CITATION: Coleman v. Neagu, 2014 ONSC 6331
COURT FILE NO.: CV-14-20924
DATE: 20141204

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Edward Coleman and Christine Banner Respondents/Plaintiffs	Jennifer Bezaire and Dina Mejalli, for the Respondents/Plaintiffs
– and –	
Paul Neagu and Elena Neagu Appellants/Defendants	Brian Murphy and Robert McGlashan, for the Appellants/Defendants
	HEARD: October 27, 2014

REASONS ON APPEAL

CAREY J.:

[1] The appellants/defendants, Paul and Elena Neagu appeal the case conference endorsement and order of Master Pope dated May 5, 2014. In that endorsement, the timetable was amended to provide for new dates for discovery, with the defendants being discovered first. Both sides were to be responsible for the costs and disbursements thrown away as a result of cancellation of the discoveries of the defendants scheduled for February 27, 2014, in Hamilton and of the plaintiffs scheduled for February 28, 2014, in Windsor. The appellants/defendants also request "the removal of communication barriers imposed by the plaintiffs' law office regarding communications with the defendant's offices existing since on or about May 2013".

[2] The appeal was heard before me on October 27, 2014 and the appellants'/defendants' argument consumed most of a full day. The Notice of Appeal cites 18 separate grounds of appeal.

[3] The respondents/plaintiffs submit that the Master's decision was correct and supported by the evidence and they disagree with many of the facts alleged in the appellants'/defendants' factum, which they characterized as argumentative, adversarial and containing allegations intended to impugn the integrity of their counsel.

The Facts

[4] The facts as found by the Master are summarized in the decision:

> Timetable was ordered on November 18/13 & counsel agreed that Defendants be examined first on February 27/14 in Hamilton followed by Plaintiffs Feb 28/14 in Windsor. Plaintiffs served a Notice of Examination. Due to a winter storm, Ms. Bezaire advised that she was unable to travel to Hamilton on Feb 27 & advised Mr. Murphy's office of same (on her way on 401). Ms. Bezaire advised Mr. Murphy's office (as he was unavailable by telephone) that she would agree to conducting Examination for Discovery of Plaintiffs the next day (as agreed per Timetable) on the condition that Mr. Murphy disclose whether he had surveillance of Plaintiffs and if so, contents. Mr. Murphy claims that he did not get this message and travelled to Windsor to do Examination for Discovery of Plaintiffs. Examination for Discovery of Plaintiffs did not proceed as Mr. Murphy refused to agree to Ms. Bezaire's condition.

[5] In her endorsement the Master ordered no costs payable by either side and provided reasons which read in part: (ED – examination for discovery; pls – plaintiffs; dfs – defendants; C.C. – Case Conference; AOD – affidavit of documents)

> [I]t is my view that by travelling to Windsor for the ED of pls on February 28, after the ED of dfs did not take place on February 27, Mr. Murphy failed to recognize pls' right to examine first (per timetable and Notice of Examination). In my view Mr. Murphy ought to have contacted Ms. Bezaire before travelling to Windsor to determine whether the ED of Plaintiffs would take place. Having stated that, I accept that Ms. Bezaire was unable to attend ED of Df due to hazardous weather conditions. I am not prepared to state she was unreasonable by not travelling the night before. What should have happened in these circumstances is that both sets of EDs should have been rescheduled such that this C.C. would not be necessary and Mr. Murphy did not have to incur expenses to come to Windsor given the Timetable. On the other hand, had Mr. Murphy confirmed to Ms. Bezaire at the Pls ED that the Defendants AOD was complete such that there was no surveillance, the ED would have proceeded on Feb 28 and the Defendant would not have incurred unnecessary costs.

Issues

[6] Commencing their oral argument, the appellants indicated that there were only three main grounds of appeal to be argued orally:

a) Their discovery plan pursuant to r. 29.1, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, "trumped" any purported timetable and the procedures on oral examination as set out in Rule 34.

b) Rule 34.15 (sanctions for default or misconduct by a person to be examined) apply to the non-attendance by the examining party's counsel on February 27 and the cancellation of the plaintiffs' discovery on February 28.

c) The learned Master erred in failing to take into account material filed at the case management conference regarding the weather conditions on February 27, 2014.

[7] The responding plaintiffs state there were two issues:

a) What is the standard of review?

b) Did the Master err such that the decision ought to be set aside?

Standard of Review

[8] The parties are agreed as to the standard of review and the test to be applied. They are in agreement that the Master's decision ought to be only interfered with if she made an error of law or exercised her discretion on wrong principles or misapprehended the evidence such that there is a palpable and overriding error: see *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131, 236 O.A.C. 76 (Div. Ct.).

[9] In my view, a high level of deference is owed to a master who, as in this situation, was a case management master and in the unique position to assess the reasonableness of the plaintiffs' cancellation of both discoveries, the history of the proceedings and the manner in which the parties had conducted themselves throughout litigation. The master sitting at Windsor is in the front line in determining matters such as this relating to examinations for discovery, undertakings and timetables.

Analysis

1. Discovery Plan

[10] The order appealed from correctly references the timetable that was in place at the time of the scheduled discoveries. The Master had the parties before her because they could not agree to a discovery plan. The defendants argue that the unsigned plan was agreed to "orally" by the plaintiffs and subsequently "rescinded" by them. However, an oral agreement does not satisfy the mandatory condition imposed in r. 29.1.04(3) that "the discovery plan shall be in writing". Even if there had been a valid discovery plan, it was clearly replaced by the timetable put in place by the Master on November 18, 2013, and, in any event, it did not deal with the order of examinations. I agree with the responding plaintiffs that r. 29.1 is to be read in conjunction with Rules 30 to 35. Rule 29.1 does not automatically supersede or "trump" r. 31.04 which provides for the order of examination for discovery.

2. Rule 35.15

[11] All the leading texts on Civil Procedure in Ontario (Archibald, McCarthy, Watson[1]) headline this section with "Sanctions for Default or Misconduct by person to be examined".

[12] The wording of the section makes it clear that "person" applies to the party being examined. I cannot understand how the section could be interpreted as to apply to a lawyer conducting the examination. Even if such sanctions were to apply, they would be uncalled for on the facts of this case. The cancellation was clearly caused by hazardous road conditions and had it been the plaintiffs' discovery that was missed it would have been clearly appropriate for it to be rescheduled on consent.

[13] The Master was correct in her finding that r. 34.15 does not apply to default or misconduct by a person conducting the impugned examination (or that person's representative). The scope of the subsection is limited to the conduct of the person being examined.

3. Failure to Consider Weather Information

[14] It is clear from the record that the Master received the weather information filed by both sides and concluded that a winter storm and hazardous road conditions prevented the plaintiffs' lawyer from travelling to Hamilton. The whole of the material including Ms. Bezaire's explanation of the events outlined in her letter to the Master, dated April 29, 2014, and her e-mail to Mr. Murphy sent at 12:11 p.m. on February 27, supported that conclusion.

[15] The Master did not need to mention that she had received and considered the material. What is clear is the fact that the Master was not swayed by either the defendants' material or argument. The defendants argued that the storm was over when the plaintiffs' lawyer cancelled the discoveries from St. Thomas, that the amount of snow that fell did not justify counsels' decision, and that counsel should have travelled to Hamilton the evening before.

[16] It is crystal clear on the facts of this case that Ms. Bezaire's cancellation of the discovery, on February 27, was the only option open to her. Mr. Murphy's reliance on his experience in Hamilton at the same time completely ignores the reality of what Ms. Bezaire encountered on the 401 highway between Windsor and London. The Master

---

[1] Todd Archibald et al., *Ontario Superior Court Practice* (Markham: LexisNexis Canada, 2008).

James J. McCarthy, W.A. Derry Millar & Jeff G. Cowman, *Ontario Annual Practice* (Toronto: Canada Law Book, 2014-2015).

Garry D. Watson & Michael McGowan, *Ontario Civil Practice* (Toronto: Carswell, 2015).

would have been well aware of the frequency of these conditions and correctly came to the only reasonable conclusion available on the facts before her. To have accepted the defendant's position that Ms. Bezaire should have travelled the night before or somehow soldiered on in the hazardous road conditions would have involved the Master imposing on plaintiffs' counsel an unreasonable expectation.

[17] It is clear on the record that Ms. Bezaire took every conceivable step to communicate both her decision to cancel the discovery and her position that the defendants' discovery could proceed on February 28 if there was no change in the defendants' affidavit of documents ("AOD") regarding the existence of surveillance. The Master correctly considered in her conclusion that the parties had agreed to the defendants being examined first and the simple confirmation by Mr. Murphy that "the AOD was complete" was a perfectly reasonable condition for the plaintiffs to request before giving up that right. The record before the Master justifies her conclusions. It also reveals Ms. Bezaire as acting professionally and with courtesy in attempting to salvage the February 28 discovery of the plaintiffs in Windsor. The Master's conclusion on what should have happened (rescheduling of both examinations) was correct and supported by the material. Her conclusion that Mr. Murphy was at fault for failing to recognise the plaintiffs' right to examine first, pursuant to the timetable, was also correct, based on the law. Her conclusion that Mr. Murphy should have contacted Ms. Bezaire before travelling to Windsor was not only available to her but the only logical conclusion on the facts before her. It is inconceivable that Mr. Murphy would not, if somehow unaware from information received from the Examiner's office, his own office, or Ms. Bezaire's communications that the examination were cancelled, contact Ms. Bezaire's office to find out why she had not appeared, and whether the plaintiffs' examination could still take place. The position taken on this appeal that Mr. Murphy was not in contact with his office for approximately 24 hours and was confronted with "communication barriers" from the plaintiffs' law firm was implausible and contrary to ordinary legal practice and properly rejected by the Master.

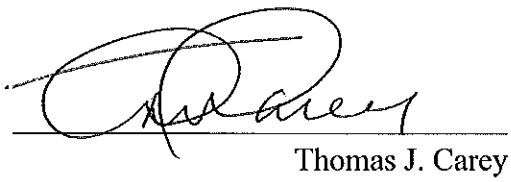
[18] The material filed on this appeal, including correspondence between counsel and the transcripts of the aborted February 28 discovery reveal a level of intractability, discourtesy and bullying behaviour on the part of the defendants' counsel, Mr. Murphy, which is completely unacceptable and contrary to the standards of civility expected by the Law Society and the courts of this province. The Master had a full opportunity to assess the circumstances and reasonableness of the parties' counsel and their positions. Had the Master ordered costs against the defendants for what she found was an unnecessary case conference, she would have been perfectly justified.

[19] The appeal is dismissed. The two certificates of non-attendance are vacated. Examinations are to proceed expeditiously.

[20] I have received written submissions as to costs from both parties. In view of the facts found by the Master and on this appeal the plaintiffs have established a case that they be awarded costs on a substantial indemnity basis. This appeal was absolutely without merit and vexatious. There was no novel point of law at play on the facts of this case. The defendants made unfounded and unnecessary attacks on plaintiffs' counsel's integrity.

The plaintiffs have satisfied me that the effect, if not the intent of such tactics, has been to delay and lengthen the litigation in what is otherwise a straightforward case.

[21] Based on the foregoing and the principles enunciated in *Boucher v. Public Accountants Counsel for the Province of Ontario* (2004), 71 O.R. (3d) 291, 188 O.A.C. 201 (ONCA) by the Ontario Court of Appeal that elevate access to justice as the primary consideration in assessing costs, I fix costs of the appeal at $10,000 inclusive of disbursements, plus HST, payable by the defendants forthwith.



Thomas J. Carey
Justice

Released: December 4, 2014

CITATION: Coleman v. Neagu, 2014 ONSC 6331

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Edward Coleman and Christine Banner

Respondents/Plaintiffs

– and –

Paul Neagu and Elena Neagu

Appellants/Defendants

REASONS ON APPEAL

Carey J.

Released: December 4, 2014