SUPREME COURT OF NOVA SCOTIA
Citation: *Sapra v. Cato*, 2020 NSSC 30

Date: 20200204
Docket: Hfx No. 470922
Registry: Halifax

Between:

Aayoosh Sapra and Sanjeev Sapra

Plaintiffs/Respondents on Motion

v.

Kenneth Cato

Defendant/Applicant on Motion

Decision – Motion for Summary Judgment

Judge:	The Honourable Justice Denise Boudreau
Heard:	December 2, 6, 2019, in Halifax, Nova Scotia
Counsel:	David Lasaga, for the Applicant on Motion/Defendant Godfred Chongatera, for the Respondents on Motion/Plaintiffs

By the Court:

[1] This is an action in defamation. The plaintiffs claim that the defendant has defamed them by way of spoken communications and emailed communications.

[2] The parties were, at the relevant times, directors of a company called Ceesix Health Inc. The defendant became concerned about certain perceived actions of the plaintiffs as they related to the company and began expressing his concerns to the other directors, at meetings and in emailed communications. The plaintiffs state that the concerns were unfounded, and that the defendant's communications were based in spite or ill will on his part, as he was being removed from the company.

[3] The defendant/applicant before me has made two motions: the first for summary judgment on the pleadings, and the second for summary judgment on evidence. The two motions proceeded on the same dates by agreement, although the affidavit evidence that was presented to me will only be considered on the motion for summary judgment on evidence.

Summary Judgment on pleadings

[4] Summary judgment on pleadings is governed by Rule 13.03, which provides that a Statement of Claim must be set aside where a judge finds that it discloses no

cause of action, or makes a claim that is clearly unsustainable. Such a motion must be assessed only on the pleadings, without recourse to any additional evidence.

[5] The Rule provides that a court may grant summary judgment on pleadings in a number of ways (Rule 13.03(2)):

1. That judgment be granted to the claimant, where a defence is set aside wholly;

2. That the proceeding be dismissed, where a claim is set aside wholly;

3. That a claim be allowed, where all parts of the defence relating to that claim are set aside; and

4. That a claim be dismissed, where all parts of the statement that pertain to that claim are dismissed.

[6] The Statement of Claim in this proceeding has undergone three versions or amendments. The first Statement, attached to the Notice of Action, was dated and filed December 1, 2017. An Amended Notice of Action and Statement of Claim was dated March 20, 2019, and filed March 21, 2019; it contained further particulars about the events alleged. A third version, the most recent version (the second Amended Statement of Claim) was dated October 25, 2019, filed October 31, 2019, and again provided more details.

[7] The defendant notes that following receipt of the first Notice of Action and Statement of Claim, he sent to the plaintiffs a Demand for Particulars, and the plaintiffs provided him with an Answer. He submits that both documents constitute "pleadings" and that I should therefore consider both documents within the motion for summary judgment on pleadings. The defendant did not raise much objection with that suggestion. No authority was given to me on this point.

[8] Following discussion I advised counsel that I would further consider this issue and advise. The Answer to Demand for Particulars was provisionally marked as an exhibit (Exhibit 5).

[9] Rule 38, entitled "Pleadings", references Demands for Particulars and Answers, at Rule 38.09:

> Rule 38.09 (1) The party to whom a demand for particulars is delivered must file an answer no more than ten days after the day the demand is delivered.
>
> (2) The answer must contain the standard heading, be entitled "Answer to Demand for Particulars", be dated and signed, identify the party demanding particulars and the party answering, repeat each numbered demand and, after each demand, provide one of the following statements:
>
> (a) a response to the demand that becomes part of the pleading to which it relates;
>
> (b) a refusal to respond and the reason for the refusal. (emphasis is mine)
>
> …

[10] Therefore, answers are clearly part of the pleadings.

[11] Having said that, the Answer before me is of very limited use. It is dated February 5, 2018; it could therefore necessarily only relate to, and "become part of", the original pleading/Statement of Claim dated December 1, 2017. That Statement of Claim is no longer the active pleading; it had been amended twice since its original version. The present and active version of the Statement of Claim is the one dated October 2019. It is that pleading that I assess to determine whether it meets the criteria of Rule 13.03.

[12] The active Statement of Claim (October 2019) provides the following allegations as against the defendant:

> …
>
> 7. On or about October 31 2017, during the Directors meeting, hereinafter called "the Meeting" the Defendant orally made multiple statements to the Board that Aayoosh Sapra was a criminal, and that he committed a fraudulent act.
>
> 8. The Plaintiffs further state that during the Meeting the Defendant orally called Aayoosh Sapra a liar on many occasions.
>
> 9. Present at the Director's meeting were Aayoosh Sapra, Sanjeev Sapra by telephone, Igor Yushchenko, Clay Bryden, and the Defendant.
>
> …
>
> 11. The Defendant also sent an e-mail on or about October 25, 2017 to Clay Bryden, Sanjeev Sapra, and Aayoosh Sapra stating that Aayoosh Sapra committed an act which was dishonest, illegal, fraudulent, and threatened to report Aayoosh Sapra and Sanjeev Sapra to law enforcement/immigration if they did not tender their resignation of Ceesix Health Inc.
>
> 12. On or about October 5, 2017, the Defendant sent an email to Rohan Rajpal and Clay Bryden claiming Aayoosh Sapra committed fraud, committed a criminal breach of trust, and stated he had further "supporting evidence" against Aayosh Sapra and Sanjeev Sapra.

> 13. On or about October 1, 2017, during another Directors meeting the Defendant orally accused both the Plaintiffs of committing fraudulent acts.
>
> 14. Present at the Directors meeting on or about October 1, 2017 were Aayoosh Sapra, Sanjeev Sapra by telephone, Clay Bryden, Megan MacDonald, and the Defendant.
>
> 15. Aayoosh Sapra states that the Defendant has made negative comments regarding both the Plaintiffs, in particular, has stated that Aayoosh is a criminal, while in the presence of Minder Singh, Clay Bryden, and Mark Goldhar, either jointly or separately.
>
> 16. The Plaintiffs state that Aayoosh Sapra has also been informed by Mark Goldhar and Clay Bryden on several occasions that the Defendant spread information that Aayoosh Sapra is not the CEO and/or the director of the company, Ceesix Health Inc.

[13] The claim goes on to note the belief of the plaintiffs that the statements noted are defamatory, libellous or slanderous.

[14] The defendant has brought the present motion for summary judgment on the pleadings, arguing that the pleading filed against him does not support a cause of action on its face.

[15] The caselaw is clear that a request for summary judgment on the pleadings is a high bar for an applicant to attain.

> [17] Rule 14.25 (this is the previous Rule for SJ on pleadings) offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying the litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action. (*CBRM v. AGNS* 2009 NSCA 44)

[16] Having said that, this is an action in defamation. It is clear that such an action has specific and particular requirements. A pleading in respect of a defamation claim needs to be carefully and specifically particularized.

> The purpose of the statement of claim and the particulars that form a part of it is to define the issues of the claim, inform the court what the case is all about, and alert the defendant to the case against him or her, thereby precluding any surprise. Therefore, the plaintiff must at a minimum, plead a *prima facie* case and set out with some particularity all those material facts necessary to support a cause of action for defamation. This includes the defamatory words, their publication, the fact that they were spoken "of and concerning the plaintiff", and any additional material facts necessary to support an action, including damages, where appropriate. The time, place, content, publisher and recipient of the publication should be included in the pleading…There must be clarity in the pleadings; they must be sufficiently particularized to enable the defendant to plead to them. The "claim must be pled with a heightened level of precision and particularity". (*Brown on Defamation*, Vol 6, 19.3(1))

[17] Professor Brown's text makes it clear that a claim in defamation requires that the exact words complained of must be pled:

> The general rule is that the defamatory words about which the plaintiff complains must be set out fully and precisely in the statement of claim. The particular words that are claimed to be defamatory must be included in the claim. The impugned words must be pleaded. They should be set forth verbatim, or at least with sufficient particularity to enable the defendant to plead to the allegation…
>
> Ordinarily it is not sufficient to give the tenor, substance or purport of the libel or slander, or an approximation of the words, or words to a certain "effect", or any other words of a similar import. Merely to refer to "demeaning and slanderous remarks" or to plead that the plaintiff was defamed is not sufficient…
>
> The exact words had to be set out with reasonable certainty, clarity, particularity and precision…(*Brown*, supra, Vol 6, 19.3(2)(a))

[18] I also note the comments of the Court in *Robertson v. McCormick*, 2012 NSSC 4, at paras. 17-18:

> 17 The rules of pleading have been said to be particularly strict when applied to defamation claims. The allegedly defamatory words constitute material facts and generally should be set out verbatim: Roger D. McConchie and David A. Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 535….
>
> 18. In *C. (D.) v. Children's Aid Society of Cape Breton Victoria*, 2008 NSSC 196, Coughlan, J. struck a claim in defamation under the former Rule 14.25 commenting that "a plaintiff must set out fully and precisely the defamatory words the defendant is alleged to have published and specify how, when, where and to whom they were published. In this proceeding, the statement of claim does not specify any defamatory statements, whether the statements were written or oral, or anything about to whom, when or where any defamatory statement was made." (para. 15) There is, however, authority to the effect that where the plaintiff does not know the exact words of an alleged slander, there is some flexibility…"

[19] It is with these principles in mind that I turn to the specific pleadings in this case.

Claims of plaintiff Sanjeev Sapra

[20] There are four references to Sanjeev Sapra as a plaintiff in the pleadings; they are at paragraphs 11-15 (I reproduce them for ease of reference, underlining the references to Sanjeev Sapra):

> 11. The Defendant also sent an e-mail on or about October 25, 2017, to Clay Bryden, Sanjeev Sapra, and Aayoosh Sapra stating that Aayoosh Sapra committed an act which was dishonest, illegal, fraudulent, and threatened to report Aayoosh Sapra and Sanjeev Sapra to law enforcement/immigration if they did not tender their resignation of Ceesix Health Inc.
>
> 12. On or about October 5, 2017, the Defendant sent an email to Rohan Rajpal and Clay Bryden claiming Aayoosh Sapra committed fraud, committed a criminal

> breach of trust, and stated he had further "supporting evidence" against Aayosh Sapra and Sanjeev Sapra.
>
> 13. On or about October 1, 2017, during another Directors meeting the Defendant orally accused both the Plaintiffs of committing fraudulent acts.
>
> 14. Present at the Directors Meeting on or about October 1, 2017 were Aayoosh Sapra, Sanjeev Sapra by telephone, Clay Bryden, Megan MacDonald, and the Defendant.
>
> 15. Aayoosh Sapra states that the Defendant has made negative comments regarding both the plaintiffs, in particular, has stated that Aayoosh is a criminal, while in the presence of Minder Singh, Clay Bryden, and Mark Goldhar, either jointly or separately.

[21] In my view, these pleadings are insufficient and do not adequately plead the claims of defamation made by Sanjeev Sapra.

[22] More specifically, the comments at paragraphs 11 and 12 do not identify anything that could be considered defamatory as against Sanjeev Sapra. Simply indicating that you intend to report someone to law enforcement, or that you have "evidence" against them, could not objectively be viewed as a defamatory statement in and of itself.

[23] As to paragraphs 13 and 15, clearly these do not afford the requisite particularization that is needed. In paragraph 13, the exact words alleged to have been uttered about Sanjeev Sapra are not pleaded. Paragraph 15 contains no information as to the exact words used, nor the time and place of the utterances. In my view, they are both clearly deficient.

[24] The plaintiff Sanjeev Sapra has not requested an adjournment of the present motion in order to present a motion for amendment of his pleadings, as is possible by Rule 13.03(4). These pleadings have been through three versions already and, frankly, it might be difficult to imagine a scenario where Mr. Sapra would be permitted to file a fourth pleading. In any event, he has not asked to do so.

[25] Therefore, as to Sanjeev Sapra, and in accordance with Rule 13.03, I grant the defendant's motion for summary judgment on the pleadings. Since all parts of the Statement of Claim relating to Sanjeev Sapra are set aside, the entirety of the claims of Sanjeev Sapra are wholly set aside and dismissed (Rule 13.03(2)(d)).

Claims of plaintiff Aayoosh Sapra

[26] The claims made by Aayoosh Sapra fall into four categories:

1. Meeting of October 1 2017:

> 13. On or about October 1, 2017, during another Directors meeting the Defendant orally accused both the Plaintiffs of committing fraudulent acts.
>
> 14. Present at the Directors meeting on or about October 1, 2017 were Aayoosh Sapra, Sanjeev Sapra by telephone, Clay Bryden, Megan MacDonald, and the Defendant.

2. Emails in October 2017:

> 11. The Defendant also sent an e-mail on or about October 25, 2017 to Clay Bryden, Sanjeev Sapra, and Aayoosh Sapra stating that Aayoosh Sapra committed an act which was dishonest, illegal, fraudulent, and threatened to report Aayoosh Sapra and Sanjeev Sapra to law enforcement/immigration if they did not tender their resignation of Ceesix Health Inc.

> 12. On or about October 5, 2017, the Defendant sent an email to Rohan Rajpal and Clay Bryden claiming Aayoosh Sapra committed fraud, committed a criminal breach of trust, and stated he had further "supporting evidence" against Aayosh Sapra and Sanjeev Sapra.

3. Meeting of October 31:

> 7. On or about October 31 2017, during the Directors meeting, hereinafter called "the Meeting" the Defendant orally made multiple statements to the Board that Aayoosh Sapra was a criminal, and that he committed a fraudulent act.
>
> 8. The Plaintiffs further state that during the Meeting the Defendant orally called Aayoosh Sapra a liar on many occasions.
>
> 9. Present at the Director's meeting were Aayoosh Sapra, Sanjeev Sapra by telephone, Igor Yushchenko. Clay Bryden, and the Defendant.

4. General allegations:

> 15. Aayoosh Sapra states that the Defendant has made negative comments regarding both the Plaintiffs, in particular, has stated that Aayoosh is a criminal, while in the presence of Minder Singh, Clay Bryden, and Mark Goldhar, either jointly or separately.
>
> 16. The Plaintiffs state that Aayoosh Sapra has also been informed by Mark Goldhar and Clay Bryden on several occasions that the Defendant spread information that Aayoosh Sapra is not the CEO and/or the director of the company, Ceesix Health Inc.

[27] I will deal with the last category first. In my view, neither paragraphs 15 nor 16 comply with the Rules for pleadings in a defamation claim. There are no dates or places noted in either paragraph. They are simply not particularized enough to sustain the claims therein.

[28] As to paragraph 16, wherein the plaintiff alleges that the "Defendant spread information that Aayoosh Sapra is not the CEO and/or the director of the company, "Ceesix Health Inc.", I fail to see how this statement is defamatory on its face.

[29] As to the claims related to the meeting of October 1 (paragraphs 13 and 14), the words complained of are not pleaded. The pleading merely refers to "fraudulent acts". The exact words should be pled and there is simply no reasonable explanation for why they are not. Aayoosh Sapra was present for the meeting. Assuming all present heard the words used (which is, quite frankly, not clear from the pleadings either), Aayoosh Sapra would have heard exactly what was said and, therefore, would be in a position to plead the exact words used. He has not done so, despite having amended his pleadings three times.

[30] I make the same comments about Aayoosh Sapra that I did about Sanjeev Sapra in relation to Rule 13.03(4), as contained in paragraph 24 hereinabove.

[31] Therefore, and in accordance with Rule 13.03(2)(d), I grant partial summary judgment on the pleadings in relation to the claims of Aayoosh Sapra. I set aside/strike paragraphs 13, 14, 15 and 16 of the Second Amended Statement of Claim, and I dismiss the claims of Aayoosh Sapra contained in those paragraphs.

[32] In relation to the remaining claims made by Aayoosh Sapra, contained in paragraphs 7, 8, 9, 11 and 12 (those relating to the October emails and the October 31 meeting). In my view, they do contain at least the most basic information that would be required in a defamation pleading; they include the words used, the dates,

the vehicles used to communicate (orally or by email), and the recipients. I find that they contain enough of that basic information to satisfy me that they should not be struck summarily.

[33] Therefore, I will not set aside paragraphs 7, 8, 9, 11, 12 of the claim and I do not dismiss Aayoosh Sapra's claims as contained therein.

Summary Judgment on evidence

[34] In the alternative, the defendant has made application for summary judgment on evidence.

[35] Given my decision on his first motion, I am now left with the claims made by the remaining plaintiff Aayoosh Sapra as against defendant Kenneth Cato relating to the October emails and the October 31 meeting.

[36] Summary judgment on evidence is dealt with in Rule 13.04:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment

> must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[37] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, the NSCA has interpreted this Rule as necessitating the posing of five questions:

1. Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?
2. If the answer to #1 is no, then does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
3. If the answers to #1 and #2 are both no, summary judgment must issue.
4. If the answers to #1 and #2 are no and yes respectively, then the judge may grant summary judgment. To govern that discretion the judge should ask does the challenged pleading have a real chance of success?
5. If the answer to #3 is yes, then should the judge exercise the "discretion" to finally determine the question of law?
6. If the motion is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[38] Other principles which may be gleaned from the *Shannex* decision, and others that have followed, are: 1) a "material fact" for the purposes of this analysis is one that would affect the result; 2) the moving party bears the onus of showing no genuine issue of material fact, while the responding party bears the onus of showing a real chance of success; and 3) both parties bear the responsibility of putting their "best foot forward" in bringing their respective positions to the motions judge.

[39] I move to a review of the evidence before me on this motion. The affidavit of the defendant/moving party Kenneth Cato dated June 14, 2019, states as follows:

> …
>
> 5. I am a former director and employee of Ceesix Health Inc. (Ceesix)
>
> ….
>
> 7. Ceesix was a start-up company originally envisaged by myself and Aayoosh Sapra.
>
> …
>
> 12. Since on or around April 2017, I was informed and did verily believe that Aayoosh Sapra had invested $30,000 in the company. This was consistent with financial information disclosed by Aayoosh Sapra in financial documents he prepared for Ceesix and with representations he had made to potential partners and investors…
>
> 13. On multiple occasions I asked Aayoush Sapra for more information about his $30,000 investment, but Aayoosh Sapra denied my requests. As Ceesix started to pick up steam I became increasingly concerned about whether these funds had actually been invested and I wondered if Aayoosh had misrepresented the company's financial picture.
>
> …

19. At the October 1st meeting I raised a number of concerns to the other directors about the recent conduct of Aayoosh Sapra in his capacity as a director of Ceesix. These concerns, which I honestly held, included:

> a. that Aayoosh Sapra was not acting in the best interests of Ceesix and was instead prioritizing his own personal gain;
>
> b. that Aayoosh Sapra was being dishonest by misrepresenting and confusing his various roles within Ceesix and the authority he had contingent with those roles;
>
> c. that Aayoosh Sapra attempted to unjustly and improperly terminate my employment and and directorship with Ceesix, threatening my job security; and
>
> d. that Aayoosh Sapra had misrepresented the amount and type of shares that each director would be entitled to once Ceesix had a formal shareholder's agreement in place and was ready to issue those shares…

20. I did not act out of spite or ill will in making any statements that touched on these concerns, or at all.

21. I was, however, very frustrated with how Aayoosh Sapra was running the meeting and the conflicting information he was giving me and the other directors that seemed to minimize our roles in the company and maximize his role in the company.

…

24. A second director's meeting of Ceesix took place at the offices of Bacchus & Associates on October 31, 2017 (the "October 31st meeting"). The only individual present at the October 31st meeting were:

> a. Myself, in my capacity as a director of Ceesix;
>
> b. Aayoosh Sapra, in his capacity as a director of Ceesix;
>
> c. Sanjeev Sapra, via teleconference, in his capacity as a director of Ceesix;
>
> d. Clayton Bryden, via teleconference, in his capacity as a director of Ceesix;
>
> e. Igor Yuschenko of Bacchus & Associates, in his capacity as counsel for Aayoosh Sapra.

25. At the October 31st meeting I raised concerns previously discussed with Aayoosh Sapra that he had committed fraudulent acts, and I advised the other directors that, in my view, Aayoosh Sapra had committed a criminal offence (specifically, that he had stolen intellectual property) and was currently under investigation.

> 26. Prior to the October 31st meeting I contacted the RCMP to figure out how to handle this case moving forward. I spoke with Sgt. Jeffrey Karran and was advised to send documents to the Halifax detachment. While I initially intended to actively pursue this investigation, I changed my mind after the October 31st meeting as I did not wish to complicate things even further for myself or for Aayoosh Sapra.
>
> …
>
> 28. At the October 31st meeting I raised a number of concerns to the other directors about the recent conduct of Aayoosh Sapra in his capacity as a director of Ceesix. These concerns, which I honestly held, included:
>
> > a. that Aayoosh Sapra had committed theft by selling Ceesix'z intellectual property unilaterally and without the consent of the other directors to Alteora Solutions Inc. To the best of my knowledge, Aayoosh Sapra was at all material times the sole shareholder of Alteora Solutions Inc. We had been in communication with a potential investor, Larry Hood, who indicated that he would not invest with Ceesix until all intellectual property was transferred back from Alteora Solutions Inc. to Ceesix. Aayoosh Sapra refused to complete the transfer.
> >
> > b. that Aayoosh Sapra had misrepresented to me and to potential investors that he ahd invested $30,000 of owner's capital into the company.
> >
> > c. that Aayoosh Sapra was attempting to structure the October 31st meeting so that he could become the majority shareholder of the company and vote me out of my position.
>
> 29. I did not act out of spite or ill will in making any statements that touched on these concerns, or at all.
>
> …

[40] Mr. Cato was cross-examined and did not really deviate in any material way from his affidavit evidence. He agreed that while his start-up vested interest in the company was ten percent, he eventually felt that it should increase to 25 percent, and he raised this with Aayoosh Sapra on more than one occasion. Mr. Sapra would not agree to this change. Mr. Cato testified that this was not the reason for his negative comments about Aayoosh and Sanjeev Sapra, and that any comments he made represented his honestly held views.

[41] Mr. Cato further confirmed that the two emails referenced in the Statement of Claim at paragraphs 11 and 12 were authored and sent by himself.

[42] The remaining plaintiff/respondent Aayoosh Sapra provided an affidavit in response dated November 26, 2019. He testified as follows:

> …
>
> 5. In April of 2016, I came up with a business idea for an all-in-one resource for diabetes care. I was inspired by a friend who had diabetes. I decided to call this business "Ceesix".
>
> …
>
> 8. I met Mr. Kenneth Cato ("Mr. Cato") in April 2017, and told him of the business I have been developing, which led to him joining the Ceesix team.
>
> 9. Mr. Cato was to receive a 10% vested interest in the company provided he was able to get 500 paid subscribers sign up for the services. This number was later reduced to five, which Mr. Cato failed to obtain…
>
> …
>
> 16. In 2015 I incorporated Alteora Solutions, which I used to develop different start-up ideas I had. I cane up with the idea of Alteora owning all the intellectual property Ceesix was going to create and in turn have Alteora lease the intellectual property back to Ceesix. Mr. Cato and Mr. Bryden did not agree with this idea and no property was ever transferred.
>
> 17. To get the business off the ground, my father and I discussed investing $30,000.00 in the business as a shareholder loan to pay for the medical devices we hoped to have a manufacturer develop. Specifically, a device that would check the levels of blood glucose and Ketones. I told Mr. Cato and Mr. Bryden about this possibility.
>
> 18. After talking to manufacturers, and becoming aware of the great cost of producing such devices, I spoke to my father about the potential investment and decided that investing $30,000.00 would be too much of a risk.
>
> 19. Mr. Cato and Mr. Bryden were the only individuals I informed of the possibility of investing this money. I did not present the information to any potential investor.
>
> …

36. Prior to the meeting of October 31, 2019 (sic), I received email correspondence from the Defendant which is attached to this Affidavit as **Exhibit D**. In this email Mr. Cato claimed my actions were dishonest, illegal, and fraudulent. He demanded the resignation of myself along with my father, otherwise he would be reporting me to law enforcement /immigration.

37. I am not aware of what actions Mr. Cato claims to be dishonest, illegal or fraudulent.

38. I have never been contacted by the police or any immigration officials regarding my involvement in Ceesix.

39. My father, Sanjeev Sapra, who lives in India, was copied on this email along with Clay Bryden. This email caused a great strain between my father and I as he told me he was concerned I had got him involved in some illicit activity without him knowing.

40. As my relationship with Mr. Cato deteriorated, my father and I decided it was in our best interests to discontinue our relationship with Mr. Cato.

41. At the director's meeting we decided to vote to remove Mr. Cato as director.

42. Present and (sic) the director's meeting of October 31, were Igor Yuschenko, who I hired to act as my personal counsel, Sanjeev Sapra, Clay Bryden, the Defendant, Mr. Cato, and myself.

43. During this meeting Mr. Cato made several unsupported allegations that I was a criminal, informed everyone present that there was a criminal investigation currently being conducted against Ceesix and that I had illegal ownership of intellectual property.

…

47. Mr. Cato was terminated from his position as a director of Ceesix on November 15, 2019 (sic) by way of resolution. He was also notified in writing;

48. After Mr. Cato's removal as director, I removed his company email.

49. In removing Mr. Cao from access from his company email, I became aware of email correspondence he had sent to Mr. Rojan Rajpal, who I have originally hired to incorporate the company and copied Clay Bryden on the email. In this correspondence Mr. Cato claims I committed a criminal breach of trust and that he had "supporting evidence" against myself and my father Sanjeev Sapra. Attached to this Affidavit as **Exhibit E** is a copy of this email correspondence.

50. In this email correspondence Mr. Cato claimed I illegally transferred intellectual property from Ceesix to Alteora Solutions, which he stated was a criminal breach of trust. This is not true. No property intellectual or otherwise was ever transferred from Ceesix to Alteora Solutions.

…

[43] Mr. Sapra was also cross-examined and did not deviate materially from his affidavit evidence. His affidavit attaches two email chains (the contents of which, in fact, are the subject of Mr. Sapra's formal claims at paragraphs 11 and 12 of his Second Amended Statement of Claim). The first is a series of correspondence between Kenneth Cato and Rohan Rajpal of McInnis Cooper. Mr. Cato appears to be seeking clarification about a number of issues involving Ceesix, including the issuance of shares and voting issues, seeking copies of documents, and expressing concerns about both Aayoosh Sapra and Sanjeev Sapra. The final email from Mr. Cato, dated October 5, 2017, sent to Mr. Rajpal and copied to Clay Bryden, reads:

> Good evening Rohan
>
> From your previous email, you ignored by request for certain documents. I did not receive all the documentation as requested.
>
> Missing Documents:
>
> 1) Minute Book
> 2) By-laws "The board (which includes you) have not approved the by-laws, have not issued shares, have not approved the form of share certificates, have not approved the fiscal year etc" (Even though they are not signed, I am still entitled to receive them.)
>
> As per our conversation earlier today. If you are working in the best interest of Ceesix Health Inc then the articles I am presenting out of an extremely large list of supporting documentation/evidence against Aayoosh Sapra and Sanjeev Sapra is beyond sufficient evidence to completely remove Aayoosh Sapra and Sanjeev Sapra from Ceesix Health Inc.
>
> 1) Kenneth Cato Termination Without Cause as an Employee (2 Witnesses).
> 2) Kenneth Cato Removal/Termination as a Director without Cause or by Proper Procedures (Evidence is in the Minutes of the First Directors Meeting) *"With regards to your comment about Mr. Sapra terminating your role as director, I have not received notice of any such a removal of director. I am not clear as to your comment about Mr. Sapra voting using "his 80% shares" to vote as,*

> *again, no one (including Mr. Sapra) has signed and been issued share certificates."* Did you not listen to the Minutes of the first Director meeting which I request you to in my previous email? Respond with a yes or no to my question and state why you made this comment when this event clearly happened.
>
> 3) Fraud – Aayoosh Sapra acted on behalf of Ceesix Health Inc. as the majority shareholder when he is not. (Exit Agreement between Ceesix Health Inc and Kenneth Cato).
>
> 4) Aayoosh Sapra transferred and/or sold all IP, rights, logo, etc of Ceesix Health Inc to Alteora Solutions Inc. which is a Criminal Breach of Trust.
>
> This is only a fraction of supporting evidence I have against Aayoosh Sapra and Sanjeev Sapra. If you do not completely remove Aayoosh Sapra and Sanjeev Sapra from Ceesix Health Inc then this is sufficient evidence that you are working in the best interest of Aayoosh Sapra and Sanjeev Sapra and not in the best interest of Ceesix Health Inc. This will also support the multiple articles of evidence I have of you "Rohan Rajpal" working in the best interest of Aayoosh Sapra and Sanjeev Sapra and not in the best interest of Ceeesix Health.
>
> Thank you for your time.
>
> Sincerely
>
> Ken Cato

[44] The second exhibit is an email chain starting with correspondence from Aayoosh Sapra to an unknown list of recipients, scheduling a meeting for October 27, 2017. There is a response from Kenneth Cato, addressed to Aayoosh Sapra, Sanjeev Sapra, and Clay Bryden. Mr. Cato writes:

> Good Afternoon
>
> Aayoosh, I see that you chose to ignore my email regarding your dishonest, illegal and fraudulent actions.
>
> I will give you the benefit of the doubt and give you till **12 o'clock, Noon on Friday 27th October 2017** to hand in your and Sanjeev Sapra complete tender resignation of Ceesix Health Inc or I will report your fraudulent and illegal actions to law enforcement/immigration. I gave you plenty of notice to respond/act and you chose to ignore it. Once this is finalized we can arrange a time to sign documentation required for your and Sanjeev Sapra complete removal of Ceesix Health Inc, i.e. business accounts, emails, passwords, etc.

> Thank you for your time,
>
> Ken Cato

Analysis

[45] The first question I must ask myself is whether there is a genuine issue of material fact for trial.

[46] The claim is framed in defamation. The Notice of Defense filed on February 23, 2018, raises the following defences:

> 23. Mr. Cato states that at all material times, any statement he made about the plaintiffs was either:
>
> (a) a statement that Mr. Cato reasonably believed to be true;
>
> (b) fair comment;
>
> (c) subject to responsible communication or privilege.
>
> 24. Mr. Cato specifically denies making any comment intended to lower the reputation of the plaintiffs in the eyes of the public.
>
> 25. Mr. Cato specifically denies that the plaintiffs have suffered damage as stated or at all as a result of any comments made by Mr. Cato to any person.

[47] The defendant/moving party argues that, in this particular case, there is no question of material fact in issue. He notes that he has agreed that he made certain alleged statements; that he has identified the reasons for making these statements to other directors of Ceesix; and that the information before me identifies the persons present when the utterances of October 31 were made and the recipients of the October emails.

[48] The defendant submits that there is only one question of law in this case that, in his view, truly needs to be answered: that of qualified privilege, and whether this defence is available to the defendant in the circumstances of this case.

[49] Qualified privilege attaches to communication, when the person communicating has a duty to do so to a recipient or recipients, and the recipient(s) has (have) a corresponding duty to hear it. I refer to *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130:

> 146 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward* [1917] A.C. 309 (H.L.), at p. 334:
>
> > …a privileged occasion is…an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> 147 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice…

[50] The defendant submits that this is the only live question that exists in this case. He submits that I should decide that question of law within the present motion, by finding that the defence applies, and by concluding that the plaintiff's claims cannot succeed.

[51] The remaining plaintiff/respondent Aayoosh Sapra responds that, while this question is certainly one that needs to be answered, it should be answered at trial, by a trial court, not by a motions judge at a summary judgment motion.

[52] Furthermore, the remaining plaintiff submits that there is at least one question of fact that exists: whether the defendant was motivated by malice. The caselaw establishes that qualified privilege can be defeated where the plaintiff can show that the purpose of the communications is actual malice on the part of the defendant (*Kanak v. Riggin*, 2017 ONSC 2837). The existence of a live question of fact automatically defeats a summary motion on evidence.

[53] It certainly appears, on the evidence before me, that the issue of whether qualified privilege applies to protect the statements made by this defendant is a live question of law or mixed fact/law that needs to be decided in this case.

[54] Having said that, there is also a live dispute of fact. The remaining plaintiff says that the defendant was motivated by spite, or ill will, in the making of the statements, because he (the defendant) was displeased and angry about his percentage of the vesting shares. The defendant denies that such was the case, and testified that his motives were genuine, and that he should be protected by privilege. This is a live issue, and a question of fact.

[55] I am in no position to resolve that issue within the confines of this motion. There is competing evidence before me, and it is abundantly clear that a motions judge does not have the authority or power to weigh competing evidence. I quote from *Martin Marietta Materials Canada Inc. v. Beaver Marine*, [2017] NSCA 61:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] ...
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, **or the appropriate inferences to be drawn from disputed facts**.
> >
> > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
> >
> > [Emphasis added]
>
> [26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does "weighing the evidence" mean?
>
> [27] *Black's Law Dictionary*(10th ed.) defines weight as follows:
>
> > **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.
> >
> > *Black's Law Dictionary*, 10th ed, sub verdo "weight of the evidence"
>
> [28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:

> Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence. [Emphasis added]
>
> John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Vol 1 (Toronto: Little, Brown and Company, 1983)

[29] The *Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law. [Emphasis added]

[30] Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

[56] Accordingly, I have no authority to resolve any evidentiary dispute between the parties. Those are issues to be left to the trial judge after a full hearing.

[57] In conclusion, I find that there is at least one material question of fact for trial; there is at least one question of law/fact that needs to be answered; and, in my view, the entire matter is best left to a trial court to hear evidence and make appropriate decisions.

[58] I dismiss the defendant’s motion for Summary Judgment on Evidence.

[59] Given this decision, and pursuant to Rule 13.08, I am now to schedule a hearing for directions. I would ask counsel to contact my judicial assistant to provide available dates and subject-matters for discussion.

[60] I would ask counsel for the applicant to draft the Order resulting from this decision. If counsel are not able to agree on costs, I would ask for written submissions within 30 days of receipt of this decision.

Boudreau, J.