CITATION: ARUNASALAM v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 2015 ONSC 5235
COURT FILE NO.: CV-09-393666
MOTION HEARD: AUGUST 19, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Manokar Arunasalam and Panneerselvy Ganeshan

v.

State Farm Mutual Automobile Insurance Company

BEFORE: MASTER R.A. MUIR

COUNSEL: Shanti Barclay for the moving party/defendant
Michael Katzman for the responding parties/plaintiffs

REASONS FOR DECISION

[1] This motion is brought by the defendant pursuant to section 105 of *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 33 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order requiring the plaintiff Manokar Arunasalam to attend at defence orthopaedic and psychiatric examinations. The plaintiffs are opposed to the relief sought.

[2] This action arises from a motor vehicle accident on July 13, 2009. As a result of the accident, the plaintiff claims to have suffered various injuries and seeks significant damages.

[3] Mr. Arunasalam was also involved in a motor vehicle accident in 2006, which is the subject of a separate action. An order has been made for the two actions to be tried together.

[4] A pre-trial conference is scheduled for December 15, 2015. The trial of the two actions is set to begin on February 29, 2016 for a period of 30 days. The pre-trial and trial dates were established at an appearance before Justice Archibald at trial scheduling court on January 8, 2014.

[5] The central issue on this motion involves the interpretation of Rule 48.04(1) and whether the defendant requires leave to bring this motion after agreeing to a trial date when counsel appeared before Justice Archibald in January 2014. In my view, it is clear from the evidence that counsel for the defendant agreed to the fixed trial date without reserving the defendant's right to

conduct an independent medical examination of Mr. Arunasalam. In fact, it was not until March 2015 that the defendant advised the plaintiffs' lawyer of its intention to schedule two such medical examinations of Mr. Arunasalam. It is obvious from the pleadings and the plaintiffs' medical evidence that Mr. Arunasalam's alleged physical and psychological impairment are matters in issue in this proceeding. These facts were well known to the defendant before it agreed to the February 2016 trial date. Counsel for the plaintiffs did not take serious issue with the suggestion that the requested examinations would have been appropriate had the defendant made its request before agreeing to the fixed trial date. The plaintiffs' opposition to this motion is really about timing.

[6] Rule 48.04(1) provides as follows:

> 48.04 (1) Subject to subrule (3), any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

[7] Rule 48.06(1) is also relevant to the issues on this motion. It reads as follows:

> 48.06 (1) A defended action shall be placed on the appropriate trial list by the registrar sixty days after the action is set down for trial or, if the consent in writing of every party other than the party who set the action down is filed earlier, on the date of filing.

[8] The defendant did not set this action down for trial. The trial record was served and filed by the plaintiffs. However, the plaintiffs argue that by agreeing to a specific trial date at trial scheduling court, the defendant, in effect, consented to this action being placed on a trial list. The plaintiffs submit that regardless of whether or not the defendant's counsel used the word "consent" the defendant's actions at trial scheduling court amount to a deemed consent to this matter being placed on a trial list.

[9] The plaintiffs rely primarily on the decision of Justice DiTomaso in *Grainger (Litigation Guardian of) v. Grainger*, 2009 CarswellOnt 1943 (SCJ). In that case, the defendant brought a motion seeking an order bifurcating the trial on the issues of liability and damages. The defendant's lawyer had previously written to the plaintiff's lawyer suggesting that the action be placed on the spring 2009 trial sittings list in Barrie. The plaintiff's lawyer then attended trial scheduling court on May 14, 2008 at which time the matter was added to the spring 2009 jury trial sittings list. The defendant's motion was not brought until a year later and only one month before the commencement of the spring 2009 sittings.

[10] On these facts, Justice DiTomaso concluded that the defendant's conduct amounted to its consent to the action being placed on the spring 2009 Barrie trial list. Justice DiTomaso concluded that leave was required pursuant to Rule 48.04(1). See *Grainger* at paragraphs 22 and 23.

[11] The plaintiffs also rely on two recent unreported decisions of Master Dash and Master Brott. In *Rajendran v. Lalic* (4 May 2015), Toronto CV-08-366893 (ONSC - Master), Master

Dash relied on *Grainger* and held that a defendant who consented to a trial date at trial scheduling court is required to seek leave under Rule 48.04(1) in order to continue a motion for documentary production. Presumably, he concluded that consenting to a trial date is the same as consenting to an action being placed on a trial list for the purposes of Rule 48.04(1).

[12] Master Brott came to the same conclusion in *Marianayagam v. Akkad* (27 July 2015), Toronto CV-11-429230 (ONSC – Master). Master Brott also relied on *Grainger* and concluded that "by consenting to a trial date, a party is consenting to it being placed on the trial list and Rule 48.04(1) is triggered".

[13] The decision in *Grainger* and the decisions of my colleagues Master Dash and Master Brott must be contrasted with two other decisions of this court both of which were released after *Grainger*. The decision of Justice Perell in *Fromm v. Rajani*, [2009] O.J. No. 3671 (SCJ) and the decision of Justice Stinson in *Ananthamoorthy (Litigation Guardian of) v. Ellison*, 2013 ONSC 340 also deal with the issue of when leave is required under Rule 48.04(1).[1]

[14] In *Fromm*, the defendants brought a motion seeking an order that the plaintiff attend at a second defence medical examination. The parties had already attended a pre-trial conference and had previously agreed to a trial date of November 2, 2009. The request for the second defence medical was made on August 18, 2009, less than three months before the trial date. Justice Perell dismissed the defendants' motion in view of the fact that it was brought so close to trial and based on information well known to the defendants for a considerable period of time. See *Fromm* at paragraphs 11-17. However, the plaintiff in *Fromm* also opposed the motion on the basis of Rule 48.04(1). The plaintiff argued that the defendants required leave because they had completed the Toronto pre-trial and trial Certification Form and had agreed to a fixed trial date. In response to this argument Justice Perell stated as follows at paragraph 7:

> **7** In my opinion, however, rule 48.04(1) does not apply to the circumstances of the case at bar. The Defendants did not set the action down for trial, and I do not regard the fact that defence counsel completed the Certification Form as a part of the pre-trial conference process as their consenting to the action being placed on a trial list, which, of course, had already occurred. I approach this matter on the basis that the Defendants do not require leave to bring their motion and the motion should be decided on its merits.

[15] As Justice Perell correctly noted, the *Fromm* action had already been placed on a trial list. Rule 48.06(1) provides that a defended action shall be placed on the appropriate trial list by the registrar 60 days after it is set down unless all parties consent to an earlier listing for trial. The Toronto Certification Form is not issued until after the action has been placed on a trial list pursuant to Rule 48.06. When the defendants in *Fromm* completed the Certification Form and agreed to the fixed trial date, the matter had already been placed on a trial list. Similarly, this

[1] These decisions were not referred to in the parties' materials but were provided to counsel by the court prior to the argument of this motion. Both counsel were provided with an opportunity to consider these authorities and make submissions during the course of argument.

action had already been placed on a trial list when the parties appeared before Justice Archibald and agreed to the February 2016 trial date.

[16] *Ananthamoorthy* also involved a motion for an order requiring a plaintiff to attend an additional defence medical examination. The plaintiff had set the action down for trial and a completed Certification Form was filed with the court in June 2011. A trial date of February 4, 2013 was agreed to by the parties. An initial pre-trial was held on October 9, 2012 and a further pre-trial was set for early 2013. At the October 2012 pre-trial the defendants indicated an intention to seek an order permitting a further medical examination of the plaintiff. Their notice of motion was served on October 18, 2012 with a return date of January 10, 2013. The motion materials were not served until January 3, 2013. No attempt was made to obtain an early date or have the motion heard on an urgent basis.

[17] Justice Stinson dismissed the defendants' motion. He found that the defendants had not met the applicable test on a motion seeking a further medical examination. However, Justice Stinson also addressed the issue of whether leave was required pursuant to Rule 48.04(1). Justice Stinson stated as follows at paragraph 12 of *Ananthamoorthy*:

> **12** I agree with Justice Perell. The regime for setting actions down for trial today is different than it was in 1992 when *Hill v. Ortho*[2] was decided. No longer do parties file Certificates of Readiness nor are they, as they once were, deemed to have consented to an action being set down for trial. Now any party may set an action down for trial under rule 48.02(1) by serving and filing a trial record. Thereafter, the case is placed on a trial list after 60 days. Pursuant to rule 48.06(1), the 60 days may be abridged if every other party consents. The language in rule 48.04(1) that imposes a requirement for leave to bring a motion upon any party who has consented to the action being placed on a trial list is thus a reference to consent under rule 48.06(1). It should not be confused with the Toronto Region Certification Form to set pre-trial and trial dates. In the present case, only the plaintiffs set the action down. The defendants did not consent under rule 48.06(1) to placing the action on a trial list. They therefore do not require leave under rule 48.04(1) to bring this motion.

[18] Justice Stinson's decision makes it clear that the consent referred to in Rule 48.04(1) is consent to abridging the 60 day time period in Rule 48.06(1). It is not to be confused with consenting to a fixed trial date by filing a Certification Form or through the pre-trial process generally. I see no difference between a trial date fixed by completing the Certification Form and one obtained by attendance at trial scheduling court, as suggested in argument by the plaintiffs. In both cases the parties are agreeing to a trial date and communicating that agreement to the court. It is also noteworthy that the motions in *Fromm* and *Ananthamoorthy* were heard after pre-trial conferences had taken place and the court still held that no leave was required.

---

[2] [1992] O.J. No. 1740 (G.D.)

[19] I prefer the approach of Justices Perell and Stinson. In my view, the language of Rule 48.04(1) is clear and specific. It requires a party who has set an action down for trial or consented to the action being placed on a trial list to seek leave to initiate a motion or conduct further discovery. If the drafters of the Rules intended to extend that leave requirement to any party who agreed to a fixed trial date they could have easily included language that said exactly that. In my view, Justice Stinson's interpretation also makes sense from a practical point of view. If parties seek to speed up the process of listing a matter for trial by abridging the time under Rule 48.06(1) they should not be permitted to undo that time savings by bringing motions and conducting further discovery. It must be remembered that a party to an action is required to complete the Toronto Certification Form, and possibly appear at trial scheduling court, whether or not they are the party that has set the action down for trial. In my view, the Rules should not be interpreted in a manner that discourages parties from cooperating in the trial scheduling process out of a fear of losing substantive rights.

[20] In my view, the approach of Justices Perell and Stinson is also to be preferred because they were dealing with Toronto trial scheduling procedures. *Grainger* involved a Barrie action. Unlike Toronto, Barrie does not have continuous civil trial sittings or fixed trial dates. Civil trials are scheduled on the basis of running lists for limited sitting days during the year. *Grainger* is also distinguishable on its facts. The consent found by Justice DiTomaso in *Grainger* was provided by the defendant before the expiry of the 60 day time period set out in Rule 48.06(1) and appears to have been an express consent to placing the action on the spring 2009 trial sittings list in Barrie. Justice DiTomaso also made a finding of fact that the *Grainger* matter was added to the trial list when the plaintiff's lawyer appeared at trial scheduling court. See *Grainger* at paragraphs 11-13. Presumably this finding is based on the local Barrie practice.

[21] The decisions of Masters Dash and Brott are Toronto decisions but they rely on *Grainger*. Moreover, it does not appear that the decisions of this court in *Fromm* and *Ananthamoorthy* were brought to their attention when those cases were argued. However, to the extent that my colleagues were of the view that consent to a fixed trial date is synonymous with consent to an action being placed on a trial list, I must respectfully disagree.

[22] The plaintiffs also referred to my decision in *Paranitharan v. Alex Irvine Motors Ltd.*, 2011 ONSC 3104 (Master). At paragraph 6 of that decision I held that by completing the Toronto Certification Form and agreeing to a fixed trial date, the defendants had consented to that action being placed on the trial list. This decision is obviously inconsistent with my finding in this case. However, it appears that the decision of Justice Perell in *Fromm* was not brought to my attention when that motion was argued and counsel for the defendants in that case did not take issue with that finding. See *Paranitharan* at paragraph 6. More importantly, I note that my decision in *Paranitharan* was subsequently referred to by Justice Stinson in *Ananthamoorthy* and he obviously disagreed with my conclusion on that point.

[23] I have therefore concluded that the defendant does not require leave to bring this motion.

[24] I now turn to the substantive relief requested by the defendant. In my view, Mr. Arunasalam should be required to attend the medical examinations requested by the defendant. I

agree with the observations of Justice Boswell in *Kernohan v. The Corporation of the Regional Municipality of York*, 2009 CanLII 9422 (ON SC). The request for a defence medical involves an exercise of discretion and should be determined principally on the basis of trial fairness. See *Kernohan* at paragraph 22. I have also considered the principles applicable to ordering further medical examinations referred to in *Ananthamoorthy* at paragraph 16.

[25] It is clear from the pleadings and the plaintiffs' medical evidence that Mr. Arunasalam's alleged physical and psychological impairment are matters in issue in this proceeding. The plaintiffs do not dispute this fact. In my view, the requested examinations will assist the trier of fact in determining issues related to causation, the severity of Mr. Arunasalam's injuries, appropriate treatment and Mr. Arunasalam's future employment prospects.

[26] I also note that the defendant in this action has not yet had the benefit of an independent medical examination, at least for the purposes of this action. The defendant is also Mr. Arunasalam's accident benefits insurer. The defendant did have an opportunity to examine Mr. Arunasalam in that capacity. However, I accept that those examinations were not conducted for the same purposes as the examinations that are the subject of this motion. Those previous examinations were conducted for the purposes of determining whether a treatment and assessment plan should be approved, whether Mr. Arunasalam was able to engage in his usual pre-accident activities and whether Mr. Arunasalam was catastrophically impaired. I accept that there may be some overlap with the accident benefit reports and any reports generated by the requested examinations on this motion. The accident benefit reports may be helpful but they are not a substitute. It is my view that the defendant is entitled to separate examinations specifically carried out for the purpose of providing assistance to the court in this tort action. I also note that the accident benefit examinations all took place several years ago, with the most recent being October 2012.

[27] The plaintiffs intend to rely on a further physiatry report by Dr. Joseph Wong dated September 3, 2014. This report was prepared after this action was set down for trial and after the parties had agreed to a fixed trial date. The report covers much of the same ground as an earlier report by Dr. Wong delivered in 2012. However, the 2014 report does contain some new and updated information in respect of Mr. Arunasalam's condition. It is clear that his physical and psychological health is evolving over time. The plaintiffs have the benefit of this updated examination. In my view, the defendant is also entitled to a current assessment of Mr. Arunasalam's injuries and condition in the interest of a level playing field.

[28] Finally, I see no prejudice to the plaintiffs if the relief requested by the defendant is granted. The defendant made its request for these examinations on March 17, 2015, almost one year in advance of the trial date. This motion was brought promptly after the plaintiffs indicated that Mr. Arunasalam would not attend the requested examinations. If the plaintiffs had agreed to that request, the examinations would have been completed by now. The current dates for the examinations are August 27, 2015 and September 8, 2015. Reports will be available well before the pre-trial date of December 15, 2015. The trial date is not in jeopardy. I note that the plaintiffs have not suggested any hardship to Mr. Arunasalam in connection with attending the examinations. The potential prejudice to the defendant, however, would be substantial if it is

forced to go to trial without its own medical examination of Mr. Arunasalam, conducted for the purposes of this action.[3]

[29] I agree with the plaintiffs that it would have been preferable if the defendant had made its request for these examinations much sooner. The nature of Mr. Arunasalam's injuries has been known to the defendant for many years. I also acknowledge the plaintiffs' concerns about the manner in which counsel for the defendant came into possession of Dr. Wong's 2014 report. Both sides have also expressed frustration with respect to how this motion was scheduled. However, these matters do not alter my conclusions regarding the substantive issues on this motion, although they may be relevant to the issue of costs.

[30] In my view, fairness requires that an order be made compelling Mr. Arunasalam to attend the requested examinations. He shall attend to be examined by Dr. Paitich on August 27, 2015 and with Dr. Finkel on September 8, 2015.

[31] If the parties are unable to agree on the issue of costs, they shall provide the court with brief submissions in writing by September 21, 2015.

Master R.A. Muir

DATE: August 20, 2015

[3] In my view, many of these same considerations are also applicable to any determination of whether leave to initiate this motion should have been granted pursuant to Rule 48.04(1). It is far from clear that the "substantial or unexpected change" test would apply to a motion of this nature. Justice DiTomaso briefly addressed this debate in *Grainger* at paragraphs 24-27.