion judge held that this stage of the test would also have been sufficient to allow the motion.

[7] The motion judge went on to consider the weighing of the public interest. He determined that the appellant would suffer reputational harm, but the harm did not outweigh the public interest in protecting this type of speech. The context of the criticisms was the furtherance of transparency and accountability from the leadership, and this was expression worth protecting. Despite the falsehood, the expression touched on the values of truth-seeking and participation in public decision-making.

[8] The appellant raises three grounds of appeal.

[9] First, he submits that the motion judge erred in determining that there were no grounds to believe that the claim had substantial merit. He maintains that his analysis amounted to the sort of “deep dive” into the case that is improper on an anti-SLAPP motion. The appellant concedes that the motion judge identified the correct test for the substantial merit analysis and the essential elements of a claim of defamation, but contends that the motion judge went too far in his application of that law.

[10] We disagree.

[11] The motion judge situated the impugned passage within the context of the petition as a whole. It was open to him to do so. Moreover, he properly considered the pleadings and ultimately determined that the action did not have a real prospect of success. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22

does contemplate an examination of a statement of claim as part of the merits analysis. In addition, an action may not be frivolous, and may even be technically valid, but still not pass the requisite threshold of substantial merit: *Pointes Protection*, at para. 47. As Côté J. explained, the discretion is placed on the motion judge, not a "reasonable trier": *Pointes Protection*, at para. 41. Simply put, the motion judge is entitled to significant deference in his assessment of the merit of the case. We would not interfere with the motion judge's determination that the claim did not have a real prospect of success.

[12] Second, the appellant submits that the motion judge erred in his weighing exercise. We also would not give effect to this submission. The motion judge was alive to the facts in dispute and the values in play. He properly weighed the harm to the appellant and the public interest in allowing the action to proceed against the public interest in protecting the expression in issue. He also legitimately addressed the disproportionality between the resources required for the litigation and the expected damages award as a consideration in his weighing exercise: see *Pointes Protection*, at para. 80. Ultimately, having identified the correct test and considered appropriate factors, the decision was his call to make. We would not interfere. In light of this disposition, there is no need to address the appellant's third ground of appeal, relating to the "no valid defence" prong of the test under s. 137.1(4).

[13] For these reasons, the appeal is dismissed. As agreed by counsel, the appellant shall pay the respondent costs fixed in the amount of $9,000 on a partial indemnity scale inclusive of disbursements and applicable tax.

"S.E. Pepall J.A."
"G.T. Trotter J.A."
"J.A. Thorburn J.A."