

CITATION: Kreinin v. SS&C Technologies Canada Corp., 2023 ONSC 5238
COURT FILE NO.: CV-21-00663835
MOTION HEARD: 20230628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Alex Kreinin, Plaintiff

AND:

SS & C Technologies Canada Corp., Defendants

BEFORE: Associate Justice B. McAfee

COUNSEL: A. Taylor, Counsel, for the Plaintiff (Moving Party)

R. Khan and S. Maude, Counsel, for the Defendant (Responding Party)

HEARD: June 28, 2023

ENDORSEMENT

- [1] This is a motion brought by the plaintiff for an order requiring the defendant to produce a further and better affidavit of documents. The documents pursued on this motion are non-privileged documents relating to the reorganization also referred to on the motion as restructuring documents, regardless of when they arose temporally.
- [2] The plaintiff commenced this action on June 10, 2021, seeking damages for wrongful dismissal in the amount of \$605,820.00 and other relief. In the statement of defence, the defendant denies that the plaintiff is entitled to any relief.
- [3] The defendant has not yet served a sworn affidavit of documents. The defendant served an unsworn affidavit of documents on April 11, 2022. On April 11, 2022, plaintiff's counsel requested a further and better affidavit of documents to include, among other documents, the reorganization documents. Plaintiff's counsel followed up on April 18, 2022, and May 9, 2022. On May 13, 2022, although not conceding relevance, defendant's counsel responded committing to the production of further documents including the non-privileged restructuring documents. On June 14, 2022, and June 21, 2022, plaintiff's counsel followed up with defendant's counsel. On June 27, 2022, defendant's counsel responded advising that the requested documents would be produced the following week. On June 9, 2023, defendant's counsel stated that he was prepared to produce the non-privileged documents relating to the reorganization "regardless of when they arose temporally." On or about June 15, 2023, the defendant served an unsworn supplementary affidavit of documents.
- [4] The applicable *Rules of Civil Procedure* are Rule 1.04, Rule 29.2 and Rule 30.

- [5] The defendant argues that the motion is premature. The defendant submits that it agrees to plaintiff having an additional 2 hours of examination for discovery in which the plaintiff can ask questions concerning the purported deficiencies in the draft affidavits of documents. The defendant submits that undertakings can be given by the defendant with respect to certain documentation should that be appropriate. The defendant also relies on the affidavit of M. Wallace, who deposes in part that she has "...reviewed all email correspondence in my possession relating to SS&C's RIF in April 2021. To the best of my knowledge, I have disclosed all non-privileged documents that I have found with respect to the SS&C RIF" (affidavit of M. Wallace, paras. 4 and 5).
- [6] While in certain cases it may be appropriate to proceed as the defendant suggests and wait until examinations for discovery to address purported deficiencies in an affidavit of documents or draft affidavit of documents, in my view that approach is not appropriate in the circumstances before me.
- [7] The affidavit of M. Wallace refers to reviewing documents in her possession but does not refer to reviewing documents in the corporation's possession. The documents at issue were previously agreed to be produced (see letters dated May 13, 2022, June 27, 2022, and June 9, 2023). The documents are relevant based on the pleadings and in particular based on the statement of claim at paragraph 8 and the statement of defence at paragraphs 6 and 12. Based on the email dated January 6, 2021, now listed in the draft supplementary affidavit of documents, it is clear that documents regarding the restructuring would be in existence prior to that date.
- [8] I am satisfied that relevant documents regarding the restructuring exist that have been omitted from the draft affidavit of documents and draft supplementary affidavit of documents. The defendant shall serve a sworn further and better affidavit of documents that lists the non-privileged restructuring documents regardless of when they arose temporally.
- [9] With respect to the issue of costs, if successful, the plaintiff seeks substantial indemnity costs because the defendant changed their position with respect to production of these documents shortly before the return of the motion. If successful, the defendant seeks costs in the amount of \$1,500.00.
- [10] The plaintiff is successful on the contested issue argued. The defendant previously agreed to produce the documents that have now been ordered to be listed in a further and better affidavit of documents. Although the plaintiff does not specifically seek costs in the notice of motion, the defendant does not argue that the plaintiff is not entitled to costs for failure to do so. I am satisfied that the plaintiff is entitled to costs of this motion in the all-inclusive amount of \$2,500.00. This is a fair and reasonable amount that the defendant could expect to pay to the plaintiff. While this amount is higher than the defendant's requested costs, the defendant did not submit a factum or any case law for this motion and the defendant's costs outline indicates its costs on a partial indemnity basis are in the amount of \$7,450.43.

[11] Costs are payable by the defendant to the plaintiff in the all-inclusive amount of \$2,500.00 payable within 30 days.

[12] Order to go as follows:

1. The defendant shall serve a sworn further and better affidavit of documents listing the non-privileged reorganization/restructuring documents regardless of when they arose temporally.

2. Costs of this motion are fixed in the all-inclusive amount of \$2,500.00, payable by the defendant to the plaintiff within 30 days.

Associate Justice B. McAfee

Date: September 18, 2023