

SUPREME COURT OF NOVA SCOTIA

Citation: Ramar Construction Ltd. v. Seguin, 2014 NSSC 169

Date: 20140530

Docket: Hfx No. 253678

Registry: Halifax

Between:

Ramar Construction Limited

Plaintiff

v.

Daniel Seguin and Deborah Seguin

Defendants

Judge: The Honourable Justice Denise M. Boudreau

Heard: February 17, 18, 19, 20, 21 and 24, 2014 in Halifax, Nova Scotia

Written Decision: May 30, 2014

Counsel: Barry Mason, for the Plaintiff
Brian Casey, for the Defendants

By the Court:

[1] This is an action alleging defamation. The matter was heard concurrently with another matter involving the same parties, and the same evidence (see *Seguin v. Ramar Construction*, 2014 NSSC 170).

[2] The Plaintiff herein, Ramar Construction Limited (hereinafter “Ramar”), entered into an Agreement of Purchase and Sale in September 2003 for the construction and sale of a home to the Defendants, Daniel and Deborah Seguin (hereinafter “the Seguins”). The home was to be located at 141 O’Leary Drive, Beaver Bank, Nova Scotia.

[3] Shortly after the closing date in March 2004, the Seguins became concerned about the quality of construction of their home. In particular, they observed standing water around the home and detected a musty smell in parts of the home, which they attributed to faulty construction. Through 2004 and 2005, the parties engaged in efforts to determine the nature and origin of the concerns, which efforts required the engagement of administrators from the Atlantic Home Warranty Program. The Seguins came to believe that the problems with their home were

causing mould to grow and made the home unsafe to live in. The Seguins commenced an action against Ramar in contract and negligence, alleging that the home they built was improperly constructed, and not fit for its intended purpose. The court's decision in relation to that action is being released concurrently with this decision.

[4] Due to events arising from this same dispute, Ramar commenced an action against the Seguins for defamation. This is the court's decision in relation to the defamation action.

[5] As contained in Ramar's amended Statement of Claim, and later confirmed by the evidence, there were three examples of conduct by the Defendant Seguins which, according to Ramar, amounted to defamation. The conduct was in the nature of complaints about Ramar's work. The majority of the evidence in respect of these three events was related to the court by Ben Young, CEO of Ramar and Larry Marchand, one of the principals of Ramar.

[6] The first event occurred in approximately early June of 2005. The Seguins began to place signs in the windows of their home. One sign in particular was made

up of 6 separate sheets of paper, one for each word, spelling out “TOXIC MOLD NOT IN SALE AGREEMENT.” (See Exhibit 5 “Exhibit Book of the Defendant/Plaintiff Ramar Construction Limited” at Tab B-3.) This sign was placed inside a window of the home, facing the portion of the road going into a new phase of the subdivision. The house was approximately 75 feet from the road and, as shown in the pictures from Exhibit 5, the signs were visible by persons from the road. There was also a small sign in the window adjacent to the front door of the home, saying “toxic mold”; however, this sign was not visible from the street (see Exhibit Book 5 at Tab B-4).

[7] In addition, Mrs. Seguin agreed to be interviewed by The Daily News (which was then a local newspaper) about the difficulties she and her husband were having with their home. An article appeared in that newspaper on May 9, 2005, entitled “Home is where the Heartbreak is”. This article was reproduced for the court in Exhibit 5, Tab B-1.

[8] As reported in this article, Mrs. Seguin directs many negative comments towards the Atlantic New Home Warranty Program, which she specifically named. It is clear from a reading of the article that the Program is the main entity being

complained about. Mrs. Seguin is quoted in that article as saying, in reference to that Program, “It’s a useless, toothless organization”.

[9] In relation to the difficulties with the home, the article notes the following:

They (meaning the Seguins) have spent more than \$10,000 to drain their swampy property and remove mould from the walls of their downstairs bathroom and den.

...

“It was the most disheartening feeling, to know your house wasn’t safe”, says Seguin, 46.

At first, they barely noticed the musty smell in their downstairs bathroom. But the smell grew worse in the next few months, forcing them to keep the bathroom door shut and the window wide open. “You couldn’t even open the cupboards under the sink, it was so gross. You would have thrown up.” Seguin says.

[10] Ramar is not specifically named in this article, although the article does make reference to a “builder”. References by Mrs. Seguin to the “builder” are as follows:

She appealed first to the builder, and then, in October 2004, to the Atlantic New Home Warranty Program. She’s frustrated the program hasn’t paid for the repairs, or forced the builder to take on the expensive fix.

On January 19, the warranty program told the builder to take out the shower stall, replace the wet, mouldy insulation and put in a vapour barrier. The builder did, but Seguin said the mouldy wood was only dried, not replaced, and the smell quickly came back. Meanwhile, water was pooling around the house’s foundation; the Seguins believe it was getting into the walls. Frustrated with delays, the couple

hired their own contractors last month. Seguin says she doesn't trust the home warranty program to force its builder members to do a pricey overhaul.

[11] The article did list the Seguins street name, O'Leary Drive, and pointed out that the home was in Beaver Bank, a Halifax county community.

[12] Lastly, in July of 2005, the Defendant Daniel Seguin parked his vehicle (a pickup truck) in the parking lot near Ramar's office. This office was located in a strip mall on Sackville Drive in Lower Sackville, Nova Scotia; while there were other businesses in this mall, the witnesses stated that there were no other building companies or contractors at that location. Mr. Seguin parked his vehicle so that the back of the truck faced Ramar's business. Taped onto the back of his vehicle was a large hand lettered sign, which read "OK Boys time to live up to your word and fix the house you built". (See Exhibit 5, Tab 3) It appears that the truck and sign remained in that area for a period of a few hours, during one afternoon. Sackville Drive is a busy main thoroughfare in Lower Sackville.

[13] Neither of the Defendant Seguins chose to directly respond to the defamation claim, strictly speaking. However, as I have previously noted, this matter proceeded concurrently with another action involving the same parties and much of the same

evidence. As a result, during their direct examination the Seguins were asked questions about the events leading to these defamation claims. As well, certain excerpts of the Seguins' discovery evidence was tendered to the court by consent of the parties (Exhibit 16).

[14] Having reviewed all of the evidence before me, I find that all three events happened as I have described in this decision.

DEFAMATION

[15] The general principle as to a cause of action in defamation, was described by professor Raymond Brown in *The Law of Defamation in Canada* (2d) 1994, Carswell, as follows: "The law of defamation protects a person's reputation from defamatory falsehoods."

[16] The question to be asked, says Professor Brown in his volume *Defamation law: a Primer* (2d) 2002, Carswell, at p. 30, is the following:

Simply speaking, does the publication have the tendency to lower the reputation of the plaintiff in the estimation of the community, or at least that portion of the

community whose standards of opinion the court is willing to recognize, or what is commonly, if unfortunately, referred to as “right thinking” members of society?

[17] I also cite author Hilary Young, in *Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs* (2013) 46 UBC L. Rev. 529, who says the following at paragraph 14:

The tort of defamation has three elements: a statement must refer to the plaintiff; it must be published to at least one person other than the plaintiff; and it must be defamatory in nature, meaning that it would tend to make a right-thinking person think less of the plaintiff. Since the definition of what is defamatory relies on what hypothetical ordinary people would think, that element relates more to the meaning of the words in context than to their effect on actual people: it is irrelevant to liability that no one actually thought less of the plaintiff.

[18] In determining whether any particular utterance is defamatory, the court must take into consideration all of the circumstances, including context, audience, and manner published. It is also possible for a court to make certain inferences as to, for example, the interpretation to be given to the words, as well as identification of the person being referred to (see *Murray v. Independent News* [2008] NIQB 137; *Lewis v. Daily Telegraph* (1963) A.C. 234 (H.L.)). The test is an objective one.

IDENTIFICATION

[19] The first question for this court, in respect of each of the three events complained of, is whether the Plaintiff Ramar has met the burden of proof as to the issue of identification. That is to say, a plaintiff must show that the words being complained of, were published “of and concerning” him (see *Hayward v. Thompson* [1981] 3 W.L.R. 470 (C.A.)).

[20] The fact that a plaintiff is not specifically named is not necessarily fatal to a claim of defamation. However, where a plaintiff is not named, it must be shown that the words used, or the circumstances surrounding the events are such that an ordinary reasonable person, paying attention to the communication, would understand that it was the plaintiff being referenced. (See *Hayward*, supra; Brown “*Defamation Law: a Primer* (2nd ed)” at Chapter 6.)

[21] In this particular case, it is acknowledged, in relation to all three events referenced by Ramar in its action, that the name “Ramar” did not appear.

[22] As I have already indicated, the court heard evidence from Ben Young and Larry Marchand, as employees/representatives of Ramar. Both men testified that the Seguins' home is located in a particular subdivision in Beaver Bank, where Ramar was well known in the community as a major builder. During the relevant period, the subdivision had large "Ramar" signs in prominent places.

[23] Mr. Marchand further confirmed that there was another street nearby, within sight of the Seguins home, where homes were being built by a construction company called Roof-Tight. Having said that, Mr. Marchand testified that in his view, local real estate agents would know that O'Leary Drive, in particular, was a Ramar-built street.

[24] Mr. Young testified that, in relation to the signs in the Seguin's window, he got a "flow" of phone calls, from realtors, contractors, and clients. While Mr. Young could not name any specific clients who asked questions about the signs, he indicated that he did get such calls.

[25] In relation to the newspaper article, both Mr. Marchand and Mr. Young offered that, in their view, "most people" would know that the area identified in the

article was a “Ramar” area. Therefore, although Ramar was not named, in their view the article still identified Ramar as the builder. Both Mr. Marchand and Mr. Young testified that they received many phone calls about these negative comments as well.

[26] In relation to the sign on the truck, the evidence from both men was that the sign was directly facing their office and referred to “fixing a house you built”. In the context of there being no other home builders or renovators in the area, it was their view that this sign identified Ramar.

[27] The court also heard from witness and real estate agent Kris Gerroir. In 2004/2005 Ms. Gerroir was working for Coldwell Banker in Lower Sackville. This office was next to the Ramar office on Sackville Drive; and she and Ray Marchand (owner of Ramar) were business partners, as part owners of Coldwell Banker.

[28] Ms. Gerroir testified that she saw the truck sign in July 2005, in the parking lot across from the office. She recalls the sign saying something to the effect of “boys” and “fixing the house”. She confirmed that the mall contained other

business, such as an accounting company, and an insurance company, but no other construction company. She assumed the sign was referring to Ramar.

[29] Ms. Gerroir testified that during the time the sign was present in the parking lot, she recalls customers being at Coldwell Banker. She also recalled a great deal of discussion about the sign at the time; however, on cross examination, Ms. Gerroir acknowledged that she could not recall if these discussions were only between real estate agents. Ms. Gerroir told the court that she personally found the sign upsetting, since Coldwell Banker was a listing agent for Ramar, and she feared that potential clients might be influenced negatively. Having said that, Ms. Gerroir confirmed that the sign did not affect her personal opinion of Ramar in any way. Ms. Gerroir, in my view, was a very careful and credible witness; however, as a business partner with Ray Marchand in the real estate company, she is not independent from Ramar. She has concerns in relation to possible negative interpretation of the sign by others; but what is important is the interpretation that would be given by an average, unconnected person.

[30] Ms. Gerroir also recalled seeing the newspaper article, and testified that “someone” had mentioned the article to her at an open house in Bedford. Ms. Gerroir could not say whether this event had affected any sales of Ramar homes.

SIGNS IN WINDOWS

[31] Ramar submits that the signs in the Seguins’ window (“Toxic Mold not in sale agreement”) were damaging to their reputation. It is their contention that they were identified by this sign, due to the fact that their company was doing the majority of the building in that area and particularly on that street. They note the presence of large Ramar signs at the entrance to the subdivision.

[32] I have considered this issue, and I am not persuaded that Ramar is identified by the signs in the Seguins windows.

[33] In my view, an ordinary reasonable person, upon seeing those signs, would not identify Ramar. It is certainly possible that persons involved in the construction

or real estate industries would be aware of Ramar's involvement in that area. That does not mean that Ramar would be identifiable to the average person from that sign.

[34] I accept the evidence of both Ben Young and Larry Marchand, that Ramar was a major builder in the subdivision. However, I also accept that there was another company building houses in that same area. I accept that Ramar had signs in the area, showing them to be a home builder in the area. However, the court heard no evidence about the location of these signs in relation to the Seguins home, nor the number of signs.

[35] Furthermore, even if I accepted that a reasonable person would have known that that particular house was built by Ramar Construction, in my view that still does not satisfy the requirement for identification.

[36] The signs referred to "toxic mold" and "sale agreement". Nothing in the sign refers to a builder, or a construction company. The sign could just as likely be

referring to another service industry whose work might cause moisture damage in a home; or to a purchase of some item which contained mould.

[37] Obviously, given the events of 2004/2005 between Ramar and the Seguins, it is understandable that employees of Ramar would have felt identified by these signs. They knew of the ongoing conflict with the Seguins. I also accept that employees of Ramar received calls about the signs; however, I do not know who exactly made these calls, as no caller could be identified by any witness. I do not attach much, if any weight to this very vague assertion.

[38] In conclusion, I have not been persuaded that the test for identification has been met. I find that the Plaintiff Ramar has not met the onus of showing that it was the party identified in the house window signs, and their action in relation to those signs fails.

NEWSPAPER ARTICLE

[39] In my view the newspaper article also lacks the necessary identification of Ramar as required by the law of defamation. As I have stated, the article named the Atlantic New Home Warranty Program, and “the builder”. The article specifically references the fact that there are 340 builders who are members of the Program. Ramar is not named.

[40] Mr. Young and Mr. Marchand, again in their evidence, referenced the fact that persons in the industry (specifically real estate agents) would be aware that O’Leary Drive is a “Ramar-built” street. It appears clear to me that, unless a person was very closely tied into the construction or real estate industry in the greater Halifax area, that person would not be able to identify which builder is being referred to in this article.

[41] As I have already said, the test to be applied here is: would a reasonable, ordinary person identify the Plaintiff? I find that, on the facts before me, such a person would not identify Ramar.

[42] As a result, I find that the Plaintiffs have not been sufficiently identified in the newspaper article to satisfy the law of defamation.

SIGN IN TRUCK

[43] In relation to the sign on the back of the truck, the circumstances are somewhat different. The sign referred to “fixing the house that you built”; the only interpretation of that sign is that it is referencing a builder. Witnesses testified that Ramar was the only builder in the area of that truck and sign, and I accept that evidence. The truck was parked so that the sign faced Ramar’s business premises. In my view, in the totality of the circumstances, I accept that an average sensible person, upon seeing that sign, would understand that it was a reference to Ramar.

[44] Having said that, I must next ask: were the words on the sign, in fact, defamatory? I return to first principles in order to consider this question. In *Salmond on Torts*, 17th ed, at p. 139, the principle is described this way:

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**. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one, and it is no defence to say that the statement was not intended to be defamatory, or uttered by way of a joke. (Emphasis is mine)

[45] A court must determine what meaning or meanings the statement would convey to an ordinary and reasonable person. I note the comments of Professor Brown (*Law of Defamation in Canada*, supra) pp 172-73:

Courts will apply a standard of common sense construction. Words are to be construed in their common, natural, ordinary, plain, popular and usual sense, and given their natural, obvious and ordinary meaning.

. . . The natural and ordinary meaning is not necessarily the literal meaning of the words, but that meaning which they would naturally convey to those reading or hearing them, giving the words their ordinary signification. . . .

[46] Brown further states at page 195 that:

Context is crucial in determining the defamatory sense of words. The defamatory communications must be viewed in context. An alleged defamatory statement cannot be considered apart from the context in which it was made. “Words, like people, are judged by the company they keep.”

[47] The specific “publication” here, was a hand painted, homemade sign, displayed on the back of a pick up truck, for a few hours. The sign said “Come on boys, time to live up to your word and fix the house you built” In my view, the natural and ordinary meaning of those words, in the context that they exist here, is that of a disgruntled client, seeking a quicker response to a repair request. I am not convinced that this constitutes defamation. It is neither a statement of fact or opinion. It says nothing about Ramar’s abilities or qualifications. It is not a statement that one can call a truth or falsehood. At most, I find that it is referencing a delay.

[48] It must further be said that while a corporation, such as Ramar, can be defamed, there are certain realities in the case of a corporation that must be recognized. For example, a corporation does not have feelings which can be hurt; the only effect on a corporation that is material, in this context, is the commercial

or economic effect. As author Young, in the article *Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs* (supra), comments at paragraph 146:

Modern defamation law is what it is, however, largely because harm to reputation often implicates human dignity and causes human suffering. To wrongly injure people's reputation is to call into question their role in society and, as a result, to offend their dignity. Such injuries cause feelings of embarrassment and distress that are often the motivation for and focus of defamation actions. Corporate reputation is a different beast altogether. No one's dignity is affected when a corporation's reputation is wrongly injured, and no one is humiliated. The interest at stake is the corporation's bottom line -- its revenue and ability to generate future revenue.

[49] There is also authority for the proposition that, where a corporation is selling goods and/or services, it cannot expect to be shielded from any and all negative commentary in relation to those goods and services. A corporation, engaged in business, cannot take a mere complaint about its work, even a public and/or unfair complaint, and call it actionable, unless more is alleged. I note from Brown in *The Law of Defamation in Canada*, Carswell, 1994, at page 1196:

A corporation may be defamed solely by reference to its goods or products if the publication by inference imputed to the corporation some fraud, deceit, dishonesty, or reprehensible conduct in its business with respect to those goods or products.

[50] Author Brown further quotes from *National Refining Co. v Benzo Gas Motor Fuel Co.* 20 F. 2d 763 at 771 (8th Cir. 1927), at page 1197:

However, if the statement relates solely to the quality of the goods or services received and does not impugn the integrity of the corporation, the latter cannot sue for defamation, unless it is shown to have suffered special damages.

[51] In other words, courts have certainly recognized that there are situations where words impugn more than mere good and services. Some criticisms strike at the heart of the Plaintiff's business or integrity.

[52] In *Color Your World Corp. v. Canadian Broadcasting Corp.* [1994] O.J. No. 178 (Ont. G.D.), the defamation claim related to a report of defective paint being sold by the Plaintiff. The court referred to *Linotype Co. v. British Empire Typesetting Machine Co.* (1899), 15 T.L.R. 324, 81 L.T. 331 (H.L.) at page 332:

There is no doubt that if the only meaning which is a reasonable man could attach to these words amounted to a mere criticism of the machine as a mechanical appliance it is not an actionable wrong to publish such a criticism. I think that principle is well established and I do not think that it requires any authority to establish it.

[53] In the *Color Your World* case, the trial court found that the statement in question went beyond criticism of the plaintiff's product, since it alleged that the plaintiff used mercury in its paint, thereby producing and selling a potentially harmful product. The trial court found that allegation to be defamatory. This finding was overturned by the Ontario Court of Appeal ([1998] OJ No 510); Abella, J. held she was "unable to agree with the trial judge's threshold finding that the programme was defamatory". (para. 16)

[54] In this particular case, while special damages were sought in the pleadings, none were identified or particularized in the evidence.

[55] I find that the words used here did not allege any fraud or deceit on the part of Ramar, and did not imply any attack on their integrity, on any level. They were simply complaints being made by a consumer; while definitely ill-advised, they were not particularly harsh or accusatory towards Ramar.

[56] Furthermore, the context here is crucial. It is my view that a reasonable person would quickly have concluded that the method by which Mr. Seguin was choosing to display his message, was completely lacking in credibility and seriousness. I do not believe that any reasonable person seeing this sign would have been affected in their opinion of Ramar, or that this sign lowered the reputation of Ramar in the estimate of its community. Witness Kris Gerroir confirmed that this sign did not affect her opinion.

[57] To the contrary, it would seem to me that the only person whose reputation and credibility was possibly affected here, was Mr. Seguin himself. In cases where it is obvious to any sensible observer that a defendant is merely reacting in an angry, foolish, and confrontational manner, such would not constitute defamation (See: Brown, *Defamation Law: A Primer*, 2nd ed, page 34). In such cases, reasonable persons would not attach value to the statements, and would not be affected in their opinion. In my view, this is one such case.

[58] For all of these reasons, I dismiss the Plaintiff's claim in defamation with respect to all three events complained of.

[59] I am prepared to hear the parties on costs if they cannot reach agreement.

J.