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Docket: CI 14-01-88901
(Winnipeg Centre)
Indexed as: Green v. Metz et al.
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
MARTIN GREEN,	)	Martin Green
	)	In person/self-represented
plaintiff,	)	
	)	Brian J. Meronek, Q.C. and
- and -	)	Mark D.J. Schulz
	)	for the defendants
DON METZ, NEIL BESNER and,	)	
THE UNIVERSITY OF WINNIPEG,	)	Judgment delivered:
defendants.	)	May 10, 2017

EDMOND J.

Introduction

[1] The defendants seek summary judgment dismissing the plaintiff's claim with costs.

[2] These reasons for decision are being released contemporaneously with the reasons for decision in ***Green v. Bush et al.***, 2017 MBQB 83 (the "Bush action")

[3] Like the Bush Action, this is a defamation action dealing with the steps taken by the defendants, Don Metz ("Metz"), Neil Besner ("Besner") and The University of Winnipeg (the "University") in response to the report received from George Bush

("Bush") that the plaintiff had attempted to force his way into his home to serve court documents.

[4] The primary issue for determination in this case is whether the evidence discloses a genuine issue for trial.

Facts

[5] The facts outlined in the Bush Action, are facts that apply in this case and will not be repeated in this decision.

[6] The following evidence was filed and reviewed:

a) Affidavits of Martin Green sworn September 15, 2014, November 14, 2014, December 29, 2014, and February 13, 2017;

b) Affidavit of Metz sworn August 7, 2014;

c) Affidavit of Besner, sworn August 28, 2014;

d) Affidavit of Martin Grainger ("Grainger"), sworn August 28, 2014;

e) Affidavit of Jan Stewart, affirmed November 5, 2014.

[7] Reference was also made to affidavits sworn by Ken McCluskey and Besner in another Queen's Bench action, ***Green v. The University of Winnipeg***, 2016 MBQB 13 (CI 15-01-94743), as well as cross-examinations conducted on those affidavits.

[8] The pleadings were reviewed and in particular, the amended statement of claim alleges the following:

> 13. Mr. Bush then phoned his colleague, the defendant METZ, and reported that the plaintiff had just attempted to force his way into his home. Several minutes later the Defendant METZ then sent an email to the defendant BESNER, stating:
>
> > "George Bush just called me to report that Marty Green tried to break in his house. He has called police."

14. The plaintiff claims that in so doing the defendant ~~BUSH~~ METZ did falsely and maliciously, with intent to harm the plaintiff, defame the Plaintiff to Neil Besner.

15. Shortly after receiving this communication, the defendant BESNER sent an email addressed to Colin Morrison, Laurel Repski, and Martin Grainger, stating (in part):

> "I just spoke with George Bush. Marty Green tried to force his way into George's house minutes ago."

16. Fifteen minutes later, Besner sent out another email addressed to Colin Morrison, Jeremy Read, Laurel Repski, and Martin Grainger, stating (in part):

> "Green (who had been to Bush's church 3 weeks ago) called Bush at home on his unlisted # and then appeared at his door two minutes later and tried to force his way in and deliver a document to Bush. Bush and his wife refused to let him in (apparently there was some struggle.) Then Bush called the police."

17. The plaintiff claims that in sending the aforesaid emails, the defendant BESNER did falsely and maliciously, with intent to harm the plaintiff, defame the Plaintiff to Colin Morrison, Laurel Repski, Martin Grainger, and Jeremy Read.

18. The plaintiff claims the aforesaid statements were made by the Defendants were defamatory in their plain and ordinary meaning, without consideration of additional inferences.

19. The plaintiff further claims that read in context, the particular words of Besner with respect to Green's attendance at Bush's church meant, and were understood to mean, that the Plaintiff had been stalking Bush.

[9] Other acts or conduct which are alleged by the plaintiff to be defamatory include:

I. The University's Chief of Security, Grainger, is alleged to have written out and implemented a barring notice against the plaintiff. The plaintiff claims the act of publishing the barring notice at the University and serving the barring notice on the plaintiff's son, amount to actionable defamation;

II. Steps taken by the University to ensure that both the existence of the barring notice and allegations upon which it was based, became widely known on the University campus, including but not limited to:

a) posting of the Barring notice in the University of Winnipeg security office along with a picture of the Plaintiff, and informing security staff that the reason for the barring notice was because the Plaintiff had tried to force his way into the Bush residence;

b) holding a meeting during the week of Monday January 14th with the various participants including but not limited to Professors Bush and Metz, security Chief Grainger, and union representative Lisa McGifford, at which the existence of the barring notice and the allegations upon which it was based were freely discussed;

c) hiring extra security personnel during the last week of January 2013 and assigning them the specific task of preventing the plaintiff from entering the campus;

d) informing the plaintiff's former instructors that the plaintiff had engaged in inappropriate behaviour at the Bush residence and that the plaintiff had therefore been barred from attending the campus;

e) posting special guards at the classroom doors where Professors Metz and Bush were teaching; and

f) arresting and detaining the plaintiff within plain view of the general public on three different occasions when he presented himself on campus in January and February of 2013.

[see amended statement of claim, paras. 22 a) to f)]

[10] The e-mails that were identified and quoted in my reasons for decision in the Bush action were sent by Metz and Besner on January 11, 2013. For ease of reference they are repeated here as follows:

i) On January 11, 2013, Metz sent an e-mail to Besner at 5:18 p.m. stating as follows:

> George Bush just called me to report that Marty Green tried to break in his house. He has called police.

ii) On January 11, 2013, Besner sent two e-mails to representatives of the University. The first one at 5:30 p.m. read as follows:

> I just spoke with George Bush. Marty Green tried to force his way into George's house minutes ago. The police are there taking a statement. Don Metz is aware of this (Bush called him, and Metz emailed me.) Bush is upset and agitated. He'll call me back when he is through with the police.
>
> We should discuss next steps.

iii) The second e-mail sent at 5:45 p.m. reads:

> The police have taken George Bush's statement. The statement # is C13-7371. Bush and his wife are, as you can imagine, upset. He called me a moment ago; Green (who had been to Bush's church 3 weeks ago) called Bush at home on his unlisted # and then appeared at his door two minutes later and tried to force his way in and deliver a document to Bush. Bush and his wife refused to let him in (apparently there was some struggle). Then Bush called police. Bush also apprised Metz of all this.

[11] Grainger, in his affidavit, confirms that the second barring notice, effective January 11, 2013 was placed in a binder in the security office at the University and that the only individuals who had access to the binder were the security guards (see para. 3 of the Grainger affidavit).

[12] In paragraph 5 of his affidavit, Grainger states that on January 14, 2013, a meeting was called by the University's faculty association executive director in order to discuss the incident that occurred at the Bush residence on January 11, 2013. He identifies the persons present at the meeting and confirms that no minutes were recorded. He states at paragraph 6 that Mr. and Mrs. Bush confirmed what had occurred at their residence and Grainger advised those present that the University was in the process of issuing a second barring notice, which would indefinitely bar the plaintiff from attending the University (see para. 6 of the Grainger affidavit).

[13] Grainger confirms that in the last week of January 2013, the University hired extra security personnel and placed them at various locations throughout the University

and in the vicinity of the classrooms that Bush and Metz were teaching in. The University did not circulate any public communication advising faculty staff, students or the general public that there was an increased security presence or the reasons for doing so (see paras. 8 and 9 of the Grainger affidavit).

[14] Grainger confirmed the circumstances under which the plaintiff was taken into custody by University security services, initially on January 29, 2013. Grainger advised the plaintiff that the University had re-issued a barring notice due to both the incident at the Bush residence as well as his past behaviour.

[15] Grainger also confirmed that the plaintiff was observed on University property on February 1, 2013 and February 7, 2013, in violation of the barring notice. On each of those two occasions the Winnipeg Police Service was called and the plaintiff was detained by members of the University security services pending arrival of the police.

Law on Summary Judgment and Defamation Principles

[16] The law applied on summary judgment motions and general defamation principles were outlined in my reasons for decision delivered in the Bush action. I do not intend to repeat the principles in these reasons. One additional legal principle that requires additional reference, is the law of qualified privilege. The defendants submit that they are protected from the alleged incidents of defamation pursuant to the defence of qualified privilege.

[17] Qualified privilege is described in *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2d ed, Vol 1 at 1-60 (Toronto: Thomson Reuters Canada Limited, 1999, 2016) as follows:

(d) Qualified Privilege

> There is a qualified privilege to publish defamatory remarks if they are made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest of either the publisher or the person defamed or some third person, if the publication is made to a person who has some corresponding interest in receiving the information. The duty may be either legal, social or moral and the test is whether persons of ordinary intelligence and moral principle would have considered it a duty to communicate the information to those to whom it was published. The privilege may be lost if it is made maliciously, if the comments go beyond the exigency of the occasion, or if they are communicated to those who have no interest in receiving the information.[208]
>
> [208] Quoted in *Fast v. Cowling*, [1996] 10 W.W.R. 73 at 82 (B.C.S.C.); *Starwood Group Inc. v. Calvelti* (2005) CarswellOnt 1957, [2005] O.J. No. 2003 (S.C.J.) at para. 15, additional reasons at (2005), 2005 CarswellOnt 7199 (S.C.J.), affirmed (2006), 2006 CarswellOnt 1533, [2006] O.J. No. 1005, 208 O.A.C. 282 (C.A.). For a discussion of qualified privilege, see Chapter 13.

Position of the Parties

[18] The defendants submit that the plaintiff's claim alleges four incidents of defamation. The first incident is an e-mail sent by Metz to Besner in which Metz stated that "Marty Green tried to break in his house. He has called police." The second incident of defamation are two e-mails sent by Besner to representatives of the University on January 11, 2013. The first e-mail was sent at 5:30 p.m. and the alleged defamatory statement is that "Marty Green tried to force his way into George's house minutes ago."

[19] The second e-mail sent at 5:45 p.m. is also alleged to contain defamatory statements and specifically the following:

> Green (who had been to Bush's church 3 weeks ago) called Bush at home on his unlisted # and then appeared at his door two minutes later and tried to force his way in and deliver a document to Bush. Bush and his wife refused to let him in (apparently there was some struggle).

[20] The third incident of defamation alleged by plaintiff involved the University serving the plaintiff's son with a copy of the second barring notice issued by the University. The plaintiff alleges that the serving of the second barring notice upon his son constitutes a publication and defamation by virtue of the innuendo that the plaintiff was a person who had committed some form of improper behaviour which justified being banned by the University.

[21] The final incident of defamation alleged by the plaintiff relates to measures taken by the University to ensure the existence of the barring notice and the allegations upon which it was based was published on campus at the University.

[22] The defendants submit the statements made are subject to one or more of the following defences:

I. The remarks were made on an occasion of qualified privilege;
II. The remarks were true;
III. The plaintiff has suffered no damages; or
IV. The remarks are not defamatory in either their plain and ordinary meaning or through innuendo.

(see motion brief of defendants, para. 69)

[23] The defendants submit that there is no genuine issue for trial as one or more of the defences provide a full defence to the claim advanced by the plaintiff.

[24] The plaintiff submits that the words are defamatory and the defence of qualified privilege does not apply in this case as there was no duty to report the incident by Metz or Besner. If the court accepts that the statements were made on an occasion of qualified privilege, the plaintiff argues privilege is forfeited as there is evidence of malice. The plaintiff alleges that Metz was involved in the campaign which led to his expulsion from the education faculty in January 2012 and the plaintiff had appealed his

grades in courses taught by Metz. The plaintiff describes the statements made by Metz and Besner to be exaggerated and unfounded complaints which were false and made maliciously with the intent to harm the plaintiff and defame him.

[25] The plaintiff submits that there is a genuine issue for trial and where that genuine issue relates to state of mind, it is not appropriate to resolve that issue on a summary judgment motion (see ***Canada (Attorney General) v. Cochrane***, 2008 MBQB 207, 238 Man.R. (2d) 1 at para. 29; ***G.D. Johnson Ltd. v. Royal Bank of Canada***, [1998] 126 Man.R. (2d) 285 (Man. C.A.)).

[26] In essence, the plaintiff submits that summary judgment is not appropriate in this case because evidence is contested and relates to a state of mind, whether there is malice and it is therefore necessary for the court to receive evidence *viva voce* to assess those issues at trial.

Analysis and Decision

[27] There is no dispute that summary judgment is available to defendants in defamation actions (see ***Weisenberger v. Johnson & Higgins Ltd.***, [1998] 131 Man.R. (2d) 274 (Man. C.A.); ***Hoeppner v. Linden***, 2002 MBQB 270, [2002] M.J. No. 461; ***Hall v. Puchniak***, [1997] 122 Man.R. (2d) 256 (Man. Q.B.)).

[28] I do not intend to repeat the findings that were made in the Bush action respecting the statements that were made in the Bush action. The statement in Metz's e-mail to Besner was that "Marty Green tried to break in his house." For the reasons given in the Bush action, I am satisfied that the statement by Metz to Besner in his e-mail is substantially correct.

[29] The same finding would apply to the statements made by Besner to other representatives of the University in his e-mails of January 11, 2013. In my view, applying the principles outlined by the Supreme Court of Canada in ***Hryniak v. Mauldin***, 2014 SCC 7, [2014] 1 S.C.R. 87, and the Manitoba Court of Appeal in ***Lenko v. Manitoba***, 2016 MBCA 52, 330 Man.R. (2d) 48, I am satisfied that there is no genuine issue for trial, because I am able to reach a fair and just determination on the merits of the plaintiff's alleged defamation action.

[30] In my view, the alleged defamatory statements that "Marty Green tried to break in his [Bush residence] house", and "Marty Green tried to force his way into George's house ... ", are substantially correct. As noted in ***Makow v. Winnipeg Sun***, 2003 MBQB 56, 172 Man.R. (2d) 213 at para. 59, aff'd 2004 MBCA 41, 194 Man.R. (2d) 97 (Man. C.A.), "the justification must meet the gist or sting of the charge." I am satisfied that both Metz and Besner had justification for making the statements they did in the e-mails on January 11, 2013.

[31] In addition to the defence of truth or justification, the defendants have raised the defence of qualified privilege. In my view, there is evidence establishing that the communications from Metz to Besner and from Besner to the other representatives at the University occurred on an occasion when there was a legal, social or moral duty to communicate the information. In applying the test summarized above, I considered whether persons of ordinary intelligence and moral principle would have considered it a duty to communicate the information to those to whom it was published.

[32] Metz e-mailed Besner who, is described in his affidavit sworn August 7, 2014 as Provost and Vice-President Academic and International Professor of English at the University.

[33] In response to receiving this information, Besner spoke to Bush and obtained information regarding the incident with the plaintiff. Besner then sent his first e-mail to a number of representatives at the University, Colin Morrison (legal counsel), Laurel Repski (vice-president of human resources audit and sustainability) and Martin Grainger (director of security), all employees of the University, advising them of the information which he received from both Bush and Metz regarding the incident with the plaintiff.

[34] The second e-mail sent by Besner included another recipient, Jeremy Read (senior executive officer and advisor to the president of the University).

[35] Further, on January 15, 2013, Besner sent an e-mail for circulation to the faculty and staff of the Department of Education at the University. The purpose of that e-mail was to advise that the University was in the process of indefinitely barring the plaintiff from the University and that if anyone saw the plaintiff on University premises, there were to contact security services.

[36] In my view, the defendants established a *prima face* case that these statements were made on an occasion of qualified privilege.

[37] Since the defence of qualified privilege may be lost if the statements are made maliciously, if the comments go beyond the exigency of the occasion or if they are communicated to those who have no interest in receiving the information, that was considered by me in determining whether the defence of qualified privilege applied in this case.

[38] The plaintiff led evidence and argued strenuously that the defendants were motivated by malice. Malice is often presumed from the very nature of the defamatory statement. However, if the defendants establish that the statement was made on an occasion of qualified privilege, the *bona fides* and honest belief of the defendants is presumed and the plaintiff must prove that the defendants were motivated by actual or express malice. Proof may be shown by evidence that the defendants used the occasion of qualified privilege for some wrong or improper motive or spoke dishonestly or in knowing or reckless indifference to or disregard of the truth (see *Brown on Defamation* at p. 1-61).

[39] Notwithstanding the strenuous submission made by the plaintiff, I am not satisfied that the plaintiff met the onus of proving that the e-mails sent and the steps taken were motivated by malice. Further, I am not satisfied that the defendants used the occasion of qualified privilege for an improper motive or spoke dishonestly or made statements or took steps knowing or with reckless indifference to or disregard for the truth.

[40] Metz reported the matter to Besner as a senior administrator of the University.

[41] After receiving information from both Metz and Bush about the incident at the Bush residence, Besner sent e-mails to legal counsel and senior representatives of the University who were people who needed to receive this information. I accept that Besner was acting within his obligation and duty to his colleagues and the University in reporting the matter as he did.

[42] Further, the discussions that occurred at the January 14, 2013 meeting were also communications that occurred on an occasion of qualified privilege where there was a

legal, social or moral duty to communicate the information and discuss a complaint of a faculty member.

[43] The plaintiff chose not to cross-examine the affiants on their affidavits and in my view, the evidence led by the plaintiff was insufficient to demonstrate that there is a genuine issue for trial on the defence of qualified privilege and malice.

[44] I am also not satisfied that the third incident, which involves service of the second barring notice on the plaintiff's son and the alleged posting of the barring notice is capable of sustaining a claim in defamation.

[45] The incident involved service of a barring notice which was required in order to give the plaintiff notice of the steps that had been taken by the University in light of his conduct.

[46] I am not satisfied that service of such a notice by a process server retained by the University is actionable in defamation. There is no evidence that the process server made a statement or provided information to the plaintiff's son relating to the incidents which led to the University issuing the second barring notice. The undisputed facts are that the plaintiff did not answer the door to receive service of the second barring notice. The plaintiff's son answered the door and received the document. The barring notice itself is not defamatory as it simply gave notice that the plaintiff was barred from the University property, a statement that was true.

[47] There is no evidence that the barring notice was posted as alleged by the plaintiff. Even if it was, the posting does not change the fact that the information in the barring notice was true. In my view, what is referred to as the third incident of defamation does not raise a genuine issue for trial.

[48] The fourth incident of defamation relates to allegations of defamation made against the University. The alleged defamation deals with various measures the University is alleged to have taken to make the second barring notice and the circumstances which led to it being issued known within the University campus.

[49] The allegations of defamation against the University are outlined in paragraph 22 of the amended statement of claim (reproduced in para. 9 above). The defendants relied upon the Grainger affidavit in which he described the security measures taken by the University.

[50] On review of the affidavits filed by the plaintiff, he has failed to lead evidence confirming the allegations made in paragraph 22 of the amended statement of claim.

[51] Subparagraphs 22 c), e) and f) of the amended statement of claim allege certain measures taken by the University as well as steps taken to arrest and detain the plaintiff. These steps are not grounds for a defamation action because defamation protects a person's reputation from defamatory statements. The defamatory statement must be published. In my view, the allegations in subparagraphs 22 c), e) and f) do not include a publication of a defamatory statement.

[52] If there was evidence that the University falsely detained or imprisoned the plaintiff, it is possible that such conduct would be actionable. However, the amended statement of claim has not advanced a claim for false imprisonment. The claim is advanced in defamation only. Further, the University took the steps that it did in response to the plaintiff's conduct and in my view, was lawfully enforcing the barring notice. Such conduct by the University is not proof to support a claim for defamation.

[53] The plaintiff alleged defamatory statements were made at the meeting that occurred on Monday, January 14, 2013, in which the participants discussed the plaintiff's attendance at Bush's residence and the University's barring notice. There are no specific allegations of defamatory statements which are alleged by the plaintiff to have been made at the meeting on January 14, 2013. If the Bushs repeated the circumstances that occurred at their home and made the statements noted above, I have already found that such statements are not defamatory, but are substantially correct and do not raise a genuine issue for trial.

[54] The defendants also relied upon the defence of qualified privilege in relation to the meeting of January 14, 2013 and I agree that defence applies to the discussions held at the meeting.

[55] On the basis of the evidence filed, I am satisfied that Mrs. Bush feared that the plaintiff was trying to force his way into their home on January 11, 2013 and that she attempted with all her strength to shut the door and prevent him from entering. The words attributed to the Bushs and described by Metz and Besner in their e-mails do not amount to defamatory statements primarily because the actions they described regarding the plaintiff's conduct are not false, but substantially correct.

[56] It is important to remember that the plaintiff chose to disregard what he was initially told by Bush on the telephone, which was to serve the documents on his lawyer. Instead, he chose to attend at the home and when he was told by Mrs. Bush that Bush did not want to see him, the plaintiff deliberately prevented Mrs. Bush from shutting the door. Further, once the plaintiff was barred from the University, instead of complying with the barring notice, he deliberately asserted what he described as his

right to attend at the University campus and defy the barring notice. I accept that the plaintiff was attempting to make a point that he felt he had been treated unfairly and should have the right to attend the University campus. However, I do not find that the steps taken by the University to enforce the barring notice to be unreasonable or done in bad faith or with malice. Those steps were taken in response to the plaintiff's desire to publically protest the University's position.

[57] In reviewing all of the evidence filed, I am satisfied that the defendants have established a *prima face* case for dismissing the defamation action. The onus shifted to the plaintiff as the responding party to show that there is a genuine issue for trial which has a real chance of success.

[58] As noted in my decision in the Bush action, it is not sufficient to say or allege that full particulars of the plaintiff's claim will be provided at a later time. The plaintiff has the onus of leading evidence or to cross-examine the affiants on the affidavits that have been filed to satisfy the court that there is a genuine issue for trial.

[59] On the basis of the evidence filed, the conclusion reached in the Bush action applies in this case.

[60] Similarly, the allegations of defamation relating to the University have either not been proven on a balance of probabilities, or if the steps taken amounted to a re-publication of alleged defamatory statements, those statements are not false, but are substantially correct. Further, statements were made on occasions of qualified privilege and it is clear that the plaintiff has failed to satisfy the onus to prove that the statements were motivated by malice.

[61] In my view, applying the principles outlined by the Supreme Court of Canada in ***Hryniak*** and by the Court of Appeal in ***Lenko***, I am satisfied that there is no genuine issue for trial.

[62] In the result, the plaintiff's claim is dismissed with costs to the defendants in accordance the Court of Queen's Bench Tariff on a Class 1 basis.

_____ J.