SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax County Condominium Corporation No. 38 et al. v. Meshal*, 2023 NSSC 288

Date: 20230920
Docket: No. 518704
Registry: Halifax

Between:

Halifax County Condominium Corporation No. 38, Province Property Management, Impact Construction, and Brian Dort

Plaintiffs

v.

Samira Meshal

Defendant

DECSION ON MOTION TO SET ASIDE DEFAULT JUDGMENT

Judge:	The Honourable Justice Scott C. Norton
Heard:	August 24, 2023, Halifax, Nova Scotia
Decision:	September 20, 2023
Counsel:	Michael P. Blades, for the Plaintiff/Respondent Robert Mroz, for the Defendant/Applicant

By the Court:

Introduction

[1] The Defendant, Samira Meshal, brings this motion to set aside a default judgment issued by the prothonotary dated December 16, 2022, pursuant to *Nova Scotia Civil Procedure Rule* 8.09. In the underlying proceeding the Plaintiffs allege that the Defendant defamed them in two emails sent respectively on August 20 and September 17, 2021.

The motion was heard by me on August 24, 2023.

Legal Framework for Motion

[2] The legal framework for a motion to set aside a default judgment is well defined. *Rule* 8.09 states that, "A judge may set aside a default judgment issued by the prothonotary or made on an *ex parte* motion by a judge.". The test to be applied on a motion to set aside a default judgment is well settled. As stated by the Court of Appeal in *Temple v. Riley*, 2001 NSCA 36, at para. 27:

> [27] The test, whether to set aside default judgment, is well established in Nova Scotia and has been reiterated by this court recently in **Widmeyer v. Atlantic Pipeline Resources Inc.** [2000], N.S.J. No. 45 (C.A.), Justice Roscoe stated:
>
> > *Ives v. Dewar* [[1949] 2 D.L.R. 204] has been consistently followed in this Court and in the Supreme Court for 50 years. There are two requirements to be met in order to have a default judgment set aside:
> >
> > 1. A fairly arguable defence, or a serious issue to be tried; and
> > 2. A reasonable excuse for the delay in filing the defence.

[3] The Court of Appeal in *Temple* went on to explain, at para. 39, that while both stages of the test must be considered, it is up to the judge to consider the weight to be afforded to each stage, depending on the particular circumstances of the case.

[4] About the second stage of the test, the Court of Appeal in *Temple* found that the Court must consider both the delay in filing a defence, and the delay in applying to set aside the default judgment. See also *Farm Credit Canada v. Wolfridge Farm Ltd*., 2015 NSSC 240 (affirmed on appeal in *Wolfridge Farm Ltd. v. Farm Credit Canada*, 2016 NSCA 46).

[5] The moving party bears the onus of showing that there is a fairly arguable defence or serious issue to be tried. The moving party must put forward facts, via affidavit, which support its position that it has an arguable defence to the claims as they are set forth in the pleadings. In *J.W. Bird and Company Limited v. Allcrete Restoration Limited*, 2019 NSSC 311, the Court held as follows at para. 24:

> [24] When considering this part of the test, I am guided by the comments of Parker, J. in *Ives v. Dewar*, [1949] 2 D.L.R. 204 (N.S.S.C. in banco) at page 206:
>
> > Before the interlocutory judgment should have been set aside…it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits: not necessarily a defence that would succeed at the trial because the action was not being tried on that application; but facts which would at least show beyond question that there was a substantial issue between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules.
> >
> > [Emphasis added]

Background

[6] The Defendant Meshal was a self-represented litigant until May 10, 2023. Ms. Meshal is nearing 80 years old. Her first language is not English.

[7] Ms. Meshal used to own a condominium unit at Waterfront Place, 1326 Lower Water Street, Halifax, Nova Scotia (the "Property"), governed by the Board of Directors of Halifax County Condominium Corporation No. 38 ("HCCC 38").

[8] Ms. Meshal purchased the unit at the Property in February 2021 and was elected to the Board of Directors of HCCC 38 on May 26, 2021.

[9] While she was on the Board of Directors of HCCC 38, Ms. Meshal had certain disagreements with the Plaintiff, Brian Dort, the property manager of the Property. Mr. Dort also operates a business called Impact Construction, also a Plaintiff in this matter.

[10] The disagreements between Ms. Meshal and Mr. Dort mainly involved renovations that Ms. Meshal did to her unit at the Property and certain concerns Ms. Meshal had raised about the financial management of HCCC 38, including the fact that a different member of the Board, Jeanne Cruickshank, was drawing a salary

from HCCC 38 for a role of her own creation, that of a "Building Monitor". While on the Board, Ms. Meshal had raised her concerns to other members of the Board.

[11] Ms. Meshal's concerns were shared by another owner at the Property, Mr. Arthur Ferguson, Ms. Meshal's former neighbour and a former member of the Board of HCCC 38.

[12] One of the key concerns Ms. Meshal had respected apparent related-party transactions that took place between HCCC 38 and Mr. Dort's personal business(es). After Mr. Ferguson brought these transactions to the attention to PricewaterhouseCoopers (PwC), former auditor of HCCC 38, the corporation's financial statements included a note to that effect, and PwC resigned as auditor not long after. A criminal complaint file was also opened with Halifax Police (case #HP21-28316) in spring 2021.

[13] Ms. Meshal and Mr. Dort also disagreed about renovations that Ms. Meshal performed to her unit. Ms. Meshal's understanding is that Mr. Dort and/or Ms. Cruickshank had complained about her renovations to Halifax Regional Municipality, resulting in a building inspector becoming involved. Those complaints were resolved in Ms. Meshal's favour, with a finding that building permits were not required.

[14] On September 6, 2022, with the assistance of Mr. Ferguson, Ms. Meshal filed a Small Claims Court proceeding, seeking to recoup out-of-pocket expenses she said were unnecessarily incurred as a result of Mr. Dort's conduct.

[15] Ms. Meshal was and remains self-represented in that Small Claims proceeding, which is ongoing and, after repeated adjournments, was scheduled to be heard August 31, 2023.

[16] In response to Ms. Meshal's Small Claims proceeding, the Plaintiffs filed a defence and counterclaim in which they advanced substantially the same allegations of defamation being advanced in this proceeding. Indeed, in the Plaintiffs' Statement of Claim in this matter, it is stated that they "counterclaim" against Ms. Meshal. Thus, it appears that the pleading in this court was cut and pasted from the Small Claims Court defence and counterclaim.

[17] The Plaintiffs' pleadings in the Small Claims and the Supreme Court matters were delivered to Ms. Meshal at the same time via email on November 10, 2022.

[18] Soon after, on November 18, 2022, Plaintiffs' counsel asked Ms. Meshal whether she would agree to a "transfer of all claims" to the Supreme Court.

[19] Ms. Meshal was personally served with the Supreme Court Notice of Action and Statement of Claim on November 24, 2022.

[20] After Ms. Meshal declined the transfer request, Plaintiffs' counsel then requested that she consent to a stay of the Small Claims Court proceedings. Ms. Meshal declined that request, wanting the claims to be heard by the Small Claims Court, and, apparently, believing that she had the ability to choose. On December 8, 2022, with Mr. Ferguson's assistance, Ms. Meshal authored a letter to Plaintiffs' counsel and the Small Claims Court, titled "Refusal of a 'Request for Stay Motion'", in which it was stated, among other things:

> […] I am not agreeable to accept your "Stay Motion" and your demands to have our dispute transferred to Supreme Court… Moreover, your clients[']s claims that I defamed them (which I vehemently deny), are purely fabricated, and never came to light until after I filed a claim with the courts…
>
> Now, I believe in our civil society I have the right to file a claim under $25k in the Court of Small Claims, and I have properly done so. It would be an injustice to further complicate this matter by refusing to hear my claim in this court. Your suggestion to transfer to Supreme Court is nothing but a thinly veiled retaliation attempt…
>
> I eagerly await my day in Small Claims Court to prove my case…
>
> [Emphasis added]

[21] After Ms. Meshal's letter, Plaintiffs' counsel filed a motion seeking a stay in the Small Claims Court on December 12, 2022.

[22] Four days later, on December 16, 2022, without any prior warning to Ms. Meshal, the Plaintiffs wrote to the Prothonotary of the Supreme Court and delivered a default judgment order for filing. Curiously, this letter was not included in the Plaintiffs' affidavits filed on this motion. That letter stated:

> We have not been contacted by the Defendant or any person on the Defendant's behalf expressing an intention to file defence pleadings in the within proceeding, and we have received no defence pleadings themselves nor a demand for notice on behalf of the Defendant. …

[23] Due to administrative oversight, the issued default judgment order (date stamped December 16, 2022) was not returned to Plaintiff counsel until January 11, 2023.

[24] On December 21, 2022, after already writing to the Supreme Court requesting the filing for default judgment, Plaintiffs' counsel wrote to Ms. Meshal by email:

> … you have our clients' notice of motion and draft order concerning our clients' intended motion seeking a stay of the Small Claims Court proceeding. Does it remain your position that you will not agree to a stay of the Small Claims Court proceeding?

[25] No reference was made to any default judgment despite the entire basis for the stay motion having been the purported need to have the counterclaim – the defamation claim – tried in the Supreme Court.

[26] The Plaintiffs then continued to canvass dates for the stay motion with the Small Claims Court and Ms. Meshal.

[27] On January 6, 2023, still unaware of the default judgment filing, Ms. Meshal wrote to the Small Claims Court Clerk as follows:

> I don't understand what this MOTION has to do with my claim submitted earlier to the small claims court, besides I didn't agree at all on that process, and chose to be heard before the small claims court. …

[28] Despite the obvious confusion Ms. Meshal was exhibiting about court procedures, the levels of court in Nova Scotia, and her misapprehension about being able to decide whether the dispute would proceed in Small Claims Court as opposed to the Supreme Court (after being asked by the Plaintiffs whether she would "agree" to a transfer), the Plaintiffs did not attempt to set the record straight, did not advise Ms. Meshal that she was operating under a misapprehension, nor draw anyone's attention to the default judgment having been sought in response to Ms. Meshal's email.

[29] Having received the issued default judgment Order on January 11, 2023, no steps were taken to deliver it to Ms. Meshal. It was not until February 28, 2023, the day before the intended hearing date for the stay motion, that Plaintiffs' counsel wrote to the court, copying Ms. Meshal, advising about the default judgment and that there was therefore no longer any need for the stay motion, stating:

> … A Motion (by telephone) is scheduled in this proceeding for tomorrow March 1, 2023. The Motion concerns a request by the Defendants to stay the within proceeding in favour of the claims and counterclaims herein being heard and determined in the Nova Scotia Supreme Court.
>
> The Defendants no longer have any need to bring that Motion, as the Nova Scotia Supreme Court proceedings have now been determined pursuant to an Order for Default Judgment. As such, the Defendants are content for Ms. Meshal's claims herein to remain in and be determined by the Small Claims Court.

[30] The Plaintiffs provided no reason for their failure to bring the default judgment – received more than a month prior – to the Small Claims Court's attention until the day before the hearing.

[31] After receiving the February 28, 2023, letter, Ms. Meshal immediately reached out to Mr. Ferguson by email with, "I don't know what that means?". Mr. Ferguson then suggested that Ms. Meshal attend the Supreme Court to obtain information about setting aside a default judgment. Ms. Meshal then spoke with a friend, Lloyd Robbins, a practicing lawyer, in March 2023.

[32] After her discussions with Mr. Ferguson and Mr. Robbins, Ms. Meshal wrote to the Court (with Mr. Ferguson's assistance) on April 13, 2023, to ask that the default judgment be set aside. She left the letter in the box for delivery to the court in the courthouse lobby. She later called the court to confirm it had been received and was told it had not. She then emailed a copy to the court on April 18, 2023.

[33] After a copy of Ms. Meshal's letter was provided to Plaintiffs' counsel, he wrote to the Supreme Court scheduling coordinator, on April 28, 2023, objecting to Ms. Meshal's effort to set aside the default judgment. In that letter, it was stated, among other things:

> This proceeding was commenced six months ago on October 31, 2022. The Defendant was personally served in the normal course and failed to respond. A Default Order for Judgment was issued last year, on December 16, 2022.
>
> Earlier today, you provided me with a copy of an unsigned letter dated April 13, 2023 with the heading "*motion to set aside default judgment*", which I understand the Defendant Samira Meshal delivered to the Prothonotary on April 18, 2023. … The Defendant's unsigned letter makes a passing reference to proceedings that the Defendant herself has commenced in the Nova Scotia Small Claims Court, which have no bearing on my clients' defamation claims against the Defendant herein scheduled for assessment on May 9, 2023. As well, to my knowledge, the Defendant has not actually filed any motion to set aside the Default Order for Judgment.

[34] The Plaintiffs' motion to assess damages did not proceed on May 9, 2023, as Ms. Meshal experienced a fall in her home, struck her head, and was hospitalized. Her son, Ashraf Meshal, attended before the Honourable Justice Coughlan and obtained an adjournment. He recommended that Ms. Meshal retain counsel.

[35] On May 10, 2023, Ms. Meshal retained counsel. On May 15, 2023, this motion was filed.

Issue

[36] The issue on this motion is whether the Plaintiffs' default judgment should be set aside, pursuant to *Rule* 8.09.

Analysis

1. Fairly Arguable Defence and Serious Issue to be Tried

[37] The first part of the test has a low threshold as recently confirmed by Justice Rosinski in *Pogosyam v. Wilson Fuel Co. Limited*, 2021 NSSC 326, at paras. 9-10; and by Justice McDougall in *Amirault v. Saturley* (*"Saturley"*), 2022 NSSC 332, at para. 25.

[38] The Plaintiffs' claims are in defamation. The claims are based on two emails, the first delivered on August 20, 2021, and the second on September 17, 2021. To assess whether a "fairly arguable defence" or a "serious issue to be tried" exists necessarily involves consideration of the elements of a defamation action and potential defences.

[39] The Plaintiff's burden of proof on defamation claims was described by the Supreme Court of Canada in the leading authority *Grant v. Torstar*, 2009 SCC 61 ("Torstar"), as follows at para. 28 (references omitted):

> 28 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (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. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: … (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se:* … The plaintiff is

> not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[40] That test was recently affirmed by this court in *Abdelkader v. Khalil*, 2023 NSSC 245, at para. 21:

> [21] The three elements of defamation are:
>
> (1) The impugned words are defamatory, in that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.
>
> (2) The words in fact refer to the plaintiff.
>
> (3) The words are published, meaning that they were communicated to at least one person other than the plaintiff.
>
> See *Grant v. Torstar Corp*., [2009] 3 S.C.R. 640 at para.28

[41] In *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)*, 164 N.S.R. (2d) 161, the Court elaborated on the test as follows (paras. 33 and 115):

> 33 The offending words, to be defamatory, must tend to discredit the plaintiff in the estimation of right thinking people generally, and it is not sufficient if the words only tend to discredit it in the minds of a particular segment or section of the community. I have already determined the words are capable of a defamatory meaning so in law the falsity of the words is presumed leaving it for the defendants to establish, on a preponderance of evidence, the words are true or if they are found to be defamatory, are subject to other defences.
>
> 115 A statement is not defamatory unless it is false. As the law presumes a person has a good reputation, a statement with defamatory meaning, tending to destroy or impair the reputation is presumed in the plaintiff's favour to be false and there is no obligation on the plaintiff to prove the falsity of the published statement. However, a defendant may defend a defamation action by proving that the defamatory statement was true at the time it was made. …
>
> [Underlining added]

[42] With respect to the first email dated August 20, 2021, the Plaintiffs allege the following content is defamatory:

> However, Mr. Dort operates with a conflict of interest to our funds and with another board member, and with his contacting company: Impact Construction, Ltd. Between the two, they are self-dealing themselves over $370k annually, according to our auditor, PWC, and there have been complaints against them, including a criminal complaint with the HPD fraud unit, that case number: HP 21-28316.

[43] Ms. Meshal maintains that the Plaintiffs fail to meet their initial onus of proving a *prima facie* case of defamation. She further argues that she has a positive defence of justification. The test for justification is substantial truth (*Torstar, supra; Bent v. Platnick*, 2020 SCC 23). On this motion she is required to offer admissible evidence that such a defence is fairly arguable or amounts to a serious issue to be tried.

[44] In her affidavit, Ms. Meshal attests that after Mr. Ferguson brought certain concerns to the attention of PwC, then the auditor of HCCC 38, the financial statements of HCCC 38 indicated a substantial amount of related party transactions took place in relation to property management fees and construction/maintenance costs. Moreover, a complaint had been made to the Halifax Police fraud department, with the particular case number referenced in Ms. Meshal's email. PwC resigned as auditor of HCCC 38 not long after identifying the related party transactions.

[45] The Plaintiffs say that this is all inadmissible hearsay. However, Rule 22.15(2) permits a party to offer hearsay on "(c) a motion to determine a procedural right". A motion to set aside a default judgment is a motion to determine a procedural right.

[46] The Plaintiffs argue that this evidence proves nothing. Ms. Meshal says Ms. Meshal does not call Mr. Dort nor any other Plaintiff a "criminal". She does not use the word "fraudulent", nor does she use the word "dishonest" – those are labels which the Plaintiffs have elected to use at various places in their brief.

[47] Instead, the August 20, 2021, email recites information relayed from other sources about the financial management of the condo corporation, and which was made known to Ms. Meshal by virtue of her position as a Director. In substance, the email states that there was a conflict of interests in the manner in which the condominium corporation's funds were being managed based on the significant related party transactions that had occurred.

[48] Ms. Meshal says she used the term "self-dealing" in the email, followed closely by, "according to our auditor, PwC", in the same sentence. This was clearly a reference to the information contained in the condo corporation's audited financial statements, which at note 8 in each of the years ending December 31, 2019, and 2020, reference "related party transactions", and specifically property management fees and construction costs paid to a company related to the property manager, Mr. Dort.

[49] Ms. Meshal questioned whether those transactions were sound financial management, having previously expressed concerns and complaints about the condo corporation's financial management while serving on the Board.

[50] The evidence is that approximately $340,000 and $260,000 of related party transactions had been identified by the auditor for the years ending December 31, 2019, and 2020, respectively. Ms. Meshal and others including Mr. Ferguson and Dr. Sinha had expressed concerns about the amount of the related party transactions relative to the value received by the condominium corporation or the fabrication of issues that would require expenditures on repair services.

[51] It is not for me on this motion to determine if the defence is proved or not. I am only concerned with whether there is a fairly arguable defence or a serious issue to be tried. I am satisfied that the Defendant has established both a fairly arguable defence and a serious issue to be tried with regard to the August 20, 2021 email.

[52] With respect to the second email, dated September 17, 2021, the Plaintiffs allege the following content is defamatory:

> Stop harassing me, other wise [sic] I will seek legal action against you.
>
> …
>
> … stop practicing your hoppy [sic] of creating problems , to show that your [sic] doing a good job, which in fact , your [sic] are doing a terrible management job to one of the precious condo building[s] in Halifax.

[53] Ms. Meshal maintains that the Plaintiffs fail to meet their initial onus of proving a *prima facie* case of defamation in relation to the above passage, which is clearly a statement of opinion.

[54] Ms. Meshal submits the above words would not tend to lower the Plaintiffs' reputation in the eyes of a reasonable person. A vague complaint about performance of unspecified services is not enough to meet the threshold described in *Color Your World Corp. v. Canadian Broadcasting Corp.*, 38 OR (3d) 97, [1998] OJ No 510. She also argues that she has the positive defences of justification and fair comment.

[55] She submits that the full context of this email is important. Earlier on September 17, 2021, Mr. Dort delivered a purported "statement of arrears" to Ms. Meshal in relation to her condominium unit and sought to recuperate legal fees HCCC 38 had paid to Pink Larkin. Ms. Meshal responded, indicating that she disagreed that any amount was owed.

[56] Approximately two weeks before the September 17, 2021, email, Ms. Meshal particularized her complaints to her fellow Board members. Specifically, she raised concerns about the outdoor appearance of the condo building, including the dated nature of the exterior and interior's appearance and furniture, and questioned the value of paying a salary to a full-time "building monitor" and the amounts spent for legal and advisory fees. Ms. Meshal expressed honest concerns about the allocation of the HCCC 38 budget.

[57] Moreover, as described in the Meshal Affidavit, this email only ever reached members of the Board of Directors of HCCC 38, the party which engaged the services of Providence Property Management and which Ms. Meshal presumes continues to employ it and Mr. Dort's construction business.

[58] In *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, Justice Binnie, in concurring reasons, wrote, at paras. 67-72:

> [67] … Although defamation is not easily defined, one generally accepted test is the one from *Salmond on the Law of Torts* (17th ed. 1977), at pp. 139-40, which is based on the test proposed by Lord Atkin in *Sim v. Stretch* (1936), 52 T.L.R. 669 (H.L.), at p. 671, and was approved by the B.C. Court of Appeal in *Vander Zalm v. Times Publishers* (1980), 1980, 109 D.L.R. (3d) 531, at p. 535:
>
> > A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.
>
> [68] This test is often construed as setting a low threshold for establishing *prima facie* defamation. *Gatley on Libel and Slander* (10th ed. 2004) ("*Gatley*"), notes that "it may well be the case that the common law takes a rather generous line on what lowers a person in the estimation of others" (p. 18, footnote 32). Dickson J. made a similar point in *Cherneskey v. Armadale Publishers Ltd*., [1979] 1 S.C.R. 1067, in referring to the "low level of the threshold which a statement must pass in order to be defamatory" (p. 1095).
>
> [69] The case law generally bears these opinions out. <u>However, courts should not be too quick to find defamatory meaning — particularly where expressions of opinion are concerned.</u> The test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment. I will demonstrate, based on the first two of these factors in particular,

> that Mair's comments would likely not have led "right-thinking" members of the public to think less of Simpson.
>
> [70] It should go without saying that people evaluate statements of opinion differently than statements of fact. In discussing what constitutes a statement of fact as opposed to comment, Lord Herschell noted that
>
> > the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.
> >
> > (*Davis & Sons v. Shepstone* (1886), 11 App. Cas. 187 (P.C.), at p. 190)
>
> [71] Although distinguishing facts from comment may sometimes be difficult, a comment is by its subjective nature generally less capable of damaging someone's reputation than an objective statement of fact, because the public is much more likely to be influenced in its belief by a statement of fact than by a comment. I therefore agree with the following observation by R. E. Brown:
>
> > If the expression of opinion by the defendant on facts which are true are reasonably understood by those to whom they are published as opinions, and nothing else, they say nothing derogatory about the plaintiff which does not already inhere in the facts that have been recited. It is those facts that are damning, either to the plaintiff because the opinion expressed is so consistent with the true facts which are recited and approximate the subjective opinion of those to whom they are published, or to the defendant because they are so inconsistent with the recited facts and with the subjective opinion of those to whom they are published. In the former case, the reputation of the plaintiff is not adversely affected by the publication of the opinion; in the latter case, it is the defendant who is defamed by his or her own foolish words rather than the plaintiff.
> >
> > (*Defamation Law: A Primer* (2003), at p. 185)
>
> [72] There is no doubt that a comment may be defamatory. It must simply be borne in mind that just because someone expresses an opinion does not mean that it will be believed and therefore affect its subject's reputation.
>
> [Emphasis added]

[59] Here, the evidence is that Ms. Meshal's September 17, 2021, email was sent in the broader context of an existing legal dispute, as elsewhere in the email Ms. Meshal references the demand letter she had received from Mr. Dort's lawyer. It was also sent in the context of Mr. Dort's efforts to collect arrears from Ms. Meshal.

[60] To borrow the term used by Justice Binnie in *WIC Radio Ltd*., *supra*, the "audience" of the email, the Board of Directors of HCCC 38, is a relevant consideration in assessing whether the words are defamatory. As stated in *Skafco Limited v. Abdalla*, 2020 ONSC 136, at para. 29, this requires the trier of fact to take into account all the relevant circumstances:

> 29 There are in any event important principles about defamation actions discussed in *Baglow v. Smith* which also find support in decisions of the Supreme Court of Canada. Firstly, it is relatively easy to establish that words were published and by whom. That is a straight factual question. The issue of whether or not words are defamatory, however, involves an objective test. It is a question reserved to the triers of fact who must assess the significance of the words in the particular community where the words were published. While defamatory meaning may be obvious from the words themselves, the court may also "take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."

[61] Commentary and opinions can be defamatory. However, Ms. Meshal's opinion about the quality of the property management the condo corporation was receiving was expressed in the context of an existing legal dispute and to an audience that must be presumed to be familiar with the issues between Ms. Meshal and Mr. Dort, and with Mr. Dort's performance as the Board employs him.

[62] There is a serious issue to be tried as to whether this communication was *prima facie* defamatory, which will require the trier of fact to "assess the significance of the words in the particular community where the words were published" (*Skafco Limited*, *supra*). At this stage, I am not concerned with that nuanced analysis; Ms. Meshal need only show a fairly arguable defence or serious issue to be tried.

[63] Bearing in mind the low threshold, I find that Ms. Meshal has done so.

2. Reasonable Excuse for the Delay

[64] In *Buffett v. Dobson*, 2023 NSSC 183, pleadings were served on Mr. Dobson, who was 82 at the time, in February 2020. There was no further communication with Mr. Dobson until November 2022 when he was served with a notice of motion for an assessment of damages. Mr. Dobson had appointed an attorney, his daughter, who retained counsel soon after being notified of the default judgment. In setting aside the default judgment and finding there was a reasonable excuse for the delay in filing a defence, Justice Coughlan took into account the defendant's age, health

status, the pandemic, and the lack of communication with the defendant after pleadings were served.

[65] Here, there was similarly no communication with Ms. Meshal about the intention to enter a default judgment after she was served with the pleadings. Instead, the Plaintiffs continued to participate in the Small Claims proceeding – in which they raised the exact same defamation claims by counterclaim – and simply entered default judgment without notice.

[66] In *Royal Canadian Legion v. Norman*, 1996 NSCA 224, the Court of Appeal adopted the principle that the judicial response to a failure to file a defence needs to bear an element of proportionality to the circumstances in which the failure arose. For the unanimous Court, Justice Bateman wrote:

> Chipman, J.A. wrote in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at p. 145
>
> > At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result . . .
> >
> > . . .Under these headings of wrong principles of law and patent injustice **an Appeal Court will override a discretionary order in a number of well-recognized situations**. The simplest cases involve an obvious legal error. As well, **there are cases where no weight or insufficient weight has been given to relevant circumstances**, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. **The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case**, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters.
>
> In dismissing the application the Chambers judge stated that, while there was a substantial issue to be tried, he was not satisfied that a reasonable excuse had been shown for the delay. He found that the adjuster "knew about the importance of time limits and . . . was careless in not contacting [counsel] earlier".
>
> Taking into account the gravity of the consequences of the order of the Chambers judge, in that it finally disposed of the rights of the parties, we are satisfied that he failed to give proper weight to the evidence that the adjuster had made a genuine, albeit unsuccessful, effort to have a defence filed. The appellant's counsel acted promptly in contacting the respondent, resulting in a very minor delay. In the circumstances, we are satisfied that the appellant did present a reasonable excuse for the failure to file the defence.

> Accordingly, the appeal is allowed, the decision of the Chambers judge is set aside as is the default judgment entered in the court below. Within ten days from the date of the order hereunder, the appellant shall enter a Defence.
>
> [Bold emphasis by Justice Bateman]

[67] In *Pogosyam, supra*., Justice Rosinski confirmed that the analysis with respect to whether a "reasonable excuse" exists is highly fact-sensitive, and the issue turns on the specific context of each case. He also confirmed the above principle that there ought to be proportionality between the circumstances of the delay and the judicial response. He wrote, at paras. 32-34:

> [32] It is apparent from these sample cases how fact-sensitive is the determination of whether there is a reasonable excuse for the delay.
>
> [33] In concluding whether there is "a reasonable excuse for the failure to file a defence", courts are necessarily required to take into account the context surrounding those delay periods, in addition to the simple length of delays.
>
> [34] I also bear in mind "the gravity of the consequences" of not setting aside a Default Judgment – see Justice Bateman's reasons in *Royal Canadian Legion v Norman*, 1996 NSCA 224. There ought to be a proportionality between the level and nature of unreasonableness of the excuse(s) for the delay(s), and the judicial response.

[68] In *Saturley, supra*., Justice McDougall expressed similar considerations, at para. 31:

> [31] I agree with what Justice Bateman had to say in the *Norman v. Royal Canadian Legion* case, which was adopted by Justice Rosinski in his decision. The prejudice to the Saturley Defendants, should the default judgment not be set aside, is enormous. They would face the possibility of having very significant damages assessed against them. I previously indicated that I accept the fact that the Saturley Defendants had every intention of defending themselves against the claims of the Plaintiffs. And despite their counsel's failure to respond in a timely fashion to the requirement of filing a defence on their behalf, I am satisfied that he, at least, attempted to meet the deadline that was imposed on him to do so. Choosing to file a severance motion instead of a defence might not have accomplished what Mr. Robinson thought it would but it was, at least, an attempt to protect his clients' best interests.

[69] Ms. Meshal was served with Supreme Court pleadings and did not file a Notice of Defence within the timelines provided for under *Rule* 31. That is not disputed.

[70] However, this is not a matter in which the defendant simply failed to read a document served upon them, made assumptions, and not take any steps at all until judgment was registered, as was the case in *J.W. Bird*, *supra*.

[71] Here, Ms. Meshal had actively participated in the Small Claims Court proceedings with the Plaintiffs since September 2022. This includes the time period during which the Plaintiffs were in the process of taking out default judgment in December 2022.

[72] While the Order for Default Judgment was issued on December 16, 2022, it was not returned to the Plaintiffs from the court until January 11, 2023, and not brought to Ms. Meshal's attention until February 28, 2023.

[73] In the interim, and prior to the default judgment being requested, there were ongoing communications between the parties about the existing Small Claims Court proceeding, in the course of which Ms. Meshal had expressly advised Plaintiffs' counsel in writing that she "vehemently denied" the Plaintiffs' allegations of defamation.

[74] It was therefore known to the Plaintiffs prior to entering default judgment that Ms. Meshal disputed their defamation claims, yet no advance warning whatsoever was provided to Ms. Meshal that default judgment would be entered against her.

[75] Ms. Meshal is also elderly, not a native English speaker, and, most significantly, she had expressed confusion about legal processes and had stated her belief that she had not agreed to the matter proceeding in the Supreme Court, yet her misapprehension about her ability to decide that legal process was never addressed.

[76] Ms. Meshal was never informed about the Plaintiffs' intention to enter default judgment. Meanwhile, the Plaintiffs continued to participate in the Small Claims Court proceeding and sought to have Ms. Meshal's proceeding transferred to the Supreme Court, a request that was maintained even after obtaining default judgment.

[77] Then, more than a month after the Plaintiffs received the default judgment Order, on February 28, 2023, they informed the Small Claims Court that their stay motion was no longer required and first brought the default judgment to Ms. Meshal's attention.

[78] I find that the above circumstances disclose a sufficiently reasonable excuse for the delay in filing a defence. It was always known to the Plaintiffs that Ms.

Meshal intended to deny their defamation claims and, based on her communications with the Plaintiffs' counsel and the Small Claims Court, it is clear to me that she thought she was doing so.

3. Moved Promptly to Set Aside the Default Judgment

[79] After being notified of the default judgment at the end of February 2023, Ms. Meshal spoke with a lawyer and began taking steps to have the default judgment set aside. They were not perfect steps; she remained unrepresented, but Ms. Meshal clearly communicated her intention to rectify the situation.

[80] Here, too, the prejudice to Ms. Meshal if the default judgment stands is "enormous". The Plaintiffs seek a significant sum from Ms. Meshal.

[81] Ms. Meshal, in writing, confirmed she disagreed with the merits of the defamation claims prior to default judgment being taken out. She received no advance warning of the default judgment. As an elderly and self-represented litigant navigating the judicial system in her second language, I find that Ms. Meshal acted with reasonable promptness to try to have the default judgment set aside after learning about it on February 28, 2023.

Conclusion

[82] I find it is a just and proportional response in these circumstances for the default judgment order to be set aside, and order that the Form 46 that was issued by the Court and registered under the *Land Registration Act* is hereby vacated. I direct that Ms. Meshal prepare an Order for consent as to form and I direct that the Plaintiffs immediately register this Order under the *Land Registration Act*.

[83] Ms. Meshal is directed to file her defence within 15 days of the date of this decision.

[84] As requested, I will consider written submissions on the issue of costs to be filed within 15 calendar days from the date of this decision with reply submissions filed within 15 calendar days following.

Norton, J.