

CITATION: Leendertse v. HMQ, 2021 ONSC 3765
COURT FILE NO.: CV-14-2549
DATE: 20210525

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JESSIE LEENDERTSE, Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Defendant

BEFORE: K.A. GORMAN

COUNSEL: Martha Cook for the plaintiff

Brian Sunohara and Erin Crochetière for the defendant

HEARD: May 17, 2021

ENDORSEMENT

- [1] The plaintiff asks the court to declare a mistrial, on two grounds. First, he submits that Ms. Cook was so ill at the beginning at the trial that she required a week-long adjournment before starting evidence, and required an accommodation during the first two days of trial, which commenced the following week. Second, the COVID-19 pandemic has delayed the trial for more than one year, and it cannot be scheduled to recommence in person at this time.
- [2] Counsel for the defendants oppose the motion.
- [3] The relevant procedural history is as follows:
- a) The trial of this action was scheduled to commence February 10, 2020. Ms. Cook was very ill, and the matter was adjourned to February 18, 2020.
 - b) Over the next few days, counsel participated on several conference calls with the court, in an effort to assess the status of the action.
 - c) On February 17, 2020, Ms. Cook sent an email to Mr. Sunohara, indicating that while she was not feeling her best, she would be able to start the trial on February 18th.
 - d) The trial proceeded February 18, 19, 20 and 21, 2020. Ms. Cook called eight witnesses, and anticipated calling two additional lay witnesses and three medical experts. The matter was adjourned to May 25, 2020 to complete the trial.

- e) On March 15, 2020 the Chief Justice of the province of Ontario issued a Notice to the Profession suspending all Superior Court of Justice operations, effective March 17, 2020 as a result of the global COVID-19 pandemic.
- f) The scheduled May 25, 2020 date could not proceed.
- g) On January 21, 2021 the court held an audio case conference to discuss “next steps”.
- h) Ms. Cook filed the within motion for mistrial.

- [4] Counsel is in agreement with the legal principles surrounding a declaration of a mistrial. There is no need for the court to reiterate them here.
- [5] A mistrial may be declared where a judge, seized of a matter, is satisfied that there is a reasonable apprehension that either party will have a fair trial if the current trial continues, and that a fair trial would be possible should the matter proceed *ab initio*.
- [6] There can be no question that when the calling of evidence commenced Ms. Cook was not feeling well. As a judge presiding in the Southwest jurisdiction for the past 13 years, I have had numerous dealings with Ms. Cook. Physically, to me, she appeared ill.
- [7] However, at no time during the presentation of the plaintiff’s case did she request an adjournment due to health concerns. She cannot point to any point in the trial that appeared to be a mis-step or an oversight on her part. There is no evidence before me that senior counsel has reviewed the transcripts and found fault with her performance. Further, there is no evidence before me that her client was dis-satisfied.
- [8] Effectively what the court has before it is a bald assertion that Ms. Cook may have performed better, had she been feeling better. As justice participants, we have undoubtedly all felt that way at one time or another. However, it is not a cogent reason for the declaration of a mistrial.
- [9] I turn now to the effect that COVID-19 has had on all of us.
- [10] Since the declaration of the pandemic, the Superior Court of Justice has had to modify and indeed, invent new procedures across all of our lines of business: criminal, family and civil. We proceed by ways of audio-conferencing and ZOOM hearings. There are glitches, but work is getting done.
- [11] Counsel for the defendant is anxious to continue the trial, and is satisfied with proceeding via the ZOOM platform.
- [12] Ms. Cook advised the court that since the COVID-19 declaration, Stratford has not been conducting ZOOM trials. In the absence of the declaration of a mistrial, Ms. Cook wishes the trial continue “in person”.

- [13] In my view, the mere passage of time is not a sufficient basis upon which to declare a mis-trial. Civil non-jury matters often proceed over time. Further, I have taken detailed notes (as I'm sure all counsel have) and we have the availability of transcripts.
- [14] I have conferred with the LAJ, Justice Garson, and he is confident that court staff and the relevant technology can be made available to allow the trial to continue remotely.
- [15] I cannot see any prejudice that would attach, for the trial to continue on the ZOOM platform.
- [16] The trial shall continue on the ZOOM platform, at dates to be set through the trial coordinator. Counsel are to provide their availability for a trial management audio-conference call to the trial coordinator. The parties to the conference call shall be: myself, counsel for the plaintiff, counsel for the defendant and the Stratford trial coordinator. This conference call shall take place no later than July 2, 2021.
- [17] Further, having read this endorsement, if the parties wish to avail themselves of a "mid-trial pre-trial", the trial coordinator shall make a judge available for this purpose.
- [18] The defendant is entitled to costs of this motion. If the parties cannot come to an agreement as to quantum, I will receive brief written submissions, after the conference call.



Justice K.A. Gorman

Date: May 25, 2021