



Durham costs “thrown away for wasted time spent preparing for examinations for discovery, payable within thirty (30) days”; and

- b. A further and better affidavit of documents pursuant to Rule 30.06 to include income tax returns, corporate income tax returns and bank statements from 2010 to 2022 of the Labow Defendants.

- [2] For ease of reference, I will refer to this motion as the “Durham motion”.
- [3] The first issue is whether the Durham motion can even proceed today because it was not expressly referenced in RSJ Edwards’ scheduling Order of June 19, 2024. That Order states only that Labow’s “motion to exclude a party to the action from the examinations for discoveries is to be heard on August 1, 2024”. There is no reference to any other motion being heard that day.
- [4] Mr. Mack takes the position that by virtue of the June 19, 2024 Order, only his motion to exclude a party from the examination for discovery was scheduled for August 1, 2024, and, at the end of the day, he decided not to bring that motion. As such, no motions are scheduled for today.
- [5] Mr. Annen argues that he had scheduled the Durham motion for August 1, 2024 back on May 1, 2024. The purpose of RSJ Edwards’ scheduling Order was to add Labow’s proposed motion to the August 1, 2024 motion date already scheduled, not to substitute Labow’s motion for the Durham motion. RSJ Edwards did not have to reference the Durham motion in his scheduling Order because it was already scheduled.
- [6] The difficulty with Mr. Annen’s interpretation of the June 19, 2024 scheduling Order is that the Durham motion was a motion for an Order imposing a discovery plan on the parties. Durham’s proposed discovery plan, appended as Schedule “A” to its Notice of Motion, did include, as one item in the discovery plan, a further and better affidavit from the Labow Defendants. But a further and better affidavit was not a separate order claimed in the Notice of Motion.
- [7] RSJ Edwards’ June 19, 2024 Order did impose a discovery plan, fixing dates for the examinations for discovery of the parties, dates for answering undertakings, and a date for serving any motions arising on the examinations for discovery. It did not include a requirement for a further and better affidavit.
- [8] As I read the June 19, 2024 Order in context, RSJ Edwards accepted certain parts of Durham’s proposed discovery plan and incorporated them into his Order. That Order was intended to be the discovery plan, and if a step proposed by Durham did not find its way into the Order, it was because it was not accepted by RSJ Edwards.
- [9] The incorporation of the discovery plan into a court order was intended to address and obviate Durham’s motion for a discovery plan. RSJ Edwards does not reference the Durham motion in the scheduling Order because the scheduling Order dealt with the relief requested – a discovery plan – even if Durham did not get everything it wanted.

[10] This is not to say that Durham may not be entitled to some or all of the documents it is requesting. That is a question of timing.

[11] Rule 30.06 provides:

**Where Affidavit Incomplete or Privilege Improperly Claimed**

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

- (a) order cross-examination on the affidavit of documents;
- (b) order service of a further and better affidavit of documents;
- (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
- (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[12] Durham takes the position that the Labow Defendants should be required to produce their income tax returns, corporate income tax returns, bank statements and corresponding Financial Statements. They argue that these documents are necessary to show the extent of the Labows' interest in PLCKK Holdings Inc., although its factum does not really explain how those specific documents are relevant to specific issues raised in its counterclaim.

[13] The Labow Defendants take the position that the issue of a further and better affidavit of documents should be addressed after the examinations for discovery have been conducted. They argue that, as currently framed, the demand is too broad and amounts to a fishing expedition.

[14] The Labow Defendants also argue that many of Durham's claims fall outside of the applicable limitation period, although no motion to strike those claims has been brought, so the applicability of the limitation period to any particular claim remains an outstanding issue that cannot be resolved on this motion.

[15] Both parties rely on the decision in *Titanium Logistics Inc. v. B.S.D. Linehaul Inc. et al.*, 2019 ONSC 4955, which summarized the principles for the application of Rule 30.06 at para. 11:

- a) Rule 30.06 continues to require evidence (as opposed to mere speculation) that potentially relevant undisclosed documents exist;
- b) The level of proof required should take into account the fact that one party has access to the documents and the other does not;

c) The onus for reviewing documents and determining relevance in the first instance remains with the party having the obligation to produce;

d) While court inspection of contested documents is an option, that is not an efficient use of judicial resources and should not be the preferred procedure;

e) When dealing with categories of documents such as business records, it may not be possible to determine the extent or depth of the required production until preliminary questions have been asked or a preliminary level of production of a category of documents has been made;

f) If a more efficient solution exists, without creating unfairness to either of the parties, the costs and delay inherent in successive rounds of examinations and production should be avoided;

g) Rules 1.05 and 77 and in particular Rule 77.11 (1) (e) provide flexibility to devise an order other than those specifically contemplated by Rule 30.06.

[16] The Labow Defendants argue that the principle set out in subparagraph e) applies: Durham should conduct the examination for discovery, and if it cannot obtain the information it needs, it can bring a refusals motion following the examination for discovery.

[17] This was the result in *Titanium*, where Van Melle J. held, at para. 12:

Given the issues before the court in this action, the better course would have been to proceed with the already scheduled examinations for discovery, ask questions about documents, and if it transpired that documents existed that had not been produced, bring any applicable motions at that time.

[18] In my view, that is also the best course in this matter: to proceed with the examinations for discovery already scheduled by RSJ Edwards, and, if necessary, a refusals motion may be brought as contemplated by timetable set out in the scheduling Order.

### **Motion for Costs**

[19] As indicated, Durham has also brought a motion for costs thrown away for preparing for an examination for discovery that was cancelled by Labow's lawyer because he would not conduct the second day of the examination of William Cowley until the co-defendant, Melanie Cowley, left the room.

[20] Durham's lawyer submits that Mr. Mack's refusal to continue the examination for discovery was improper, and he is entitled to costs thrown away in the amount of \$1,500, all inclusive.

- [21] I am not aware of any Rule of Civil Procedure that permits a lawyer to bring a motion for costs thrown away in the midst of a proceeding. Generally, costs are determined at the end of a proceeding or after a motion has been heard and decided, and the court knows which of the parties was successful at the trial or on the motion. Hence the general principle that “costs follow the cause” or “costs follow the event”. Courts do not award, and lawyers do not expect to collect, costs following each step in the litigation process.
- [22] Counsel should be discouraged from running to court to seek costs against the other party every time the other party (or its lawyer) does something counsel thinks is improper or a waste of his valuable time. Costs are decided after the case or the motion has been decided, not in the midst of a proceeding.
- [23] While oppressive or vexatious conduct in a proceeding may result in costs consequences against the offending party, the parties must wait until the end of the proceeding or the motion to make their claim for costs.
- [24] While counsel’s time is no doubt valuable, so is the Court’s time, and the Court cannot entertain a costs motion every time a lawyer complains that the other side has wasted \$1,500 worth of his time.
- [25] A similar issue arose in the *Titanium* case, in which one of the parties cancelled an examination for discovery at the last minute. Although she was critical of counsel’s behaviour in that regard, Van Melle J. refused to order costs against the offending lawyer at that stage of the proceedings, stating, at paras. 14 and 15:

The plaintiff’s failure to comply with the Rules of Civil Procedure insofar as they deal with the Discovery Plan is also troubling ... The plaintiff’s conduct in agreeing with three other counsel, to hold examinations over three days in May and then cancelling those examinations at the last minute does not seem to be a civil way for counsel to conduct themselves.

Mr. Ferreira’s Costs Outline includes costs for the aborted examination for discovery in May. I am not awarding costs relating to the examination for discovery. Those costs can be dealt with at another time.

- [26] Whether Mr. Mack had a valid reason for refusing to continue with the examination for discovery is a question that will have to be addressed when costs are claimed by whichever party is successful at the end of this proceeding.

### **Conclusion**

- [27] The motion is dismissed,

[28] If the parties cannot agree on cost, the Plaintiff/Defendants by Counterclaim (Labow et al) may file costs submissions of no more than 3 pages plus costs outline and any offers to settle within 20 days of the release of this decision, and the Defendant/Plaintiff by Counterclaim (Durham et al) may file responding submissions on the same terms within a further 15 days.

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Justice R.E. Charney

**Released:** August 19, 2024

**CITATION:** Labow v. Durham Label Inc., 2024 ONSC 4585

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

LAWRENCE LABOW

Plaintiff

– and –

DURHAM LABEL INC. and WILLIAM COWLEY  
and MELANIE COWLEY

Defendants

**AND BETWEEN:**

DURHAM LABEL INC.

Plaintiff by Counterclaim

– and –

LAWRENCE LABOW and PLCKK HOLDINGS INC.  
and PAMELA JEAN LABOW

Defendants by Counterclaim

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**REASONS FOR DECISION**

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Justice R.E. Charney

**Released:** August 19, 2024