

CITATION: Enverga v. Balita Newspaper, 2017 ONSC 3500
COURT FILE NO.: CV-14-502946
DATE: 20170612

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Senator Tobias Enverga

Plaintiff

– and –

Balita Newspaper, Balita Media Inc., Tess
Cusipag, Romeo P. Marquez (A.K.A Romy
Marquez) and Carlos Padilla

Defendants

) Howard K. Winkler, counsel for the plaintiff

) James H. Chow, counsel for the defendants
) Tess Cusipag, Balita Newspaper, and Balita
) Media Inc.,

) **HEARD:** June 2, 2017

REASONS FOR JUDGMENT

F.L. MYERS

**I. TESS CUSIPAG HAS ADMITTED THAT HER ALLEGATIONS AGAINST
SENATOR ENVERGA ARE NOT TRUE**

[1] By order dated July 13, 2016, Mr. Justice Lederman of this court determined that the defendants libeled the plaintiff. In reasons for decision reported at [2016 ONSC 4512 \(CanLII\)](#), at para. 33, Justice Lederman assessed the merits of the case as follows:

In the end, the defendants have no reliable evidence to prove the truth of the \$6,000 fraud allegation or the PCCF donation/tax credit allegation. **In fact, Cusipag admitted on discovery that it is not true that Senator Enverga committed a fraud in relation to fund raising activities and that the PCCF allegations are false.**[Emphasis added.]

II. TESS CUSIPAG IS ON A MALICIOUS QUEST TO DESTROY SENATOR ENVERGA'S REPUTATION

[2] At paras 47 and 48 of his reasons, Mr. Justice Lederman found that Ms. Cusipag was on a malicious quest to destroy the plaintiff's reputation as follows:

[47] Cusipag vows to continue to make defamatory statements against the plaintiff and has shown no interest in stopping her efforts or refraining from misconduct. In 2010, after Senator Enverga was elected as a Catholic school board trustee, he arrived late to a press event held by Cusipag. She published a warning to Senator Enverga. "First off is to respect the press who can wield its power to make or break you." In the Article and on her Facebook page, she is fulfilling the threat that she made against the plaintiff in 2010 that she would destroy him.

[48] Cusipag was motivated by malice. She obviously holds a deep seated resentment towards Senator Enverga. She used his comments to the Philippine press as a springboard to vent her unfounded allegations in the published Article and her Facebook to intentionally besmirch Senator Enverga's reputation in the Filipino-Canadian community.

III. THE SUPERIOR COURT ORDERED TESS CUSIPAG AND BALITA TO STOP REPEATING THEIR FALSE ALLEGATIONS ABOUT SENATOR ENVERGA

[3] As a result of the foregoing findings, by order dated July 13, 2016, Lederman J. granted an injunction prohibiting Ms. Cusipag and Balita from repeating their libels of the plaintiff, directly or indirectly, expressly or by innuendo.

IV. MS. CUSIPAG AND BALITA KNOWINGLY AND DELIBERATELY VIOLATED THE COURT'S ORDER

[4] In an October 6, 2016 email, Ms. Cusipag disseminated to others an email exchange between herself and a correspondent with Journal Globalinks. In the exchange, she reiterated her libel of the plaintiff. In her cover email forwarding this email exchange to others, including at least one member of the Senate of Canada, Ms. Cusipag wrote:

Please help me disseminate the truth out there. I have permanent injunction. I am asking all our contacts all over the world for the truth to come out. [Emphasis added.]

[5] At para. 33 of my prior decision dated March 8, 2017, reported at 2017 ONSC 1635, I held Ms. Cusipag and Balita in contempt of court. I found that in sending this email and making other publications after the injunction "...Ms. Cusipag intentionally published statements

containing words that she knew were false and which she knew she had been enjoined from re-publishing directly, indirectly, or by encouraging others to do so.”

[6] At para 36 of the prior decision, I ruled that,

The Media Defendants are continuing an avowed, malicious, very public quest to destroy the plaintiff’s reputation in face of and despite an order of the Superior Court of Justice. As Chief Justice Dickson wrote, their conduct “transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.”

[7] The parties filed further material and have now made legal argument concerning the appropriate sentence for the contempt found.

V. THE QUEST CONTINUES

[8] The Court of Appeal for Ontario recently upheld Mr. Justice Lederman’s decision. I note that the defendants did not appeal from the decision that their statements were false and defamatory. They only contested the amount of money that Lederman J. ordered them to pay to the plaintiff.

[9] In *Enverga v. Balita Newspaper*, 2017 ONCA 302 (CanLII), the Court of Appeal unanimously ruled:

[4]...In any event, this was not a “political” case on the findings of the motion judge. On those findings, the appellant created a controversy so that she could defame the respondent. This was entirely personal.

[5] The conduct of the appellant as described by the motion judge demanded a substantial award of punitive damages. **On his findings, the appellant had repeated the defamation, knowing full well that it was false and intended to continue to repeat the defamation in the future. On the facts as found by the motion judge, deterrence could only be adequately served by a significant award of punitive damages.** We cannot say that the amount awarded is outside of the range required to serve as an adequate deterrent in the circumstances of this case. We cannot interfere with the award. [Emphasis added.]

[10] That is, despite Ms. Cusipag’s claim that she is engaging in political speech that is protected by the freedoms of expression and of the press set out in the *Canadian Charter of Rights and Freedoms*, in fact she is not doing anything of the sort. She is on a personal quest to destroy the plaintiff’s reputation by spreading through her newspaper untrue statements about him while admitting in the court proceeding that she knows the statements to be untrue.

[11] To be clear, there is nothing altruistic, political, community-minded, or protected about what Ms. Cusipag is doing.

[12] Lederman J. and the Court of Appeal thought that an award of an extra \$100,000 in punitive damages might deter Ms. Cusipag from her misguided and illegal quest. They were sadly mistaken. All that it seems to have done is prompted her to transfer her house to her son for free and to transfer two condominium units to others. She tries to avoid the court's judgment rather than comply with it.

VI. MS. CUSIPAG AND BALITA ARE NOT WILLING TO PURGE THEIR CONTEMPT

[13] At para. 38 of my prior decision, I invited Ms. Cusipag and Balita to purge their contempt as follows:

The court encourages the Media Defendants to take further steps to purge their contempt so as to demonstrate concretely and completely their respect for the orders of the Superior Court of Justice and bring this entire ordeal to a quick and final conclusion.

[14] Ms. Cusipag delivered a very brief affidavit for this sentencing hearing in which she corrects what she says are translation errors in evidence filed by the plaintiff for this hearing. Ms. Cusipag and Balita chose not to file an affidavit explaining their contempt, apologizing, demonstrating their respect for the orders of this court, or evincing an intention to refrain from repeating their contemptuous misconduct in future. They arrive for sentencing unrepentant.

[15] At the commencement of the sentencing hearing, the defendants' counsel purported to express an apology on behalf of Ms. Cusipag. He then commenced making submissions concerning Ms. Cusipag's intentions. I declined to hear unsworn evidence from counsel. Instead, after confirming Ms. Cusipag's presence in the courtroom, I invited counsel to have her give live evidence from the witness stand to explain her intentions or to provide any other relevant evidence that she wished to provide. Ms. Cusipag declined the opportunity to give evidence.

[16] Accordingly, the court is left with an apology offered by counsel that is not supported by any evidence. While I accept that counsel's submission is a form of apology by the defendants, it is a most minimal act of purging contempt. Ms. Cusipag may well regret having violated the court's order and leaving herself open to punishment. But, I am still left to infer by Ms. Cusipag's refusal to give testimony and to face cross-examination that she is unwilling to swear to recognize the authority of this court's orders, promise to obey the court's orders, and to refrain from repeating her violation of this court's injunction. Given that context, the apology offered by counsel has little content and is of equally little effect.

VII. THE PRINCIPLES OF SENTENCING FOR CONTEMPT OF COURT

[17] The court must determine a fit sentence for Ms. Cusipag and the two Balita defendants for their convictions for contempt of court.

[18] In *College of Optometrists of Ontario v. SHS Optical Ltd.*, [2008 ONCA 685 \(CanLII\)](#) at para. 106, 93 O.R. (3d) 139, Watt J.A. noted that “[t]he underlying purpose of contempt orders is to compel obedience and punish disobedience.”

[19] That is, the sentence should aim firstly at taking steps to compel the defendants to obey the court’s order. Punishment for prior breaches is a secondary aim. It is common for punishment for breach of an order to be fairly modest once the defendant has accepted the court’s authority and obeyed the order. Often an apology, a costs award, and a small fine are seen as sufficient punishment *once the defendant has complied with the order*.

[20] Sentencing principles for contempt of court were recently discussed comprehensively in *Astley v. Verdun*, [2013 ONSC 6734 \(CanLII\)](#), aff’d [2014 ONCA 668 \(CanLII\)](#). At first instance in *Astley*, at para. 16, Goldstein J. provided a very helpful summary of these principles:

- A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: [Criminal Code](#), s. 718.1; *Chiang (Trustee of) v. Chiang*, [2009 ONCA 3 \(CanLII\)](#), para. 86; *Mercedes-Benz Financial v. Kovacevic*, [2009 CanLII 9423 \(ON SC\)](#), [2009] O.J. No. 888, 308 D.L.R. (4th) 562, 74 C.P.C. (6th) 326 (Sup.Ct.) at para. 12.
- A sentence should be increased or reduced to account for aggravating or mitigating factors surrounding the contempt or the contemnor: [Criminal Code](#), s. 718.2(a); *Chiang*, para. 24; *Sussex Group v. Fangeat*, [2003] O.J. No. 3348, 42 C.P.C. (5th) 274 (Sup.Ct.) at para. 67.
- A sentence should be similar to sentences imposed on similar contemnors for similar contempts committed in similar circumstances: [Criminal Code](#), s. 718.2(b); *Chiang*, para. 24.
- Sentences should denounce unlawful conduct, promote a sense of responsibility in the contemnor, and deter the contemnor and others from defying court orders: [Criminal Code](#), s. 718; *Sussex Group* at para. 67; *Chiang* at para. 24.
- The Court should consider sanctions other than jail: [Criminal Code](#), s. 718(2) (d) and (e); *Sussex Group v. Sylvester*, [2002 CanLII 27188 \(ON SC\)](#), [2002] O.J. No. 4350, 62 O.R. (3d) 123 (Sup.Ct.) at paras. 80-82.

VIII. MITIGATING FACTORS AND POST-CONVICTION CONDUCT

[21] As far as I am aware, Ms. Cusipag is a first time offender. She runs a business that apparently is of some import to the community that it serves. She had her lawyer convey an apology to the court, which, as I noted above, is of some minimal assistance. Unfortunately, Ms. Cusipag chose to refrain from providing any further evidence about herself or her circumstances that might shed light on other mitigating factors in her favour. Just prior to sentencing, Ms. Cusipag submitted two impressive letters of reference. Neither speaks to the issue of contempt however.

[22] Mr. Chow argues that Ms. Cusipag's statements for which she and Balita were held in contempt and her post-conviction internet postings that signal her continued unwillingness to end her quest, do not specifically use the words "criminal fraud" or "biological or pathological liar" as enjoined. He argues that Ms. Cusipag reiterating the truth of her libelous allegations but not actually repeating the specific words ought to weigh as mitigation in her favour. But, Lederman J. did not just prohibit the use of six words. He prohibited the defendants from indirectly or directly repeating their untrue allegations against the plaintiff expressly or by innuendo. At para. 31 of my reasons holding Ms. Cusipag and Balita in contempt of court, I held:

I see no room for doubt that, good to their word, the Media Defendants have repeated and encouraging other to publish the very same allegations that they admitted to be false and were found to be false by Justice Lederman and which they knew they were enjoined from re-publishing.

[23] On March 14, 2017, after being found in contempt, Ms. Cusipag posted on the internet that she has made a vow not to give up. She reiterated yet again that her allegations against the plaintiff are true on March 14, 2017 in an article that she proposed to publish on March 16, 2017. She also wrote the following on the internet that day:

Like I said, as long as we are not doing anything wrong, what we are publishing are [sic] the truth then I have no reason to go down.

[24] Prior to writing those words, Ms. Cusipag had been found to have committed the tort of libel and she was found guilty of the criminal offence of contempt of court. She does not recognize or accept the court's findings of wrongdoing. She does not respect the orders of the court.

IX. ANALYSIS AND SENTENCES

[25] Mr. Winkler argues that incarceration of Ms. Cusipag is required. Nothing short of jailing has brought home to her to date that public disobedience to the court's orders will not be tolerated. In holding Ms. Cusipag in contempt, I signaled to her the need to demonstrate her respect for the authority of the court and the need to obey its orders. She made no such demonstration. She has not admitted any wrongdoing. She has not voiced words that indicate that she accepts that she must comply with the court's order or that she intends to do so in future.

Rather, her defiance establishes that she and her business are a law unto themselves and are ungovernable without coercion.

[26] Mr. Chow argues that the court should focus on rehabilitation of Ms. Cuspiag as was done by Goldstein J. in *Astley*. He argues that Ms. Cusipag has shown remorse in the apology that he made for her. The public denunciation of the conviction is punishment enough he argues.

[27] I would be inclined to accept much of what Mr. Chow says but for one key fact. Ms. Cusipag and Balita have given the court no reason at all to accept that they have ended their quest and will no longer violate the court's order. There is no basis in the evidence or in the apology made through Mr. Chow to accept that the primary aim of compelling obedience with the court's order has been achieved. As Goldstein J. wrote in *Astley*, at para. 36

The circumstances that will warrant a jail sentence will depend on the facts of any given case, but I think it obvious that the more willful, flagrant, ongoing, and damaging the contempt the more likely it is that a jail sentence will be imposed. In other words, proportionality continues to be an important principle.

[28] It is hard to get much more willful than a public, malicious quest including a specific request for others to publish material that the defendants acknowledge they are enjoined from publishing. It is hard to more flagrantly violate a court order and show disrespect for the court's authority than doing so by publications in a popular community newspaper and on Facebook. It is hard to find more risk that a breach is ongoing than when defendants say that they are on a quest that they will not give up. Whether the defendants' quest actually causes continuing damage to the plaintiff is not clear. But its continuation at least threatens to undermine the public's confidence in the court's ability to maintain and uphold the rule of law.

[29] In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992 CanLII 99 \(SCC\)](#), at page 931, McLachlin J., now the Chief Justice of Canada, wrote:

The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

[30] Ms. Cusipag does not just attack the plaintiff with her conduct. Her violations of the court's injunction in her newspaper and on Facebook are very public attacks on the court and the rule of law. If people allow the malice in their hearts to overcome the knowledge in their minds that they must comply with the law, organized society will disintegrate into vigilantism. That is the opposite of the rule of law.

[31] The *Charter of Rights and Freedoms* provides that we are all equal *before* and *under* the law. But none of us can be *above* the law. None of us may operate *outside* the law. We do not have the right to choose to have the law not apply to us or to ignore laws that do apply to us.

[32] The acts of the defendants Cusipag and Balita strike at the heart of this court's ability to enforce its process. In *Surgeoner v Surgeoner*, [1992] O.J. No. 299 (C.A.) Blair J.A. wrote:

No society which believes in a system of even-handed justice can permit its members to ignore, disobey, or defy its laws and its courts' orders at their whim because in their own particular view it is right to do so. A society which countenances such conduct is society tottering on the precipice of disorder and injustice.

[33] The plaintiff relies on a number of precedents in which judges imposed sentences from 14 to 45 days in jail for similar offences. The plaintiff asks for a sentence of 14 to 21 days to show some leniency to the defendants. In my view, leniency is only due when mitigating factors justify it. As noted above, had the defendants made clear statements recognizing the court's authority and pledging to comply with the court's order in future, I might well have accepted Mr. Chow's submissions that only a token sentence was required to punish past transgressions. But where the primary sentencing goal of compelling obedience with the court's orders has not been achieved, leniency is not appropriate. Given the large damages award already outstanding, all that remains available to try to compel obedience with the court's order is incarceration.

[34] The Balita entities cannot be sentenced to jail as they are corporations. I acknowledge that they do not appear to function independent of Ms. Cusipag. Accordingly, I sentence each of Balita Media Inc. and Balita Newspaper to a fine of just \$5,000. Tess Cusipag and Balita defendants are also jointly and severally liable for the plaintiff's costs of these contempt proceedings on a full indemnity basis. Mr. Winkler may submit a costs outline to my attention by June 19, 2017. Mr. Chow may submit no more than three pages of submissions on the quantum of costs to my office by June 26, 2017. All submissions shall be in searchable PDF format attached to an email to my Assistant.

[35] Finally, Ms. Cusipag, please rise. For the offence of criminal contempt of court, I sentence you Teresita Cusipag, also known as Tess Cusipag, to a term of twenty-one (21) days in provincial reformatory to commence immediately.

[36] This is your sentence for the contempt of court found on March 8, 2017. Please understand that this is not a one-time price for a release from Justice Lederman's order. You and all of the defendants remain bound by Justice Lederman's order both in letter and in spirit. It is the court's true wish that you learn from this experience that you are bound by the law and you must comply with court orders even if you do not agree with them. The court will compel obedience to its orders and punish disobedience. The protection of the rule of law must be a paramount concern of society.

F.L. Myers J.

Released: June 12, 2017

CITATION: Enverga v. Balita Newspaper, 2017 ONSC 3500
COURT FILE NO.: CV-14-502946
DATE: 20170612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Senator Tobias Enverga

Plaintiff

– and –

Balita Newspaper, Balita Media Inc., Tess Cusipag,
Romeo P. Marquez (A.K.A Romy Marquez) and Carllos
Padilla

Defendants

REASONS FOR JUDGMENT

F.L. Myers, J.

Released: June 12, 2017