

CITATION: Leendertse v. OPP, 2019 ONSC 4661
COURT FILE NO.: 14-2549
DATE: 2019/08/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JESSIE RYAN LEENDERTSE, Plaintiff

AND:

ONTARIO PROVINCIAL POLICE,

ROBERT PAGE and

KEVIN POTTER, Defendants

BEFORE: Justice S. K. Campbell

COUNSEL: Martha Cook, Counsel for the Plaintiff

Robert Forderer, Counsel for the Defendants

HEARD: July 30, 2019

ENDORSEMENT

Introduction

[1] The Defendant's seek an Order compelling the Plaintiff Jessie Ryan Leendertse to attend a further Examination for Discovery. There is some urgency in this situation as the matter is set to be tried at the sittings of this court in Stratford during September 2019. By agreement the matter is not to be called before September 12th, 2019.

Background

[2] The action arises as a result of a motor vehicle accident which occurred on June 4th, 2012. The Plaintiff alleges that he was injured in that accident and the Defendants are responsible for his injuries, damages and consequential losses.

[3] After the exchange of pleadings, the parties proceeded with the discovery process. Examinations of the Plaintiff were completed on November 27th, 2015. At the examination and in subsequent discovery the Plaintiff's employment and income have been relevant issues.

[4] The Plaintiff served what was described as a further supplementary Affidavit of Documents sworn August 23rd, 2018. Documents provided include the Plaintiff's records for his business called Leen Clean and his income tax returns for the years 2016 and 2017. A further supplementary Affidavit of Documents sworn February 3rd, 2019 was served

February 21st, 2019. That document included receipts, records and invoices for Leen Clean up to October 14th, 2018. It also included rent receipts and documents supporting utility expenses.

- [5] The documentation provided in February of 2019 includes a handwritten note to Leen Clean's landlord dated October 3rd, 2018. The note states that Leen Clean will be vacating the premises October 31st, 2018. At the Pre-trial held February 25th, 2019, the Plaintiff indicated that he had been forced to wind down Leen Clean.
- [6] The Defendant's investigation has included surveillance of the Plaintiff. That surveillance produced video footage of the Plaintiff entering the Leen Clean premises on January 19th, 2019. The investigation also included social media searches. Those searches produced a social media post dated March 5th, 2019 indicating that Leen Clean had not closed but was in the process of moving locations.
- [7] The Defendants state that these facts are important. A key issue for Trial is going to be the Plaintiff's past and future loss of income. The Plaintiff has not yet served an economic loss report. At Pre-Trial his claim for loss of competitive advantage and future income was \$412,062.61.

Steps After Trial Record was Served

- [8] The Trial Record in the action was served November 8th, 2017. The action was scheduled for Trial May 6th, 2019 at the Assignment Court of September 18th, 2018. A Pre-Trial was held February 26th, 2019.
- [9] On May 13th, 2019 the parties attended a triage court for the May 2019 trial sittings. At that time they were advised the matter would not be reached and it was adjourned to the September 2019 Trial list. The parties agreed that the Trial was not to begin earlier than September 12th due to the unavailability of Plaintiff's counsel before that date.
- [10] Counsel for the Plaintiff suggested they did not consent to the matter being set for Trial. There was an exchange of emails between counsel for the parties and the Trial Coordinator prior to the triage Court on May 6th, 2019. In the course of that exchange Mr. Forderer advised Ms. Cook that the proposal to place the matter on the September listing was agreeable to him or any other sittings in 2019.

Issues

- [11] I would articulate the issue to be:
 - a. whether the Defendants require leave to initiate or continue any form of discovery;
 - b. if leave is required should the further discovery be allowed.

Discussion

- [12] The Plaintiff submits the Defendants require leave to conduct their requested examinations of the Plaintiffs pursuant to Rule 48.04. The Defendants assert they do not.
- [13] Rule 48.04 of the *Rules of Civil Procedure* O. Reg. 396/91, s. 7. Provides;

CONSEQUENCES OF SETTING DOWN OR CONSENT

48.04 (1) Subject to subrule (3), any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court. O. Reg. 396/91, s. 7.

- [14] The Defendants argue that they did not consent to the action being placed on the trial list. Therefore, they do not require leave pursuant to Rule 48.04. Respectfully I disagree, and conclude that leave is required.
- [15] Counsel for the Defendants agreed on September 18th, 2018 to a Trial date (May 6th, 2019) and a Pre-Trial date (February 26, 2019). When it was clear the Trial was not going to be reached at the May 2019 sittings, both counsel agreed to place the matter on the list of matters to be tried in September of 2019. The email correspondence between the parties and the Trial Coordinator establishes that fact.
- [16] The issue then becomes should leave be granted. In the course of argument counsel for the Defendants referred to *B&L Entertainment Inc. v. Ricketts* 2015 ONSC 1737 a decision of Master R. A. Muir. At paragraph 14 of that decision he states:

I have reviewed and considered the various conflicting authorities cited above and relied upon by the parties. I prefer to follow the line of cases that have adopted the broader approach. In my view it is ... for the court to apply a factual test when exercising its discretion to grant leave under Rule 48.04. The court should consider all of the circumstances of the matter before and make an Order that is just in the circumstances of each particular case. This approach is consistent with the overall determinative provision found in Rule 104(1) which requires the rules to be “liberally construed to secure the just most expeditious and least expensive determination of every civil proceedings on its merits.”

- [17] Counsel for the Plaintiff referred the Court to the decision of RSJ Thomas in *2116656 Ontario Inc. v. Grant and LLF Lawyers LLP*, 2018 ONSC 1080. In his decision RSJ Thomas referred to a decision by Baltman J., *Chokler v. FCA Canada Inc.* 2017, ONSC 4494. In her decision Baltman J. referred to what she described as two streams of cases that have emerged in considering Rule 48.04. One is the strict stream requiring the establishment of the substantive or unexpected change in circumstances. The second stream uses a more flexible approach and allows leave when it is necessary in the interests of justice. In *Chokler*, Baltman J. questioned the correctness of *B&L Entertainment*. However, she concluded that applying either test leave ought not to be granted.

- [18] In *Kaur v. Blue Cross Insurance Company of Canada* 2018 OJ 2816 Coroza J. referred to both *Chokler* and *B&L Entertainment*. At paragraph 23 of his decision Coroza J. stated, “I prefer the line of cases that suggest leave should be assessed through a more factual approach”. In doing so Coroza J. adopted the comments of Master R. Muir in *B&L Entertainment*.
- [19] I conclude that leave ought to be granted. In the decisions of Baltman J. in *Chokler* and Gilmore J. in *Alofs v. Blake, Cassels & Graydon LLP* 2017 ONSC 950 it was concluded that the matter before them did not meet either test. Paradoxically I am of the view that the request here meets both tests.
- [20] Whether the Plaintiff is continuing to operate his business or not is a significant issue for Trial. The Plaintiff has advanced a substantial claim for past and future wage loss. The oral examinations for discovery occurred over three years ago. Subsequent investigation and disclosure have not provided clarity with respect to the issue of the Plaintiff’s income and therefore wage loss. I would note the Plaintiff has provided supplemental Affidavits of Documents, but no future economic loss report. It is clear that the future lost income is going to be an issue that requires significant consideration by the Court.
- [21] I am of the view that if the Plaintiff is no longer carrying on his business that may be an unexpected change in circumstances. That is so even if the Plaintiff’s operation of that business has diminished. To avoid the Defendants being unprepared to deal with the issue of future economic loss at Trial, it is necessary in the interests of justice to grant leave. Further continued discovery may allow the issues at Trial to be narrowed and dealt with more expeditiously. There is little value for the Court to, in effect, conduct an Examination for Discovery.
- [22] However, the interests of justice necessitate that the examinations be limited. They must occur before August 30th, 2019. The further examination will be limited in scope to the Plaintiff’s income and source of income since completion of oral examinations (November of 2015). The examination would last no longer than two hours and it will occur at an examiner’s office selected by the Plaintiff. Any undertakings arising from the examination will be answered within five days of completion. I believe that following this timetable will make it unnecessary to adjourn the Trial.

Costs

- [23] Neither party provided me with an estimate of costs. If either party seeks costs of this motion submissions must be made within 25 days of today’s date. Either party may respond to the submissions made by the other within 15 days of being served those submissions.



Justice S. K. Campbell

Date: August 9, 2019