

Case Name:
Gavidia v. Roberts

Between
RE: Rebecca Gavidia and Peter Gavidia, and
Cheryl Roberts, Jennifer Bluhm, Lorna Vanderploeg,
c.o.b. Keppel Creek Animal Shelter, the Ontario Society
for the Prevention of Cruelty to Animals, John Doe and
Jane Doe

[2008] O.J. No. 422

164 A.C.W.S. (3d) 602

56 C.P.C. (6th) 260

2008 CarswellOnt 549

Court File No. 06-300

Ontario Superior Court of Justice

G.D. Lemon J.

February 7, 2008.

(17 paras.)

Civil litigation -- Civil evidence -- Privilege -- In the context of an action where the plaintiffs sought damages related to the seizure of six of their dogs, the plaintiffs were denied an order directing the defendants to disclose all documents in their possession, power or control relating to the informant who had placed the complaint which had resulted in an investigation -- It would not be appropriate that an informer in these circumstances could be open to civil liability despite being protected in criminal or similar proceedings -- On the facts, the informer was protected by informant privilege.

The plaintiffs sought an order directing the defendants Bluhm, Roberts and the OSPCA to disclose all documents in their possession, power or control relating to an informant -- In the underlying claim, the plaintiffs sought damages related to the seizure of six of their dogs -- The plaintiffs alleged the defendants failed to properly investigate a complaint against them prior to the dogs being seized, and that they were negligent in relying on a complaint by an informer -- HELD: The order sought was denied -- It would not be appropriate to required the defendants to given the name or names of the informant or to identify them in any fashion -- It would not be appropriate that an informer in these circumstances could be open to civil liability despite being protected in criminal or similar proceedings -- On the

facts, the informer was protected by informant privilege -- The informant would not be the only material witness to the events that resulted in the apprehension of the dogs and that exception to the informant rule did not apply.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 30.04(5)

Counsel:

Erroll G. Treslan, for the Plaintiffs.

Pamela Connolly, for the Defendants, Cheryl Roberts, Jennifer Bluhm, and The Ontario Society for the Prevention of Cruelty to Animals.

ENDORSEMENT

G.D. LEMON J.:--

Issues

1 The plaintiffs seek an order pursuant to Rule 30.04(5) of the Rules of Civil Procedure directing the defendants Bluhm, Roberts and OSPCA to disclose all documents in their possession, power or control relating to an informant. The plaintiffs also seek an order directing the same defendants to disclose the name and address of the informant.

2 The plaintiffs' claim against Roberts, Bluhm and the OSPCA relates to the seizure of six dogs owned by the plaintiffs. The plaintiffs say that those defendants are liable in damages to the plaintiffs for, among other things, failure to properly investigate a complaint against the plaintiffs prior to the dogs being seized. The plaintiffs state that the named defendants were negligent in relying on a complaint made by an informer. The plaintiffs have also claimed against John Doe and Jane Doe who are expected to be the informant.

3 The defendants refuse to provide the names or any identifying information relating to the informant and rely upon the principle of informer privilege.

4 In response, the plaintiffs submit that any informer privilege is defeated by the fact that the informant is a material witness to the events in question.

5 I am satisfied that it would not be appropriate for the defendants to be required to give the name or names of the informant or to identify them in any fashion to the plaintiffs.

Agreed Facts

6 On June 8, 2006, the OSPCA received a telephone complaint from an informant.

7 The particulars of the information relating to the investigation were that the informant advised that:

- (a) Two dogs were being housed under the deck behind the plaintiff's home with no access to light;
- (b) The informant could hear whining and fighting at all hours of the day; and

(c) The dogs had not been observed on a walk since an earlier ice storm.

8 As a result of this information, the defendant OSPCA agent Cheryl Roberts attended at the premises on June 9, 2006. The plaintiffs were away. Roberts proceeded to the rear of the property and made observations with respect to the dogs. As a result of her observations, she contacted her supervisor and then the Ontario Provincial Police to assist in removing the padlocks to obtain access to the dogs. As a result of observations by Roberts and the OPP, the six dogs were seized. The plaintiff denies the observations made by the defendant Roberts.

9 No charges of any kind were laid against the plaintiffs.

10 In argument, counsel for these defendants undertook that the informant would not be called for the defendants at trial.

Informer Privilege

11 At the time the informant made the call to the OSPCA, it would not be apparent whether criminal charges would arise out of that call. The informer privilege rule ought not to depend on whether a criminal charge is laid or not. It would not be appropriate that an informer in these circumstances could be open to civil liability despite being protected in criminal or similar proceedings. On the particular facts of this case, the informant is protected by informant privilege. The defendants may not disclose information or documentation that would identify them.

Material Witness

12 The defendants plead that Roberts was overwhelmed with the pungent odours of decaying flesh, ammonia and feces and heard the sound of whimpering dogs from within the enclosure. She became concerned that the dogs were in immediate distress. She then contacted her supervisor and the Ontario Provincial Police to assist in removing the padlocks to determine the dogs' state. Once the OPP officer arrived, the padlocks were removed and agent Roberts determined that the dogs were in immediate distress. Her observations both before and after the removal of the locks are disputed by the plaintiffs.

13 In my view, the material witnesses will be Roberts and the OPP officers in attendance at the plaintiffs' residence at the time of the apprehension. The dogs were then taken to a veterinarian clinic and, no doubt, observations were made by the veterinarian in charge. The plaintiffs' prosecution of its claim against these defendants will not be hindered if they do not have the name of the informant.

14 In *R. v. Peddle*, [1996] N.J. No. 259, Stele J.A. quoted Cory J. in *R. v. Scott* (1990) 2 C.R. (4th) 153:

Certainly, if the informer is a material witness to the crime then his or her identity must be revealed. In *Roviaro v. United States*, 353 U.S. 53 (1957), the United States Supreme Court held that the informer's identity would be divulged if the informer was a material witness. Canadian courts have very properly followed the same path in circumstances where the informer is the only material witness to the crime: see *R. v. Davies* (1982), 1 C.C.C. (3d) 299, 31 C.R. (3d) 88 (Ont. C.A.). Emphasis added

15 In this case, the informant will not be the only material witness to the events which resulted in the apprehension of the dogs. Accordingly, I do not believe that this exception to the informer privilege rule applies.

Result

16 The motion is therefore dismissed to the extent that the informant would be identified. All other relevant information or documentation that does not disclose the identity of the informant must be provided by the defendants.

Costs

17 As I said at the end of argument, I do not believe that this is an appropriate case for costs other than to leave them to the trial judge. If counsel wish to make submissions, I would invite counsel for the defendants to provide written submissions, not exceeding two pages exclusive of exhibits within 15 days. The plaintiff may respond within 10 and the defendants may reply within 5 days.

G.D. LEMON J.

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