CITATION: Enertec Engineering v. eNature Greenhouses Inc., 2025 ONSC 2100
COURT FILE NO.: CV-21-00060278-0000
DATE: 20250403

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
1546866 ONTARIO INC., carrying on business as ENERTEC ENGINEERING	)	Paul Starkman, for the Plaintiff
	)	
Plaintiff/Responding Party (motion)	)	
	)	
- and -	)	
	)	
ENATURE GREENHOUSES INC.	)	No one appearing on motion
	)	
Defendant	)	
	)	
WESTBROOK GREENHOUSE SYSTEMS LTD.	)	Peter Mahoney, for the Non-Party
	)	
Non-Party/Moving Party (motion)	)	
	)	**HEARD:** December 20, 2024

REASONS FOR DECISION

LATIMER J.

[1] This motion turns on the legal definition of a mistake.

[2] The mistake in question was made in the context of two separate business relationships. The moving party on this motion, Westbrook Greenhouse Systems ("Westbrook"), had business dealings with eNature Greenhouses Inc. ("eNature"), who are currently being sued by Enertec Engineering ("Enertec") for breaching an agreement from 2018. As part of their litigation with eNature, Enertec brought a motion in 2022 seeking production of, *inter alia*, Westbrook's complete file relating to its dealings with eNature. This production was sought because Enertec believes that Westbrook, by virtue of its business dealings with eNature, came into possession of confidential Enertec documentation. Westbrook did not respond to the motion or attend the hearing, and a significant amount of material was ordered produced on an unopposed basis.

[3] Enertec, through its counsel, took reasonable steps to inform Westbrook of the fact of the order and its need to comply. Westbrook's President, Ray Bryer, received these correspondences but continued to give the matter limited attention, and therefore continued to fail to appreciate the scope of the judicial order made against his company until later in 2023, when a contempt motion for non-compliance caught his attention and caused him to finally refer the matter to his lawyer, following which the present motion for variance was brought. In it, Westbrook seeks to set aside the relevant portion of the existing order and participate in a re-hearing of the production issue.

[4] For the reasons that follow, while Mr. Bryer's distracted approach to this motion has complicated these proceedings and added to their length and financial cost, I nonetheless grant the motion as I am satisfied that what occurred was the type of mistake caught by Rule 37.14(1)(b) of the *Rules of Civil Procedure*.

I. The relevant evidentiary record

[5] Westbrook is a company that designs and manufactures greenhouses and greenhouse heating systems. Enertec also designs greenhouse heating systems.

The legal action that this motion flows out of relates to a claim by Enertec that eNature breached an agreement regarding the provision of services for a proposed greenhouse project in Carlisle, Ontario. It is alleged that eNature improperly shared confidential Enertec information to third parties – such as Westbrook – in violation of the agreement.

[6] As a step in that litigation, Enertec sought to compel production from Westbrook of "its files" involving eNature. Ray Bryer, Westbrook's President[1], received the motion record and reviewed its contents. The following timeline occurred:

> 1) **March 20, 2022** – Bryer receives motion record, upon a review he determines in his own mind that all that is being sought are plans Westbrook had provided to the City of Hamilton in relation to their eNature project. As a result of that erroneous belief, he did not pass the material on to his lawyers, nor did he take any further immediate action.
>
> Mr. Bryer's attention to this material involving eNature was diminished because, by March 2022, the Westbrook/eNature business relationship had deteriorated and Mr. Bryer was "not inclined to assist" eNature in litigation in the circumstances.
>
> 2) **July 14, 2022** – counsel for Enertec provides Bryer with Justice Standryk's order, focusing on paragraph 13(b) (reproduced below). Bryer continues to misread the language, believing that all that is required is documentation filed with the City of Hamilton. He does not respond to the letter.
>
> > "IDM (2005) Consultants Inc. and Westbrook Greenhouse Systems shall deliver their files to the plaintiff including without limitation all contracts, proposals, estimates, communications with the defendants and applications, documents and drawings filed by them with the City of Hamilton related to engineering services provided to the defendant with respect to a heating system for greenhouses at the Property."

[1] Mr. Bryer's status as President was questioned by Enertec because his name does not appear on corporate filings with the government. For present purposes, I am satisfied he was at least acting as President in 2022, in the sense that he had authority to act for Westbrook in that role. I need go no further in the present circumstances.

3) **August 24, 2022** – counsel for Enertec writes again, asking for a response to his July correspondence. Bryer replies by reviewing the file and finding one document potentially involving the City of Hamilton, and included it in a September 7, 2022, responding letter. The letter begins with the statement, “Westbrook Greenhouse Systems has not filed any applications, documents nor drawings with the City of Hamilton relating to engineering services for greenhouses at the Property”.

4) **June 2, 2023** – no further correspondence occurred, and on this date Westbrook was served with a motion record seeking a finding that Westbrook was in contempt of Standryk J’s order. At this point, Bryer makes the decision to consult counsel.

[7] A series of court appearances followed, culminating in the setting of the present motion.

[8] I am satisfied that two key facts have been established on this motion. First, Bryer genuinely misread the language in the motion material that subsequently made its way into paragraph 13(b) of Standryk J’s order. The key omission was his comprehension of “without limitation”. While the order contained specifying language regarding municipal filings, it nevertheless also required production of Westbrook’s files regarding this greenhouse project “without limitation”. Bryer mistakenly believed he only needed to comply with the specific language, not the broader demand for all files in Westbrook’s possession. His state of mind is evinced by his September 7, 2022, letter, where he explains his understanding that what was required for production were materials filed with the municipal authority.

[9] Second, and relatedly, I find that Bryer bears some personal responsibility for this mistake. After the falling-out between eNature and Westbrook, Bryer was not inclined to dedicate much cognitive energy to a proceeding which was connected to that prior relationship. The motion material required greater attention than it received as, on three occasions in 2022, Bryer simply gave the material a quick review and moved on. It was this cursory attention, and failure to engage

his legal counsel sooner, that caused him to fail to appreciate the scope of the order and set this matter on its current litigation path.

II. Rule 37.14 of the *Rules of Civil Procedure*

[10] Rule 37.14 reads:

> SETTING ASIDE, VARYING OR AMENDING ORDERS
> Motion to Set Aside or Vary - A party or other person who,
> (a) is affected by an order obtained on motion without notice;
> (b) fails to appear on a motion through accident, mistake or insufficient notice; or
> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, …
>
> (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[11] In the present case, Westbrook received notice but its agent, Bryer, did not sufficiently appreciate the significance of what was being sought. To succeed on this motion, Westbrook must demonstrate that Bryer's conduct amounted to a "mistake".

III. Analysis

[12] The parties have provided helpful submissions and authorities for me to consider on this issue. I am particularly aided by Justice Strathy's decision in *Ontario (Attorney General) v 15 Johnswood Crescent*, [2009] OJ No. 3971 (SCJ). Strathy J (as he then was) helpfully discusses the purpose of Rule 37.14(1)(b) and the non-exhaustive considerations on a motion to vary:

> …The purpose of Rule 37.14(1)(b) is to prevent unfairness or, worse, a miscarriage of justice, where a party's inadvertence or the absence of sufficient notice has resulted in an order being obtained without that party being afforded an opportunity to present his or her case. A party who does not appear in these circumstances will usually be given a chance to present evidence and to argue the

> motion on its merits, assuming he or she moves promptly and provided there are no countervailing considerations.
>
> … the rule is simply intended to give a party an opportunity to litigate a matter that was, through inadvertence, never dealt with by the court as a true *lis*. (paras. 39-30)

[13] As stated earlier, I am satisfied the error in this case arose from an honest mistake on Bryer's part, but one for which he bears some responsibility because of his inattentive approach to Enertec's motion and the subsequent Standryk J order. I do not understand, however, this inattention to be a relevant factor for r. 37.14(1)(b) purposes. In *Picov v. Generac Power Systems Inc.*, [2020] OJ No. 537 (SCJ), Dawe J (as he then was) was satisfied that an "accident or mistake" occurred when the moving party misread a series of communications and, as a result, did not appreciate what was being sought at a future court appearance. Dawe J found that, "[t]o the extent that blame for the communication is relevant, I am satisfied that the fault lies primarily with [the moving party] for not reading his emails more carefully" (para. 39).

[14] Notwithstanding this finding, Dawe J still concluded that the circumstances – an honest mistake founded on the moving party's inattention to detail – qualified as an "accident" or "mistake", as "treating a party's or counsel's inadvertence as the equivalent of a deliberate decision not to participate in the proceedings would run counter to [Strathy J's articulation of the purpose of Rule 37.14(1)(b)]" (para. 42).

[15] Returning to Strathy J's decision in *15 Johnswood Crescent*, His Honour set out several factors to consider. I will consider those factors in turn.

(1) Proof of accident or mistake

[16] As already stated, I am satisfied Bryer's error qualifies as a mistake.

(2) The party must move "forthwith"

[17] Following his realization that he had misread the motion material and subsequent order, Bryer consulted with counsel and the matter progressed forthwith. While there has been a significant passage of time since that event (June 2, 2023), the fault for any delay does not reside with either side of the litigation.

(3) Length of delay and reasons for it

[18] Again, on the record before me I am satisfied that, upon realizing their error, Westbrook moved reasonably to address it with Enertec and, later, the court.

(4) Presence or absence of prejudice

[19] As articulated during submissions, the core prejudice to Enertec in this case is economic – specifically the cost of re-litigation. In my view, this prejudice can be addressed during a determination of costs at the end of this ruling.

[20] With regard to Westbrook, I am satisfied the existing order compels production of a significant amount of confidential information to a competitor in the marketplace. The significance and scope of the order is a factor that, while not determinative, is highly relevant and supports Westbrook's position that they should be heard prior to the judicial issuance of such an order.

(5) The underlying merits of the moving party's case

[21] While I have not heard anything approaching full submissions on this issue, I am satisfied that Westbrook has, at least, an arguable case regarding why an order of this scope has not been justified on the existing evidentiary record.

[22] Overall, in my view it is just to vary the existing order and permit re-litigation with submissions from both relevant sides. Westbrook has met their onus on this motion.

IV. DISPOSITION

[23] I hereby order that paragraph 13(b) of the Order of Justice Standryk, dated July 4, 2022, is set aside.

[24] Regarding costs, as the successful party Westbrook would normally be entitled to costs. However, as expressed during submissions, in my view costs are a vehicle through which I can address two separate aspects of this proceeding. First, Enertec has suffered a financial expense (the cost of the 2022 motion, as it related to Westbrook) because of Westbrook's error. Second, Westbrook is only successful on this motion because they have been able to demonstrate that their agent, Bryer, failed to properly assess motion material that had been properly served, and later failed to properly scrutinize the judicial order provided to him by Enertec. In the circumstances, despite Westbrook being the successful party, I exercise my discretion and decline to order costs for this motion: *Courts of Justice Act*, RSO 1990, c. C.43, s. 131(1).

Latimer, J

Released: April 3, 2025

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B E T W E E N:

1546866 ONTARIO INC, carrying on business as ENERTEC ENGINEERING

Plaintiff

- and -

ENATURE GREENHOUSES INC.

Defendant

WESTBROOK GREENHOUSE SYSTEMS LTD.

Non-Party

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