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Persad v. State Farm Fire and Casualty

Between
Kris Persad, plaintiff, and
State Farm Fire and Casualty, defendant

[1995] O.J. No. 1539

Court File No. 94-CQ-48797

Ontario Court of Justice (General Division)

Greer J.

Heard: April 27, 1995.
Judgment: May 31, 1995.

(10 pp.)

Practice -- Discovery -- Order for examination for discovery -- Order for further examination -- Use of examination in another action -- Use in related criminal proceedings -- Confidentiality of information obtained in examination.

The defendant insurance company moved for an order requiring the plaintiff to re-attend for continued examination for discovery. The plaintiff brought a cross-motion for an order striking out the defendant's statement of defence, or an order requiring it to re-attend to answer questions on discovery. He further moved for an order requiring the defendant not to make collateral use of the information disclosed at the plaintiff's examination for discovery. The plaintiff was now subject to criminal charges in another, related matter. Since being charged, the plaintiff had refused to answer any questions unless counsel for the defendant undertook not to provide any information as to his answers to the Crown or the police. Defence counsel had refused to give such an undertaking.

HELD: The defendant's motion requiring the plaintiff to re-attend was allowed. The plaintiff's motions to strike out or to compel the defendant to re-attend was adjourned sine die. The real issue on this motion was the confidentiality of the information already given by the plaintiff at his examination for discovery, and whether he should now have the right to remain silent. The court was satisfied that, without them giving any undertaking to the court, defence counsel and his law firm would not deliberately use information obtained for other purposes. However, any of them could be sub-

poenaed to give the information or their offices could be the subject of a search warrant. The court, therefore, would not make any order to further the plaintiff's privacy, noting that he already had the benefit of the protection of the Canada Evidence Act and the Ontario Evidence Act. His motion for an order constraining the defence's use of his discovery information was dismissed.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S., c. E-10, ss. 2, 5. Ontario Evidence Act.

Counsel:

Ralph F.D. Swaine, for the plaintiff.
David Zarek, for the defendant.

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1 **GREER J.**:-- State Farm Fire and Casualty Company, ("State Farm" or the "Defendant") has refused to pay its insured, Kris Persad, ("Persad" or the "Plaintiff") for fire damage to his home and contents. During the course of litigation he refused to continue his Examination for Discovery. State Farm has now moved for an Order that Persad re-attend at an Official Examiner's Office for his continued examination. Persad moved by way of Cross-Motion for an Order striking out State Farm's Statement of Defence, or in the alternative for an Order requiring it to re-attend at its own expense to properly answer the questions asked in its written examination for discovery. Persad further asked for an Order requiring State Farm to not make collateral use of the information disclosed at his examination.

2 On the Motion Record I made the following endorsement:

> Order to go in terms of paragraph (i) of the N of M. In my view, the delay for the continuance of the Ex. for Disc has been much too long, given the nature of the case. Costs to the Defendant in the cause.

3 I endorsed the Cross-Motion Record as follows:

> Order to go adjourning sine die the relief asked for in paragraph 1. The Defendant has provided the P1. with further written answers. If, upon his review of such answers, counsel for the P1. has further concerns, I may be spoken to.

4 Reserve on relief asked for in #2.

5 The real issue before me was that of the confidentiality of the information given by Persad at his examination for discovery, and whether he should now have the right to remain silent, given the criminal charges which are outstanding against him in another related matter.

6 State Farm paid monies to Persad's mortgagee but has otherwise refused to pay him, claiming that there was a material misrepresentation made by Persad to it and that the policy was void ab ini-

tio or voidable. It further claims that the Proofs of Loss filed by Persad were false and that he failed to comply with the provisions of the policy, including submitting to an examination under oath.

7 At Persad's continued examination for discovery, he refused to answer any questions unless counsel for State Farm undertook on behalf of himself and his law firm not to provide to either the Crown Attorney's Office or the police involved in the charges laid against the Plaintiff, if requested by them, any information that may be disclosed at his continued examination, or provide them with a copy of the transcript of the examination for discovery.

8 Counsel for State Farm has refused to give the personal Undertaking which Persad's Counsel was asking him to give. In a statement for the record given by him at Persad's examination on March 6, 1995 at Q. 1509, Counsel said the following:

> Without waiving privilege, I've taken some counsel from one of my partners, and we have some difficulty with the undertaking as described. We've had some discussions as I've described to you off the record.
>
> In a nutshell, there are two separate issues. There is the issue of if the police, or any investigatory body, approaches our firm or myself and asks whether or not we have a transcript, am I being compelled to say, " Yes," "No," or "I have undertaken not to answer that question." And if they determine that we do have a transcript, if we do, because we don't have one now and may not order one, then we don't want to be in the position of, number one, refusing to cooperate when or it is alleged that as an officer of the court, if our firm has knowledge or information which is being requested by the Attorney General's office or the police with respect to an alleged crime, we certainly don't want to be refusing to cooperate or obstructing justice as that may be, in terms of either the Attorney General or the police department believes.
>
> In other words, regardless of whether or not we are certain today that any of these things will happen, and whether or not we are certain today that a refusal to produce the transcript or a refusal to cooperate is in fact a breach either of criminal law or a breach of our duties as lawyers, we don't want to be put in that position and cannot give the undertaking that you requested.
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> My suggestion to you was that you simply claim the protection of the Canada Evidence Act and the Ontario Evidence Act, which will provide your client with the protection, I submit, that he requires, and that is that the questions that will be asked today will not be used against him in any court of law after having taken notice of protections.

One of the issues to be considered, therefore, is whether there is an implied rule of law that compels a lawyer or law firm to give an express undertaking to the Court, under these circumstances, not to provide the Crown Attorney's office or the police with any information or with copies of the transcript of the Plaintiff's examination for discovery. A further issue to be considered is whether they are prevented from making collateral use of the disclosure, if given.

9 If the Court were to order Counsel for the Defendant to give the Court such an undertaking, what would Counsel do if the Police came to his office and asked to see a copy of the transcript? What would he do if he was subpoenaed by the Police to appear?

10 The Plaintiff takes the position that he requires this protection as he is required to testify under oath on his continued examination for discovery. He further maintains that he had asked for such an undertaking, given the Divisional Court's findings in Goodman v. Rossi (1994) 21 O.R. (3d) 112, [1994] O.J. No. 2778, Action No. 266/94. There the Court characterized the issue as follows at p. 1:

> Is there in Ontario a rule of law that imposes an implied undertaking to the court by a party to whom information or documents are provided in an examination for discovery or through production of documents, that he will use not use the information for any collateral or ulterior purpose, and that any such use is a contempt of court?

In the decision, it was held by O'Leary J., O'Driscoll J. concurring, that there is no such rule. Moldaver J., while concurring, said that there should be such a rule imposing an implied undertaking, "albeit one differently worded from the existing rule so as to more properly reflect its true content and purpose."

11 O'Leary J. states that the implied undertaking rule is irrelevant in most actions because most litigants are not concerned that the documents or information will be used in some other action or will be released to the public. He then went on to say:

> In those relatively few cases to which the rule could be relevant, that is to say, where there is a confidence to be protected or where public or news media interest is expected, the introduction of the rule into the law of Ontario will not, in my view, properly mediate the tension between the right to privacy and the right to impart information once it is received, that is to say, the right of freedom of communication or expression. In any event, the implied undertaking rule is far too broad and all-encompassing to be adopted. As a general rule, there is no reason why information received through the discovery process should not be available for use in another and entirely distinct action.
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> ...
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> Even if the rule were made part of our law, a party could still obtain, in a proper case, a court order permitting some collateral use of information or documents obtained through discovery. If the rule is not part of our law, a party can, in a proper case, obtain an order restricting the use to be made of such documents or information. So the issue is, who should have to seek the court order? In my view, it should be the party who wants to protect confidentiality. He knows the nature of the information or documents he has to disclose. He can foresee how a breach of confidence can cause him harm. He can at least initially, best frame the terms of the order need for his protection.

In his conclusion, O'Leary J. made the following comment which has caused this Cross-motion to be brought:

> The implied undertaking rule was not part of the law of Ontario prior to 1985 and should not be adopted. A party who wants to protect information to be disclosed on discovery from use outside the action, must obtain from the other parties to the action an express undertaking of confidentiality or apply to the court for an order providing that protection to his privacy. [emphasis added]

12 I am satisfied, without them giving any undertaking to the Court, that neither counsel for State Farm nor his partners would deliberately use any information obtained for other purposes whether collateral or ulterior. On the other hand, any of them could be left in the position of being subpoenaed to give the information or they could simply be asked for it by the police who are investigating the criminal charge. Further, search warrants could be issued to the lawyers or to the Official Examiner or the reporter to obtain a copy of the transcript from them. The Crown who is prosecuting the plaintiff, is not a litigant in these proceedings and cannot be barred from attempting to obtain the information. I, on the other hand, share Moldaver J.'s concerns, as expressed in Goodman, supra, that the privacy interest of opposing litigants be respected at the pretrial disclosure stage of the proceedings.

13 The American courts have held that constitutional immunity from giving incriminating testimony does not apply to a private examination arising out of contractual relationships. In Hichman v. London Assur. Corporation et al. 195 Pacific Reporter 45 (Cal), the court held that an insured could not refuse to submit to examination by the insurer under a policy providing for such examination, on that ground that he had been accused of arson, and that his testimony on the examination may be used against him in the prosecution for arson. That case, in some respects, mirrors the case at bar.

14 Granger J. in 755568 Ontario Ltd. v. Linchris Homes Ltd. (1990) 1 O.R. (3d) 649 canvasses many of the cases referred to by the Divisional Court in Goodman, supra, and points out the considerable pressure put on a defendant to settle a civil action when faced with a criminal investigation. In the case at bar, it is the Plaintiff who began the lawsuit and who is asking for the court's protection. On the other hand, he has the benefit of the protection of the Canada Evidence Act, R.S., c. E-10, and in particular Sections 2 and 5.

15 Given the Court's finding in Goodman, supra, that there is no implied undertaking rule, and given the protection which is afforded the Plaintiff under the Canada Evidence Act, and the Ontario Evidence Act, I am not prepared, in the circumstances of this case, to make any order to further protect the Plaintiff's privacy.

16 The relief requested in paragraph 2 of the Cross-motion is therefore dismissed.

17 There shall be no costs of this Cross-motion. I am satisfied that the Plaintiff had to ask for the relief he did, given the Divisional Court's direction that such motions should be brought on.

GREER J.

qp/s/mii/mjb/DRS/DRS