

CITATION: Dunning v. Colliers Macaulay Nicolls, 2023 ONSC 7115
COURT FILE NO.: CV-18-00600000-0000
DATE: 2023-12-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DUNNING v. COLLIERS MACAULAY NICOLLS INC. et al

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: August 15, 2023 (by videoconference)

COUNSEL: R. Macdonald, for the defendants/moving parties

Amanda Dunning, plaintiff/responding party, appearing on her own behalf

ENDORSEMENT

[1] This is a motion by the defendants seeking an order under Rule 24.1.05 exempting this action from mandatory mediation. At the return of the motion, I granted the relief requested by the defendants with reasons to follow by way of endorsement. These are those reasons.

[2] The purpose of mandatory mediation, which is codified in Rule 24.1.01, is “to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.” An order exempting an action from mandatory mediation is discretionary. In, *O. (G.) v. H. (C.D.)*, 2000 CanLII 22691 (ON SC), Justice Kitley listed following criteria that are relevant to whether an exemption order should be granted:

-- whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost and delay, they ought not to be required to repeat the effort;

-- whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases;

-- whether the issue involves a claim of a modest amount with little complexity which is amenable to a settlement conference presided over by a judicial officer without examination for discovery;

-- whether one of the litigants is out of the province and not readily available;

-- whether the exemption for any other reason would be consistent with the stated objectives of reducing cost and delay in litigation and facilitating early and fair resolution.

[3] The defendants' position on this motion is that given the vexatious course of conduct of the plaintiff in this action and related litigation, meaningful mediation with the plaintiff is not possible and requiring the parties to mediate in this case would be inconsistent with the stated objectives. The defendants point out that in two decisions in this action and in three decisions in a related action by the plaintiff against Intercity Realty, this court has held that the plaintiff's proceedings and/or conduct are scandalous, frivolous, vexatious or an abuse of process. Most recently, on January 3, 2023, Justice Centa engaged Rule 2.1 and dismissed the plaintiff's appeal on the basis that the appeal was frivolous and vexatious. Justice Centa further made an order under Rule 37.16 barring Ms. Dunning from bringing further motions in this proceeding without leave.

[4] The parties have already made preliminary attempts at mediation in this action, but those efforts were thwarted by the plaintiff's own conduct. In August 2021, the plaintiff asked that the court appoint a mediator for this proceeding and the court appointed Carol Takahashi. The plaintiff's correspondence with Takahashi following the appointment was abusive and inflammatory. The plaintiff, without foundation, accused Takahashi of having secret conversations with defence counsel and of giving the defendant special treatment. In an email to Takahashi, the plaintiff stated that she was very disappointed in Takahashi and that Takahashi had "no backbone". In the most troubling email from the plaintiff to Takahashi, she attacks Takahashi's ethnicity and her qualifications as a mediator:

“Carol:

see all attachments.

Your last name is japanese? that means you're from a collectivistic culture and have a tendency to go with the herd naturally and NOT speak up. I think that this profession is not for you, in the alternative perhaps your sitting back and saying and doing nothing because that has been the private mandate handed to you by the court because of the lies by Robert [defendants' counsel].

...

Carol, any time you want to jump in and provide that value for the dollar of your services to which I am NOT impressed with or your not even trying to do anything at all, please.

...

You are respectfully ill suited to this role Carol, I don't even have training in mediation, i do have crisis line counselling certification and bereavement certification and I could have swiftly done a far better job with this than you. Where is your professional standard?”

[5] On September 7, 2021, two days after receiving the email from the plaintiff excerpted above, Takahashi wrote to the parties advising that in her view the matter was “not suitable for mediation”. Takahashi referred the matter back to the Toronto Mandatory Mediation office at the court. Takahashi recommended to the parties that “a Consent Order to dispense with the Mediation is likely the best course of action.”

[6] I agree with the assessment of the court appointed mediator. A successful mediation requires that all parties come to the table willing to negotiate in good faith to attempt to settle the dispute. On the record before me, I find that the plaintiff has no interest or intention of engaging in such a process. The plaintiff has no expectation that mediation would result in a settlement. In her 2,700-page mediation brief the plaintiff takes the view that “the issues are too large and too numerous and will not be resolved via this Mediation.”

[7] I also agree with the defendants that the plaintiff’s primary, if not only, objective in pursuing mediation and opposing this motion is to prolong this lawsuit and increase the defendants’ legal costs. The plaintiff has not demonstrated any interest in mediation as a mechanism for settlement. In the circumstances, I find that this is one of those rare instances where compelling the parties to engage in mediation will only delay the fair resolution of the litigation, unnecessarily increasing costs to all parties. Accordingly, the exemption of this action from mandatory mediation is consistent with the stated objectives in Rule 24.1.01. The defendants’ motion is therefore granted.

[8] As the defendants were entirely successful on the motion, they should have their costs. The defendants seek costs on the substantial indemnity scale. I find that the plaintiff engaged in reprehensible conduct in her interactions with the court-appointed mediator. I also find that in opposing the exemption from mandatory mediation absent any *bona fide* intention to mediate this dispute the plaintiff has engaged in an abuse of the court’s process. The plaintiff’s conduct in my view is sufficiently egregious to be deserving of the sanction of enhanced costs. The defendants shall have their costs of the motion on the substantial indemnity scale, fixed at \$5,086.08 based on the Costs Outline filed, which I find to be reasonable.

[9] Order to go as digitally amended and signed by me.

D. Michael Brown, Associate Judge

DATE: December 15, 2023