

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2013-404-003456
[2014] NZHC 2776**

BETWEEN YI WU, alias dictus EASTER WU
Plaintiff

AND MAY MONCUR
First Defendant

STEPHEN COOK
Second Defendant

DERMOTT MALLEY
Third Defendant

TRUTH WEEKENDER LIMITED (IN
LIQUIDATION)
Fourth Defendant

BOB KERRIDGE
Fifth Defendant

Hearing: 7 November 2014

Appearances: F Deliu for Plaintiff
M Moncur in Person

Judgment: 7 November 2014

ORAL JUDGMENT OF VENNING J

Solicitors: WRMK Lawyers, Whangarei
Minter Ellison Rudd Watts, Auckland
Chapman Tripp, Auckland
Copy to: F C Deliu, Auckland
R Zhao, Auckland
First Defendant

[1] The plaintiff sues the defendants in defamation. The case is scheduled for a three day trial to commence on Monday 17 November 2014.

[2] The first defendant applies for leave to file a statement of defence out of time. The application is opposed by the plaintiff. Only the third and fifth defendant are actively opposing the proceeding at present. Both of them have filed statements of defence and will be defending the matter at trial.

[3] Although the proceedings were served on the first defendant in July 2013 she failed to file a statement of defence with the Court. When her attention was drawn to the proceedings again this year she purported to file a statement of defence with the Court on 15 September. That was not accepted as it was out of time.

[4] On 5 November the assigned trial Judge convened a telephone conference directing the first defendant to file an affidavit explaining in full the reasons for her delay in taking steps in the proceeding together with a formal application seeking leave to file the statement of defence out of time and after the setting down date. The application and affidavit have now been filed, although Mr Deliu has made the point that papers were only served on him very late last evening.

[5] The application falls to be considered under r 7.7, which provides that no statement of defence may be filed after the close of pleadings date without leave. It is necessary for a defendant such as Ms Moncur to surmount the formidable hurdles of showing that to allow her to file a statement of defence would be in the interests of justice and will not significantly prejudice other parties or cause significant delay.

[6] The Court will often consider on such applications the length of the delay, the reasons for the delay, the prejudice to other parties, whether the proposed defence is substantial, and the overall justice of the case.

[7] In the present case the length of delay is substantial. From July 2013 until at least September this year the defendant failed to take any steps to file a defence and indeed, even after September, did not seek leave to file a defence until the last few days, less than two weeks out from the fixture.

[8] Ms Moncur's explanation in her affidavit for the delay is that she attended a case management conference but was confused about what she was required to do is not convincing given that she does appear regularly in the Employment Tribunal as an advocate. The proceedings served on her had clear directions as to the steps that were required by her. Nor was there any reason for her to take the view, as she apparently did, that she did not consider the claim would be pursued.

[9] The reasons for her delay are unconvincing. She says she just considered the matter would not proceed and that she had some communications with the Court. (I make it clear that there is no obligation on Registry staff to give legal advice). Only after she returned to New Zealand from visiting her ill mother in late October did she seek to advance the matter further.

[10] The issue of whether there would be serious prejudice to other parties is a relevant consideration in this case. As noted the fixture is scheduled for 17 November. It is a case of defamation. The third and fifth defendants are apparently abiding this decision and are ready to go to trial as is the plaintiff. Defamation cases should be dealt with promptly as is indicated by the provisions of the Defamation Act 1992.

[11] I am not at present satisfied, however, that the grant of leave to the first defendant would seriously prejudice the plaintiff in particular as the party opposing the application. If leave were granted it could be granted on terms which would ensure the plaintiff could still maintain his trial date. To the extent that further costs are incurred because of the lateness of the first defendant's actions, those costs could be addressed in any award of costs whatever the outcome of the case in any event.

[12] The next issue to consider is whether the defendant has a substantial ground of defence. It is that issue and the existing defences raised by the third and fifth defendants that are particularly relevant to determination of this application in my judgment.

[13] The first defendant has had some assistance in the preparation of the statement of defence she proposes to file. She admits that she published the Chinese

text particularised at para 7 of the statement of claim but takes issue with the English translation of that text. She also admits the article appeared in the Truth newspaper and was published on the Truth website. She denies that the defamatory statements are capable of bearing the defamatory meaning attributed to them. She then proposes to raise affirmative defences of honest opinion, truth and notice of evidence of bad reputation.

[14] I make it clear that if leave is granted, it will not extend to the defence of generally bad reputation. To allow that proposed defence to run would open up issues which are currently not live and would put in jeopardy the three day fixture.

[15] Although the third defendant's defence is rather general, the fifth defendant raises the defences of honest opinion, qualified privilege and truth. To that extent and whilst obviously I accept Mr Deliu's point that the honest opinion of each party will be different, the plaintiff already faces defences of honest opinion and in particular truth.

[16] On the basis of the draft statement of defence I accept that there is an arguable defence to the claim brought by the plaintiff against the first defendant.

[17] If the first defendant was the only defendant before the Court that may not, in the circumstances of this case, have been sufficient for the Court to grant her leave. However, I am influenced by the fact that the plaintiff faces active defences from the third and fifth defendant and as noted that there is a degree at least of similarity between the issues involving the plaintiff and first defendant and the fifth defendant.

[18] Standing back and considering the matter overall, despite the first defendant's default to date I consider the interests of justice do require the grant of leave to the first defendant to file her statement of defence out of time but subject to a number of strict conditions and orders.

[19] The first defendant is granted leave to file a statement of defence but on the following conditions:

- (a) The proposed affirmative defence of notice of evidence of bad reputation is to be struck out from the statement of defence and is not to be available as a defence.
- (b) The statement of defence will be limited to the defence as pleaded with the only affirmative defences being honest opinion and truth.
- (c) The first defendant is to provide particulars of that honest opinion by filing and serving an amended statement of defence by 1.00 pm, Tuesday, 11 November 2014.
- (d) By the same time, namely 1.00 pm, Tuesday 11 November 2014, the first defendant is to file and serve the evidence that she proposes to lead in support of her defence. She is also to file and serve a bundle of documents that she proposes to rely on in support of her defence.

[20] If the first defendant fails to file and serve those documents by that date then the Court will not read or consider her statement of defence and will not hear her at the substantive hearing. For the avoidance of doubt that direction applies to the requirement to file and serve an amended statement of defence with particulars of honest opinion, the evidence and the documents the first defendant proposes to rely on.

Costs

[21] The first defendant has been granted an indulgence by the Court. The plaintiff has been put to the costs of responding to the first defendant on this application. The first defendant is to pay the plaintiff the costs associated with preparation for this hearing, together with the hearing, which in accordance with the scale I fix at \$3,482.50. Those costs are to be payable by the first defendant to the plaintiff. They are not costs in the cause. They are payable immediately.

Venning J