CITATION: De Pasquale v. Vesterra Property Management Inc.,2024 ONSC 855
COURT FILE NO.: CV-19-4400-0000
DATE: 2024 02 06

SUPERIOR COURT OF JUSTICE – ONTARIO
491 Steeles Avenue East, Milton ON L9T 1Y7

RE: Antonino (Tony) De Pasquale, Plaintiff

AND:

Vesterra Property Management Inc., Defendant

BEFORE: Justice C. Conlan

COUNSEL: Christopher Stienburg, for the Plaintiff
Jason Allingham, for the Defendant

HEARD: February 6, 2024

ENDORSEMENT

The Action

[1] This is a wrongful dismissal action brought by D.P. It is not a typical wrongful dismissal action, however, in that the Claim, in addition to alleging that the plaintiff was dismissed without just cause and without sufficient notice or pay in lieu of notice, also alleges discriminatory and harassing tortious conduct on the part of the individual who is the controlling mind of the defendant corporation.

The Motion

[2] The defendant moves for relief concerning undertakings, refusals, and "under-advisements" stemming from the examination for discovery of the plaintiff held on May 2, 2023.

[3] Fortunately for this Court, confronted with the bane of its existence, the infamous undertakings motion, good counsel have put their heads together to settle some of the dispute. They want to speak to the issue of costs of what has been resolved. That shall be done in writing, at the same time and in the same materials filed by counsel as per the direction below as it concerns the costs of what was not settled but which has been decided herein.

Preliminary Issue – to Strike or not to Strike the Plaintiff's Evidence

[4] First, however, before getting to the substance of the remaining dispute, there is a preliminary matter that has been raised by the moving party defendant. It seeks to strike out some of the evidence filed by the plaintiff.

[5] What evidence? Letters written by the plaintiff's mental health counsellor and his family doctor. Letters that speak about why those professionals do not want to disclose their records, including assertions that such disclosure will only serve to worsen the plaintiff's already fragile mental health.

[6] Those letters, and all references to them in the plaintiff's materials filed on the motion, are certainly relevant because the relief being sought by the defendant is an order that the said records shall be disclosed (these records are the subject of the "under-advisements" referred to above), while the plaintiff is suggesting that the records be disclosed under certain conditions: some redactions and on the basis that the records are for the eyes of counsel only.

[7] The defendant's motion to strike is allowed in part. The affidavit of N.C. sworn on January 18, 2024, in its entirety, which affidavit includes the letter from the plaintiff's family physician, is struck. The rest of the material under attack by the defendant is not struck.

[8] The said affidavit of N.C. is struck because it was filed improperly. It was filed by the plaintiff during the adjournment period of the within motion, without permission from the judge who adjourned the motion for any further evidence to be filed by either side, without permission from this Court or from any other judge for leave to file the material,

and without any reasonable explanation as to why the material could not have been filed before the first return date of the defendant's motion. The decision of Justice Quinn in *Ensign Group Inc. v. Sainte Estate*, 2007 CarswellOnt 2523, [2007] O.J. No. 1586, 157 A.C.W.S. (3d) 253 (ON SC), at paragraphs 15 through 20, is directly on point and is dispositive of the issue. Plaintiff's counsel did not provide to this Court any contrarian authority or in any way quarrel with the said decision.

[9] The other impugned materials are different. They were filed properly and on time. They include the letter of the plaintiff's mental health counsellor and references to that letter in the affidavits of the plaintiff, of N.C., and in the plaintiff's factum and compendium.

[10] I agree with counsel for the defendant that the letter from the mental health counsellor is hearsay, and it would have been much better for the counsellor to have provided direct evidence through the counsellor's own affidavit.

[11] The defendant relies upon *Danos v. BMW Group Financial Services Canada et al*, 2014 ONSC 2060, at paragraph 29. The facts of that case were very different than ours, however. That case, unlike ours, involved a motion for summary judgment. That case, unlike ours, involved a complete expert's report that opined on the very issue that was at the heart of the entire case and which had been simply appended as an exhibit to the party's affidavit. That case, unlike ours, was one where the party complaining about the hearsay evidence would have had the absolute right to cross-examine the deponent of the report in question. That case, unlike ours, involved a very timely objection to the admissibility of the impugned evidence.

[12] The crux of the motion that is left for this Court to decide involves a determination of whether the records in question ought to be disclosed with or without conditions that pertain to confidentiality. That determination, in turn, depends on whether this Court is satisfied on balance that the plaintiff has met the test for such an exceptional order that will only be made in very rare circumstances, that is the test set out by Justice Perell in the decision both sides rely upon, *Foss v. Foss*, 2013 ONSC 1345 (S.C.J.), at paragraph 44 – is there a demonstrated risk of serious injury if the confidentiality order is not made?

For this Court to strike out the letter of the plaintiff's mental health counsellor and all references to it would be, in my view, on our facts, an unduly restrictive preference of form over substance.

What Disclosure Order Should be Made?

[13] That leaves two questions: should there be redactions permitted before the records are disclosed to the defendant's counsel, and should the disclosure of the records be only to the defendant's counsel?

[14] I would answer the first question in the affirmative. With respect, the defendant's counsel has misinterpreted the decision of Justice Strathy (as His Honour then was) in *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408 (S.C.J.). That decision does not stand for the proposition that a document that is in any way or part deemed to be relevant cannot be redacted. That would be absurd. Imagine a document that has relevant financial information of a party to the proceeding, who happens to be a company employee, on one page and then 1000 pages of the names, contact information, and other private information of the company's other 10,000 employees. Unless there is some relevance to the information on those 1000 pages, nobody would reasonably suggest that none of that information on those 1000 pages can be redacted.

[15] **This Court orders that counsel for the plaintiff may redact from the records to be** disclosed **to the defendant's counsel all identifying information of any third parties contained therein**. If defendant's counsel is unsatisfied with the quality or the extent of the redactions, then the matter may be brought back to court on a special appointment arranged through the trial coordinator's office and without the need for any further motion. If that becomes necessary, it would be more efficient if the special appointment was made returnable before me.

[16] I would answer the second question with the following direction: **this Court orders that the records, as redacted, shall be disclosed to MacDonald Associates PC,** counsel **for the defendant, including but not limited to Mr. Kevin MacDonald and Mr. Jason Allingham, on condition that MacDonald Associates PC shall not, without**

the written consent of the plaintiff or a further court order made after today, provide copies of the records or disclose their content to anyone outside MacDonald Partners PC, except an expert witness retained on behalf of the defendant. To be clear, "anyone" includes the individual who is the controlling mind of the corporate defendant.

[17] In my opinion, the evidence of the plaintiff at paragraphs 4 through 13 of his affidavit sworn on November 23, 2023, and the evidence of the mental health professional – the letter dated October 5, 2023, demonstrate, on balance, a serious risk to the mental health of the plaintiff if the order made immediately above is not made.

[18] These records appear, from the evidence filed, to be of very limited probative value to any live issue in this case, including the pre-dismissal mental health of the plaintiff. Yet their disclosure to the defendant itself would be devastating to the plaintiff's mental health, according to the evidence of the plaintiff himself and that of the mental health counsellor, which evidence I accept on this point.

[19] If, after receiving the records as redacted, the defendant's counsel would like this Court, or another judge, to review the records (which invitation was declined by counsel for the defendant during oral submissions today), whether redacted or unredacted, with a view to determining whether a further order should be made regarding confidentiality, a motion may be filed to that effect.

Costs

[20] On costs, if they cannot be resolved between the parties, this Court will accept written submissions as follows. The defendant shall file within thirty (30) calendar days after today. The plaintiff shall file within fifteen (15) calendar days after his counsel's receipt of the defendant's submissions. No reply is permitted on the issue of costs.

[21] It would seem to me that the parties ought to seriously consider agreeing to an order for no costs of the entire motion, both that which was resolved on consent and that which has been decided herein.

[22] For the purposes of any publication of this Endorsement, the plaintiff shall be identified as D.P., and the Defendant shall be identified as V.P.

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Conlan J.

Date: February 6 2024