CITATION: Peninsula Employment v. Castillo, 2025 ONSC 1121
COURT FILE NO.: CV-24-00723309-0000
DATE: 20250224

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PENINSULA EMPLOYMENT SERVICES LTD., Plaintiff

– and –

MARC CASTILLO, CASTILLO HR CONSULTING INC., BORDERWORX LOGISTICS INC., SMART INFORMATION TECHNOLOGIES LTD., CREATIVE MINDS CHILDREN SERVICES INC., ANITA CRAWFORD, ERIKA SACLAYAN, NIKKI MATHEWS, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Kate Findlay and Lawrence Veregin*, for the Plaintiff

Hailey Bruckner, and Ryan Shah, for the Defendants, Marc Castillo and Castillo HR Consulting Inc.

Scott Lamb and David Bowden, for the corporate Defendant, Smart Information Technologies Ltd.

HEARD: January 17, 2025

REASONS FOR DECISION

I. The relief and its alternative

[1] The Defendants, Marc Castillo and Castillo HR Consulting Inc. (together, "Castillo") seek an order staying the action for abuse of process. Castillo contends that the Plaintiff failed to make timely disclosure to Castillo, as non-settling Defendant, of agreements it reached with three employees or former employees of Castillo's: Erika Saclayan, Nikki Mathews, and Anita Crawford (the "Settling Defendants"). In those agreements, the Settling Defendants agreed to co-operate with the Plaintiff in advancing its claims.

[2] Alternatively, Castillo seeks an order for further and better production of some 1 to 4 million documents seized by the Plaintiff from Mr. Castillo's residence under an *Anton Piller* Order. To date, the documents have been produced to Castillo in a format which is inaccessible

and which, in particular, does not reveal the meta-data and so it cannot be determined when and where they originally were created – i.e. the very issue in this claim, which alleges misappropriation of intellectual property and centres on the source of certain documents.

II. The settlement agreements

[3] The Plaintiff entered into a settlement agreement with the Defendant, Anita Crawford, on September 12, 2024. This agreement includes terms requiring Ms. Crawford to cooperate with the Plaintiff in its ongoing litigation against Castillo. This cooperation includes her agreeing to produce documents to the Plaintiff, swearing an affidavit as requested, and testifying at trial without a summons.

[4] On September 16, 2024, counsel for the Plaintiff served counsel for Castillo with a Notice of Discontinuance in respect of its claim against Ms. Crawford. The Notice did not come with any message from Plaintiff's counsel regarding a settlement agreement. On September 20, 2024, four days later and eight days after the settlement was finalized, the Plaintiff advised Castillo for the first time that it had reached a settlement agreement with Ms. Crawford.

[5] The Plaintiff entered into separate settlement agreements with the Defendants, Erika Saclayan and Nikki Mathews, on September 24, 2024. Each of those agreements included terms requiring Ms. Saclayan and Ms. Mathews to cooperate with the Plaintiff in its ongoing litigation against Castillo. Those terms are identical to the terms contained in the Plaintiff's settlement agreement with Ms. Crawford.

[6] On September 25, 2024, counsel for the Plaintiff served counsel for Castillo with a Notice of Discontinuance in respect of its claim against Ms. Saclayan and Ms. Mathews. However, the Plaintiff did not advise Castillo of the settlements until twelve days after the settlement agreements were finalized, on October 7, 2024.

[7] Castillo moved to stay the Plaintiff's action as a result of the Plaintiff's failure to immediately disclose the three settlement agreements. In Castillo's view, the agreements fundamentally change the nature of the litigation landscape, converting former Defendants adverse to the Plaintiff into non-parties that provide evidentiary support to the Plaintiff.

[8] In *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, at para. 39, the Court of Appeal stated that parties to an action have an unequivocal obligation to immediately disclose any agreement such as a Mary Carter or Pierringer agreement "that has the effect of changing the adversarial position of the parties set out in their pleadings into a cooperative one." The Court explained the rationale for this strict rule is to maintain fairness as between the remaining parties to the litigation. More specifically, parties, and the court itself, need to "know the reality of the adversity between the parties" and whether an agreement changes "the dynamics of the litigation" or the "adversarial orientation": *Ibid*., at para. 40, quoting *Moore v. Bertuzzi* (2012), 110 OR (3d) 611, at paras. 75-79 (SCJ).

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[9] In *Tallman Truck Centre Limited v. K.S.P. Holdings Inc*., 2022 ONCA 66, at para. 22, the Court of Appeal made clear that it is not sufficient for the non-settling Defendant to have suspected that an agreement had been reached when, for example, it received a Notice of Discontinuance against a co-Defendant. The agreement itself must be immediately disclosed.

[10] The Court has further clarified that both the existence of the settlement and the specific terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier v. Logan*, 2022 ONCA 350, at para. 26. Importantly, the Court has also been specific in instructing that, "The absence of prejudice does not excuse the late disclosure of such an agreement": *Waxman v. Waxman*, 2022 ONCA 311, at para. 24.

[11] In each of these cases, the Court of Appeal indicated that any failure to immediately disclose the agreement amounts to an abuse of process and will result in serious consequences for the litigation: *Handley*, at para. 45; *Waxman*, at para. 24; *Poirier*, at para. 38. In fact, the Court has opined that the only remedy to properly redress this failure is to stay the claim brought by the non-disclosing party; otherwise, the court will be unable to control its own processes or to see that justice is done between the parties: *Handley*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.

[12] As explained in *Crestwood Preparatory College Inc. v. Smith*, 2021 ONSC 8036, at para. 80, aff'd 2022 ONCA 743, defendants are entitled to know the adversity of the action before pleading in their own defense. Counsel for Castillo points out that the Plaintiff has pleaded that the Defendants, including Castillo, Anita Crawford, Erika Saclayan, and Nikki Mathews, "coordinated together in an unlawful means conspiracy to acquire and misuse [the Plaintiff's intellectual property]." There is no suggestion in the pleading that the three settling Defendants were anything but adversarial with the Plaintiff and aligned with Castillo.

[13] Accordingly, a settlement under which the three settling Defendants are obliged to assist the Plaintiff against Castillo represents a significant shift in the posture of the action. "[P]rocedural fairness requires *immediate disclosure*, among other things because the settlement agreement may have an impact on the strategy to be pursued by non-settling defendants, who need to be able to properly assess the steps being taken by the settling parties… These considerations apply at the pre-statement of defence stage as well as after" [emphasis added]: *Ibid*., at para. 81, citing *Handley*, at para. 38.

[14] The Court of Appeal has shown zero tolerance for any deviation from the immediacy requirement. In *Waxman*, at para. 29, the Court determined that settling defendants had gone from adverse parties adverse *vis-à-vis* the plaintiff to cooperating parties, due primarily to the fact that their "cooperation extended to providing affidavits and subjecting themselves to cross examinations." 55 56. In *Poirier*, at para. 71, the plaintiff entered into a settlement whereby one of the defendants was released from the action, without costs, in exchange for "a statement under oath setting out his knowledge of the facts relevant to the action".

[15] In both cases, the courts reasoned that "when the settling co-defendant agrees to co-operate in the plaintiff's prosecution of the proceeding, the plaintiff or applicant must immediately disclose to the non-settling defendants: *Ibid*., at para. 45. Once the relationship between the parties is altered in this way, the non-settling Defendant cannot be lulled into thinking it has an ally in the settling Defendant.

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[16] For that reason, time is of the essence when it comes to disclosure. The Court of Appeal has insisted that "The standard is 'immediate'; it is not 'eventually' or 'when it is convenient'… 'The rules really can't be any clearer. Where an agreement involves a party switching sides from its pleaded position, it must be disclosed as soon as it is made'": *Tallman*, at para. 26.

[17] In the present case, it cannot be said that immediate disclosure was made by the Plaintiff. In *Tallman*, disclosure after three weeks was considered excessively delayed on the settling parties' part. The point, however, is not to have to count the days or weeks at all.

[18] In fact, the Court of Appeal has insisted that "the existence of such an agreement is to be disclosed, as soon as it is concluded": *Laudon v. Roberts*, 2009 ONCA 383, at para. 39. To put it another way, "The agreement must be disclosed to the parties and to the court as soon as the agreement is made": *Pettey v. Avis Car Inc.* (1993), 13 OR (3d) 725, at 737 (SCJ).

[19] The lapses of eight days in respect of the Crawford settlement and twelve days in respect of the Saclayan and Mathews settlements violate this strict rule. Unbeknownst to Castillo at the time, the Plaintiff's agreement with its former employees was not banal; it substantively changed the position of the parties and the landscape of the case: see *Performance Analytics v. McNeely*, 2022 ONCA 731, para 5. While I do not say that there was malintent on the Plaintiff's behalf, the delay put Castillo in a position for a time in which it could not accurately analyze its position and strategize its response.

[20] Counsel for Castillo submits that, "The only remedy for this abuse of process acceptable to courts in Ontario is a permanent and non-discretionary stay of proceedings." Given the pronouncements from the Court of Appeal and from this Court, I am compelled to agree.

[21] As a result of the untimely disclosure to Castillo of the settlement and cooperation agreement with three other Defendants, the action must be stayed.

III. The Independent Supervising Solicitor

[22] Given my conclusion with respect to the delayed disclosure of the three settlement agreements, it is not strictly necessary to address Castillo's alternative argument. That said, Castillo's argument that it is entitled to further and better disclosure of the documents seized under the *Anton Piller* Order is an interesting and relatively novel one. The parties and their respective counsel spent considerable time arguing the point. I will therefore turn to it, if only briefly.

[23] At the commencement of this case, the Plaintiff obtained an *Anton Piller* Order issued by Justice Brownstone on July 24, 2024. In that Order, Her Honour appointed the firm Cassels Brock & Blackwell LLP as Independent Supervising Solicitor ("ISS") to monitor and administer the seizure of evidence from Castillo. Among other things, the Order obliges the ISS to provide Castillo of a list of all evidence seized and to ensure that Castillo has reasonable access to all of that evidence. The Order also provides that Castillo can come back to court for a better report from the ISS if the disclosure is insufficient.

[24] Castillo submits that the disclosure and access to the seized evidence provided by the ISS is not only insufficient; it is useless. Apparently, instead of indicating the computer files it has under its control, the ISS has simply advised Castillo that it has their computer hard drives. And instead of forwarding the files in native format so that the meta-data is readable – i.e. the only part of any file that is relevant to this proceeding since the issue revolves around the origin of the documents – they have forwarded the files in a format that is unreadable.

[25] According to Castillo, the disclosure by the ISS is something like a party not listing the files it has in its possession but instead disclosing merely that it has a filing cabinet. Likewise, the production by the ISS is something like a party forwarding the files themselves in an indecipherable code instead of a language which the parties understand.

[26] Counsel for Castillo points out that the entire point of listing the files and then producing them is so that they can be reviewed for relevance and privilege before forming part of the productions in the case. Needless to say, files that are not individually identified and that are produced in an inaccessible format cannot possibly be reviewed for relevance and privilege.

[27] The Supreme Court of Canada indicated in *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 SCR 189, at para. 32, that a party seizing evidence under an *Anton Piller* Order has an obligation to be as transparent as possible and to shoulder the burden of full disclosure of the material seized:

> [S]uch orders should only be granted in the clear recognition of their exceptional and highly intrusive character and, where granted, the terms should be carefully spelled out and limited to what the circumstances show to be necessary. Those responsible for their implementation should conform to a very high standard of professional diligence. Otherwise, the moving party, not its target, may have to shoulder the consequences of a botched search.

[28] Generally speaking, the obligation of the seizing party or the ISS in custody of the seized documents is to produce them in ordinary, readable form: *Bergmanis v. Diamond*, 2012 ONSC 5762 at para. 24. It is important that the documents be maintained by the ISS in a manner which reflects a complete, detailed record of all seized documents and which makes them accessible for the parties' review: *Regal Ideas Inc. v Haus Innovations Inc.*, 2018 BCSC 136, at para. 60.

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[29] The dispute here is not so much over the obligation to disclose and produce – both sides concede that Justice Brownstone's Order requires full disclosure and production. Rather, it is over the cost of doing so. Listing, file by file, the millions of files in the seized hard drive will be a time and resource consuming chore. Furthermore, to transpose all of those files into a readable format so that the metadata can be retrieved will require specialized software and is a costly proposition.

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[30] In the ordinary course, following the close of pleadings it would be Castillo's obligation under Rules 30.02 and 30.03 to disclose and list in its affidavit of documents all documents in its possession relevant to the issues in the action. That would include each and every relevant document stored in its computer hard drive.

[31] Of course, disclosure of the documents is not the same as disclosure of their contents. To take a simple example, a party is obliged to describe in its affidavit of documents that there is a letter going from person X to person Y dated January 17, 2025. But it is not obliged to state what the letter contains or says. If the opposing side wishes to know what is in the letter, Rule 34.04(1) gives it the right to inspect the letter, while Rule 34.04(7) gives it the right to photocopy the letter at its own expense. If the letter were found on the producing party's hard drive, and the metadata embedded in the letter was of relevance in the case, it would be Castillo's obligation to make the metadata available for inspection as an integral component of the document.

> [M]etadata is 'data and information in electronic form'. Hummingbird has determined that certain of the documents located on the hard drive and certain of the metadata was relevant. In my view, once Hummingbird has determined that a particular document is relevant, the metadata in relation to such document should be produced. In my view, the metadata is akin to a 'time/date stamp' affixed to a letter or the 'fax header' that indicated the time/date of faxing and receipt.
>
> *Hummingbird v. Mustafa*, [2007] OJ No 3624, at para. 9 (SCJ).

[32] Computer-stored documents, even if previously deleted and now invisible, must be disclosed and produced by the party with possession of them where relevant: *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.,* 2011 FC 1323. The same logic pertains to deleted or invisibly embedded parts of an otherwise disclosable document. If there were a cost entailed in making the metadata visible, it would presumptively be borne by Castillo as the party with the obligation to produce the document for inspection. The receiving party has to pay for hard copies of the documents, but the producing party has to do whatever it takes to make the documents available – and visible – for inspection.

[33] I will add that the cost of production is, like everything else, subject to the overall proportionality principle expressed in Rule 1.04(1.1). The cost burden imposed on a party could be tempered or modified by the court as "proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding." Assuming, however, that the metadata is entirely relevant and that there is a substantial amount at stake in the action overall, the party in

possession of the document must disclose it in its entirety, including the metadata. If that is a costly process that requires special software or an I.T. consultant, the expense may be a disbursement to be factored into a costs determination at a later point in the litigation: *Barker v. Barker*, 2007 CanLII 13700, at para. 14 (SCJ).

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[34] This action, however, has not proceeded in the ordinary way. It commenced with an *Anton Piller* Order, which has had the effect of changing the possession of the documents in issue. Now it is the ISS, at the behest of the Plaintiff, that is in possession of the documents found on Castillo's hard drive. The logic of civil process dictates that the party who has possession, custody or control of documents…is to produce those documents at that party's expense; it is the cost of being involved in a lawsuit": *Traverse v. Turnbull*, [1996] N.S.J. No. 212 (NS CA). Since the initial *Anton Pillar* Order changed the possession of the documents from Castillo to the ISS, it also changed the cost burden entailed in their production.

[35] An *Anton Piller* Order is an extraordinary pre-judgment tool and, if not carefully controlled, amounts to extreme interference with the target party's business or personal life. It is not to be sought lightly by parties, and it comes with obligations on the party obtaining it that must not be overlooked. The relative means of the party who has obtained this extraordinary remedy does not excuse that party from adhering to the terms of the *Anton Piller* Order, or authorize it to play by a different set of rules*: Veilette v. Piazza*, 2012 ONSC 5414, at para. 17.

[36] Given that the evidence list and production by the ISS is not usable for the purposes they were meant to serve, the ISS has not satisfied the terms of Justice Brownstone's Order. But those terms are mandatory, and the ISS is obliged to adhere to them.

[37] Were this action not to be stayed for breach of the *Handley Estate* rule, the ISS would be directed to provide Castillo with a file-by-file list of what was seized in the execution of the *Anton Piller* Order. The ISS is obliged to provide Castillo with sufficient information or with a format which allows Castillo to be able to access the documents in a way that will be useful during the course of the litigation. This includes access to the metadata for the documents if that portion of the documents is relevant to the issues in the action.

IV. Disposition

[38] The action is permanently stayed.

[39] The parties may make written submissions on costs. I would ask counsel for Castillo to provide me with brief submissions by emailing them to my assistant, and serving them on the Plaintiff, within two weeks of today. I would also ask counsel for the Plaintiff to provide me with equally brief submissions by emailing them to my assistant, and serving them on Castillo, within two weeks after receiving Castillo's submissions.

Date: February 24, 2025

Morgan J.

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