CITATION: Boyadjian v. Durham (Regional Municipality), 2016 ONSC 6477
OSHAWA COURT FILE NO.: 74724/11
DATE: 20161101

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
LUCY BOYADJIAN Plaintiff	Ian A. Little, for the Plaintiff
– and –	
THE REGIONAL MUNICPALITY OF DURHAM, THE CORPORATION OF THE TOWN OF AJAX, MATTHEW LAPENSEE and HEATHER LAPENSEE Defendants	Zohar R. Levy, for the Defendants, The Regional Municipality of Durham and The Corporation of the Town of Ajax Shanti Barclay, for the Defendants, Matthew Lapensee and Heather Lapensee
	Jillian Van Allen, for the Intervenor, LawPro
	Ian Little, Agent for Ontario Health Insurance Plan
	HEARD: October 6, 2016

REASONS FOR DECISION

GILMORE J.:

Overview

[1] Mr. Kirkor Apel ("Mr. Apel") was the former counsel for the plaintiff in this matter. LawPro appeared on Mr. Apel's behalf at this motion and requested intervenor status. The request was not opposed.

[2] Mr. Little on behalf of the plaintiff also appeared as agent for Mr. Brian Johnston from the Ontario Health Insurance Plan (OHIP). OHIP sought to make submissions at the

motion with respect to its statutory interest in the proceeding. No parties opposed this request.

[3] There are two motions before the court;

1) The plaintiff's motion to:

a. Withdraw statements made to the court by Mr. Apel at a status hearing on October 23, 2014, December 11, 2014 and April 28, 2015, which constitute admissions limiting the damages that the plaintiff would otherwise be entitled to claim herein;

b. Vary the status hearing Order of Justice Bale dated August 14, 2015 should it constitute an order limiting the damages that the plaintiff would otherwise be entitled to claim;

c. Leave to withdraw the statement at item 14 in Schedule A of the plaintiff's affidavit of documents prepared by Mr. Apel and sworn by the plaintiff on September 28, 2015, which states "no claim for income lost"; and

d. Amend the statement of claim to increase the relief to $125,000 in general damages and $250,000 in special damages.

[4] The municipal and individual defendants bring a cross motion.

[5] The municipal defendants ("The Regional Municipality of Durham and The Corporation of the Town of Ajax") seek an order to dismiss the action against the defendants if the plaintiff is permitted to withdraw the statements or admissions made on April 28, 2015 by her counsel, Mr. Apel. In the alternative, an order striking the portions of the statement of claim that exceed those permitted to proceed by the Order of Bale J. dated August 14, 2015, and a timetable for further conduct of the litigation.

[6] Matthew Lapensee and Heather Lapensee (the individual defendants) bring a cross motion for:

a. A declaration that the plaintiff's claim as against them be restricted to non-pecuniary general damages for pain and suffering related to the three broken fingers allegedly sustained as a result of her trip and fall and a short period of loss of enjoyment of life;

b. An order or declaration that such non-pecuniary general damages awarded as against the Lapensees not exceed $75,000; and

c. An order or declaration that the plaintiff shall not seek or recover any special damages, income loss, pecuniary damages or any portion of OHIP's subrogated claim against the individual defendants.

d. In the alternative, an order that the plaintiff shall not seek or recover non-pecuniary and future pecuniary damages in an amount exceeding $75,000.

e. In the further alternative to the above, an order or declaration that the plaintiff shall not seek or recover any special damages including OHIP's subrogated claim in an amount exceeding $25,000.

Background

[7] The plaintiff tripped on a slightly elevated water valve while jogging during the day on September 12, 2009. The water valve belonged to the municipal defendants but was located on the individual defendants' property. The plaintiff is alleged to have suffered three broken fingers and other injuries as a result of the accident.

[8] A notice of action was issued on September 12, 2011 and the statement of claim served thereafter. There is no dispute that very little happened on the file between 2011 and 2014. As a result of a notice of impending dismissal, the plaintiff requested that a status notice be issued. The defendants put the plaintiff on notice that they would be asking her to show cause why the action should not be dismissed.

[9] The original date for the status hearing was set for October 23, 2014. The status hearing was adjourned to December 11, 2014 to set a date for argument for a contested status hearing to timetable the filing of the plaintiff's material and any response by the defendants, and to permit plaintiff's counsel to advise LawPro of the status hearing. The plaintiff was personally present in the courtroom when this matter was spoken to on December 11, 2014.

[10] The plaintiff consulted with a second lawyer, Mr. Ian Little, in or around March 2015. Mr. Little became the plaintiff's lawyer of record on December 14, 2015. The contested status hearing was held on April 28, 2015. Mr. Apel filed no materials. Neither the plaintiff, Mr. Little, nor a lawyer from LawPro attended the status hearing on April 28, 2015. Lengthy submissions were made that day by counsel for the defendants. Mr. Apel was permitted to make certain submissions, notwithstanding the fact that he had not filed any material. A transcript of the contested status hearing was produced in the municipal defendants' motion record. The defendants made submissions as to why the plaintiff's action should be dismissed for delay. Mr. Apel also made submissions describing various personal circumstances which had prevented him from advancing the matter in a timely way.

[11] Bale J. released his Reasons with respect to the contested status hearing on August 14, 2015. The Order of Bale J., resulting from his Reasons and as approved by Mr. Apel, is attached as Schedule "A" to this Judgment.

[12] Bale J. permitted the action to proceed on certain terms, including a requirement that the parties serve sworn affidavits of documents and produce various other documents within 45 days of August 14, 2015. He further ordered a pretrial to be held within 90 days of August 14, 2015, and ordered the plaintiff to pay costs to the defendants totalling $2,500.

[13] The order dated August 14, 2015 is based on Bale J.'s Reasons. The Reasons which form the basis for his Order are particularized under the heading "Disposition" as follows:

> 16. For the following reasons, I am of the view that the action should be permitted to proceed.
>
> 17. First, no actual prejudice to the defendants has been demonstrated, and in the circumstances of this case, I have no concerns that the three-year delay will have a negative impact on trial fairness. The plaintiff alleges that she broke three fingers as a result of a trip and fall. There were no witnesses to the accident. Although in the statement of claim, the damages claimed are much broader, counsel for the plaintiff stated at the hearing, on the record, that the only damages being pursued are for pain and suffering related to the injury itself, and a short period of loss of enjoyment of life.
>
> 18. Second, if the plaintiff has not requisitioned a status hearing, and her action has not been dismissed as of January 1, 2015, she would have had until March of 2017 to set her action down for trial. While the transition provisions of the new rule required that the already scheduled status hearing proceed under the former rule, the policy implemented by the new rule is a valid consideration in determining the seriousness of the plaintiff's delay to date. Given the relatively short period of the delay, the defendants might have been well-advised to agree to a consent timetable to move the action forward.
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> 19. Third, while the delay in providing the plaintiff's affidavit of documents is inexcusable, it was delivered on January 31, 2014. As noted above, the parties were thereafter at a standstill, because counsel for the defendants considered the affidavit of documents served by the plaintiff to be inadequate, and were unwilling to schedule examinations for discovery, until further production had been made. While the defendants' position was entirely reasonable, they had a remedy: they could easily have moved under rule 30.06 for an order for service of a further and better affidavit of documents, or for an order for the disclosure or production of the additional documents that they required. While I acknowledge that the plaintiff bears primary responsibility for the progress of a law suit, a motion to compel further production is available to both plaintiffs and defendants, and is hardly unusual.

[14] The plaintiff swore an affidavit of documents dated September 28, 2015. In Schedule A of that affidavit of documents she stated as follows, under the heading of Income Loss,

she stated "No claim for income loss". The plaintiff now seeks to withdraw her former lawyer's admissions and amend her statement of claim to increase the amount for non-pecuniary damages from $75,000 to $125,000 and increase her special damages from $25,000 to $250,000. The result would be that the matter can no longer proceed under the Simplified Rules, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 76 (*Rules*).

[15] The defendants moved to strike those portions of the statement of claim which reflect Mr. Apel's submissions at the status hearing which were accepted by the court.

[16] It was the position of Ms. Van Allen, on behalf of LawPro, that, as Mr. Apel was the plaintiff's lawyer at the time, the plaintiff cannot resile from statements made by her lawyer during the course of the contested status hearing. Further, the court was and is entitled to rely on those statements.

[17] LawPro's position is that any issues arising between the plaintiff and Mr. Apel concerning the impugned statements should be determined in a separate proceeding between them. Further, the statements at the status hearing only preclude the plaintiff from claiming loss of income. There is no reason that the plaintiff cannot pursue her OHIP subrogated claim, as Justice Bale specifically identified "any out of pocket expenses relating to treatment" as part of the claim. In any event, OHIP is not legally bound by any settlement to which it has not consented.

[18] OHIP's position, as submitted by Mr. Little as their agent, is that Mr. Apel failed to discharge his statutory and regulatory duty under the *Health Insurance Act*, R.S.O. 1990, c. H.6, as well as his duty as a barrister and solicitor to his client, the general manager of the Ontario Health Insurance Plan. OHIP's position is that Mr. Apel made statements to the presiding justice that were without the authority of the general manager, and that even if the defendants are successful, OHIP will still maintain a statutory right to refile a claim against the defendants at a future date.

Statements made by Mr. Apel at the Contested Status Hearing

[19] During the course of the contested status hearing on April 28, 2015, Mr. Apel was questioned by the court with respect to his position on the requested dismissal of the action. To summarize Mr. Apel's position, he prevailed upon the court to allow the matter to proceed. He requested some understanding from the court with respect to his personal health challenges, but more importantly, submitted that the matter should proceed because it was a small straightforward claim which did not include any loss of income.

[20] With respect to loss of income, Mr. Apel stated clearly as follows: "As of today, there's no loss of income…What I'm saying is there is no loss of income."[1]

[21] With respect to other damages, Mr. Apel made the following comments:

[1] Status Hearing Transcript, Reply submissions by Mr. Apel, held April 28, 2015, at pp. 63-64.

(a) And it's a minor injury. It's a broken finger. It's not like there's a – it's not like an undiagnosed cancer that was treated and then years later was discovered. This is a very simple straightforward case...They've bombarded me with volumes of material and they want the case dismissed but it's a broken finger from a fall while somebody's jogging.[2]

(b) THE COURT: Okay. So, you said there's no claim for any wage loss, no claim for any psychological injuries. So you're saying that the only claim is pain and suffering, the breaking of the fingers and then any out of pocket expenses relating to treatment?

MR. APEL: Yeah. Yeah. And...

THE COURT: That's it?

MR. APEL: ...they're all minor. Yeah, she fell. She never missed work. She fell when she was jogging.

THE COURT: Okay, I just want to get clear. Are you saying that's the only claim?

MR. APEL: Yes. That's the only claim and that's why my client is of the view that she should – there's no reason why it should be dismissed and it's overkill. They're using a sledgehammer to kill an ant.[3]

(c) It's not a big case and I think they've – if they could probably have settled it with the legal fees that were spent on fees...[4]

The Position of the Parties

The Plaintiff

[22] The position of the plaintiff can be fairly stated as follows:

a. The Order of Bale J. dated August 14, 2015 does not prevent any amendment to the claim. While the preamble of the Order sets out the representations of counsel for the plaintiff, the preamble is not binding. The Order is the definitive document, not Bale J.'s Reasons for making the Order.

b. Much of the discussion at the status hearing did not relate to reasons why the claim should not be dismissed for delay. The size of the claim was not relevant to the delay and it is unjust that the rights of the plaintiff would be taken away as a result. It is important to note that the initial draft of Bale J.'s Order included restrictions on the claim, but was returned by the registrar as not conforming to Justice Bale's actual Order. The defendants could have appealed the Order but did not.

[2] Status Hearing Transcript, Reply submissions by Mr. Apel, held April 28, 2015, at p. 78.
[3] Status Hearing Transcript, Reply submissions by Mr. Apel, held April 28, 2015, at p. 79.
[4] Status Hearing Transcript, Reply submissions by Mr. Apel, held April 28, 2015, at p. 20.

c. The ostensible authority of Mr. Apel only goes so far. It is not necessary to establish why Mr. Apel said what he did, whether he deliberately misrepresented his client's instructions, was misinformed or simply mistaken. It is now clear that what Mr. Apel said to the court was untrue. There are medical reports which were not available at the time of the status hearing and there is evidence of over 100 hospital visits by the plaintiff. The fact that Mr. Apel told Justice Bale that this was a minor claim is not the end of the matter. Mr. Apel did not consent to a particular disposition.

d. The action was not dismissed solely because Mr. Apel stated that the claim was a small one. This was only part of the discussion and not instrumental in Justice Bale's determination. It would be exceedingly unfair to the plaintiff to hold her to commentary made at a status hearing that was not germane to the issue before the court.

LawPro

[23] Ms. Van Allen, on behalf of LawPro, was clear that neither the plaintiff nor Mr. Apel can withdraw the statement made at the status hearing. If the plaintiff alleges she has suffered damages as a result of those statements, she may commence an action against Mr. Apel.

[24] Further, this is not the forum in which to decide whether the statements were made with or without authority, or made negligently. Mr. Apel is prevented by solicitor client privilege from giving evidence about dealing with the plaintiff because no action has been commenced against him. Therefore, it is not for this court to make findings of fact about Mr. Apel's conduct.

The Municipal Defendants

[25] The plaintiff and her counsel at the time were well aware of the scope of her claim and the nature of her injury, as well as the potential for further surgery when the claim was issued. This is clear from the medical records at Tab A of her motion record.

[26] Justice Bale's Order was in part based on his reliance on the representations made by Mr. Apel. If those representations are set aside and the plaintiff's motion is granted, then the action should be dismissed for delay.

[27] It is important to note that Justice Bale's decision was made without any affidavit evidence from the plaintiff. The plaintiff, therefore, did not discharge her burden to show cause as to why her claim should not be dismissed. The decision not to pursue the appeal was based on the representations made by Mr. Apel. It is unfair to the defendants to have the reliance on those representations now set aside as they are then deprived of their ability to appeal the decision of Bale J.

[28] There should be no ability for the plaintiff to claim income loss. Plaintiff's counsel made admissions at several points during the status hearing that there was to be no claim for income loss. Further, the plaintiff made a statement in her affidavit of documents

regarding income loss. The plaintiff is unable to provide a reasonable explanation for a change in her position from September 2015, given that she already knew all of the information that her current counsel brought to the court's attention. The plaintiff should therefore be foreclosed from making any claim for loss of income.

[29] If the representations made by Mr. Apel are binding, the municipal defendants propose the following amendments to the statement of claim:

a. Deleting the portion of paragraph 11 that reads "...sustained severe permanent and painful injuries, more particularly, but without limiting the generality of the foregoing, she..."

b. Amending paragraph 13 so that it reads as follows: "As a result of her injuries, the Plaintiff has incurred out of pocket expenses relating to treatment. The full particulars of these expenses are not yet known but will be provided at or before the trial of this action."

c. Amending paragraph 14 to read "The plaintiff experienced pain and suffering."

d. Deleting paragraphs 12 and 15.

[30] The municipal defendants submit that these amendments would accord with the disposition of Bale J. At paragraph 17 of his reasons, he noted that the plaintiff was only seeking damages for a short period of loss of enjoyment of life and pain and suffering.

[31] The municipal defendants also argue that Mr. Apel's statements bind his client with respect to the OHIP subrogated claim. This claim was not mentioned during the course of that status hearing, and therefore there should be no ability to make such a subrogated claim. If such a claim is made it should be limited to part of the $25,000 claim for special damages.

The Individual Defendants

[32] While the individual defendants were aware that there was likely a potential OHIP subrogated claim, they were unaware that it was over $30,000. Mr. Apel and the plaintiff knew about the claim at the status hearing, but it was not mentioned. OHIP's position that they would bring a claim against the defendants should be given little weight since it would be *res judicata*, being an action for damages arising from the same incident.

[33] Counsel for the individual defendants advised that the statements made by Bale J. were relied upon by her when she reported the status hearing decision to her client. Discussions with her client resulted in a determination not to appeal the result of the status hearing in the circumstances. Similar to the position taken by the municipal defendants, the individual defendants submit it would be unfair to allow Mr. Apel to resile from his statements, as their counsel would have given different advice to her principal on the issue of a possible appeal.

[34] The individual defendants agree on the portions of the statement of claim proposed to be struck by the municipal defendants. They submit that the plaintiff is precluded from recovering any loss of income based on Bale J.'s Order, the statements made by Mr. Apel at the contested status hearing and the sworn affidavit of documents by the plaintiff. Non-pecuniary damages are to be limited to three broken fingers and a short period of loss of enjoyment of life, not to exceed $75,000.

[35] On the OHIP subrogated claim, their position aligns with that of the municipal defendants in that it should not be recoverable, but if it is, it should be capped at $25,000 under the heading of special damages.

[36] The individual defendants submit that, pursuant to r. 25.11(c) of the *Rules*, a court may strike out part of a pleading on the grounds of abuse of process. Counsel submits that justice and fairness is at the heart of the doctrine of abuse of process. Tripling the value of the plaintiff's claim substantially prejudices the defendants who have now lost the ability to appeal Justice Bale's decision. The only material change is a change in counsel who knew about the status hearing long before it took place. The grounds on which the plaintiff seeks to amend her claim are not supportable in law and amount to an abuse of process.

Analysis and Ruling

[37] This case raises the important question of the extent to which the court, other counsel and clients are bound by statements of counsel as officers of the court and as the representative of individual litigants.

[38] Many have been affected by what are now conceded to be the clear misstatements of Mr. Apel. The plaintiff risks having to limit her claim. The defendants have lost their right of appeal. Mr. Apel may be the subject of other proceedings as a result of his statements. OHIP may be faced with enforcing their subrogated claim by other means.

[39] A perusal of the transcript of the status hearing makes it clear that Mr. Apel minimized his client's claim as part of his strategy to ensure the matter was not dismissed. Who should pay for that strategy when, in hindsight, it was a misguided one?

[40] The role of counsel and counsel's ostensible authority in making submissions to the court has significance which cannot be ignored. For example, in *Rhonwin Investments Ltd. v. Woodbine Realty Ltd.*, [1997] O.J. No. 398, (Ont. Ct. J.), the court refused a motion by the plaintiff for an order allowing it to withdraw an admission made on its motion for summary judgment. The court held, at paragraph 3:

> There are no new facts or circumstances which were unknown at the time the admission was made and the admission was made after careful consideration, but for tactical reasons which counsel are candid enough to admit. I am afraid in equity that I must refuse the request.

[41] In *Szabo Estate v. Adelson*, [2007] O.J. No 1105, (Ont. Sup. Ct.), counsel made oral submissions during a motion, which included admissions. In its reasons, at para. 14, the

Court said, "There was no reason for me to question counsel's admissions as he made them; they were consistent with the case counsel put before me." The court refused the estate's motion to file further evidence and make further submissions as a result.

[42] In *Srajeldin v. Ramsumeer*, 2015 ONSC 6697, [2015] O.J. No. 6599, the Divisional Court considered an appeal with respect to a dismissal of a motion for summary judgment to enforce a settlement. The motions judge set aside the settlement. The Divisional Court found that the judge erred in law and made palpable and overriding errors in applying legal principles to the facts of the case before him. The court held, at para. 21, "It is well established in the case law that a lawyer has ostensible authority to effect a binding settlement on behalf of his client. Unless the opposing side has knowledge of some limitation on the solicitor's retainer, any settlement made by a lawyer will be binding on the client, regardless of any dispute between the lawyer and his own client as to the scope of the lawyer's instructions." And at para. 22, "[T]he normal practice, as noted in *Scherer v. Paletta*[5] is that the court will not embark upon any inquiry as to the instructions passing from the client to the solicitor" (footnote added).

[43] In *Dugal v. Manulife Financial Corp.*, 2011 ONSC 6761, 2011 CarswellOnt 12785, the court refused to allow the plaintiffs to amend their pleadings because of their lawyer's in-court admissions. In this putative class action, the plaintiffs sought to amend their statement of claim. They claimed that the ongoing disclosure of the defendants had led to the creation of potential sub-classes. In court, plaintiff's counsel admitted that the limitation period had commenced two years prior. The court found that this admission amounted to an admission that the "plaintiff first had knowledge of the facts giving rise to the cause of action", as under the *Securities Act*, R.D.O. 1990, c. S.5 (at para. 42). Therefore, the plaintiffs could not claim that the disclosures led to the creation of further sub-classes and an extension of the limitation period.

[44] The above cases stand for the proposition that what a lawyer says on behalf of their client in court is binding on that client. Whether the representation is made orally by way of a submission or whether it is to effect a settlement. If the ostensible authority of counsel cannot be accepted by the court or by other lawyers, the result would be absurd. That is, actual authority would have to be obtained by counsel for each and every action required during the course of their representation. It is therefore clear that the defendants are entitled to rely on the representations made by Mr. Apel and the plaintiff is bound by them.

[45] Given all of the above, the plaintiff's motion is dismissed. The defendants cross motion is allowed and the statement of claim shall be amended as per the statement of claim filed at Tab 1 of the municipal defendants' responding factum, save and except special damages shall be capped at $25,000, which includes OHIP's subrogated claim.

[46] In my view it was not necessary to address the arguments related to abuse of process raised by the individual defendants. The inability to resile from Mr. Apel's statement is a sufficient ground for the relief sought by the defendants.

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[5] *Scherer v. Paletta*, [1966] 2 O.R. 524-527

[47] This matter will remain under the Simplified Rules. The plaintiff shall serve a notice of readiness for pretrial conference. The matter shall not be dismissed for delay so long as the parties take the required steps under the Simplified Rules within 90 days of the date of this decision.

C. Gilmore, J.

Madam Justice C.A. Gilmore

Released: November 1, 2016

Schedule "A"

Court File No.: 74724/11

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 14TH
	)	
MR. JUSTICE STEPHEN T. BALE	)	DAY OF AUGUST, 2015
	)	

B E T W E E N :

LUCY BOYADJIAN

Plaintiff

-and-

REGIONAL MUNICIPALITY OF DURHAM, THE CORPORATION OF THE TOWN OF AJAX, MATTHEW LAPENSEE and HEATHER LAPENSEE

Defendants

ORDER

THIS STATUS HEARING was heard on April 28, 2015 in the City of Oshawa, Ontario.

ON READING the Affidavit of William Sproull sworn October 20, 2014, and the Status Hearing Response and Factum of the Defendants Matthew and Heather Lapensee, filed, and on reading the Affidavit of Anita Rocks sworn October 21, 2014, filed, and Status Hearing Response and Factum of the Defendants, Regional Municipality of Durham, and The Corporation of the Town of Ajax, filed, and on hearing the submissions of the lawyers for parties; and

ON HEARING and relying on the representation of counsel for the plaintiff that the plaintiff's claims for damages are limited to her pain and suffering relating to the three broken fingers allegedly sustained as a result of her trip and fall, and a short period of loss of enjoyment of life,

1. THIS COURT ORDERS that this action be permitted to proceed on the following terms:

(a) The parties shall serve a sworn affidavit of documents in accordance with Rule 30.03 within 45 days of August 14, 2015;

(b) The plaintiff shall produce the following documents within 45 days of August 14, 2015:

(i) a list of decoded OHIP services from 3 years pre-accident forward;

(ii) copies of the clinical notes and records of all health care providers from which she has received treatment from 3 years pre-accident forward; and

(iii) copies of her collateral benefits files from 3 years pre-accident forward;

(c) THIS COURT ORDERS that a pre-trial conference will be held within 90 days of August 14, 2015, pursuant to subrule 50.02(3) of the *Rules of Civil Procedure*; and

(d) THIS COURT ORDERS that the plaintiff shall pay $2,500.00 in costs to the defendants, of which $1,500.00 shall be payable to the individual defendants and $1,000.00 to the municipal defendants.

S. Bale J.

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LUCY BOYADJIAN

Plaintiff

– and –

THE REGIONAL MUNICPALITY OF DURHAM, THE CORPORATION OF THE TOWN OF AJAX, MATTHEW LAPENSEE and HEATHER LAPENSEE

Defendants

REASONS FOR DECISION

Madam Justice C.A. Gilmore

Released: November 1, 2016