CITATION: Lahra R.A. Blagrove v. Andrew R. Whittington, 2010 ONSC 3748
COURT FILE NO.: CV-06-081072-00
DATE: 20100709
CORRIGENDA: 20100709

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
LAHRA R.A. BLAGROVE	)	
	)	
	)	J. Daya, for the Plaintiff
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
ANDREW R. WHITTINGTON	)	
	)	
	)	
	)	
	)	J. Frost, for the Defendant
Defendant	)	
	)	
	)	HEARD: June 24, 2010

REVISED REASONS FOR DECISION

The text of the original endorsement has been corrected with text of corrigendum (released today's date)

LAUWERS J.

[1] This is an undertakings and refusals motion brought by the defendant. The plaintiff argues that under Rule 48.04 leave is required for the defendant to bring the motion. For the reasons set out below, I rule that leave is not required and deal with the merits.

[2] The plaintiff was riding a bicycle when she collided with a 1995 Dodge Avenger motor vehicle. She claims damages.

Procedural History

[3] The statement of claim was issued on September 11, 2006. The statement of defence was served on October 5, 2007. The examinations for discovery of both the plaintiff and the defendant were held on February 19, 2008. The matter was set down by plaintiff's counsel on August 29, 2008 and then placed on the trial list, I assume with the consent of the defendant. There was a pre-trial conference in February 2010. The matter is to be heard in the November 2010 sitting.

Undertakings and Refusals Pursued by the Defendant

[4] The plaintiff provided the clinical notes and records of the family doctor, Dr. Fitzsimmons on June 3, 2008 in answer to an undertaking. Two days later counsel for the defendant asked for additional details of the charges against the plaintiff's husband noted in the clinical notes and records on September 17, 2007. The plaintiff refused on the basis that it was not relevant. I agree that the information is not relevant and need not be provided.

[5] The plaintiff also refused to provide particulars of the "major upheaval in the family" noted in the clinical notes and records of Dr. Fitzsimmons on December 13, 2007 and January 17, 2008. Ms. Daya argued that:

> The plaintiff provided details with respect to her family during the examination for discovery. The "major upheaval" occurred prior to the examination for discovery and could have been addressed. The defendant failed to request an examination for discovery for answers to undertakings…This has little, if any, relevance to the action.

[6] The plaintiff's concession that there is relevance, even if "little," is enough to compel that the answer be provided, particularly since the plaintiff's depression and its cause is in issue. This may necessitate a further attendance for oral examination confined to the specific issue.

[7] The defendant also seeks particulars of the gross business income of $19,609 noted on the plaintiff's 2006 income tax return and $6,553 on the plaintiff's 2007 income tax return, including the name of the business and nature of the business, and any related corporate income returns, the time spent and duties performed. The tax returns were provided to the defendant on July 7, 2008, in answer to an undertaking. The information sought is relevant to the calculation of damages and must be provided. This too may necessitate a further attendance for oral examination confined to the specific issue.

[8] I required the plaintiff to answer certain of the refusals, which I dealt with orally, subject to this ruling on Rule 48.04.

The Leave Issue Under Rule 48.04

[9] Ms. Daya argues that the defendant requires leave to bring this motion and that leave should be refused on the test under Rule 48.04, which provides:

> **48.04** (1) Any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.
>
> (2) Subrule (1) does not,
>
> (a) relieve a party from complying with undertakings given by the party on an examination for discovery;
>
> (b) relieve a party from any obligation imposed by,
>
> (i) rule 29.1.03 (requirement for discovery plan),
>
> (i) rule 30.07 (disclosure of documents or errors subsequently discovered),
>
> (ii) rule 30.09 (abandonment of claim of privilege),
>
> (iii) rule 31.07 (failure to answer on discovery),
>
> (iv) rule 31.09 (disclosure of information subsequently obtained),
>
> (v) rule 51.03 (duty to respond to request to admit),
>
> (vi) rule 53.03 (service of report of expert witness); or
>
> (c) preclude a party from resorting to rule 51.02 (request to admit facts or documents).

[10] Ms. Daya relies on the case of *Van Ginkel v. East Asia Minerals Corp.* [2010] O.J. No. 541. The plaintiff had set the matter down before receiving the answer to the defendant's undertaking that led to the desire for additional production. Perell J. ruled that:

> **19** Applying these principles to the case at bar, in my opinion, Mr. Van Ginkel's motion requires leave and the test for granting leave has not been satisfied. As I view the situation, when Mr. Van Ginkel set the action down

> for trial he indicated that he did not require the "raw accounting files, cheques, invoices, and other documents which are compiled in the financial statements" and the subsequently arriving answer to the Defendant's undertaking does not justify revisiting that decision.

[11] In respect of refusals the court found at para 17:

> Because of rule 48.04(1), if a party sets an action for trial, he or she may not without leave bring a motion for: a further or better affidavit of documents; to challenge a claim for privilege; to compel answers to any questions refused at the examination for discovery; or for further discovery: *White v. Winfair Management Ltd.*, [2005] O.J. No. 1542 (Master); *Fraser v. Georgetown Terminal Warehouse*, [2004] O.J. No. 2131 (Master); *Gawronski v. All State Insurance Co.*, [1998] O.J. No. 4640 (Master); *Machado v. Pratt & Whitney Canada Inc.* (1993), 16 O.R. (3d) 250 [1993] O.J. No. 2741 (Gen. Div.)….

[12] On the issue of whether the defendant can pursue unanswered undertakings by a motion, the court said leave was required, at paras. 17 and 18:

> The authorities are not uniform as to whether a party can move without leave to compel further discovery or the production of documents if the unanswered question is an unanswered undertaking. The predominant line of authorities, however, requires that after the action is set down for trial, leave be obtained to compel answers to undertakings: *Benedetto v. Giannoulias*, [2009] O.J. No. 3218 (S.C.J.); *Fraser v. Georgetown Terminal Warehouses Ltd.*, [2005] O.J. No. 573 (S.C.J.). There, however, is authority that indicates that leave is not required where a party is not honouring his or her undertakings: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality*), [1996] O.J. No. 4809 (Gen. Div.)….
>
> **18** In my opinion, the line of authorities that holds if an action is set down for trial leave must be obtained to compel answers to undertakings is preferable. I say this because for situations where the moving party does not receive answers to the undertakings, the *Rules of Civil Procedure* continues the obligation to honour the undertakings and provides sanctions for the failure to do so, and for situations where the moving party receives answers but wishes to ask follow up questions; the test for granting leave provides an appropriate means to measure whether justice requires that the questions be answered.

Analysis

[13] I find, with respect, that leave is not required for a party to pursue unanswered undertakings by a motion, for four reasons. First, the conclusion that leave is required is not consistent with a fair reading of Rule 48.04. The words of subrule 2 that: “Subrule (1) does

not… relieve a party from complying with undertakings given by the party on an examination for discovery" are reasonably clear. Subrule 1 requires leave, but subrule 2 sets out a list of exceptions. Requiring leave for a motion to compel answers to undertakings, for example, would read out subrule 2 and in my opinion there is no warrant in the language for doing so.

[14] Second, the philosophy of discovery under the Rules of Civil Procedure is somewhat different from the philosophy under the old Rules of Practice, as subrule 2 shows by its list of ongoing obligations. The weight of the current authorities, which are largely based on decisions under Rule 246 of the Rules of Practice, must be doubted in respect of the matters falling under Rule 48.04 (2), since the Rules of Practice did not have an equivalent provision. See *Holmestead and Watson, Ontario Civil Procedure* (1993) at 48-3 and following on Rule 48.04, and *Holmestead and Gale on The Judicature Act of Ontario and Rules of Practice (Annotated)* (2005), at p. 1539 concerning Rule 246, which provided:

> 246. – (1) Where a statement of defence or answer has been delivered, and pleadings are closed, any party who had delivered a pleading and is ready for trial may serve upon every other party who has delivered a pleading and file, with proof of service, a certificate of readiness according to Form 38.
>
> (2) Where all parties entitled to do so have delivered certificates of readiness, any such party may set the action down for trial.
>
> (3) Subject to any order enlarging or abridging or abridging the time, where one or more but not all parties entitled to do so have delivered a certificate of readiness and sixty days have elapsed since the delivery of the first such certificate, any such party may set the action down for trial.
>
> (4) Except by leave of the court, a party who has delivered a certificate of readiness, shall not initiate or continue any interlocutory proceedings or any form of discovery.

Rule 48.04 (1) obviously has its genesis in Rule 246 (4).

[15] I turn now to consider the authorities summarized in *Van Ginkel* at para 17:

> Once a party has set an action down for trial, it is a matter of discretion in the particular circumstances of the case whether the court will grant leave to initiate or continue a motion or form of discovery. However, the setting down for trial is not a mere technicality and the test for granting leave to permit further discovery or other interlocutory proceedings, is that there must be a substantial or unexpected change in circumstances such that a refusal to grant leave would be manifestly unjust or the interlocutory step must be necessary in the interests of justice. *Hill v. Ortho Pharmaceutical (Canada) Ltd.*, [1992] O.J. No. 1740 (Gen. Div.) at para. 3; *Machado v. Pratt & Whitney Canada Inc.* (1993), 16 O.R. (3d) 250 [1993] O.J. No. 2741 (Gen. Div.); *White v. Winfair Management Ltd.*, [2005] O.J. No. 1542

> (Master) at paras. 15-16; *Benedetto v. Giannoulias*, [2009] O.J. No. 3218 (S.C.J.).

In terms of the test for leave Ms. Daya also cites *MacRae v. Dreuniok* [2007] O.J. No. 3283 per DiTomaso J. at para. 21; *Trapukowicz Estate v. Royal Bank of Canada* [2009] O.J. No. 3799 per Harris J. at para 13. Another reason for giving leave is inadvertence in setting down the matter for trial: *Greenhalgh v. Vaillancourt* [2010] O.J. No. 459 per E.M. Stewart J. at paras. 13-18 and see *Boivin v. Slack* [2009] O.J. No. 4984 per Wood J.; there is none here.

[16] My difficulty is that none of the authorities cited grapple with the implications of subrule 2 of Rule 48.04 for the requirement of leave under subrule 1.

[17] The problem can be readily shown by picking out a couple of the cited authorities that rely on precedents under Rule 246. In *Hill v. Ortho Pharmaceutical (Canada) Ltd., supra*, a party sought leave to conduct a second examination of the defendant when counsel was changed because the "the discovery of the defendant was so poor that it constitutes no discovery" and that "it would be impossible to properly prepare for trial" without one. In *Machado v. Pratt & Whitney Canada Inc., supra*, the plaintiff's counsel sought leave to appeal from a Master's decision that was pending when he set the action down. Relief was refused in both.

[18] The approach in both cases to Rule 48.04 is exemplified in *Hill.* E.M. MacDonald J. held:

> In order for the plaintiffs to succeed in obtaining the right to further discovery, they must first meet the requirements of Rule 48.01(4). There are many decisions which deal with the consequences of setting a matter down for trial. The significance of setting a matter down for trial is evidenced by, among other things, the fact that counsel setting the matter down for trial must sign a certificate to the effect that everything has been done to place the matter on the list for trial. The authorities make it clear that setting a matter down for trial is not a mere technicality of procedure. Before it can be vacated to permit any further discovery or other interlocutory proceedings, there must be a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust. There are several authorities in support of this proposition which Counsel for the defendant cited to me. (See Kovary v. Heinrich, et al. (1974), 5 O.R. (2d) 365 at page 366 (H.C.J.); Tolbend Construction Ltd. et al. v. Freure Holmes Ltd. et al. (1984), 45 C.P.C. 42 at page 44 (Ont. Div. Ct.); Elder et al. v. Swiss Chalet Bar-B-Q et al., an unreported decision of Master Sandler (November 21, 1983); affirmed in an unreported decision of Mr. Justice Labrosse (January 4, 1984); Lando & Partners, et al. v. Upshall, et al. (1983), 39 C.P.C. 45 at pages 47 to 48 (Ont. H.C.J.))

[19] She added: "I could not help but note in reviewing this matter the words of the Honourable Mr. Justice Montgomery at the opening of his decision in Lando & Partners, et al. v.

Upshall, et al., supra at p. 47: "The profession must be forcefully reminded that a certificate of readiness means what it says!""

[20] In *Machado, supra,* at para 12, Wilkins J. took the same approach, and added:

> The cases referred to me make reference to the concept of a certificate of readiness. The rules no longer require a certificate of readiness, but rule 48.04 has replaced that certificate. In my view, there is no difference between the obligation of a solicitor in signing a certificate of readiness and the obligation of a solicitor under rule 48.04. Under both circumstances, leave of the court is necessary in order to either have the certificate set aside or, alternatively, to initiate or continue a motion or launch an appeal as is sought in this instance.

[21] Both *Hill* and *Machado* fell within Rule 48.04 (1) and not within Rule 48.04 (2) to which no reference was made (rightly so because the relief sought is not listed in subrule 2). But how does the approach to leave under Rule 48.04 (1) help in construing Rule 48.04 (2)? In my view it does not.

[22] Third, I am not persuaded that sanctions within the specific rules listed in Rule 48.04 (2) are always adequate. Under Rules 30.07 (disclosure of documents or errors subsequently discovered), and 31.09 (disclosure of information subsequently obtained), for example, the sanction is that a party may not introduce the material at trial if it is favourable to the party without leave of the trial judge, and if it is favourable to the other party, "the court may make such order as is just" (Rule 30.08 and Rule 30.09 (3)). In some instances the other party may well be content with such sanctions and may decide that pursuing answers or documents is not worth the time and effort, but in other instances the significance of the issue, timing, and trial fairness may militate in favour of an earlier and more effective resolution by motion, as in this case.

[23] Fourth, given the stringent test for leave under Rule 48.04 (1), I am concerned that counsel may adopt in practice a relaxed approach to the serious obligations under Rule 48.04 (2) if the ability to enforce them by motion is subjected to that test.

Conclusion

[24] There is a perennial and endemic tension between, on the one hand, the policy of requiring the parties to work diligently towards trial readiness, to signal it, and to live with the consequences as they do under Rule 48.04 (1) when they set the matter down or consent to its listing for trial, and, on the other hand, the trial fairness concerns that underlie the exceptions in Rule 48.04 (2). But the way that the Rules resolve that tension is in the words of Rule 48.04; they provide the limited exceptions in Rule 48.04 (2). Those specific exceptions must be respected. I am supported in this conclusion by the decision of Borins J., as he then was, in *CBL Investments Inc. v. Menkes Corp.* (1994), 17 O.R. (3d) 147 at para. 8 (Gen. Div.): "Read together rules 48.04(1) and (2) enable a party to set an action down for trial while preserving the rights which it has in respect to the scope of the pre-trial discovery process stipulated in rule 48.04(2)."

[25] I therefore find that the obligation to seek leave under Rule 48.04 (1) to bring a motion does not apply to the matters listed in Rule 48.04 (2). This includes, of relevance to this motion, the plaintiff's obligation to comply with the undertakings given at the examination for discovery including reasonably related follow-up questions.

[26] Despite the general practice of not pursuing refusals after a matter has been set down for trial on consent, there is no principled basis for treating refusals, which fall under "rule 31.07 (failure to answer on discovery)" listed in Rule 48.04 (2) (b) (iii), differently from undertakings compliance under Rule 48.04 (2) (a). In short, I can find no reason for including the reference to refusals in Rule 48.04 (2) if it was not to avoid the need for leave in Rule 48.04 (1). I therefore find that leave is not required to bring a refusals motion after the case has been set down or placed on the trial list with consent. The consequences of these rulings in this case are set out above.

Costs

[27] The defendant submits that the undertakings motion was necessary in order to get compliance by the plaintiff. A costs outline was filed. It showed that a clerk spent 19.8 hours reviewing the transcripts and assembling the charts and other motion materials. Counsel for the defendants who argued the motion spent 3.0 hours in preparation. Counsel who swore the affidavit in support of the motion spent 7.2 hours reviewing documentation and following-up on the undertakings and refusals before the motion was set and also in reviewing the motion material. At the partial indemnity rate, the total charge is $3,719.80.

[28] The plaintiff's costs outline records 22 hours of lawyer time and 1.5 hours of clerk time. The fees on a partial indemnity basis are $3,675.00 plus $300.00 for counsel fee.

[29] Based on the criteria in Rule 57.01, I find that the defendant is entitled to costs on a partial indemnity basis, assuming that there have been no settlement offers. I am assisted by the fact that similar levels of effort were expended by each side. I fix costs at $3,500 all inclusive, to be paid to the defendant within 30 days of this endorsement. If the parties are unable to agree on costs in light of any settlement offers, I will accept written submissions in a 10 day cycle starting with the defendant.

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Justice P.D. Lauwers

RELEASED: July 9, 2010

C O R R I G E N D A

1. Page 1 – Heard Date now reads: June 24, 2010.