Dismissal of motion shows ?one-sidedness? of anti-SLAPP legislation, counsel says

By Amanda Jerome

The Ontario Superior Court of Justice dismissed a motion seeking to terminate a defamation lawsuit in a decision, that highlights the one-sidedness of anti-SLAPP (strategic lawsuit against public participation) legislation.

In McCarthy-Oppedisano v. Muter 2018 ONSC 2136, the court heard that the defendant, Mary Muter, sought an order dismissing the defamation action brought against her by the plaintiff, Tara McCarthy-Oppedisano (McCarthy).

McCarthy is a real estate agent in the community of Kingscross Estates, and her father is a developer who builds homes in the community. Muter is an environmentalist who lives within the same community and who sits on the board of the Kingscross Ratepayers' Association (KRA).

The KRA has been concerned with developers purchasing property in the community directly from homeowners, who may not be aware of their land's worth, at less than market value. The builders then profit by building large homes on the lots.

According to court documents, McCarthy submitted an application to the Township in May 2015 to amend the official plan, so she could sever two properties (Snowberry Lane). The two properties were owned by McCarthy and her mother, and the severance would have created an additional lot. The KRA opposed the application as it would create smaller lots in the community and ?offend the official plan.?

?McCarthy's application seems to have brought to a head the tensions in the community between those who share Muter's interests and concerns, and those who either support broader choice with respect to development or who, for whatever reason, do not share KRA's agenda,? wrote Justice Susan Healey.

According to court documents, Muter claims she was tasked with polling residents of the community as a co-chair of the KRA. She was to figure out what the views were on McCarthy's application. Muter had conversations with residents where she expressed the KRA's opposition to lot sizes being reduced. The issue was heated and led to community meetings about McCarthy's plans.

The evidence on the motion states that at some point rival real estate agents allegedly told Muter that McCarthy had real estate licence infractions and was blocking bids on home purchases in the community. This rumour was also heard by other people in the community.

The evidence goes on to explain that a resident of Kingscross, Lisa Iafrate, had Muter over to her home where a discussion about the community ensued. Iafrate recorded the conversation, without Muter's knowledge, as Muter made negative comments about McCarthy.

The court noted that the recording is incomplete and that the cell phone on which Iafrate recorded the conversation repeatedly stopped at which point the recording would have to be re-started.

Justice Healey wrote that, read in its entirety, the transcript leaves the impression that Iafrate was interested in talking about a member of the KRA board whom she dislikes and who she believed was controlling the decision to hold a meeting about lot severance.

?The transcript also leaves the impression that Muter's primary objective during the conversation was to present her opposition to the idea of reduction of lot sizes through severance, and the potential precedent that would be set if McCarthy's application was granted, by maligning and vilifying McCarthy and her father,? she added.

The court noted that Muter denied disseminating negative comments to anyone else but Iafrate. However, members of the community said defamatory words were repeated after the conversation between the two women occurred.

According to court documents, another KRA board member, Michael Notaro, spoke to Muter about her conduct after he was approached by McCarthy. He advised Muter to stop making these remarks, which the court wrote were that McCarthy was ?dishonest and had infractions on her licence.?

McCarthy commenced a lawsuit after Muter did not cease the defamatory comments about McCarthy.

The court noted that s. 137.1 of the Courts of Justice Act has a two-part test as to whether an action should be dismissed: 1) ?that the proceeding arises from an expression made by the moving party,? and 2) ?that the expression relates to a matter of public interest.?

Justice Healey wrote that the parties agreed that ?the words complained of? are an expression that was made by Muter. However, the second part of the test is not met.

?It is true that the Kingscross community appears to have had widespread interest in the topic of McCarthy's severance proposal, and that Muter was involved in the concerns raised by it both on a personal level and as a co-chair of the board. What is not germane to that public interest, however, is sheer gossip about McCarthy's integrity or ethics in her chosen profession,? noted Justice Healey, adding that McCarthy's reputation is not connected to the public interest in severance application.

Justice Healey went on to write that Muter's lack of concern about the ?veracity of the gossip that she was so readily relaying to others? supports the view that the allegations are personal attacks passed on to others for ?political advantage.? She determined, in a decision released April 3, to dismiss the motion.

Cameron Fiske, a partner at Milosevic Fiske LLP and co-counsel for McCarthy with David Cassin, said the decision shows that a court will not permit a member of a voluntary community organization to ?shelter behind? that position when making defamatory comments about the reputation of a private citizen.

?A key takeaway from the case is that one cannot embed defamatory comments against another within speech that at times may relate to matters of public interest. In other words, defamatory comments are defamatory regardless of whether they are ?cloaked' in subsequent speech that may touch upon public interest,? he explained.

Fiske said that while there is a need for anti-SLAPP legislation to protect vulnerable defendants from aggressive litigation tactics, the current legislative scheme is too one-sided and ?pre-supposes? that all defamation suits are de facto SLAPP suits.

?It puts those plaintiffs who have legitimate causes of action in libel or slander at a significant disadvantage,? he noted.

Fiske said one disadvantage is that there is no obligation for a defendant to bring an anti-SLAPP motion to strike a claim in a timely manner. He explained that under the new anti-SLAPP legislation these motions can be brought at any time.

?In theory, such a motion could even be brought in the middle of a trial and the effect of bringing such a motion is to stay the action as well as any related tribunal proceedings until after it is heard,? he said.

Another disadvantage Fiske pointed out is that once an anti-SLAPP motion is formally brought by the defendant, they are supposed to be heard within approximately 60 days. However, he said it is common for such motions to be delayed for six months to a year due to scheduling or other issues.

?If a plaintiff wins an anti-SLAPP motion and is able to demonstrate that they had a bona fide cause of action in libel or slander, the anti-SLAPP legislation still creates a presumption against costs. Therefore, a plaintiff who has likely had to spend between $10,000 and $50,000, and in some cases even more, to defend an anti-SLAPP motion is presumptively not entitled to costs. Strategically, this puts a plaintiff at a serious disadvantage because a defendant can wear them down financially with little risk of having to pay costs. Yet, a plaintiff has to expend significant resources in responding to such a motion because if they lose, the overriding action is dismissed, and they are exposed to a presumption of full indemnity costs on the motion and possibly damages,? he said.

Fiske noted that further issues arise with anti-SLAPP legislation as an unsuccessful defendant who has failed to show that the action is a SLAPP suit has an automatic right of appeal, without the requirement to obtain leave, even though it is an interlocutory motion.

?The way to remedy this legislation is threefold: the entire costs regime for anti-SLAPP legislation should be struck down; as should an automatic right of appeal of an unsuccessful defendant on an interlocutory decision; and further, anti-SLAPP motions should be required to be brought in a timely manner. The legislation as it stands could well spell the end to defamation litigation unless a plaintiff has significant time, energy and funds to carry a case,? he added.

Fiske said that, as drafted, the anti-SLAPP provisions allow a defendant to use the legislation as a sword when it is meant to be used as a protective shield.

Counsel for Muter declined to comment on the decision.

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