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Discovery Rights at Small Claims Court

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September 2019

Introduction

Discovery can sometimes make or break a case.

There has been discussion of increasing the monetary limit of the Ontario Small Claims Court from $25,000 to $50,000. With this potential change, heightened consideration needs to be given to discovery rights at the Small Claims Court.

While the Small Claims Court and Ontario Superior Court of Justice share procedural similarities, a notable difference is the discovery process, or lack thereof, at the Small Claims Court.

The efficiency of the Smalls Claims Court process that results from the lack of oral and documentary discovery does not come without disadvantage. The lack of discovery is an especially pertinent issue when a plaintiff or defendant desires evidence from a non-party to an action.

In the Superior Court, a party to an action can seek production of documents from a non-party by bringing a Rule 30.10 motion.

In the Small Claims Court, this avenue is unavailable, although it is not uncommon to see counsel attempt to argue otherwise.

Jurisdiction to Order Production from Non-Party

Elguindy v. St. Joseph's Health Care (2016 ONSC 2847)

In *Elguindy v. St. Joseph's Health Care*, the Divisional Court addressed whether the Small Claims Court has jurisdiction to issue an order for production of documents from a non-party.

The plaintiff commenced an action in the Small Claims Court against a hospital, a nurse and two physicians as a result of a cancellation of a medical procedure. At the mandatory settlement conference, the Deputy Judge ordered among other things, production of the plaintiff's medical records and the plaintiff's expert reports that were intended to be relied upon at trial.

The Superior Court asserted that, while there is no provision in the Rules of the Small Claims Court for discovery generally, Rule 13.05(2)(a)(vi) provides that a judge conducting a settlement conference may make an order relating to the conduct of an action that the court could make, including directing production of materials.

As such, the Superior Court held that the Deputy Judge had jurisdiction to order the plaintiff to produce the expert reports that were intended to be relied upon at trial.

The Superior Court was careful to say, however, that Rule 13.05(2)(a)(vi) only applies in the context of a settlement conference and only permits an order for production by a party to the action as part of the settlement conference.

In regard to the issue of whether the Small Claims Court has jurisdiction to order documentary production from a non-party, the Superior Court held that the Small Claims Court has no such jurisdiction.

Riddell v. Apple Canada Inc. (2016 ONSC 6014)

In *Riddell v. Apple Canada Inc.*, the Divisional Court addressed the issue of jurisdiction of the Small Claims Court to order discovery post *Elguindy*.

In *Riddell*, the plaintiff commenced an action against the defendant as a result of an iPhone overheating, causing severe burns to the plaintiff's arm. The defendant was successful in obtaining an order of the Deputy Judge to have the plaintiff produce the iPhone in question for the purpose of the defendant having the iPhone examined by an expert.

The Superior Court upheld the Deputy Judge's order in light of the fact that the examination of the iPhone was critical to a proper determination regarding causation of damages. In doing so, however, the Superior Court cautioned that such orders should be made sparingly and only when justice cannot possibly be done between the parties without such discovery.

The Superior Court distinguished the issues in *Riddell* from that of *Elguindy*, noting that favour is to be given to not making pre-trial orders for discovery type relief, especially when those orders seek information from non-parties to an action, as was the case in *Elguindy*.

This decision was upheld by the Ontario Court of Appeal (2017 ONCA 590).

Schafer v. Wagner (2016 CanLII 90738)

Post *Riddell* and *Elguindy*, the Ontario Small Claims Court in *Schafer v. Wagner*, dismissed a motion seeking an order to compel discovery of the plaintiff's former property, damage to which gave rise to the action.

The Court commented that the case law has established that the Small Claims Court has no jurisdiction to entertain motions under Rules 30.10 and 32 of the Rules of Civil Procedure, although *Riddell* may have opened the door to some degree for Rule 32 motions (i.e., inspection of property).

Nevertheless, the Court held that because the property in question was no longer owned by the plaintiff, to grant the order sought by the defendants the Court would, in effect, have to order inspection of property of a non-party to the action.

The Court confirmed that the Small Claims Court has no jurisdiction to make such an order. The Court further held that even if the court had jurisdiction, the relief sought was unwarranted in this instance.

Conclusion

In conclusion, the case law indicates that the Small Claims Court has limited jurisdiction to order discovery of documents and discovery of property.

Jurisdiction to order discovery is available in very limited circumstances only as between the named parties to the action in the context of a settlement conference when justice cannot possibly be done between the parties without such discovery.

In situations where a party to an action seeks production of property or documents from a non-party to the action, dealt with under Rule 30.10 in Superior Court, the jurisprudence has established that the Small Claims Court does not have jurisdiction to make such an order.

Accordingly, the type of evidence that will be needed and from whom are important considerations in determining the appropriate forum to commence an action.

When commencing an action in Small Claims Court, strategy must be developed accordingly on the part of both the plaintiff and defendant to ensure the necessary evidence is accessible to establish a case and/or defense without requiring judicial intervention to obtain of evidence from a non-party.

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