

ENDORSEMENT OF JUSTICE FESTERYGA DATED JULY 11, 2001

***Glover v. Pafco et al, 00-1531
and all following actions***

***Nogra v. Allstate et al, 00-474
Dick v. Ing/Halifax et al, 00-439
Dick v. Ing/Halifax et al, 01-3307
Fraser-Rolson v. Pafco et al, 00-492
Fraser-Rolson v. Pafco et al, 00-2085
Young v. Pem Bridge Ins. Co. et al, 00-1849
Young v. Burl Oak et al, 00-2682***

For the Plaintiffs: Mr. Paul Miller
For the Defendants: Mr. Ryan M. Naimark

I am the case management Judge under Rule 37.15 in the above noted matters as well as in an application 01-3852 to have Lou Ferro declared a vexatious litigant.

Motions for Summary Judgment were served by the Defendants on October 26, 2000 returnable November 9, 2000 in the following actions: 00-474, 00-2085, 00-492, 00-1531 and 00-439. In April 2001 the solicitors for the Defendants served motions for summary judgment in 00-2682, 00-1849 and 01-3307. In addition the application court file 01-3852 was served.

Requests for affidavits of documents were served with each statement of claim. The Plaintiffs have served their affidavits of documents.

By letter dated October 31, 2000 Mr. A. Spurgeon notified Defendants' counsel that he was retained by Mr. Ferro on the motions returnable November 9, 2000. He needed time to review the affidavit material, and if necessary conduct cross-examinations.

Due to the complexity of the number of motions the matters were put over and when the application 01-3852 was served in April 2001 by the Defendants, Mr. Spurgeon's office became counsel representing Mr. Ferro on the application and Mr. Miller's office was retained as counsel for Mr. Ferro, solicitor for the Plaintiffs on all summary judgment motions.

The Defendants served an affidavit of documents dated November 24, 1998 in Glover v. Pafco et al 5325/98 but not in any of the other actions although requested to do so.

The Plaintiffs have not filed responding material to-date on the motions for summary judgment, nor have they cross examined the Defendants who filed affidavits in support of the Summary Judgment motions.

The Issues before me to-day

Although the motions request the striking of the statements of defence for failing to produce affidavits of documents, counsel for the Plaintiffs is not pursuing that.

1. The main issue on the motions is the production of a complete affidavit of documents prior to the hearing of any motion for judgment.

On consent counsel also agreed/argued

2. Whether Plaintiffs' counsel is precluded from cross examining the deponents of affidavits in motion (5) served on October 2000 and returnable November 9, 2000.
3. What documents should be included in a complete affidavit of documents?

Discussion

The summary judgment motions are to dismiss the claims against the employees of various Insurance Companies amongst other things but not to dismiss against the Insurance Companies except where conspiracy is alleged.

There is no doubt that the time for delivery of an affidavit of documents by the defendants has expired per Rule 30.03(1) except in the Glover action but should I order their production before the motions for Summary Judgment are heard?

My answer to that is no because I am satisfied that the Plaintiffs are launching a "fishing expedition" on the material before me. I find the Statements of Claim are almost "boiler plate" in each action against the personal defendants. Affidavits have not been filed on behalf of the Plaintiffs. I draw the inference that the Plaintiffs did not have the information to put in these affidavits or I dare say before the Statements of Claims were issued.

Under the circumstances the affidavits of documents need not be produced before the Summary Judgment motions. I rely on the following decisions:

645952 Ont. Inc. v. Guardian Ins. Co. (1989) 69 O.R. 2d 341 P345

Bank of Montreal v. Negin (1994) O.J. No. 3159 (Gen. Div.)
(1996) 31 O.R. (3d) 321 (C.A.)

Manulife Bank of Canada v. Burly Developments (Gen. Div.) [1997] O.J. No. 3985
[1998] O.J. No. 1849
(C.A.)

with quote respect to Justice Cumming in

Cole v. Hamilton (City) 1999 45 O.R. (3d) 235

he did not appear to consider the above cases.

Laurentian Bank of Canada v. Herzog [1990] O.J. No. 3272

can be distinguished on the facts.

In any event I choose to exercise my discretion under Rule 2.03. I do not require the Defendants to serve their affidavit of documents before the hearing of the Summary Judgment motions.

There will be an Order dismissing that portion of the Plaintiffs' motions.

Cross-Examination of Deponents

The Defendants were made aware in late October 2000 the Plaintiffs' counsel intended to conduct cross examinations. Part of the blame for delay is the service of the application to declare Mr. Ferro a vexatious litigant.

In the interests of justice and to move these motions along I Order that Plaintiffs' counsel may cross-examine the various deponents in the various affidavits filed in support of the motions for Summary Judgment after they deliver their responding material. Similarly, the defendants may cross-examine any deponent on affidavits filed to oppose the motions, if so advised.

The Plaintiffs shall deliver their affidavits within 20 days of this Order. The cross-examinations shall be completed as soon as practicable.

Affidavits of Documents

In the Glover action 5325/98 the Defendants shall deliver a better affidavit. In particular they shall comply with Rule 30.03(2) and (3).

They shall also deliver affidavits of documents setting out the contents as listed in 30.03(2)(3) in all other actions.

The above affidavits shall be delivered within 20 days after the completing of the above Summary Judgment motions.

I find that it is premature to decide what particular documents ought to be provided.

Costs

The success is divided. No Order as to costs.



Signed by Justice W.J. Festeryga.

Endorsement. July 11/01

(1)

● *Grove v Pafco et al* 00-1531
and all following actions

Loggia v Allstate et al 00-474
Dick v Ing/Halifax et al 00-439
Dick v Ing/Halifax et al 01-3307
Traser-Robson v Pafco et al 00-492
Traser-Robson v Pafco et al 00-2085
Young v Penn Bridge & Ice Co et al 00-1849
Young v Real Oak et al 00-2682

For the plffs. Mr. Paul Miller
For the defts Mr. Ryan M. Naimark

Learn the case management judge under
Rule 39.15 in the above matters as well as in an
application 01-3852 to have Lou Juro declared
a vexatious litigant.

Motions for summary judgment were served by the
defts on Oct 26/00 returnable Nov 9/00 on the
following actions 00-474, 00-2085, 00-492, 00-1531
and 00-439. In April 2001 the notes for the
defts. served motions for summary judgment in 00-2682

00-1849 and 01-3307. In addition the application
case file 01-3852 was served.

A Request for affidavits of documents was
served with each statement of claim. The
plffr have served their affidavits of documents.

By letter dated Oct 31/00 Mr. A Spurgeon
notified defolt's counsel that he was retained by
Mr. Jones on the motions returnable Nov 9/00. He
needed time to review the affidavit material,
and if necessary conduct cross examinations.

Due to the complexity of the number of motions
the matter was put over and when the application
01-3852 was served in April 2001 by the defolt,
Mr. Spurgeon's office became counsel representing
Mr. Jones on the application and Mr. Hillier's

office was retained as counsel for Mr. Juro
son for the p[ar]ts in all summary judgment
motions.

The depts. served an affidavit of documents
dated Nov 24/98 in *Blower v Pafco et al* 5825/98
but not in any of the ~~the~~ other actions although
requested to do so.

The p[ar]ts have not filed responding
material to-date on the motions for summary
judgment, nor have they even examined the
deponents who filed affidavits in support of the
summary judgment motions.

The Issues before me to-day.

Although the motions request the striking of the
statements of defence for failing to produce ~~an~~
affidavits of documents, counsel for the p[ar]ts

is not pursuing that.

① The main issue on the motions is the production of a complete affidavit of documents prior to the hearing of any motion for judgment.

On cross-examination counsel also argued

② Whether pltf's counsel is precluded from cross-examining the deponents of affidavits in motions (5) served on Oct 2000 and returnable Nov 9/00.

③ What documents should be included in a complete affidavit of documents?

Discussion - The summary judgment motions are to dismiss the claims against the employees of various Insurance Companies amongst other things but not to dismiss against the Insurance Companies except where conspiracy is alleged.

There is no doubt that the time for delivery of an affidavit of due diligence has expired per Rule 30.03 (i) except in the above action but should I order their production before the motions for summary judgment are heard?

My answer to that is no because I am satisfied that the pltfr are launching a "fishing expedition" on the material before me.

I find the statements of claim are almost "boiler plate" in each action against the personal defendants. Affidavits have not been filed on behalf of the pltfr. I draw the inference that the pltfr did not have the information to put in their affidavits or I draw say before the statements of claim were issued.

Under the circumstances the affidavits of document need not be produced before the summary judgment motions. I rely on the following decisions:

645952 BNT INC v GUARDIAN INDEP
(1989) 69 OR 2d 341 P345

BANK OF MONTREAL v NORDIN
(1994) OJ NO 3159 (GEN DIV) P2
(1996) 31 OR (3d) 321 (CA.)

MANULIFE BANK OF CANADA v BURLY DEVELOPMENTS
(GEN DIV) [1997] OJ NO. 3985
[1998] O.J. NO. 1849 (C.A.)

With great respect to Justice Cummings in
COLE v HAMILTON (CITY) 1999 45 OR (3d) 235

he did not appear to consider the above cases.

LAURENTIAN BANK OF CANADA v HERZOG [1990] OJ NO
3272 can be distinguished on the facts.

In any event I chose to exercise my discretion under
Rule 2.03. ~~to~~ I do not

require the defendants to serve their

affidavits of documents before the hearing of the

Summary Judgment motions.

There will be an order dismissing that part of

the pltf's motions.

Cross Examination of deponents -

The defects were made aware in late Oct 2010 that pltf's counsel intended to conduct cross examinations. Part of the blame for delay is the server of the application to declare Mr. Jones a vexatious litigant.

In the interests of justice and to move these matters along I Order That the pltf's counsel may cross-examine the various deponents in the various affidavits filed in support of the motions. ^{or} after they deliver their resp material for summary judgments. Similarly the deflt's counsel may cross-examine any deponent on affidavits filed to oppose the motions, if so advised.

The pltf's shall deliver their affidavits within 20 days of This Order. The cross examinations shall be completed as soon as practicable.

Affidavits of Documents -

In the above action 5325/98 the defendants shall deliver a better affidavit. In particular they shall comply with Rule 30.03(2) and (3).

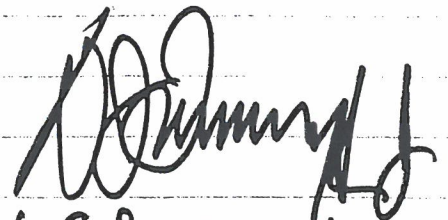
They shall also deliver affidavits of documents setting out the contents as listed in 30.03 (2)(3) in all other actions.

The above affidavits shall be delivered ^{within 20 days} after the completion of the above summary judgment motions.

I find that it is premature to decide what particular documents ought to be produced.

Certs - The success is divided.

No Order as to certs.


W.J. POSTORYKA.