CITATION: Asrat v. 1438305 Ontario Inc. et al, 2017 ONSC 6965
COURT FILE NO.: CV-08-00353871
DATE: 20171123

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KIDEST WONDIMU ASRAT, Plaintiff

AND:

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

BEFORE: KOEHNEN J.

COUNSEL: *Shanti Barclay, Andrew C. McKague*, for the Plaintiff

Ian Macleod, Mariam Moktar, for the Defendants

HEARD: November 16, 2017

ENDORSEMENT

[1] This is an appeal from the order of Master Suganasiri dated June 13, 2017, pursuant to which she ordered that the plaintiff and a psychological expert retained by her produce the expert's handwritten notes, questionnaires and answers from his assessment of the plaintiff. The Master's reasons are now reported at *Asrat v. 1438305 Ontario Inc. et al.*, 2017 ONSC 3801.

[2] The plaintiff's expert was given no notice of the motion. The motion was a simple undertakings and refusals motion and not a motion for production from a non-party pursuant to rule 30.10 of the *Rules of Civil Procedure*.

[3] In my view the Master erred in ordering production without giving the plaintiff's expert an opportunity to make submissions. I would therefore allow the appeal and vary the Master's order as described later in these reasons.

Background

[4] In the underlying action, the plaintiff alleges that: she was a domestic worker for some of the defendants in Ethiopia, the defendants brought her to Canada against her will, seized her passport and forced her to perform domestic duties for them in Canada without pay. She claims unpaid wages and general damages for intentional infliction of nervous shock arising out of her wrongful imprisonment and unlawful confinement by the defendants.

[5] As part of her case, the plaintiff delivered an expert's report from Dr. Gerald Young, a clinical psychologist and professor of psychology at York University.

[6] On the plaintiff's continued examination for discovery, her counsel took the following question under advisement:

> "To provide the raw data and forms or questionnaires that were filled out by Ms. Asrat as part of the psycho-legal assessment conducted by Dr. Gerald Young."

[7] The plaintiff's counsel approached Dr. Young about this information. Dr. Young took the position that the information was proprietary and that he never gives it out.

[8] In response, plaintiff's counsel advised the defendants' counsel:

> "Dr. Young will not produce the questionnaire and answers since they are proprietary. If you seek a 30.10order against Dr. Young, we would take no position …"

[9] The Master ordered the plaintiff *and* Dr. Young to produce the documentation to the defendants' counsel, prevented defendants' counsel from sharing the information with their clients, and required defendants' counsel as well as any expert they retained to destroy the information on completion of the action.

[10] The plaintiff appeals from the order requiring production of information that Dr. Young objects to producing. The defendants have not cross-appealed but nevertheless object to the conditions the Master imposed on production.

Analysis

A. Plaintiff's Appeal

[11] The nub of the Master's decision is found at paragraph 11 of her reasons which reads as follows:

> Dr. Young indicated in an email to Plaintiff's counsel that the questionnaires put to the Plaintiff in the course of his assessment are "proprietary". The Plaintiff's counsel now presents this position as a reason why the questionnaires cannot be produced. The Plaintiff asserts that the present motion is an undertakings and refusals motion and that she has made best efforts to obtain the questionnaires and answers from Dr. Young. What is required to obtain the documents is a further non-party production motion. While that may technically be true, I have discretion to address the questionnaire issue within the present motion and may grant relief ancillary to the motion brought. In doing so I am mindful of the goals of Rule 1.04 to promote the most just, efficient and expedient adjudication of the case on its merits. It is inefficient to bifurcate the issues in this case relating to raw data by making one ruling on Dr. Young's handwritten notes now, and deferring the production of the questionnaires and answers to another motion. I have Dr. Young's position and counsel was present to represent his interests. I can decide the issue within the present motion.

[12] The fundamental error the Master made was to order relief against a party who was not before the court and had no opportunity to make submissions. This violates the fundamental precept of *audi alteram partem*, a rough translation of which is "listen to the other side", or "let the other side be heard as well". It reflects the core principle of our courts that no person should have their rights impaired without having an opportunity to respond to the case against them. Dr. Young was deprived of that opportunity.

[13] The reasons for the decision do not provide justifiable grounds for depriving Dr. Young of the opportunity to be heard.

[14] The Master begins by acknowledging that it is "technically "true that Dr. Young should be heard. She then holds that she has the discretion to order production from Dr. Young because she may grant relief ancillary to the motion brought.

[15] Ancillary is generally defined as subservient or subordinate: see *The Shorter Oxford Dictionary,* (London: Oxford University Press 5th ed, 2002).

[16] Ordering production of documents from a non-party when the non-party has articulated a reason for refusing to produce and when the non-party has not been given notice of the relief sought against him, is not "ancillary" to a refusals motion. Production from a non-party is a separate motion entirely. The *Rules* treat that relief as separate from a refusals motion by creating a separate rule, 30.10, with a separate procedure and a separate test for production.

[17] The material and non-ancillary nature of a motion for production from non-parties is underscored by the requirement in rule 30.l 0 (2) that such a motion "**shall be made on notice**" to every party and to the non-party.

[18] While I am sympathetic to the principles set out in rule 1.04 to promote the most just , efficient and expedient adjudication of the case on the merits; refusing to permit a non-party to make submissions when relief is sought against them places too much weight on efficiency and too little on the just adjudication of disputes.

[19] I am equally sympathetic to the inefficiency of bifurcating the issues by making one ruling on the motion against the plaintiff and requiring a second motion for relief against Dr. Young. That inefficiency was unnecessary. The defendants chose to proceed inefficiently. They could have brought a refusals motion and a rule 30.10 motion at the same time. That would have been the more efficient and preferable way to proceed.

[20] In the penultimate sentence of paragraph 11, the Master noted that she had Dr. Young's position and counsel was present to represent his interests. The only counsel on the motion were counsel for the plaintiff and the defendants. Plaintiff's counsel was not there to represent Dr. Young's interests. On the contrary, plaintiff's counsel had already advised that she would take no position on a rule 30.10 motion against Dr. Young. It would in fact be unusual for plaintiff's counsel to have any position about the proprietary or non-proprietary nature of an expert's information. It is simply something in which the plaintiff has no interest one way or the other.

[21] While the Master may have had Dr. Young's position and felt that she could decide the issue on the present motion, the test for a fair hearing is not whether an adjudicator has received a

summary of a party's position or whether an adjudicator believes she can decide the issue, it is whether the party whose interests are affected has had the opportunity to be heard.

[22] There is a generally accepted approach to obtaining medical documentation from non-parties. The plaintiff usually requests production from the medical practitioner. If the practitioner refuses to produce documents, the defendant moves for an order compelling production under rule 30.10 of the *Rules*: *Suchan v. Casella*, 2006 ONSC 3775, at para 28; *W(T.) v. W (K R.J)*, 1994 OCJ 510, at para 9; *Trovato v. Smith*, 1987 ODC 364, at paras 23, 24, and 28. That is the approach that should have been followed in this case.

[23] The Master went on to hold in paragraphs 12 and 13that, although Dr. Young's proprietary interest in the information is to be considered, it does not automatically trump the competing interests of the defendants to a fair trial and the importance of a court having the benefit of all relevant information.

[24] I agree with those sentiments but they speak past the point. The only way that a court can fairly determine whether Dr. Young's proprietary interests outweigh those of the defendants and the court's interest in having full information, is to hear Dr. Young.

[25] In argument, the defendants pointed to Dr. Young's Acknowledgement of Expert's Duty and the paragraph that obliges Dr. Young to provide such additional assistance as the court may reasonably require to determine a matter in this issue. That too, misses the point. The point is not to relieve Dr. Young of that duty, it is to let him make submissions if someone requires him to do something to which he objects.

[26] The parties appear to agree that, on questions of law, the standard of review of the Master's decision is correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 5, 6, 8 and 9.

[27] In my view, the Master erred in law in ordering production from Dr. Young when he was not before the court, and erred in law in holding that the relief against Dr. Young was ancillary to the relief on the refusals motion.

B. Defendants' Objections

[28] The defendants object to the conditions on production. In paragraphs 2-4 of her order, the Master stipulated that: (i) the information from Dr. Young was to be produced only to defendants' counsel and not to the defendants themselves; (ii) defendant's counsel should destroy all copies of the information upon completion of the action; and (iii) if defendants' counsel retained an expert to review information from Dr. Young, the expert was required to destroy all copies of the information upon completion of his or her retainer.

[29] For the reasons set out below, I do not accept the defendants' submissions in this regard. In my view, the Master made no error in imposing the conditions she did in paragraphs 2-4 of her order.

[30] The restrictions placed on the information by the Master appear to be relatively standard procedures that are generally applied by this court: *Richard Long et al. v. Dundee Resort et al*., 2012 ONSC 3201 (CanLII) at para. 10.

[31] The defendants submit that the conditions are unfair because some of the defendants may be self-represented at trial. In its present form, the order would impair their ability to defend themselves. At the moment all defendants are represented by counsel. There is no evidence to suggest that this will change. If it does change and the order presents difficulties, the defendants can always apply to vary the order.

[32] The defendants argue that, if the information is marked as an exhibit at trial, the order compels counsel to destroy evidence in the court record. That is clearly not the order's intention. Whether the information is marked as a public or confidential exhibit at trial and what, if anything, should be done with that information is best left for the trial judge to determine. The order in no way limits the trial judge's discretion in that regard.

[33] Defendants' counsel submits that the prohibition on sharing the information with his clients is contrary to established practice. He cites *Long* in support of that proposition. I read *Long* differently. In *Long*, the court ordered that psychologist's data be produced only to the plaintiff's psychological expert and not to counsel: see paragraph 27. In this case the Master went further and allowed production of the data directly to defendants' counsel. Defendants' counsel took me to paragraph 30 of *Long* where the court held that the competing interests could be properly addressed by denying·"production of the raw test data directly to Mr. Mcleish at this stage" but requiring that production to him at a later stage. It is unclear who Mr. Mcleish is. From the style of cause of the proceeding it would not appear that he is a party.

[34] The defendants have not provided any evidence of prejudice that the restrictions on the information create for them. I should note that the information in question is highly technical in nature and generally requires training in psychology to understand: *Long* at para. 2. There is no evidence that any of the defendants have such training. It is therefore unclear of what benefit the data would be to the defendants.

[35] While I have considered the defendants' arguments and find that the conditions imposed by the Master were appropriate, I would note that the defendants have not filed a notice of cross- appeal. They would therefore be precluded from objecting to the Master's order in any event.

[36] As a result of the foregoing I would vary paragraph one of the Master's order so that it reads:

> 'This court orders that the plaintiff produce, within 20 days, those handwritten notes, questionnaires and answers from Dr. Young's assessment of the plaintiff which are in the plaintiff s possession, power and control and which Dr. Young does not object to producing.„

[37] Nothing in these reasons is meant to in any way limit the defendants' right to seek a rule 30.10 order against Dr. Young. Nor is anything in these reasons is to be taken as expressing any view on the merits or outcome on any such motion.

Costs

[38] The plaintiff seeks costs on a partial indemnity scale, fixed at $12,000. The defendants request that no order as to costs be made or that, in the alternative, costs be fixed at no more than $2,000.

[39] I fix costs in favour of the plaintiffs on a partial indemnity scale in the amount of $11,516.83 payable within 30 days. I have reduced the award sought slightly to correspond to the precise amount of fees and disbursements set out in the cost outline.

[40] The plaintiff has submitted a detailed bill of costs to support its costs claim. Apart from a bald allegation that the costs are excessive, the plaintiff has not pointed to any specific entries that are unnecessary. It is not appropriate for a court to arbitrarily cut back the amount of time spent without something much more concrete than a general allegation of excessive time.

[41] There are a number of factors under Rule 57 that, in my view, justify the award the plaintiff seeks.

[42] The appeal was of importance to the plaintiff. The order appealed from compelled them to produce documents they could not produce. Failure to adhere to that order could have led to her claim being struck. It was appropriate for the plaintiff to take the order seriously and mount the best appeal she could.

[43] The plaintiff was entirely successful on the appeal.

[44] The plaintiff offered to settle the costs issue by first offering $10,000 and then reducing the offer to $5,000. The defendants made no counter-offer.

[45] The defendants took numerous steps which lengthened the proceeding, were vexatious and were unnecessary. Their factum cast aspersions on the conduct of plaintiff s counsel. I spent some time wading through factums, affidavits and transcripts of cross-examinations dealing with those allegations. The allegations were without merit.

[46] The entire dispute could have been avoided had the defendants followed the ordinary procedure in cases like this which is to bring a motion for answers to refusals and a rule 30.10 motion at the same time. They had no explanation for failing to proceed in that manner.

[47] The defendants added further time by arguing against the conditions the Master imposed on production and asking me to reverse those conditions even though they had not filed a notice of cross-appeal.

[48] The defendants levelled new personal attacks on plaintiff s counsel in their cost submissions. The new allegations of misconduct are as unwarranted as those in their factum.

[49] The defendants complain that plaintiff's counsel undertook on his cross-examination to produce correspondence and notes of discussions with Dr. Young regarding the questions taken under advisement. The defendants note that plaintiff s counsel received a fax cover page attaching Dr. Young's notes and argue that either the fax cover page and/or the notes should have been produced in answer to the undertaking. I disagree.

[50] The undertaking related to notes about requests of Dr. Young to produce the information, it was not an undertaking to produce the information itself. The fact that Dr. Young had sent his notes to plaintiff's counsel was irrelevant because plaintiff's counsel had already agreed that those notes would be produced, provided their circulation were restricted and that the notes would be destroyed when the litigation concluded. The defendants refused to agree to those conditions. In those circumstances there was no obligation on the plaintiff's counsel to produce the fax cover sheet or the notes. Master Suganasiri ultimately ordered the conditions that the plaintiff requested to begin with.

[51] Allegations of misconduct against lawyers are serious. Courts must take those allegations seriously and investigate them closely. It is damaging to reputations of counsel to make unwarranted allegations against them. It wastes public resources when judges are forced to examine unwarranted allegations. If clients wish to raise such allegations, counsel have a responsibility to ensure they are warranted. They should not to be used lightly as tactical weapons in litigation.

[52] For the foregoing reasons I order the defendants to pay costs of $11,516.83 to the plaintiffs within 30 days.

[53] I also note that the Master ordered the defendants to pay costs of $3,500 which were payable by October 19, 2017. The defendants did not appeal the Master's order and did not raise any potential challenge to the order until they filed their factum on November 10, 2017. As a result, those costs should have been paid by October 19, 2017. I remind the defendants that court orders are meant to be complied with and have consequences when they are not.

Koehnen J.

Date: November 23, 2017