

CITATION: Music and Beyond Performing Arts v. Van Duyvenbode, 2025 ONSC 293
COURT FILE NO.: CV-15-00063307-0000
DATE: 20250116

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Music and Beyond Performing Arts, Plaintiff

AND

Nico van Duyvenbode, Defendant

BEFORE: Justice R. Ryan Bell

COUNSEL: Gary G. Boyd, for the Plaintiff

Self-represented Defendant

HEARD: December 3, 2024

ENDORSEMENT

Overview

[1] The plaintiff, Music and Beyond Performing Arts, moves to enforce minutes of settlement signed September 14, 2023, at the conclusion of a mediation before the Honourable Colin McKinnon.

[2] Nine years earlier, in September 2014, Minnema J. ordered Music and Beyond to pay \$39,000 into court as a condition for the release of its wines held by the defendant, Nico van Duyvenbode. The minutes of settlement provide for payment of the funds previously paid into court to Low Murchison Radnoff, in Trust, the payment by Low Murchison Radnoff to Mr. van Duyvenbode of the greater of \$20,000 or half of the gross balance of the funds, including interest, the dismissal of the claim and counterclaim without costs, and the signing of a mutual release. Mr. van Duyvenbode, represented by counsel at the mediation, signed the minutes of settlement.

[3] Five days after the mediation, counsel for Mr. van Duyvenbode wrote to advise that Mr. van Duyvenbode wished to set aside the minutes of settlement and that counsel would be seeking an order removing himself from the record. It is my understanding that counsel's motion to remove himself from the record proceeded in November 2023.

[4] Mr. van Duyvenbode's position that the minutes of settlement should not be enforced is predicated on the following arguments:

- (i) the statement of claim was, or should have been, automatically dismissed under r. 48.14(1) on February 7, 2020 because it had not

been set down for trial within five years after the action was commenced;

- (ii) he was under duress when he signed the minutes of settlement in September 2023;
- (iii) there was “undisclosed bias” on the part of the mediator;
- (iv) the “misrepresentations” of Music and Beyond’s representative at the mediation influenced the mediator;
- (v) the incorrect file no. appears on the minutes of settlement – they are therefore “defective” and cannot be enforced;
- (vi) the local mediator coordinator received Mr. van Duyvenbode’s complaint concerning the mediator and, until the complaint is processed, the court cannot enforce the minutes of settlement;
- (vii) the mediation should not be considered “complete” because the complaint has not been processed; and
- (viii) the minutes of settlement should only be enforced if and when it is determined that the mediator “acted correctly.”

[5] None of Mr. van Duyvenbode’s arguments has any merit. Music and Beyond’s motion to enforce the minutes of settlement is granted.

Preliminary issues

[6] I first address two preliminary issues. The first issue is Mr. van Duyvenbode’s belief that he would be permitted to examine persons at the hearing of the motion and his complaint that the Registrar had failed to serve his summonses to witness. With leave of the court, a person may be examined at the hearing of a motion or an application: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.03(4). Where a party seeks to examine a person at the hearing of a motion, the person’s attendance may be compelled in the same matter as provided for a witness at a trial, under r. 53: *Rules of Civil Procedure*, r. 39.03(5). Rule 53.04 is clear that the responsibility for service of a summons to witness rests with the party who requires the attendance of a person at the hearing, in this case, Mr. van Duyvenbode.

[7] The right to cross-examine a deponent of an affidavit and the right to examine a person as a witness before the hearing of a pending motion must be exercised with “reasonable diligence”: *Rules of Civil Procedure*, rr. 39.02(3), 39.03(3). This motion has been outstanding for an extended period of time. It is plain that Mr. van Duyvenbode has failed to act with reasonable diligence. I ruled that the motion to enforce the minutes of settlement would proceed.

[8] Second, Music and Beyond objects to the admission in evidence of Mr. van Duyvenbode’s affidavit sworn November 25, 2024. The affidavit was served the day before the hearing. On June

11, 2024, Rees J. adjourned the motion because Mr. van Duyvenbode uploaded his materials to Case Center the day before the hearing and ordered that Mr. van Duyvenbode serve and file a properly sworn affidavit within 30 days. Mr. van Duyvenbode is clearly not in compliance with Rees J.'s order. The affidavit is said to be in response to Music and Beyond's motion to enforce the minutes of settlement and in support of Mr. van Duyvenbode's own motion.

[9] Although I am not satisfied with Mr. van Duyvenbode's explanation for the late service of his affidavit, given that he is self-represented, I have determined that the affidavit will be admitted in evidence. However, I have placed no weight on those portions of the affidavit that relate to Mr. van Duyvenbode's motion because that motion was not properly before me. I have also disregarded the scandalous allegations made against court staff, judicial officers, and Music and Beyond, among others.¹

The minutes of settlement should be enforced

(i) The statement of claim has not been dismissed

[10] Mr. van Duyvenbode says that the statement of claim was, or should have been, automatically dismissed under r. 48.14(1) on February 7, 2020 because the action had not been set down for trial within five years after the action was commenced.

[11] As set out in the case conference endorsement of A.J. Fortier dated October 14, 2021, following the case conference of September 13, 2021, at which time Mr. van Duyvenbode was represented by counsel, the parties were advised by the Case Management Co-ordinator that the action was active and had not been administratively dismissed. The parties were advised that a motion was required seeking dismissal of the action. As no motion for dismissal had been brought by Mr. van Duyvenbode, a timetable was established by A.J. Fortier as set out in her October 14, 2021 endorsement. A further consent timetable was established in writing in 2022.

[12] Rule 48.14(1) provides that the registrar shall dismiss an action for delay if the action has not been set down for trial by the fifth anniversary of the commencement of the action, unless the court orders otherwise. In this case, A.J. Fortier endorsed that the action was active and fixed a timetable on the consent of the parties. A.J. Fortier's order was not appealed. The statement of claim was not administratively dismissed; to the contrary, both parties proceeded in accordance with A.J. Fortier's order.

(ii) The complaints regarding the conduct of the mediation, the mediator, and the minutes of settlement are without merit

[13] I reject Mr. van Duyvenbode's submission that he was under duress when he signed the minutes of settlement. Mr. van Duyvenbode now claims that he was in pain during the mediation

¹ These include that Music and Beyond relied on "perjured testimony" before Minnema J., that the Registrar engaged in "blatant favouritism to the benefit of the Plaintiff", that Music and Beyond's counsel and the mediator "colluded", and that court staff and judicial officers favoured parties who are "better known or more highly regarded."

and that he was tired and wanted to leave. There is simply no evidence to support his claims or that he voiced any such concerns. Paragraph 14 of the mediation agreement provides that “[t]he mediation may be terminated at any time by the parties, their representatives, or by the mediator.” Importantly, Mr. van Duyvenbode was represented by counsel at the mediation.

[14] Mr. van Duyvenbode complains about the conduct of the mediation and the fact that it turned into an evaluative mediation. However, the mediation agreement expressly provides that the mediator may provide his evaluation if requested. The mediator was asked his opinion in this case and he expressed it. A settlement between the parties was finally achieved. Again, Mr. van Duyvenbode was represented by counsel throughout the mediation. Mr. van Duyvenbode personally signed the minutes of settlement, which were drafted by his counsel, with a few changes provided by Music and Beyond’s counsel.

[15] Mr. van Duyvenbode maintains that the mediator was biased because he was a “client” of Music and Beyond. There is no merit to this submission. The mediator was proposed by counsel for Mr. van Duyvenbode and agreed to by both parties. The fact that the mediator may have, over the years, attended two or three concerts hosted by Music and Beyond does not make the mediator a “client” of Music and Beyond. The mediator has never been a sponsor of or a subscription holder to Music and Beyond’s concert series.

[16] I am not prepared to give effect to Mr. van Duyvenbode’s submission that the minutes of settlement are “defective” due to an incorrect court file no. and therefore cannot be enforced. The matter was originally commenced as an application, with court file no. 14-62027, the file no. used on the minutes of settlement. Following the order of Minnema J., the matter was then converted into an action, with court file no. 15-63307. At its highest, this amounts to a minor irregularity of no consequence. Mr. van Duyvenbode’s counsel prepared the minutes of settlement about which Mr. van Duyvenbode now complains. There is no suggestion that the parties did not know what they were signing.

(iii) The mediation is complete and the minutes of settlement can and should be enforced

[17] Mr. van Duyvenbode argues that the court cannot enforce the minutes of settlement because his complaint concerning the mediator has not been processed, the mediation is not complete, and there has been no determination that the mediator “acted correctly.”

[18] These arguments, too, are without merit. The Honourable Colin McKinnon is a member of the roster of Arbitration Place. He is also a member of the Canadian Academy of Distinguished Neutrals. At no time has he been a member of the roster of court-appointed mediators associated with the Superior Court of Justice in Ottawa. Mr. van Duyvenbode sent a letter of complaint to the Local Mediation Committee in Ottawa, which is chaired by Roger Beaudry. Mr. Beaudry informed Mr. van Duyvenbode, correctly, that the Committee had no jurisdiction to entertain his complaint because Mr. McKinnon is not a member of the Ottawa court-appointed roster of mediators.

[19] The mediation is complete. The minutes of settlement were signed by the parties, including Mr. van Duyvenbode.

[20] The discretion to refuse to enforce minutes of settlement should be exercised only in rare cases in which “compelling circumstances” show enforcement would not be in the interests of justice: *Srebot v. Srebot Farms Ltd.*, 2013 ONCA 84, at para. 6. There are no compelling circumstances in this case. To the contrary, the interests of justice compel the conclusion that the minutes of settlement should be enforced.

Conclusion

[21] The motion is granted. There will be judgment in the terms of the minutes of settlement. Music and Beyond shall upload a draft order to Case Center for my review. Mr. van Duyvenbode’s approval as to the form of the order is dispensed with.

[22] As the successful party, Music and Beyond is presumptively entitled to its costs of the motion. In the event the parties are unable to agree on costs, they may provide their submissions in writing. Music and Beyond is to provide its submissions by January 30, 2025. Mr. van Duyvenbode is to provide his responding submissions by February 13, 2025. Costs submission are not to exceed three pages. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

Justice R. Ryan Bell

Released: January 16, 2025

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