COURT OF APPEAL OF YUKON

Citation: *Ramirez v. Gale*,
2017 YKCA 18

Date: 20171206
Docket: 17-YU813

Between:

Evangeline Ramirez

Appellant
(Plaintiff)

And

Dianne Gale, Individually and as Administrator of Whitehorse United Church; and Whitehorse United Church

Respondents
(Defendants)

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated May 29, 2017 and September 5, 2017 (*Ramirez v. Gale*, 2017 YKSC 29, Whitehorse Docket 16-A0073).

The Appellant Evangeline Ramirez:	Self-Represented
Counsel for the Respondents:	D.L. Fendrick
Place and Date of Hearing:	Whitehorse, Yukon November 20, 2017
Place and Date of Judgment:	Vancouver, British Columbia December 6, 2017

Summary:

The appellant applies to extend the time to file a notice of appeal against the dismissal of her defamation claim. If the extension is granted, she seeks a stay of the lower court order. The respondents say the extension of time should not be granted because the appeal is meritless. Held: Application dismissed. It is not in the interests of justice to grant an extension of time to file the notice of appeal because the appeal is bound to fail. In light of the foregoing, there is no need to address the issue of whether to stay the lower court order.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Ms. Ramirez seeks to extend the time to file a notice of appeal in relation to a decision rendered May 29, 2017 dismissing her claim in defamation against the respondents. She is several months out of time. If the extension is granted, she seeks a stay of proceedings of the lower court order.

[2] The case was decided as a summary trial. Ms. Ramirez had a janitorial contract with the respondent Whitehorse United Church from 2010-2016. Dianne Gale was the Church's administrator. Ms. Ramirez claimed that Ms. Gale defamed her by sending her an e-mail, which was copied to the Church's Property Management Committee ("Committee"). The e-mail accused Ms. Ramirez of theft of janitorial supplies.

[3] Ms. Ramirez submits that the trial judge erred in concluding that the defence of qualified privilege applies. She also seeks disclosure of CCTV footage that she says would show an exchange between herself and Ms. Gale that occurred the day before Ms. Gale sent the impugned e-mail. There is nothing in the material to support the submission that any CCTV footage would support the claim.

[4] The facts are straightforward – Ms. Gale was instructed by the Church's finance committee to review a number of the church's costs, and in particular, a recent invoice for janitorial supplies that was over-budget. Ms. Gale looked for the supplies on the invoice and found that they did not accord with the invoice she reviewed. She asked Ms. Ramirez about the supplies, and Ms. Ramirez said she stored the supplies at her home, and said she would return them.

[5] When Ms. Gale next checked the supply closet, she noted that some supplies had been returned, however, 80 rolls of toilet paper and 200 garbage bags were still missing. Ms. Gale then sent Ms. Ramirez the e-mail, copied to the Committee, stating that she believed that Ms. Ramirez had not returned all of the supplies, specifically a case of toilet paper and a case of garbage bags. She said:

> I would like the toilet paper and garbage bags returned by tomorrow when I arrive at work. If they are not here, then I will have no choice but to call the police and report the theft.

[6] Ms. Ramirez sued for defamation after receiving the e-mail.

Trial Judge's Reasons

[7] The trial judge referred to *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28, where the Court reminds us of the three elements a plaintiff must prove in order to be successful in a defamation action: (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.

[8] The trial judge concluded that the words were defamatory, that they referred to Ms. Ramirez and they were published. Indeed, this part of the test was admitted at trial by the respondents. However, she found that the defence of qualified privilege applied and dismissed the claim.

[9] The trial judge referred to the law in relation to qualified privilege, and said at paras. 33-34:

> [33] In the case before me, the Defendants are claiming qualified privilege. *Hill* comments on the effect of qualified privilege:
>
> > 144 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 tides* 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. See *Horrocks v. Lowe,* [1975] A.C. 135 (H.L.), at p. 149.

> *[Hill v. Church of Scientology of Toronto, supra, at para.* 144.]
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> [34] The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given: *Hill v. Church of Scientology of Toronto, supra,* at para. 147.

[10] The trial judge found that Ms. Gale was obliged to report to the Committee, and that the Committee was responsible for overseeing janitorial services and receiving information from Ms. Gale about janitorial issues. She concluded that the subject matter of the e-mail pertained to Ms. Gale's responsibilities and to the responsibilities of the Committee. These communications, including the defamatory e-mail, were sent as a matter of qualified privilege.

[11] Finally, the judge found that there was no evidence of a malicious intent on the part of Ms. Gale.

Extension of time

[12] The criteria in an application to extend time to begin an appeal or apply for leave to appeal were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.) and may be summarized as follows:

1) Was there a bona fide intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension of time?
4) Is there merit in the appeal?
5) Is it in the interest of justice that an extension be granted?

[13] In *Davies*, Seaton J.A. for the Court said the fifth factor "encompasses" the other factors and "states the decisive question" (at 260). Similarly, Lambert J.A., concurring in the result, stated that the interests of justice is "an overriding question and embraces the first four questions" (at 261).

[14] The reasons for judgment were delivered on May 29, 2017. Ms. Ramirez advised the respondents that she intended to appeal on June 7, 2017. However, she took no further steps towards pursuing her appeal until she filed this motion on

October 26, 2017. Ms. Ramirez did not explain her reasons for the delay in her affidavit material. Suffice to say that Ms. Ramirez is no stranger to these Courts.

[15] Thus, Ms. Ramirez formed the intention to appeal during the appeal period, and she advised the respondents of that intention. The respondents would not suffer prejudice as a result of the late filing of the appeal, except the costs of pursuing an appeal, which I will address in the interests of justice component.

[16] The main issue on this application is that of merit and whether it is in the interests of justice to pursue the appeal.

[17] The threshold question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit" (*Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6; *Clock Holdings Ltd. v. Braich*, 2009 BCCA 269 at para. 31, aff'd 2009 BCCA 437; *Seiler v. Mutual Fire Insurance Co*. *of British Columbia*, 2003 BCCA 696 at para. 18, leave to appeal ref'd [2004] S.C.C.A. No. 60]; *Gourmet Gallery Inc. v. Pacific International Development Corp.*, 2000 BCCA 681 at para. 9).

[18] The absence of merit also informs the interests of justice factor, the overriding criterion (*Seiler* at para. 18):

> [18] While refusal to extend the time for service in these circumstances may seem like a harsh result, the fact is that there is no prospect of the plaintiffs succeeding on their appeal. Extending the time for service of notice for an appeal that is doomed to fail would put all parties to unnecessary expense, and clearly would not be in the interests of justice.

[19] On this point, see also *Moore v. Moore*, 2012 BCCA 266, where the application to extend the time to file a notice of appeal was refused because it was "not in the interest of justice to prolong this meritless litigation…" (at para. 35).

[20] It is clear from her written material and her submissions that Ms. Ramirez wishes to reargue the case that was before the trial judge. She argues that qualified privilege does not apply to her case because she seems to be of the mistaken view that by sending the e-mail to eight people, the e-mail is now on the Internet and

available to millions of people. The trial judge's finding of fact, for which there is no basis to interfere, is that the e-mail went only to the Committee responsible for janitorial services in the Church. The trial judge's findings of fact strongly support the conclusion that qualified privilege applied in this case.

[21] Ms. Ramirez argues at some length that the e-mail was defamatory. The difficulty is that the trial judge found that the e-mail was defamatory, and that fact was conceded by the respondents.

[22] In my view, there is little merit to this appeal. It does not meet the threshold test. It is clear that this appeal is "bound to fail". In my view, it is not in the interests of justice to grant an extension of time to file a notice of appeal and to permit a meritless appeal to proceed.

[23] I would dismiss the application for an extension of time to file the notice of appeal. Therefore, I need not address the issue of whether to stay the lower court order.

[24] The respondents will have the costs of the application.

"The Honourable Madam Justice Bennett"