CITATION: Adams v. Body Plus, 2024 ONSC 315
COURT FILE NO.: CV-22-00677610-0000
DATE: 20240115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Mikhael Adams et al v. Body Plus Nutritional Products et al*

BEFORE: Associate Justice Rappos

COUNSEL: *Ian Matthews and Milica Bijelic*, for the Plaintiffs

John Reiterowski, for the Defendants

HEARD: September 14, 2023

REASONS FOR DECISION

OVERVIEW

[1] The Plaintiffs initially brought a motion seeking two orders from the Court: (a) an order under subrule 30.06(b) of the *Rules of Civil Procedure* (the "***Rules***") directing the Defendants to serve a further and better affidavit of documents; and (b) an order under rules 3.04(4) and 60.12 directing the Defendants to pay costs to the Plaintiffs in the amount of $8,500 as a consequence of the Defendants breaching court orders regarding discovery and breaching a discovery plan.

[2] Following service of the Defendants' responding motion record, the Plaintiffs served a second notice of motion requesting an order under rule 25.11 striking an affidavit tendered by the Defendants for this motion, or in the alternative, striking certain paragraphs of the affidavit on the basis of settlement privilege.

[3] For the reasons that follow, the Plaintiffs' motions for a further and better affidavit of documents and a costs sanction are granted, and the motion to strike the affidavit is dismissed.

ANALYSIS

Motion to Strike Responding Affidavit

[4] Rule 25.11 of the *Rules* provides that the court may strike out or expunge all or part of a document, with or without leave to amend, on the ground that the document, (a) may prejudice or delay the fair trial of the action, (b) is scandalous, frivolous or vexatious, or (c) is an abuse of the process of the court.

[5] The Defendants rely on an affidavit sworn by a law clerk employed by the law firm acting as counsel for the Defendants in this action (the "**Responding Affidavit**"). In each material paragraph of the affidavit, the affiant states that she was informed of the information contained therein by Kalman Magyar, one of the lawyers representing the Defendants in this action.

[6] The Plaintiffs argue that the Responding Affidavit effectively makes one of the Defendants' lawyers the principal witness on matters that are the subject of challenge, which is contrary to the *Rules of Professional Conduct*.

[7] The Plaintiffs also argue that the Responding Affidavit is replete with argument that ought not to be contained in an affidavit.

[8] Lastly, the Plaintiffs argue that paragraphs 3 through 7 of the Responding Affidavit, along with a chart attached as Exhibit "A" to the affidavit, refer to information that is subject to settlement privilege. The Plaintiffs note that the Defendants did not seek the consent of the Plaintiffs to disclose the "without prejudice" discussions and documentation.

[9] It is for those reasons that the Plaintiffs ask the Court to strike the affidavit entirely, or at a minimum, strike paragraphs 3 through 7 and Exhibit "A".

[10] The Defendants argue that an affidavit from a law clerk based on information and belief from counsel is permissible where, as is the case here, the informing counsel is not a material witness and did not argue the motion. As well, the Defendants note that the Plaintiffs did not seek to cross-examine the affiant.

[11] As a starting point, I echo the statements made by Master MacLeod (as he then was) in *Mapletoft v. Christopher J. Service*, that, "if it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm."[1]

[12] Having reviewed the Responding Affidavit, I do agree with the Plaintiffs that the affidavit is argumentative and that many of the statements contained in the affidavit have no place therein and should have been excluded.

[13] However, I do not believe that the discussion of the Defendants' position in response to the productions dispute between the parties is with respect to a highly contentious issue that prohibited the Defendants from relying on the affidavit of a law clerk (or effectively an affidavit from Mr. Magyar) for this motion. I do note that both affidavits tendered by the Plaintiffs in support of their motions was sworn by a lawyer from the law firm representing the Plaintiffs in this action.

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[1] *Mapletoft v. Christopher J. Service*, 2008 CanLII 69354 (ON SC), para. 15.

[14] As well, I am not convinced that the fact that the Responding Affidavit was sworn by a law clerk on information from Mr. Magyar, who did not argue the motion, and contains argument may prejudice or delay the fair trial of the action, is scandalous, frivolous or vexatious, or is an abuse of the process of the court to justify the Responding Affidavit being struck pursuant to rule 25.11. The contents of the affidavit are restricted to the narrow issues argued on this production motion.

[15] With respect to the Plaintiffs' alternative argument, paragraphs 3 through 7 of the Responding Affidavit details that a discussion amongst counsel occurred, and e-mails were exchanged, regarding the productions dispute. Mr. Magyar sent an e-mail to counsel to the Plaintiffs to "try to assist us in getting a resolution of the perceived deficiencies in the defendants' production." Mr. Magyar attached a chart which he sent on a "without prejudice" basis. That chart is attached as Exhibit "A" to the Responding Affidavit, and contains Mr. Magyar's position in response to the documents requested by the Plaintiffs.

[16] The Plaintiffs' counsel did not respond to the e-mail or the chart prior to serving their motion record.

[17] The Responding Affidavit notes that the contents of the chart track the topics in the Discovery Plan (as defined below).

[18] Having reviewed the Responding Affidavit and the chart appended as Exhibit "A", as well as the reply affidavit filed by the Plaintiffs, I do not believe that paragraphs 3 through 7 of the Responding Affidavit and the chart at Exhibit "A" should be struck under rule 25.11.

[19] In my view, I need not make a determination as to whether paragraphs 3 through 7 and Exhibit "A" are subject to settlement privilege as, even if they are, the Plaintiffs have not satisfied me that their disclosure should be struck pursuant to rule 25.11.

[20] Again, the contents of the paragraphs and the chart are with respect to a narrow issue concerning production of documents. Both the Responding Affidavit and the Defendants' factum make the same arguments that are contained in the Exhibit "A" chart. I fail to see how their disclosure in the Defendants' responding motion record may prejudice or delay the fair trial of the action, is scandalous, frivolous or vexatious, or is an abuse of the process of the court.

[21] As a result, the Plaintiffs' motion to strike under rule 25.11 is hereby dismissed.

Motion for Further and Better Affidavit of Documents

[22] Subrule 30.06(b) of the *Rules* provides that, "where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents… the court may order service of a further and better affidavit of documents."

[23] On a motion for production of a further and better affidavit of documents, the moving party must prove that the subject documents exist on a balance of probabilities before an order is made that they be disclosed in a further and better affidavit of documents.[2]

[24] While evidence in support of the motion cannot be based on speculation or guesswork, the level of proof required must take into account that one party has access to the documents and the moving party does not.[3]

[25] The Plaintiffs have sued the Defendants for breach of contract, inducing breach of contract, and misappropriation of personality in the amount of no less than $2.0 million. The core allegation in the claim is that the Defendant, Body Plus Nutritional Products Inc. ("**Body Plus**"), has breached the terms of a termination agreement effective as of September 28, 2017 (the "**Termination Agreement**"), pursuant to which Body Plus was to cease using the name, likeliness and biographical information of the Plaintiff, Dr. Mikhael Adams, in marketing certain nutritional products after August 31, 2019, in exchange for a lump sum payment.

[26] The Plaintiffs allege that Body Plus has breached the Termination Agreement by continuing to use Dr. Adams' name, likeness and biographical information since September 1, 2019 without additional compensation being paid to Dr. Adams.

[27] The parties spent nine (9) months negotiating a discovery plan, which was agreed to by the parties on May 8, 2023 (the "**Discovery Plan**"). The Discovery Plan lists Dr. Adams as a custodian of documents for the Plaintiffs, and four individuals as custodians of documents for the Defendants.

[28] Section 4 of the Discovery Plan provides that, after collecting documents from the custodians, the parties were to apply the list of topics identified in Appendix "A" to the Discovery Plan (collectively, the "**Topics**") in order to identify potentially relevant documents. Appendix "A" states that the parties "shall produce relevant documents in their possession, control or power" relating to the Topics.

[29] The Defendants produced 409 documents on March 14, 2023, and an additional 141 documents on June 6, 2023.

[30] The Plaintiffs allege that the Defendants have produced zero documents for some of the Topics, and that there are deficiencies with respect to documents produced for other Topics.

[31] In support of their motion, the Plaintiffs rely on an affidavit affirmed by Kelly Friedman, counsel at the law firm representing them in this motion, who specializes in electronic discovery. The affidavit provides a detailed review of the documents produced by the Defendants to date and

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[2] *Mitrex Inc. v. Wilson*, 2023 ONSC 4658, para. 5.
[3] *Ibid.*

compares them to the documents the Defendants agreed to produce under the Topics. The affidavit also explains how most of the Topics are connected to allegations made in the pleadings.

[32] The Plaintiffs' position is that most of the documents produced to date are marginally relevant to the litigation and not particularly responsive to the Topics. The Plaintiffs also argue that it is unlikely that all relevant documents maintained by the custodians were searched and produced, as required under the Discovery Plan.

[33] The Defendants' position is that the productions sought by the Plaintiffs are not proportionate and that many documents sought are not relevant to the issues in the action as detailed in the pleadings. The Defendants do not, as a whole, argue that the documents sought by the Plaintiffs do not exist. However, they view the requests for documents to be broad and unfocused and more akin to a "fishing expedition" that will result in costly overproduction.

[34] The Defendants also rely on the following portions of paragraphs 24 and 25 of the Discovery Plan:

> "This Discovery Plan is not intended to define all of the Parties' respective obligations with respect to the production of documents, and this Discovery Plan shall not impact the discovery rights and obligations otherwise imposed by the *Rules*, unless expressly noted herein.
>
> The Parties acknowledge that, as additional information becomes available throughout the course of the action, it may become apparent that: (i) it is impractical or impossible for a Party to comply with the terms of this Discovery Plan, or to do so in a time-efficient, cost-efficient or proportionate manner; or (ii) further steps beyond those set out in this Discovery Plan are required in order for a Party to obtain access to relevant documents in the action. The Parties agree to negotiate in good faith with respect to any amendments to the Discovery Plan requested by a Party on this basis and to update the Discovery Plan in accordance with rule 29.1.04. Any amendments to the Discovery Plan shall be recorded in writing."

[35] The Defendants argue that discovery plans: (a) are not intended to be a mechanism for addressing and finally resolving all possible disputes that may arise in the course of discovery;[4] and (b) are not meant to be a speculative motion for a further and better affidavit of documents.[5]

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[4] *Rooke v. Deloitte*, 2023 ONSC 1046, para. 11.
[5] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2014 ONSC 660, para. 85.

[36] Based on my review of the materials, the Plaintiffs have satisfied me that there are relevant documents which exist and are within the power, possession and control of the Defendants that have not been produced by the Defendants.

[37] I find that that the review conducted by Ms. Friedman of the productions in the context of the Topics to be detailed and compelling. The Defendants have failed to produce any documents under three Topics (4, 8 and 9). For Topics 3, 5, 6, 7 and 10, the Defendants produced documents that were far more limited in scope than what was agreed to in the Discovery Plan and the language used in defining the Topics.

[38] The existence of the negotiated Discovery Plan is an important fact in this motion. It took the parties almost nine months to finalize the Discovery Plan. Subrule 29.1.03(1) required the parties to agree to the Discovery Plan. Subrule 29.1.03(3) provides that a discovery plan must include, among other things, the intended scope of document discovery, taking into account relevance, costs, and the importance and complexity of the issues in the particular case, and information respecting the timing, costs and manner of the production of documents by the parties and other persons.

[39] It is concerning that, after the time it took to execute the Discovery Plan, the Defendants almost immediately took the position that the Topics were not proportionate and would result in overproduction of irrelevant documents and excess expense.

[40] In my view, the Defendants position is contrary to the purpose behind rule 29.1 which, among other things, is to ensure that, where possible, discovery is a collaborative exercise rather than a contentious one. It defeats the purpose of requiring a discovery plan if parties can immediately resile from what they have agreed to do.

[41] I do not see the language in paragraphs 24 and 25 in the Discovery Plan granting the parties "carte blanche" to, again, almost immediately refuse to produce documents required under the Topics for the reasons put forward by the Defendants.

[42] In many ways, the position taken by the Defendants is akin to the position that a party would take in response to a motion for the imposition of a discovery plan under subrule 29.1.05(2). Such a position is not appropriately taken after the parties have already spent nine months negotiating and agreeing to terms of a discovery plan.

[43] As a result of the foregoing, the Plaintiffs' motion for a further and better affidavit of documents, which provides for production of relevant documents required under certain of the Topics agreed to by the Defendants, is granted.

Motion for Costs Re: Breaching Court Orders and Discovery Plan

[44] Subrule 3.04(4)(c) of the *Rules* provides that if a party fails to comply with a timetable, a judge or an associate judge may, on any party's motion, make such other order as is just.

[45] Subrule 60.12(c) of the *Rules* provides that where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules, make such other order as is just.

[46] The Plaintiffs request that the Court grant an order directing the Defendants to pay $8,500 in connection with the following breaches committed by the Defendants:

(a) failure to serve their affidavit of documents by December 1, 2022, as provided for in the consent order of Justice Pollak dated November 7, 2022;

(b) failure to serve their affidavit of documents by February 28, 2023, as counsel to the Defendants committed to do in an email dated February 1, 2023;

(c) failure to serve a revised and sworn affidavit of documents by May 31, 2023, as the Defendants consented to and is provided for in the Endorsement and Order of Associate Justice Brown dated April 24, 2023; and

(d) failure to serve a sworn affidavit of documents and complete documentary productions by May 31, 2023, as set out in a Discovery Plan dated May 8, 2023 signed by counsel to the Defendants.

[47] The Plaintiffs argue that a sanction against the Defendants is warranted in the circumstances, given that the Defendants failed to comply with consent Court ordered timetables for delivery of their affidavit of documents. The Plaintiffs specifically note that the Defendants missed the original deadline under the December 1, 2022 by over six months.

[48] The Defendants argue that there have been *bona fide* disputes with respect to discovery matters, and that it is not appropriate to order a costs sanction, as the Defendants have not done anything to delay matters. The Defendants rely on *Hemming v. Oriole Media Corp.* ("***Hemming***") in support of their argument that sanctions are only warranted where court orders have been "ignored repeatedly and over a number of years."[6]

[49] In *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, the Court of Appeal emphasized the fundamental obligation to disclose and produce relevant documents on parties so as to ensure the proper and fair functioning of the civil litigation process.[7]

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[6] *Hemming v. Oriole Media Corp.* ("***Hemming***"), 2021 ONSC 6748, para. 23.
[7] *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310 ("***Falcon Lumber***"), paras. 41-42.

[50] The Court of Appeal stressed that "parties to every action must comply with their document disclosure and production obligations without the need for a court to intervene to compel their adherence…[t]he fundamental obligation to disclose relevant documents and produce those that are not privileged should be performed automatically by a party, without the need for court intervention."[8]

[51] The Defendants have provided no explanation for their failures to adhere to two Court ordered timetables, as well as a deadline for delivery they set and a deadline for delivery contained in a discovery plan that they agreed to.

[52] There are sanctions for a party's failure to comply with a Court ordered timetable, especially consent ordered timetables.[9] A party cannot ignore their production obligations under the *Rules*, and they especially cannot ignore Court ordered timetables.[10]

[53] In exercising the discretion afforded to me under subrules 3.04(4)(c) and 60.12(c), I believe that a costs sanction against the Defendants is warranted in these circumstances. The comments from *Hemming* are not applicable, as those were made in the context of a motion for an order striking a statement of defence.[11]

[54] The civil justice system is in a dangerous state,[12] and parties must play their role in abiding by the *Rules* so as to ensure that civil proceedings are determined on their merits in a just, most expeditious and least expensive manner.[13]

[55] In terms of quantum of the sanction, the Plaintiffs seek $8,500 from the Defendants. The Plaintiffs rely on *L'Abbé v. Allen-Vanguard* ("***Allen-Vanguard***"), where Master Macleod (as he then was) ordered payment by the Plaintiffs of $7,000 for their failure to meet several court-imposed deadlines.[14] The Plaintiffs do not place any significance on the $8,500 number, as they have simply increased the amount given that *Allen-Vanguard* was decided over 12 years ago.

[56] The Defendants argue that the *Allen-Vanguard* case is distinguishable, as in that case the Court held that the plaintiff had "not taken its production obligations as seriously as it should have done" and "failed to do proper groundwork."[15]

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[8] *Ibid.*, para. 43.
[9] *Joshi v. David Grace*, 2023 ONSC 278, para. 20
[10] *Hendrix v. Geo Group of Companies*, 2008 CanLII 29596 (ON SC), para. 20.
[11] *Hemming*, paras. 1 and 23.
[12] *Miller v. Ledra et al*, 2023 ONSC 4656, paras. 20-27.
[13] *Falcon Lumber*, para. 43.
[14] *L'Abbé v. Allen-Vanguard*, 2011 ONSC 40, paras. 2, 53 and 61.
[15] *Ibid*., paras. 53-54.

[57] While I do not dispute that the facts of the *Allen-Vanguard* case are different than the ones before me, that does not change the fact that the Defendants failed to adhere to two consent court orders and their obligations under the *Rules* and the Discovery Plan.

[58] In my view, $8,500 is an appropriate amount to award against the Defendants given the Defendants' transgressions detailed above.

DISPOSITION AND COSTS

[59] For the reasons set out above, the Plaintiffs' motions for delivery of a further and better affidavit of documents and payment of $8,500 due to breaches of court orders are hereby granted, and the motion to strike the Responding Affidavit is dismissed.

[60] In terms of costs, the Defendants argue that the Plaintiffs should not be awarded any costs, as they inappropriately chose to proceed with their motions rather than cooperate with the Defendants' attempts to resolve the discovery disputes without the Court's intervention.

[61] Given that the Defendants previously breached two Court orders for productions and did not produce documents in accordance with the agreed to Discovery Plan, it was not unreasonable for the Plaintiffs to request the Court's intervention. There is nothing in the record that warrants supplanting the rule that costs typically follow the event and the successful moving party is entitled to costs.

[62] In terms of quantum, the Plaintiffs seeks costs for the two motions in the sum of $46,071.80 on a partial indemnity basis. This amount includes almost $10,000 in fees for Ms. Friedman's review of documents to prepare her affidavit.

[63] The Defendants argue that the amount is excessive, and a more appropriate amount would be $15,000.

[64] The Plaintiffs argue that they had the more difficult task and that it should not be surprising that they were required to spend considerably more time than the Defendants in connection with their motions.

[65] Costs of a step in a proceeding are in the discretion of the Court, as set out in section 131 of the *Courts of Justice Act* (Ontario). Rule 57.01 of the *Rules of Civil Procedure* sets out factors that the court may consider in exercising such discretion. The overriding principles in determining costs are fairness and reasonableness (*Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), at paras. 24, 26, and 37-28).

[66] In fixing the amount of costs, I have taken into consideration the fact that the Plaintiffs were unsuccessful in their motion to strike the Responding Affidavit.

[67] Having reviewed the costs outlines and heard submissions of counsel, and having considered the factors set out in rule 57.01, I believe a fair and reasonable amount of costs for the

motion is $30,000 all inclusive. As a result, I hereby fix costs in this amount, payable by the Defendants to the Plaintiffs within 30 days.

[68] As I expect that there may have been additional productions since the motion was argued, I ask that the parties agree to an updated form of draft order and send it to Assistant Trial Coordinator Kimi Sharma (kimi.sharma@ontario.ca) for my review.

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Associate Justice Rappos

DATE: January 15, 2024