

CITATION: Khatib v Goeasy Ltd., 2023 ONSC 5103
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DATE: 20230908

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SHADI KHATIB v. GOEASY LTD.

BEFORE: ASSOCIATE JUSTICE LA HOREY

HEARD: September 8, 2023

COUNSEL: Robert Taylor, for the moving party/ plaintiff

Jonathan Pinkus, for the responding party/ defendant

ENDORSEMENT

[1] This is a wrongful dismissal action. The plaintiff served the trial record in this matter in April 2022 and set the action down for trial.

[2] The plaintiff now brings this motion for leave pursuant to Rule 48.04(1) to bring a motion under Rule 30.10 (discovery of non-parties with leave) seeking an order that six former employees of the defendant attend to be examined for discovery and produce documents related to their termination. At the outset of the hearing, the plaintiff abandoned his request for leave to bring a motion to compel the answers to three questions refused at the examination of the defendant's representative and an order for his further discovery.

[3] The three questions refused sought information about the termination of other employees. The plaintiff alleges in his statement of claim that the defendant employer let other executives keep unvested restricted share units and shares but did not do so for the plaintiff, and that this is evidence of bad faith. The plaintiff claims for the value of this aspect of employee compensation in the sum of approximately \$1,613,596 and thus this is a significant aspect of his claim. The defendant refused the questions related to the termination of the other employees on the basis that they were irrelevant, and settlement privileged.

[4] If granted leave, the plaintiff will bring a motion pursuant to Rule 30.10 to obtain discovery from these former employees going to the issue of whether these other employees were permitted to keep their unvested restricted share units and shares on termination. The plaintiff did not serve the former employees with this motion and the Rule 30.10 motion is not before me.

[5] The issue of the refusals was dealt with by Associate Justice Brown in his decision on February 17, 2023. In his endorsement, Associate Justice Brown noted that the plaintiff had not sought leave to bring the refusals motion under Rule 48.04(1) on notice to the defendant and this was fatal. The request for leave was only made during oral argument. Associate Justice Brown went on to say: “In any event, even if leave had been properly sought, I would not have granted leave under Rule 48.04(1) on the record before me.” In his unreported endorsement Associate Justice Brown explained his reasons as follows:

[6] Setting a matter down for trial is not a mere technicality of procedure. Counsel setting the matter down for trial must sign a certificate to the effect that everything has been done to place the matter on the list for trial. For leave to be granted under Rule 48.04(1) there must be “a substantial or unexpected change in circumstances such that a refusal to make an order under s. 48.04(1) would be manifestly unjust”: *Hill v Ortho Pharmaceutical (Canada) Ltd*, [1992] O.J. No. 1740 at para 10 (Gen. Div.); *Jetport Inc. v. Global Aerospace Underwriting Managers*, 2013 ONSC 2740 (Master), at paras 40-42.

[7] In this case, the plaintiff has known that the defendant has refused to provide the information sought since examinations for discovery were conducted in March 2021 and knew that the defendant was continuing to refuse to provide the information when the plaintiff set the matter down for trial a year later. There is no evidence in the record before me of any substantial or unexpected change in circumstances that would justify an order granting leave. The plaintiff’s motion is therefore dismissed.

[6] As noted above, the plaintiff abandoned the request for leave to bring the refusals motion at the outset of the hearing.

[7] The defendant submits that the request for leave to bring a motion for discovery of the former employees is precluded by issue estoppel. Mr. Pinkus argues that the record before me is essentially the same as the record before Associate Justice Brown and he decided the issue of whether leave should be granted to pursue further discovery. Mr. Taylor disagrees, noting that the supplementary affidavit of plaintiff’s lawyer, Muneeza Sheikh sworn September 7, 2023, was not before Associate Justice Brown, and the issue of whether leave be granted to bring a Rule 30.10 motion was not before him. I do not need to decide this issue because I would exercise my discretion to refuse leave to the plaintiff in any event.

[8] In *Horani (Litigation guardian of) v Manulife Financial Corp.* (2023 ONCA 51 at para 16 - 19), the Court of Appeal noted that there is disagreement within the Ontario courts on the proper test for granting leave to bring a motion under Rule 48.04(1). They noted that some courts require the moving party to show “a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust” while other courts have determined that leave should be granted if the moving party can demonstrate that “the interlocutory step is necessary in the interests of justice” even in the absence of a substantial or unexpected change in circumstances. The court did not find it necessary to determine the appropriate test (para 38).

[9] The plaintiff also refers to a recent version of the test by Justice Perell in *Fulop v Corrigan* (2020 ONSC 1648). In that decision Justice Perell set out the factors to be considered in deciding whether to grant leave as follows (at para 77):

The predominant contemporary approach to whether leave should be granted is a flexible approach that recognizes that there may be no single test for leave to initiate or continue a motion or form of discovery, and the weight to be given the various discretionary factors will depend upon the circumstances of the particular case. In considering whether there is justification for granting leave, the court may consider a variety of factors including: (1) what the party seeking leave knew at the time of the passing of the trial record; (2) whether there has been a substantial or unexpected change in the circumstances since the action was set down for trial; (3) the purpose of the request for leave; (4) the nature of the relief being requested; (5) whether the party opposing the relief would suffer any prejudice; and (6) whether the relief sought would likely be granted if leave were given to bring the motion notwithstanding the filing.

[10] *Fulop* was not referred to in *Horani* but seems to fit in with the “interests of justice” line of cases.

[11] Under either iteration of the test, I would exercise my discretion to refuse leave.

[12] At the examination for discovery of Mr. Cooper on behalf of the defendant in March 2021, the defendant took the position that information about the termination of other employees was irrelevant and privileged. When the plaintiff’s lawyer followed up on undertakings and refusals from Mr. Cooper’s examination, defendant’s counsel in an email of May 26, 2021, advised that the defendant was maintaining its refusals. In that email the defendant’s lawyer also stated: “With respect to next steps, were you looking to set the matter down for a pre-trial? If so, you can do that now without prejudice to [your client’s] right to bring a motion for answers to undertakings in the future.”

[13] On April 8, 2022, the plaintiff’s lawyer served the trial record. On April 20, 2022, the defendant’s lawyer asked the plaintiff’s lawyer if she was abandoning the motion for refusals (originally scheduled for August 29, 2022 and ultimately heard by Associate Justice Brown in February 2023), given that she had set the matter down for trial and noted that if the plaintiff did not intend to abandon his motion, he could withdraw the trial record and wait until after the motion was heard to set the matter down. In response, the plaintiff’s lawyer took the position that the plaintiff was entitled to bring his motion notwithstanding the fact that he had set the matter down for trial. Plaintiff’s counsel asked defence counsel to confirm her understanding and noted they would do their own research in any event. Defence counsel responded and correctly advised that the plaintiff could set the matter down and still bring a motion on any outstanding undertakings but not the refusals and said: “So you have to choose which direction you want to go.”

[14] The plaintiff was on notice early on that the defendant was refusing the information relating to the termination of other employees. The plaintiff was on notice early on that the defendant was (correctly) taking the position that the plaintiff could only pursue a motion for undertakings given that he had set the action down and gave the plaintiff the option of withdrawing the trial record. If

the plaintiff wished to pursue information relating to the termination of the other employees, either the refusals or discovery of the employees pursuant to Rule 30.10, he ought to have brought the motion before setting the action down for trial, or at the very least taken the defendant upon its offer to permit the plaintiff to withdraw the trial record in April 2022.

[15] The plaintiff alleges that he was only advised by the defendant's lawyer on February 10, 2023, that the defendant did not have any termination letters in its possession. This was before the motion was argued before Associate Justice Brown and yet the plaintiff did not change course. He pursued the refusals motion before Associate Justice Brown, he did not ask for leave to bring a discovery motion in respect of the six former employees on that motion and did not ask that the certificate of readiness and setting down be vacated.

[16] The day prior to the hearing of this motion Ms. Sheikh filed a supplementary affidavit in which she states with respect to the May 26, 2021 email from defence counsel: "I mistakenly believed he [defence counsel] was inviting me to set it down for trial and he would not object to any motion to deal with the refusals and undertakings (although he did not mention refusals) and did not understand that by setting the action down for trial the [plaintiff] would be precluded from obtaining answers to refusals to provide relevant information."

[17] This statement by counsel does not make sense. The May 26, 2021 email clearly says that the defendant is maintaining its refusals. It clearly refers to the ability of the plaintiff to bring an undertakings motion. I do not find the May 26, 2021 email from defence counsel at all ambiguous. Further, there was no request for clarification or confirmation of an interpretation that would permit the plaintiff to bring a motion for refusals after setting the matter down for trial. In neither of her two prior affidavits (August 18, 2022, and April 6, 2023) does Ms. Sheikh say that the setting down of the action was inadvertent.

[18] Tellingly, when the defendant gave the plaintiff the opportunity in April 2022 of withdrawing the trial record to pursue the refusals motion, he did not do so. Counsel did not say that the action had been set down inadvertently or that there had been an earlier misunderstanding at that time.

[19] It is noteworthy that the plaintiff does not ask for leave to vacate the trial record. Rather, he wishes to pursue further discovery while attempting to maintain his place in the trial queue.

[20] In a series of emails in April 2023 Ms. Sheikh makes it clear that the plaintiff wishes to pursue its motions while the action is on the list to get a pre-trial and trial date. The plaintiff in this action is asking the court to ignore Rule 48.04 so he can maintain his position in the queue of actions waiting to be pre-tried and tried while he pursues discovery of non-parties.

[21] I do not accept the action was set down through inadvertence. The plaintiff has made a deliberate choice to set the matter down for trial and did not vary from that course, notwithstanding the defendant's offer to allow the plaintiff to change course.

[22] In any event, as Justice Frank held in *AGC Mechanical Structural Security Inc. v Rizzo* (2013 ONSC 1316 at para 17), the fact that counsel does not consider the effect of Rule 48.04(1) does not make the setting of the action down for trial inadvertent.

[23] The case before me is distinguishable from *Vallender v Marbella Boutique Imports Ltd.*, ((1977) 15 O.R. (2d) 664 (H.C.J.)), a case relied upon by the plaintiff. In *Vallender* it was accepted that the lawyer had made a mistake and it would be unjust to deprive the plaintiff of discovery of the defendant. Here, even if the setting down was inadvertent, plaintiff's counsel was given a choice to undo the error in April 2022. The plaintiff has conducted the discovery of the defendant in this case. Unlike the discovery of party litigants, the discovery of non-parties is an exception rather than the rule.

[24] In *York Condominium Corp. No 202 v Kuhl*, ([1980] O.J. No. 2786) Master Donkin exercised his discretion to permit the discovery of individual defendants who had not been discovered notwithstanding that the lawyer had set down the action in error. Notably in that case, the plaintiff moved for an order permitting the discovery or in the alternative, setting aside the certificate of readiness and notice of trial. Master Donkin held that "more injustice would be done by depriving the plaintiff of an essential preparatory step [discovery of the defendants] because of an error of a solicitor than will be occasioned by a delay in having the matter heard." He set aside the certificate of readiness and notice of trial. As noted, the plaintiff seeks only leave to bring his motion, he does not ask to remove the matter from the trial list. Discovery of non-parties is not an essential preparatory step.

[25] The plaintiff's request to reopen the discoveries is broad and far-reaching given that the plaintiff's proposed motion involves the participation of six non-parties who may wish to retain counsel and participate the proposed motion. Even if the granted, it would take some additional time for discoveries to be arranged and undertakings to be answered. Moreover, this request for leave comes too late, the matter has been set down for trial for over a year. The plaintiff has known for more than two years that the defendant was refusing discovery about the termination of other employees. The moving party could have addressed this discovery issue before setting the matter down for trial. If the plaintiff had pursued the refusals motion prior to setting the action down for trial, he likely would have learned that the defendant did not have termination letters and could have pursued his Rule 30.10 motion to obtain the information he sought from the former employees. In any event, the plaintiff can call these individuals at trial to obtain their evidence. The disclosure by the defendant in February 2023 that it does not have any termination letters related to other employees does not amount to a "substantial or unexpected change".

[26] Defence counsel even gave the plaintiff the opportunity of withdrawing the trial record, but the plaintiff chose not to do so. Although there is no pre-trial yet scheduled, the potential motion and the discoveries (if ordered) has the potential to derail the orderly process of this action to trial. This is action is already four years old.

[27] On either version of the test for leave under Rule 48.04(1) I would not exercise my discretion to grant leave to the plaintiff to bring a motion pursuant to Rule 30.10.

[28] The plaintiff's motion is dismissed.

[29] The parties have agreed that the successful party is entitled to partial indemnity costs in the amount of \$7,500 (all-inclusive). As the defendant was the successful party, the plaintiff shall pay

to the defendant costs in the sum of \$7,500 (all-inclusive) within 30 days of the release of these reasons.

L. LA HOREY, A.J.

DATE: September 8, 2023