CITATION: Khana v. Holzel et al., 2025 ONSC 3515
COURT FILE NO.: CV-22-79866
DATE: 2025-06-24

2025 ONSC 3515 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
VINEET KHANNA	S. Ahmad, Counsel for the Applicant
Applicant	
- and -	
HENDRIK WILHELM HOLZEL, AND LEONIE JACOBA HOLZEL, by her Litigation Guardian, HENDRIK WILHELM HOLZEL	S. Bilato, Counsel for the Respondents
Respondents	
	HEARD: May 29 and 30, 2024

RULING ON APPLICANT'S MOTION RESPECTING RESPONDENTS' FAILURE TO DISCLOSE MARY-CARTER AGREEMENT (DELIVERED ORALLY ON MAY 30, 2024)

The Honourable Justice M. Valente

[1] The Applicant brings a motion to stay the defence of the Respondents on the basis that the Respondents failed to disclose a Mary-Carter type agreement. The Applicant

submits the alleged failed disclosure constitutes an abuse of the court's powers and the only appropriate remedy is a stay of the defence.

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The Facts

[2] A brief summary of the facts is necessary to put the matter into context. Those facts are as follows:

1. On December 5, 2019, the Respondents entered into an agreement of purchase and sale to sell 563 Shaver Road, Ancaster for a purchase price of $2,000,000 to 2567649 Ontario Inc., a corporation of which Hamid Hakimi was a director.

2. On January 14, 2021 the Respondents entered into a second agreement of purchase and sale with the Applicant to sell the same Shaver Road property for consideration in the amount of $1,985,000.

3. Because the Respondents never completed their agreement to sell the Shaver Road property to 2567649 Ontario Inc., on June 4, 2021, 2567649 Ontario Inc. issued a statement of claim seeking specific performance of the agreement together with related relief, and several days later registered a certificate of pending litigation against the Shaver Road property (collectively, the '2567 Litigation').

4. In the meantime, the Respondents did not complete their agreement to sell the Shaver Road property to the Applicant but instead on September 28, 2021 they transferred title of the property to 563 Shaver Holdings Inc., another corporation of which Mr. Hakimi was a director. The consideration for the conveyance as recorded in the registered transfer was $1,720,000.

5. On October 12, 2022 the Applicant issued the notice of application in this proceeding naming Hendrik Holzel and his spouse, Leonie Jacoba Holzel as Respondents.

6. Pursuant to Minutes of Settlement, dated April 24 and 27, 2023, the 2567 Litigation was resolved. The Minutes of Settlement provide, in part, that 2567 shall pay the legal fees and disbursements of the Respondents in both this proceeding and a related proceeding commenced by the Respondents' real estate agents. According to the Minutes, 2567 shall appoint the Respondents' defence counsel. The Minutes further provide the usual boiler plate provision that the parties will execute and deliver any documents necessary to give effect to the parties' agreement. The Minutes do not address in any other way the application before me.

7. Because the Respondent, Leonie Holzel is a party under a disability, the Minutes required Court approval. On August 14, 2023 counsel for 2567 provided Applicant's counsel with the motion record seeking Court

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approval of the Minutes. The motion record includes the Minutes of Settlement in their entirety. On August 18, 2023, counsel to 2567 delivered to Applicant's counsel the Order of Justice Goodman dated August 15, 2023 approving the Minutes.

It is the position of the Applicant that his counsel did not learn of the terms of the Minutes of Settlement until counsel reviewed the 2567 Litigation Court file on May 22, 2024 following a pretrial in this matter. I reject this proposition and find as a fact that the Applicant was aware of the terms of the Minutes on or about August 14, 2023.

8. On September 12, 2023, the Respondents admitted liability and as a result, the only issue to be determined is that of damages attributable to the breach.

9. On October 2, 2023, the Respondents delivered their response to the Applicant's claims in this proceeding.

Analysis

[3] The law has been well settled since at least 1993 that Mary-Carter type agreements must be disclosed to other parties to the lawsuit and to the court as soon as the agreement is made (see: *Petty v. Avic Car Inc.* (1993) 13 OR 3d 725 *('Petty')*).

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[4] A typical *Mary Carter* agreement contains the following features: (i) the contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is “capped” at that amount; (ii) the contracting defendant remains in the lawsuit; (iii) the contracting defendant’s liability is decreased in direct proportion to the increase in the non-contracting defendant’s liability(see: *Pettey,* at para. 732; *Moore v. Bertuzzi*, 2012 ONSC 3248 110 O.R. (3d) 611 (Ont. S.C.J.), at para. 67).

[5] The seminal decision of the Court of Appeal in *Handley Estate v. DTE Industries Limited,* 2018 ONCA 324 (*‘Handley Estate’)*, makes clear, however, that:

> The obligation of immediate disclosure is not limited to pure *Mary Carter* or *Pierringer* agreements. The disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one: *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99 (Ont. S.C.J.), at para. 23. To maintain the fairness of the litigation process, the court needs to “know the reality of the adversity between the parties” and whether an agreement changes “the dynamics of the litigation” or the “adversarial orientation”: *Moore v. Bertuzzi*, 2012 ONSC 3248, 110 O.R. 611 (Ont. S.C.J.), at paras. 75-79. (at para. 39)

[6] The rational for the obligation to disclose a Mary-Carter type agreement was explained in some detail by the Court of Appeal in its earlier decision of *Laudon v. Roberts* 2009 ONCA 383 where at para. 39 the Court stated:

> The existence of a [*Mary Carter* agreement] significantly alters the relationship among the parties to the litigation. Usually the position of the parties will have changed from those set out in their pleadings. It is for this reason that the existence of such an agreement is to be disclosed, as soon as it is concluded, to the court and to the other parties to the litigation. This reason for this is well stated in [*Pettey*, at paras. 737-738]:

> The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The *non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them*. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. *Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interest of fairness and justice to all parties*.

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[7] The Applicant relies on a number of decisions in addition to *Pettey* and *Handley Estate* to support his position that the Minutes of Settlement are a Mary-Carter type agreement and should have been disclosed on or about April 27, 2023. These decisions include *Aecon Buildings v. City of Brampton* 2010 ONCA 898, *Hamilton Wentworth v. Zizek* 2022 ONCA 638, *Crestwood Preparatory College Inc. v. Smith* 2022 ONCA 743(‘*Crestwood’)* and *Fleming v. Brown* 2017 ONSC 1430 (‘*Fleming*’), all of which I have considered.

[8] In particular, the Applicant relies upon the 2022 decision of the Court of Appeal in *Crestwood* for the principle that the court is not limited to an examination of the pleadings in order to determine whether the settlement agreement significantly altered the adversarial relationship among the parties (at para. 45).

[9] I accept without reservation all of the authorities upon which the Applicant relies. However, in my view the facts of this case are clearly distinguishable from the facts considered by this court and the Court of Appeal in the decisions cited by the Applicant. In all of the decisions but for one, the agreement to be disclosed was an agreement struck

between certain of the parties to the lawsuit to the exclusion of one or more of the other parties. Only an agreement between some of the parties to the litigation will have the potential consequence of changing the adversarial position of certain parties to one of co-operation and thereby change the litigation landscape and impact the litigation strategy, the evidence to be led and the questions to be asked on cross-examination.

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[10] In the case before me, there is no agreement between the parties to the application. The Applicant had the option of joining 2567 and its director, Mr. Hakimi, but he chose not to do so for his own strategic reasons.

[11] Admittedly the decision of this Court in *Fleming* required the production of an agreement between a party to the litigation and a non-party, but in that case the agreement at issue was a policy of adverse cost insurance, the disclosure of which is mandated by Rule 30.02(3) of the *Rules of Civil Procedure*.

[12] Accordingly, I find that the Minutes of Settlement are not a Mary-Carter type agreement which has the effect of changing the adversarial position of the parties, and for that reason, they need not to have been disclosed immediately upon their being struck.

[13] Apart from whether the Respondents had any obligation to disclose the Minutes to the Applicant, I have considered whether the delayed disclosure of some four months prejudiced the Applicant and because of that prejudice, the Applicant is entitled to a remedy. I find that the Applicant has not been prejudiced. Between the time the Minutes

were signed and their disclosure, no substantive procedural steps were taken in the application.

[14] Additionally, the there is no evidence to suggest that the Applicant's failed strategy of aggressively litigating the matter in anticipation of the Respondents settling is as a result of the delayed disclosure of the Minutes.

[15] Accordingly, the Applicant's motion is dismissed. I will hear counsel's submissions with respect to costs.

Justice M. Valente

Released: June 24, 2025

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VINEET KHANA

Plaintiff

- and –

HENDRIK WILHELM HOLZEL, AND LEONIE JACOBA HOLZEL, by her Litigation Guardian, HENDRIK WILHELM HOLZEL

Defendants

RULING ON MOTION

Justice Valente

Released: June 24, 2025