

CITATION: Schulz v. S.A. Armstrong Ltd, 2023 ONSC 2246
COURT FILE NO.: CV- 21-00666879-0000
DATE: 2023-04-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SCHULZ v. S.A. ARMSTRONG LIMITED
BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN
HEARD: December 6, 2022 (by videoconference)
COUNSEL: N. Halum Arauz, for the Plaintiff
A. McCreary, for the Defendant

ENDORSEMENT

Background

[1] The Defendant in this wrongful dismissal action is a privately held Toronto-based company with employees throughout the world. It is in the business of providing design solutions for fluid flow in building services and industrial applications. The Defendant describes its business as extremely competitive and has filed an affidavit giving an example of tactics employed by one of the Defendant's competitors aimed specifically at eliminating the Defendant from the market. The Plaintiff was a senior employee of the Defendant who was part of the leadership team and reported directly to the CEO.

[2] Prior to serving its own affidavit of documents, the Defendant raised an issue regarding the confidentiality of certain of the documents included in the Plaintiff's affidavit of documents and of certain of the documents the Defendant intended to include in its own productions. Specifically, the Defendant was concerned with the potential harm to the Defendant's business that might result if these documents were to be disclosed in the public record and available to its competitors.

[3] The confidentiality issue first came before me on a case conference convened by the Plaintiff on May 11, 2022, seeking to set a timetable for the completion of documentary and oral discoveries. At that time, the Defendant had proposed a confidentiality agreement to address its concerns. The plaintiff had rejected the proposed confidentiality agreement on the basis that the defendant is protected by the deemed undertaking rule and the plaintiff's is not obligated to agree to any confidentiality protections that go beyond that. At the case conference, I ordered that the parties were to use best efforts to come to an agreement on the confidentiality issue. I further

ordered that, in the meantime, the Defendant could serve an affidavit of documents that (temporarily) redacted or excluded documents by reason of its confidentiality concerns. If the parties were unable to agree on a resolution to the confidentiality issue, they would reattend before me on June 20, 2022 to discuss steps for resolving the issue, including on a contested basis if needed.

[4] The Defendant delivered its affidavit of documents on June 1, 2022. More than 50 of the 66 documents produced in the Defendant's affidavit of documents were redacted for confidentiality, some heavily so. The parties' further efforts at resolving the confidentiality issue were unsuccessful. The key protection sought by the Defendant has been consistently rejected by the Plaintiff. In particular, the Plaintiff has refused to agree to provide notice to the Defendant prior to filing confidential materials with the court to allow the Defendant to seek a sealing order with respect to that specific material.

[5] As a result of the parties' failure to resolve the confidentiality issue, there are now two motions before me: a motion by the Plaintiff under Rule 30.06 of the *Rules of Civil Procedure* for a further and better affidavit of documents from the Defendant and for the imposition of a litigation timetable, and a cross-motion by the Defendant seeking a sealing order under section 137(2) of the *Courts of Justice Act* or, in the alternative, an order requiring the Plaintiff to provide notice to the defendant before filing any materials in the public court record.

[6] On his motion, the Plaintiff seeks a further and better affidavit of documents from the Defendant that includes unredacted copies of all the redacted documents that were included in the Defendant's June 1, 2022 affidavit of documents plus certain other categories of documents demanded by the Plaintiff in correspondence exchanged with the defendant in June 2022 and listed in Exhibit I to the law clerk's affidavit filed by the Plaintiff. The Defendant has filed no evidence or factum in response to the Plaintiff's motion. Except for 2 categories of documents listed in Exhibit I, the defendant does not oppose the Plaintiff's additional document production request.

[7] With respect to the redacted documents in its affidavit of documents, the Defendant maintains the same position it did before me at the case conference in June 2022. The Defendant does not oppose producing unredacted versions of these documents if its confidentiality concerns are addressed. In that regard, the Defendant takes the position that the Plaintiff's motion is premature and should not have been brought until after the Defendant's cross-motion had been heard and determined. While I do not agree that the Plaintiff's motion is premature, I will consider the Defendant's cross-motion first as my determination on that motion may result in the Plaintiff's motion becoming largely unopposed.

The Defendant's Motion

[8] In my view, the Defendant's request for a sealing order is premature. A sealing order under s. 137(2) applies, by definition, to documents that have been "filed" with the court. None of the documents over which the Defendant now seeks a sealing order have yet been filed in court and it is unknown at present whether any of these documents will ever be filed. The Defendant has not provided me, nor am I aware of, any authority for granting a sealing order over documents produced on discovery which have not been filed in court. In fact, in the *Hallstone* and *Prudential*

cases relied on by the Defendant in support of the requested alternative relief (as discussed below), the court found that it was not appropriate to grant a sealing order over unfiled discovery documents.

[9] Justice Lederman of this court heard an appeal of a Master’s sealing order granted over unfiled discovery documents in *Hallstone Products Ltd. v. Canada Customs and Revenue Agency*, 82 O.R. (3d) 368. In that case the plaintiff had sought and obtained a sealing order over discovery productions and transcripts due to the risk that those documents *might* be filed on a future motion in the proceeding. In overturning the Master Dash’s sealing order, Justice Lederman held, at para 34:

However, it is pure speculation at the moment that any such motion will, in fact, be brought thereby creating risk of public exposure. Until such time, there is no specific context in which to assess the extent of the risk faced by Stucky [the plaintiff].

[10] The determination of the Defendant’s sealing order request would amount to a significant waste of this court’s time and resources. It would require a lengthy analysis and application of the test for granting such orders recently affirmed by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, all in relation to documents that may never be filed on the court record and may never require the protection of a sealing order. The Defendant’s request for a sealing order is therefore denied.

[11] In the alternative to a sealing order, the Defendant seeks “an order that the plaintiff provide to the defendant 30 days’ notice in advance of filing any materials with this court in the within action, so as to allow the defendant to seek an order pursuant to s. 137(2) of the Courts of Justice Act, if deemed necessary.” The alternative relief requested by the Defendant does not raise the same prematurity concerns. Indeed, the proposed alternative relief specifically contemplates that a sealing order will only be sought in relation to materials that the plaintiff intends to file with the court.

[12] The alternative relief requested also aligns with the ultimate determination in *Hallstone*. In overturning the sealing order, Justice Lederman held that the risk of public disclosure in a future motion could be addressed by way of prior notice:

Steps can be taken to ensure that if such a motion is, in fact, brought, Stucky would have an opportunity to assert his position that he requires a sealing order. Protection can be afforded by requiring the appellants, in conjunction with the bringing of a possible pre-trial motion, that they provide at least seven days notice of their intention to file discovery material in connection with such motion. That will afford Stucky an opportunity to re-assert his position as a preliminary issue prior to the motion being argued on the merits. [*Hallstone*, para 36]

[13] Justice Lederman concluded by ordering the appellants “to provide appropriate notice of any intention to file discovery material on any pretrial motion that is brought, and affording an opportunity to the plaintiffs to seek a sealing order in the context of that proceeding.” [*Hallstone*,

para 42]. *Hallstone* was followed by Master Dash in *Prudential Consulting Inc. v. Noel Correia et al.*, 2008 CanLII 41173 (ONSC), who similarly rejected a requested sealing order over unfiled discovery documents but granted an order requiring any party intending to file transcripts or discovery documents on a future motion “to provide notice of such intention so as to provide the opposing party with an opportunity to seek a sealing order.” [*Prudential*, para 12]

[14] While the Plaintiff has opposed the Defendant’s motion, Plaintiff’s counsel’s written and oral submissions were devoted almost entirely to opposing the request for a sealing order, to the exclusion of any specific opposition to the requested alternative relief. The Plaintiff addresses the alternative relief in a single sentence in the Plaintiff’s factum which equivocates between the sealing order and the requested alternative relief. The Plaintiff submits that both the proposed sealing order and the proposed alternative relief relate to orders limiting freedom of expression and freedom of the press in relation to legal proceedings and both must therefore satisfy the test for orders restricting the openness of the courts established by the Supreme Court of Canada.

[15] Clearly, the alternative relief sought would not impact court openness or limit the freedom of the press in any way. The alternative relief requested is essentially a timetabling order. It has no impact on the openness of the courts. It merely ensures that the Defendant has a fair and reasonable opportunity to bring a motion seeking to restrict such openness.

[16] Plaintiff’s counsel’s only additional response to the requested alternative relief in oral submissions was that the *Hallstone* and *Prudential* decisions relied on by the Defendant were distinguishable in that the risk of public disclosure at issue in those cases could give rise to the possible violation of the moving party’s *Charter* rights, whereas the Defendant in this case is seeking to protect its economic interests. In my view, this is a distinction without a difference. While the court will necessarily need to make determinations on the nature and severity of the harm resulting from public disclosure on the ultimate motion for a sealing order, such determinations need not, and should not, be made in the context of an order that merely provides a procedural mechanism for the bringing of such a motion. Sealing orders have often been made to protect the disclosure of commercially or strategically sensitive documents and information to a party’s competitors. I see no reason why the Defendant in this case should not be granted a fair and reasonable opportunity to seek such a sealing order.

[17] Finally, I note that the Plaintiff has filed no evidence and made no submissions to suggest that the requested alternative relief will prejudice the Plaintiff in any way. In my view, there is no prejudice to the Plaintiff. At most, the requirement to give notice will be a minor inconvenience to the Plaintiff which is unlikely to result in any significant delay in the proceedings. The notice at issue relates to the filing of documents, not to service. This means that on any motion where the Plaintiff intends to file documents at issue, it could give the notice at the same time as it served its motion and would only need to hold off filing the motion materials for 30 days after such service. On contested motions before this court, motion materials are often filed more than 30 days after service in the normal course.

[18] Accordingly, I would grant the Defendant’s motion as it relates to the alternative relief. However, in my view, the requirement for notice in advance of filing “any materials” as framed in the Defendant’s notice of motion is too broad. The notice requirement should only apply to those

documents over which the Defendant claims confidentiality. As evidenced by the fact that the defendant has already produced certain unredacted records, its confidentiality concerns do not apply to all of its own productions. Further, the defendant in its motion materials has only identified certain productions of the Plaintiff as raising confidentiality concerns.

[19] The Defendant shall therefore have 30 days from the date of the release of this decision to identify to the Plaintiff the documents in the affidavit of documents of the Defendant and the affidavit of documents of the Plaintiff which the Defendant designates as confidential. Going forward, the Defendant will designate as confidential any further defence productions over which it seeks confidential treatment, whether as part of a further or supplementary affidavit of documents or produced on examination for discovery or in response to undertakings. The Defendant will make such designations at the time of production. The Defendant may also designate as confidential any future document productions received from the Plaintiff provided that the Defendant makes such designations within 15 days of receiving such productions. Finally, the defendant may designate, by page number, any portions of the transcripts for examination for discovery that the Defendant deems are confidential, with such designations to be provided within 30 days of the Defendant's receipt of the discovery transcript.

[20] The Plaintiff shall give the Defendant 30 days' notice in advance of filing any documents or materials with the court that the Defendant has designated as confidential in accordance with paragraph 19 of these reasons. The Plaintiff is also prohibited from filing any documents with the court that are subject to potential confidentiality designation by the Defendant during the period allowed for the Defendant to make such designation. For example, the Plaintiff shall not file any of the productions in the parties' current affidavits of documents before the 30 days for the Defendant to make its confidentiality designations has expired.

The Plaintiff's Motion

[21] Given that I have granted the Defendant's motion for alternative relief, the Plaintiff's motion as it relates to the request for unredacted versions of the redacted documents produced by the Defendant is effectively unopposed. The Plaintiff's motion for this relief is therefore granted. The Defendant shall produce unredacted versions of all of the redacted documents included in its current affidavit of documents within 30 days of the release of this decision.

[22] The other documents or categories of documents sought by the Plaintiff in its motion for a further and better affidavit of documents are listed in an exchange of email between counsel that is exhibited to an affidavit of a law clerk and found at Tab 2I of the Plaintiff's motion record. Of the 13 documents or categories of documents listed in Tab 2I, the Defendant has produced or agreed to produce the documents described in items 1-5, 10, 12 and 13. To the extent these documents have not yet been produced, the Defendant shall produce those documents within 30 days of the release of this decision.

[23] The defendant does not oppose the requests for documents in items 7, 8 and 9 of Tab 2I. However, as of the hearing of this motion, the defendant's searches had not located any such documents. To the extent such documents have now been located and have not yet been produced, the defendant shall produce them within 30 days.

[24] The only production requests of the Plaintiff that remain in dispute are the requests for documents described in items 6 and 11 of the list at Tab 2I. Item 6 is a demand for “Evidence about what performance reviews and incentive payments other staff (such as Mr. Schulz’s team and the Leadership Board) did or did not receive.” The Defendant objects to this production on the grounds of relevance and proportionality. The Defendant describes this request as a “fishing expedition”. I do not agree that all of the documents requested in Item 6 are necessarily irrelevant. However, I do agree that the request is unfocused and overly broad. The request for “evidence” is too general and the potential inclusion of all “other staff” is too far-reaching in a company with over 1200 employees. Accordingly, the Plaintiff’s request for production of documents in Item 6 is denied, without prejudice to the Plaintiff’s ability to make a more focused request for specific documents in relation to specific employees at the examinations for discovery.

[25] Item 11 on the list at Tab 2I is a request for “Documents that allow us to determine how Mr. Schulz’s hours in 2021 differed, if at all, from (a) his hours before expressing concerns about his reviews and (b) his colleagues. We are open to discussing what this documentation would include, but it could for example be based on how long staff were logged in and/or active on their computers, leadership board calendars, etc.” The Defendant also opposes this request on the basis of relevance and proportionality. In my view, regardless of potential relevance, this request is also unfocused and overly broad. The request for documents identified in item 11 on the list at Tab 2I is denied, without prejudice to the plaintiff’s ability to make a more focused request for specific documents relating to hours worked at the examinations for discovery.

[26] Finally, the Plaintiff seeks an order for a court-imposed litigation timetable for examinations for discovery and beyond. The Plaintiff bases this request on the Defendant’s alleged intransigence, arguing that the defendant has been solely responsible for the delays in documentary discovery and the resulting delays in examinations for discovery. I disagree with the Plaintiff’s assignment of responsibility for the delay.

[27] The responsibility for the delay in discoveries, at least since May of 2022, lies largely at the feet of the Plaintiff. The issues over documentary discovery would have been resolved in May 2022 had the Plaintiff agreed to the Defendant’s reasonable request for notice before filing the documents with the court, as I have now ordered. Had the Plaintiff agreed to give such notice, it would have received the Defendant’s unredacted productions by June and the further documents requested by the Plaintiff and agreed to by the Defendant shortly thereafter. In those circumstances, neither of the motions before me would have been necessary, and the parties would likely be well into examinations for discovery by now.

[28] I therefore decline to impose a litigation timetable on the parties at this time, and direct that the parties instead confer and attempt to agree on a litigation timetable for the next steps in the proceeding that is consistent with these reasons. If the parties cannot agree on a timetable within 30 days, they may request a case conference before me to set a timetable by email to my Assistant Trial Coordinator, David Backes at David.Backes@ontario.ca.

Costs

[29] Strictly speaking, the parties were each partially successful on their respective motions. However, the combined result on the motions is exactly that proposed by the Defendant back in May 2022. As discussed above, both motions could have been avoided if the Plaintiff had accepted the Defendant's reasonable proposal to be provided with advance notice of the Plaintiff's intention to file the documentary productions with the court. For this reason, I am exercising my discretion to award costs of both motions to the Defendant.

[30] In its costs submissions at the hearing of the motion, the Defendant sought partial indemnity costs for both motions in the amount \$7,500. By comparison, the Plaintiff filed a costs outline seeking partial indemnity costs of both motions in the amount of \$23,456.75 had he been successful. At less than one third of the Plaintiff's own estimated partial indemnity costs, the Defendant's costs request is clearly within the reasonable expectations of the parties. The Plaintiff shall pay to the Defendant its costs of the motions, fixed at \$7,500 (inclusive of HST), payable within 30 days.

D. Michael Brown, Associate Judge

DATE: April 11, 2023