CITATION: Asrat v. 1438305 Ontario Inc., 2015ONSC 4208
COURT FILE NO.: CV-08-353871
MOTION HEARD: May 5, 2015

SUPERIOR COURT OF JUSTICE – ONTARIO

Re: KIDEST WONDIMU ASRAT

Plaintiff

v.

1438305 ONTARIO INC. C.O.B. ELEMENTAL EMBRACE WELLNESS SPA, BEGUMPARA SADRUDEEN TEJA, ABDUL-JAMAL SHAMJI, RYAZ SHAMJI, JELIL TEJA, MUQET TEJA, AND JARZER TEJA

Defendants

BEFORE: Master Lou Ann M. Pope

APPEARANCES: Shanti Barclay and Andrew C. McKague, Zarek Taylor Grossman Hanrahan LLP, for moving plaintiff

Fax: 416-777-2050

Jonathan Erik Laxer and D. Shore, Lenczner Slaught Royce Smith Griffin LLP, for respondent defendants

Fax: 416-865-2978

REASONS FOR ENDORSEMENT

[1] This action arises out of claims made by the plaintiff for unpaid wages, unsafe working conditions, intimidation and false imprisonment while allegedly in the captivity of the defendants.

[2] The plaintiff seeks leave to bring this motion to deliver a jury notice after the close of pleadings and for the defendants to comply with undertakings.

[3] The facts that give rise to this lawsuit are unusual. The plaintiff claims to have been employed by one or more of the defendants from 1999 to May 2006 in Ethiopia and in Canada without remuneration. Between 1999 and 2002 while residing in Ethiopia she was employed by defendants, Abdul-Jamal Shamji ("Abdul") and Ryaz Shamji ("Ryaz") as a live-in caregiver to Abdul's mother. In 2002 she was told that she had to

travel to Canada with them for a family reunion and to continue to care for Abdul's mother. While in Richmond Hill, Ontario she was told that because she was in Canada illegally she could not leave the residence for four years at which time the Canadian government would "forgive" her and permit her to legally remain in Canada. She was subjected to verbal abuse and threats. In 2003 she was relocated to Brighton, Ontario to reside at the Elemental Embrace Wellness Spa ("Spa"), which was owned by the defendant, Begumpara Teja, and worked there without remuneration. After Abdul's mother died in October 2004, the defendants continued to hold the plaintiff in Canada against her will, continued to force her to perform services without remuneration, and continued threats and intimidation.

[4] **Litigation History**

April 30, 2008	statement of claim issued
February 11, 2010	defendant, Spa, served statement of defence
June 15, 2010	Plaintiff filed notice of discontinuance against defendants, Abdul-Jamal Shamji and Ryaz Shamji
September 17, 2010	remaining defendants delivered statement of defence
September 27, 2010	close of pleadings
July and August, 2013	examinations for discovery of all parties held
September 4, 2013	Master Dash's Status Hearing Order
Early November, 2013	Plaintiff set action down for trial
Late November 2014	Plaintiff provided defence counsel with requisition form for this motion
February 3, 2015	Plaintiff filed the within notice of motion
April 24, 2015	Plaintiff served moving party's motion record, factum and brief of authorities
April 29, 2015	Defendants serve responding party's motion record, factum and brief of authorities
May 22, 2015	cross-examination of Andrew C. McKague, deponent of affidavit filed by plaintiff
May 5, 2015	Motion hearing
January, 2017	scheduled for trial

Test for Leave – Rule 48.04(1)

[5] The plaintiff wishes to deliver a jury notice pursuant to rule 47.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which states that a jury notice may be delivered any time before the close of pleadings. Pleadings were closed on September 27, 2010. Their notice of motion was filed on February 3, 2015.

[6] The plaintiff set this action down for trial in early November, 2014. Pursuant to subrule 48.04(1), one of the consequences of setting an action down for trial is that the party shall not initiate any motion without leave of the court with the exception of a motion to compel compliance with any obligation imposed by a rule listed in clause (2)(b). Delivering a jury notice does not fall within the exceptions in clause (2)(b).

[7] The law is well-settled on the issue of when leave should be granted to proceed with a motion once a case has been set down for trial. There is no single test for leave pursuant to rule 48.04(1). The relevant principles to be considered and the weight to be given to leave motions will vary depending upon the nature of the leave requested and the circumstances of the case. In the case of routine interlocutory matters that can be raised before the trial judge, for example to amend a pleading, the higher threshold test of substantial and unexpected change in circumstances would apply in order to bring closure to claims in the interests of certainty and predictability. However, where substantive rights are affected, a more flexible test with respect to leave should be applied. In those matters, the merits of the requested relief are a fundamental consideration to ensure the case is fully canvassed at trial, and full consideration must be given to any prejudice to the party opposing the motion that cannot be compensated for by costs. (*Tanner v. Clark*, [1999] O.J. No. 581, 30 C.P.C. (4th) 358, paras. 9-16)

[8] In *Tanner*, supra., Wilson J., in upholding the Master's decision to dismiss a motion to change the place of trial, found that the case law on the issue of when to grant leave after an action had been set down for trial was divergent. Justice Wilson stated that the divergence appeared to reflect different but important competing principles: the benefit of predictability and certainty on one hand, weighed against the principles of justice and fairness affecting individual cases. Justice Wilson concluded that a change of venue motion was ". . . at its heart a matter affecting substantive rights . . . ." in that it could not be dealt with by the trial judge. (para. 28)

[9] In an earlier decision of *McWilliams v. Figliola,* [1993] O.J. No. 2 (Ont. Gen. Div.), Ground J. granted leave to deliver a jury notice after the trial record had been passed. On the issue of whether the right to a jury trial is a substantive right, Justice Ground found that the right to a jury was an important right and that there would have to be very cogent reasons for taking that right away. (para. 1) Stating that it was unclear as to what the Court has to determine in order to grant leave under Rule 48.04, Justice Ground was satisfied that finding a substantial change in circumstances as not absolutely essential.

[10] The plaintiff submits that the right to a jury trial is a substantive right which is entrenched in the Canadian judicial system. (*R. v. Colonial Homes Ltd. et al*, [1956] S.C.R. 528, page 533) It is further submitted that this authority was followed more than 25 years later by Justice Griffiths in *Jackson v. Hautala* (1983), 42 O.R. (2d) 153 at page 4. On the issue of the right to trial by jury, having reviewed section 60(1) of the *Judicature Act*, Justice Griffiths stated at page 4:

> The section provides the statutory right to trial by jury but specifies that the right must be exercised within a definite time-limit, which may be extended by a judge. No doubt the Legislature imposed the time-limit for the delivery and filing of the jury notice so that the matter could be settled at an early stage so far as the parties were concerned, as to whether the action was to be tried with or without a jury.
>
> The courts, in exercising a discretion as to whether a procedural time-limit should be extended, have traditionally weighed the pros and cons of

> extending the time to determine on balance whether the time could be extended without prejudice to the opposite parties. Here, in favour of the applicant, it has long been established that the right to trial by jury is a substantive right. The defendant Jackson ought not to be denied that right except for cogent reasons. On the other side of the coin, there would have been no prejudice to the opposite parties if the jury notice had been permitted at the time of the application. The action had not then been set down for trial, nor had certificate of readiness been served.

[11] I am satisfied that a flexible test with respect to leave to bring this motion should be applied given the plaintiff's right to trial by jury. However, this requires a thorough review of the merits of the relief requested and consideration whether granting the relief would prejudice the defendants that could not be compensated for by costs.

Test for Late Delivery of Jury Notice

[12] Rule 47.01 provides that a jury notice is to be served before the close of pleadings.

[13] In this action, pleadings were closed on September 27, 2010.

[14] The decision to grant leave to serve a jury notice after the time has expired is discretionary.

[15] The Divisional Court ruling in *Nikore v. Proper*, 2010 ONSC 2307, at para. 26, sets out two key factors that must be considered when determining whether to permit the late filing of a jury notice:

(a) The circumstances of the delay; and

(b) Whether there is prejudice to the opposing party if leave were granted.

[16] Regarding the first factor of delay, the moving party must explain both the length of the delay and the reasons for it. The greater the delay and the more preparation that is done, the greater the likelihood that leave will be denied. (*Nikore* at para. 18) The court in *Nikore*, supra., commented that of the cases referred to by counsel, there are no cases that granted leave to deliver a jury notice after discoveries had been completed; however, it went on to state that the lack of such reported cases does not mean that prejudice is presumed upon the completion of discoveries.

[17] In *Paskie (Litigation Guardian of) v. Canadian Amateur Boxing Assn.* (1999), 45 O.R. (3d) 765, the majority of the Divisional Court found that a delay of almost four years from the close of pleadings to bring the motion was not unconscionable in the circumstances. In that action, discoveries were not complete, the action had not been set down for trial, no certificate of readiness had been filed, no sign that documentary discovery was complete and no defence medical examination had been completed. The court found no real possibility of prejudice to the defendant.

[18] In *Cipparone v. Royal and Sunalliance Insurance*, 2010 ONSC 4528 (CanLII), the court granted leave to file a jury notice one month before trial. The court accepted defence counsel's explanation for delay that when new counsel had been appointed two

months prior to the motion, the omission of the jury notice was noticed and promptly moved to correct it. The delay was found not to be intentional or tactical. After canvassing the objections, the court found that there would be no prejudice to the opposing party.

[19] The plaintiff herein states that a jury notice was not served due to inadvertence. The evidence tendered on behalf of the plaintiff is that it was that law firm's standard office procedure to always file a jury notice unless told otherwise. When the statement of claim was issued on April 30, 2008, Mr. Smith had carriage of the file. In July 2008 carriage of the file was turned over to Ms. Zigomanis. Mr. Smith wrote an internal office memo to Ms. Zigomanis advising of the deadline to serve the statement of claim with no mention of serving a jury notice. In May, 2012 carriage of the file was turned over to Mr. McKague from Ms. Zigomanis as she was going on maternity leave. Mr. McKague's evidence is that he recalled reviewing the pleadings but he did not search for the jury notice because he assumed it was in the pleadings folder given that firm's standard office procedure of always filing a jury notice.

[20] Mr. McKague was cross-examined under oath on his affidavit filed in support of this motion. It was his testimony that when he took over carriage of this file, he had only been with the firm for one month and that he assumed there was a jury notice delivered on this file because it was the standard office procedure to file one. (Question 147) He assumed Ms. Zigomanis followed that practice although he had no direct basis for that assumption. (Question 148)

[21] It was not until October 29, 2013 that Mr. McKague states that he discovered there was no jury notice when he was preparing materials to file the trial record. That same day, their process server attended the courthouse and confirmed that no jury notice had been filed. Also that day, he contacted Ms. Zigomanis to inquire if she recalled filing a jury notice. Mr. McKague continued to file the trial record at that time.

[22] On November 8, 2013, Mr. McKague wrote to former counsel for the defendants and requested consent to file a jury notice. Shortly thereafter, defence counsel refused to give consent.

[23] On November 20, 2013, Mr. McKague wrote again to former defence counsel to explain that he discovered there had been no jury notice filed when he was compiling the trial record.

[24] In January 2014, the defendants changed counsel to their current counsel. In late November, 2014, plaintiff's Certification Form to Set Pre-Trial and Trial Dates indicates the plaintiff's intention to bring a motion before trial for undertakings, refusals and leave to serve a jury notice. Shortly thereafter, defence counsel advised in writing that the defendants would not consent to a jury trial. In that letter, Mr. Laxer made reference to the plaintiff's requisition form for scheduling of this motion.

[25] The plaintiff filed her notice of motion on February 3, 2015.

[26] I accept that the delay in filing a jury notice was due to inadvertence; however, the plaintiff has not explained the delay in bringing this motion from November 2013 when

Mr. McKague discovered the omission to November 2014 when the motion requisition form was sent to defence counsel. There is simply no evidence of activity on the file regarding this issue for one year from November 2013 to November 2014.

[27] The defendants place significance on the fact that plaintiff's counsel knew that no jury notice had been filed prior to the action being set down for trial yet proceeded to set it down without having filed a motion. With respect, I do not agree. This action was subject to a timetable order made by Master Dash which required that it be set down for trial by December 31, 2013. The evidence is that in late October 2013 Mr. McKague was preparing the trial record for filing, well in advance of the deadline. This was, in my view, a reasonable step as there were no further steps required to be taken prior to setting it down for trial, with the exception of the motions as indicated on the Certification Form. In my view, the significant date is the close of pleadings as provided for in rule 47.01 and not the date the action was set down for trial.

[28] In summary, there was delay in filing a jury notice of just over three years from September 2010 when the action was set down for trial to October 2013 when Mr. McKague discovered the omission. I do not find this amount of delay to be unconscionable given that the action proceeded through discoveries as set out in the following paragraph. However, given the unexplained delay in bringing this motion, there was delay of over four years to November 2014 when the motion requisition form was delivered to defence counsel.

[29] Regarding the status of this action, discoveries were completed in July and August 2013. There are some outstanding undertakings of the defendants which are included in the relief sought in this motion. The plaintiff delivered a "valuation report" which, presumably, is an expert report. (Exhibit "J" to Affidavit of Andrew McKague sworn April 23, 2015) It is logical that the plaintiff may obtain a medical expert opinion given her allegations of mental abuse. It is defence counsel's view that each party may have two expert witnesses at trial.

[30] The second factor to be considered is whether there would be prejudice to the defendants if leave is granted to file a jury notice.

[31] In *Nikore*, supra., the court stated that there is no presumption of prejudice; however, a logical inference may be drawn in appropriate cases where the closer the action is to trial, the more likely it will be that prejudice is inferred. The court used the example of one week before trial where counsel will likely have prepared witnesses and exhibits based on presentation to a judge alone. Notably, preparation for a jury trial has substantial differences. Similarly, it was accepted that a jury trial will take more time than by judge alone and that prejudice to the other party can be inferred.

[32] However, in *Cipparone*, supra., in granting leave to file a jury notice, the court found no prejudice to the opposing party despite the motion being heard one month before trial. Justice Ramsay found that it was not too late for opposing counsel to make the necessary adjustments in his different presentation techniques for a jury trial. Further, Justice Ramsay found that possibly seven more days to conduct a jury trial did not

constitute prejudice. He also found that the trial would not be delayed if a jury notice were filed.

[33] The defendants submit that they will be prejudiced if leave is granted to the plaintiff to file a jury notice because, had a jury notice been filed earlier, they would have brought a motion for summary dismissal of the action to have this matter determined by a judge alone. They did not bring this motion because they believed the trial would be before a judge alone. Thus, as this action has been set down for trial, they are precluded from bringing that motion under rule 48.04(1) without obtaining leave of the court. With respect, I find great difficulty in understanding the rationale for bringing a motion for summary dismissal if a jury notice had been filed earlier. The defendants have not provided any grounds for that motion. On a rule 20 motion, the court must be satisfied on affidavit evidence that there is no genuine issue requiring a trial, or no genuine issue for trial if the motion was brought before January 1, 2010, the effective date of the rule change. Further, if the motion were brought after the Supreme Court of Canada decision in *Combined Air Mechanical Services Inc. v. Flesch* (2011), 344 D.L.R. (4th) 193, a court, in deciding whether to exercise its power to order oral evidence under subrule 20.04(2.1), the interests of justice guide that determination. In those circumstances, the motion judge must ask if a full appreciation of the evidence and issues required to make dispositive findings can be achieved by way of summary judgment, or only by way of a trial. Given the plaintiff's allegations and the duration of time the abuse and confinement occurred, in my view, it is unlikely that a judge hearing the summary judgment motion would be able to fully appreciate the evidence and issues without a full trial. Thus, it is my view that the defendants' assertion of prejudice due to an inability to bring a summary dismissal motion has little merit.

[34] The defendants do not assert any other forms of prejudice if leave is granted.

[35] To summarize, the plaintiff's delay in bringing this motion was not unconscionable with the exception of one year from November 2013 to November 2014, which was not explained. However, despite the lack of explanation for that time period, I find that there has been no prejudice to the defendants had the motion been brought in early 2014 rather than early 2015.

[36] There will be no prejudice to the defendants if leave is granted to file a jury notice at this time.

[37] In conclusion, it is my view having weighed the plaintiff's substantive right to a jury trial as opposed to the defendants' interests of predictability and certainty, the plaintiff's right far outweighs the defendants' interests herein. Therefore the plaintiff is granted leave to deliver a jury notice within 14 days of the date this decision is released.

Undertakings of the Defendants

[38] The plaintiff moves on five undertakings given by the defendant, Begumpara Teja, at her discovery held on July 29, 2013.

[39] As a preliminary issue, the plaintiff did not comply with the timeline ordered by Master Dash in his order of September 4, 2013 which required that any undertaking motion be

completed by May 15, 2014. This order was made on consent of all parties. The notice of motion herein was served on February 2, 2015 and heard on May 5, 2015. Thus, there has been a delay of one year beyond the agreed-to timeline.

[40] On the other hand, the defendant gave certain undertakings at his discovery. An undertaking is a promise to do a specified act or to obtain and produce a document. Although there was no timetable set for compliance with undertakings in Master Dash's timetable order, at the latest, the defendants were required to satisfy their undertakings by May 15, 2014, the timeline to complete motions for undertakings

[41] The plaintiff's non-compliance with a timeline in a court order can be considered an irregularity and may not render the step a nullity pursuant to rule 2.01(1). Also, Rule 1.04 provides that the rules be construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[42] Of the five undertakings in dispute, several of them were given on a best efforts basis. The issue on the remaining undertakings is whether the defendant made best efforts to comply.

[43] I am satisfied based on the evidence that the plaintiff continued to follow up on the defendants' undertakings during the relevant times and subsequent to service of the notice of motion in early February 2015. Therefore, I am permitting this motion to proceed for the relief sought with respect to the undertakings of the defendants.

[44] This case will turn on credibility with respect to numerous allegations including whether the plaintiff resided with the defendants against her will, whether she provided services to the defendants without remuneration or whether she was a "house guest" as alleged by the defendants. Given the plaintiff's allegations of having worked without pay for the defendants at their Spa, it will be critical to the plaintiff's case to obtain the names of employees, guests and delivery people to the Spa who may know which version of the relationship between the parties is true. This information is within the defendants' knowledge.

[45] The plaintiff relies on the meaning of "best efforts" as defined by Justice Power in *Gheslaghi v. Kassis*, 2003 CanLII 7532 (On SC), para. 6, as follows:

> A promise to use one's best efforts is, in my opinion, an undertaking – an undertaking that must be complied with. On the one hand, it is not a guarantee that the relevant information/documents will be produced. The promise, or undertaking, cannot be ignored. A promise to use one's best efforts, as aforesaid, is an undertaking which a court will enforce and, in appropriate cases, apply sanctions for non-performance where serious efforts have not been undertaken. "Best efforts" means just what one would expect the words to mean. The words mean that counsel and his/her client will make genuine and substantial search for the requested information and/or documentation. The undertaking is not to be taken lightly – a cursory inquiry is not good enough. The word "best" is, of course, the superlative of the adjective "good" (good-better-best) and must be interpreted in that light.

Undertaking No. 2

[46] The defendant undertook to produce names of employees of the Spa and most recent contact information for years 2003 to 2006 being the relevant period of time when the plaintiff allegedly worked at the Spa.

[47] The defendant produced payroll data for years 2004 to 2006, but not 2003, as undertaken. Further, many of the employee names do not show surnames. (Exhibit "HH" to Affidavit of Andrew McKague sworn April 23, 2015) One explanation for the lack of surnames is that it was the Spa's policy to use first names only. In my view, that is not a credible explanation given that the Spa, presumably, would have had to issue T4s to the employees in their full names for income tax purposes. Secondly, the defendant produced no evidence of the said policy. The second explanation for not producing any further records of employees and guests is that the computer was damaged by flooding several years ago. Firstly, the defendant has produced no evidence of the flood. Secondly, there is no explanation of "several years ago." The undertaking was for years 2004 to 2006.

[48] This action was commenced in 2008; therefore, the defendants have had an obligation to retain all relevant documents since that time. The Spa continued to operate until 2011, albeit intermittently from 2008 to 2011. Therefore, it is reasonable to conclude that the defendant retained information regarding full names and contact information of employees from 2003 to 2006.

[49] For the above reasons, it is my view that the defendant has not fully complied with this undertaking as she has not made best efforts to do so.

Undertaking No. 3

[50] The defendant has not set out what her efforts were to attempt to locate the names of the guests. In my view, she has not made her best efforts to locate these records. In addition and for the same reasons regarding Undertaking No. 2, the defendant has not complied with this undertaking.

Undertaking No. 4

[51] The defendant's effort to satisfy this undertaking involved contacting Golden Rose farm who indicated that payments would have been made by cash.

[52] The defendant's discovery evidence is that either her father or brother would have paid the plaintiff (or her mother). (Transcript of defendant, Question 190)

[53] The defendant made no effort to enquire of her father or brother regarding this undertaking. In addition, if payments were made to the plaintiff or her mother, one would expect there to be documentary evidence of instructions to pay and to stop payment.

[54] For the above reasons, it is my view that the defendant has not fully satisfied this undertaking.

Undertaking No. 5

[55] It appears that the defendant obtained information regarding her cleaning lady that she got married, changed her last name and left the country. This is information does not answer the undertaking which was to provide her name. It is reasonable to conclude that if the defendant knows of the cleaning lady's change of surname, she would also know her surname. In addition, the defendant has not made her best efforts to obtain the cleaning lady's name as she merely indicates that she "made enquiries with an individual living in Richmond Hill at the time." Who is the person she spoke to and why does that person know the cleaning lady? Did the defendant pay her cash or cheque? For the above reasons, the defendant has not satisfied this undertaking.

Undertaking No. 7

[56] The defendant stated on discovery that she could find out the surname of a "Sara P-O-N – Pointas" who was an intern at the Spa. She has not done so nor has she advised of what efforts she made to obtain this information. In addition, she has failed to advise of what efforts she has made, if any, to obtain the names and contact information of all other interns from Fleming College who worked at the Spa. The defendant has not satisfied this undertaking.

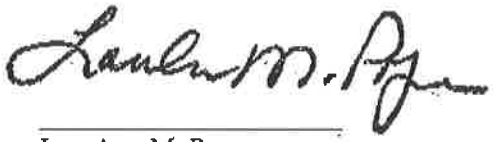
Conclusion and Costs

[57] The plaintiff is granted leave to bring this motion and to deliver a jury notice within 14 days of the date this decision is released. The plaintiff has been successful on the undertakings in dispute.

[58] The majority of documents filed on this motion and the majority of oral submissions involved the issue of the jury notice. The primary explanation for the failure to deliver a jury notice was inadvertence of plaintiff's counsel. Further, I found that the plaintiff failed to explain the delay in bringing this motion of one year from November 2013 to November 2014, although this delay did not change the defendants' position that they opposed the late delivery of a jury notice, such that a motion was necessary in any event. For those reasons, I am not inclined to grant costs to the plaintiff of the motion for leave to deliver a jury notice.

[59] Also, given the delay in bringing the undertakings motion beyond the timeline set by Master Dash in his timetable order with no valid reason, I decline to grant the plaintiff costs of that relief.

[60] Therefore, there shall be no order as to costs.



Lou Ann M. Pope

Date Released: July 2, 2015