

**CITATION:** Mata v. Norstar Corporation, 2025 ONSC 1085  
**COURT FILE NO.:** CV-23-705572  
**MOTION HEARD:** December 2, 2024

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** *Oscar Mata* Plaintiff

**-AND-**

*Norstar Corporation* Defendant

**BEFORE:** Associate Justice Abrams

**COUNSEL:** H. Coleman, counsel for the plaintiff

K.M. Power, counsel for defendant

**HEARD:** December 2, 2024

**REASONS FOR DECISION**

[1] The defendant seeks an Order, pursuant to R. 31.03(2)(a), directing that the representative of the defendant to be examined for discovery be the defendant's General Manager, Robert Davey, and not the plaintiff's representative of choice, the defendant's President, Tony Trigiani ("Mr. Trigiani").<sup>1</sup>

[2] For the reasons that follow, I am denying the defendant the relief that it is seeking.

*Prima Facie Right*

[3] Relying on *Ravenda Homes Ltd. v. 1372708 Ontario Inc.* (2008 CanLII 58427 (ON SCJ), at para. 8), the plaintiff says, and I agree, that the examining party has a *prima facie* right to select whom to examine--with the court to refrain from substituting its own opinion (as to whom best to examine) for his opinion. The onus is on the defendant, being the party seeking to substitute another person as its representative on discovery, to adduce evidence as why the

---

<sup>1</sup> In considering this motion, I have not had regard to Exhibit "L" to Mr. Mata's affidavit (with the defendant having taken issue, in its motion materials, with its inclusion).

person selected by the plaintiff is an inappropriate choice (*Nezhat-Mahal v. Cosmetica Laboratories Inc.*, 2022 ONSC 2458, at para. 22).

[4] The plaintiff is a former employee of the defendant. His evidence is that, from the start of his employment in 2019 until the time of his termination (without cause) on June 1, 2023, his only direct report was to Mr. Trigiani. Indeed, he signed three contracts during the period of his employment--each one with Mr. Trigiani signing on behalf of the defendant; and, he and Mr. Trigiani, both, made handwritten changes to the third contract, being the contract here at issue.

[5] As to this, the defendant states that if the plaintiff had direct contact with Mr. Trigiani, it was only because the plaintiff insisted on dealing with him. The defendant's evidence, adduced by way of affidavits from Mr. Davey, is that Mr. Davey was always behind the scenes and was involved in all employment decisions relating to the plaintiff. In fact, Mr. Davey suggests that Mr. Trigiani simply conveyed to the plaintiff that which Mr. Davey asked him to convey.

#### *Issues To Be Considered*

[6] On this motion, I have considered the following key issues in assessing the relief sought by the defendant (see: *Ciardullo v. Premetalco Inc.*, 2009 CanLII 45445 (ON SC)):

1. Is Mr. Trigiani sufficiently knowledgeable in relation to the matters at issue?
2. Would it be oppressive to require of Mr. Trigiani that he be examined for discovery?
3. Would there be prejudice to the plaintiff if he is required to examine someone other than Mr. Trigiani?

[7] The *prima facie* right of the examining party to select the corporate representative to be examined by him reflects, in part, the right of the examining party to explore the pleaded issues most important to his case. Mere inconvenience is not sufficient to displace the examining party's choice. Key officers and presidents of corporations are not immune from examination by virtue of their respective roles within their companies, provided that "... they have sufficient knowledge of the matters in dispute, which means at least some direct involvement with the parties and the transactions out of which the claims arise" (*Nezhat-Mahal v. Cosmetica Laboratories Inc.*, *supra*, at para. 25).

[8] Whatever Mr. Davey's involvement, the plaintiff says, "[w]hether the [plaintiff's most recent] [c]ontract [with the defendant] is for a fixed or indefinite term...is the question at the heart of the action. No other disputed fact comes close in terms of the magnitude of possible effect it could have on [the] litigation" (factum, at para. 18). Looking at the pleadings, I agree. Damages flowing from breach of contract is what is here claimed, with wrongful dismissal damages pleaded in the alternative. No claims are made for bad faith conduct in the termination of the plaintiff's employment; and, no punitive damages are sought.

### *Sufficiency of Knowledge*

[9] And even if everything set out in Mr. Davey’s affidavits filed on this motion is true, the plaintiff posits, that does not mean that Mr. Trigiani lacks sufficient knowledge to give evidence on discovery. The defendant acknowledges interaction between the plaintiff and Mr. Trigiani (see, for instance, paras. 9, 12, 16, 18 and 60 of Mr. Davey’s September 30/24 affidavit and paras. 9, 16, 17, 27 and 44 of Mr. Davey’s October 25/24 affidavit) and there is at least one exhibit annexed to Mr. Davey’s September 30/24 affidavit (Exhibit “G”) and one annexed to Mr. Mata’s affidavit (Exhibit “K”) that make clear that some sensitive key financial information was imparted by Mr. Trigiani to the plaintiff, but not to Mr. Davey. Taking the defendant’s position at its highest and in the defendant’s own words: “The G[eneral] [M]anager knows what was *supposed* to be communicated. The President is the only person at the [d]efendant [corporation] who knows what was *actually* communicated” (factum, at para. 40). As the plaintiff submits, Mr. Trigiani is the only one with “firsthand knowledge” about the negotiations that led to the June 1, 2022 contract now in dispute--negotiations which the defendant acknowledges, but which Mr. Davey says he *believes* were not “extensive” (para. 60 of Mr. Davey’s September 30/24 affidavit).

[10] Assuming, for a moment, that Mr. Trigiani was only a “messenger” (a descriptor used by Mr. Davey), as the defendant says was the case, Mr. Trigiani may have “misperceived the facts” relayed to him by Mr. Davey; the facts may have been “wrongly remembered” by him; the facts may have been relayed by him in any “unintentionally misleading manner”; and, he may have “knowingly [or unknowingly] made a false assertion” (*R. v. Baldree*, 2013 SCC 35, at para. 32). With Mr. Davey not having been present when Mr. Trigiani purportedly acted as “messenger”, only the plaintiff and Mr. Trigiani can speak to what was actually said.

[11] Further, and in any event, the plaintiff aptly points out that the evidence adduced by the defendant is replete with hearsay statements and references to documents not appended as exhibits. There is no direct evidence from Mr. Trigiani as to what he knows, what he recollects, the sufficiency of his knowledge (and, parenthetically, how attending for discovery might be oppressive to him). The only evidence adduced by the defendant is evidence as to what Mr. Davey believes and what he says he told Mr. Trigiani and Mr. Trigiani told him, with reference to documents not produced.

[12] To buttress his argument, and persuasively, plaintiff points out that his intention was to bring a summary judgment motion but that the defendant stated its opposition given that “[t]he issues to be determined, including the circumstances surrounding the negotiation of the contract terms, will be based largely on credibility”. With the contract having been negotiated by Mr. Trigiani on behalf of the defendant (even if Mr. Davey was involved behind the scenes), the credibility here at issue is that of the plaintiff and Mr. Trigiani. Indeed, on this motion, Mr. Davey deposes as to what Mr. Trigiani told him about his discussions with the plaintiff (i.e. as to nature of those discussions and as to his not having suggested that the June 1, 2022 contract had

a fixed “end date”) and, in so doing, suggests that Mr. Trigiani has an independent recollection of what, for the plaintiff, is the key issue in this litigation.

[13] With Mr. Trigiani continuing to play a not-insignificant role with the defendant (see paragraph 14, below), the sufficiency of his knowledge is buttressed. I note that ‘sufficient’ does not mean ‘perfect’. In the context of any examination for discovery, “a certain level of informing oneself” is required (*Nemni v. BCE Inc.*, 2011 ONSC 6196, at para. 3) and, often, undertakings need to be given.

#### *Oppressiveness*

[14] On the issue of whether it would be oppressive to require Mr. Trigiani to attend to be examined, I am not persuaded that it would be. Reference is made by the defendant to Mr. Trigiani’s age. I note that he is only five years the plaintiff’s senior. The evidence before me is that his physical and mental acuity are strong and that he continues to attend at the defendant’s place of business and to play a role in its business (and in his own charitable endeavours), daily. He signs cheques; he signs off on decisions in his role as President; he has access to the defendant’s books and records; he maintains contact with the defendant’s employees and customers; he is regularly updated as to the defendant’s business affairs; and his thoughts on issues relating to the defendant’s business are solicited (see: para. 37 of Mr. Davey’s affidavit sworn October 25/24). Mr. Trigiani is the defendant’s President, Secretary, Treasurer and sole shareholder. I recognize that, as at the time that this motion was brought, Mr. Trigiani had suffered a personal loss. But that was more than five months ago (and, if Mr. Trigiani needs more time before he can attend to be examined, he certainly can/should be reasonably accommodated).

[15] Then too, and in any event, one would think that it would be more oppressive for Mr. Davey (who lists extensive responsibilities and tasks at para. 63 of his October 25/24 affidavit) to absent himself from the defendant to prepare for and attend at discoveries.

#### *Prejudice*

[16] On the issue of prejudice, *Sattva Capital Corp. v. Creston Moly Corp.* (2014 SCC 53) is instructive. Surrounding circumstances can be considered in interpreting a contract but “[t]he nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” ...should consist only of objective evidence of the background facts at the time of the execution of the contract..., that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting” (at para. 78). Mr. Davey’s intentions regarding the nature of the employment contract are subjective and not within the knowledge of the plaintiff. Only Mr. Trigiani and the plaintiff know what Mr. Trigiani said to the plaintiff and the plaintiff said to Trigiani.

[17] Further, if Mr. Davey is substituted for Mr. Trigiani, “[a]ll information from the President would be filtered through the G[eneral] M[anager], and any admissions about the contracts and negotiations would have little value at trial” (plaintiff’s factum at para. 54).

---

[18] Failing agreement as to the timing of next steps and/or as to costs, I may be spoken to. If I do not hear from counsel, in this regard, by March 14/25, I will treat these issues as having been settled.

February 21, 2025

*Original Signed by Associate Justice Abrams*