

CITATION: Namena Corp. v Ameri-Can Pharma Inc.; 2024 ONSC306
COURT FILE NO.: CV-20-646688
DATE: January 12, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Namena Corp. and Namena Pharma Corp. v. Ameri-Can Pharma Inc., Thinesh Sivarajah and 36 Pharma Consulting Services Inc.;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Michael B. Lesage *for Namena Corp. and Namena Pharma Corp.*;
Shahzad Siddiqui *for Ameri-Can Pharma Inc. and Thinesh Sivarajah*;

HEARD: November 16, 2023.

REASONS FOR DECISION

[1] This motion by the plaintiff, Namena Corp. (“Namena”), seeks to strike the statement of defence and counterclaim of Mr. Sivarajah for failing to answer discovery questions, or, in the alternative, to have Mr. Sivarajah ordered to reattend at discovery at his own expense to answer to outstanding undertakings and refusals he gave at discovery and for certain Rule 30.10 relief.

a) *BACKGROUND*

[2] The underlying action is by Namena, a developer and marketer of pharmaceutical and nutraceutical products. It is undisputed that on December 4, 2015 Namena entered into a licensing agreement with Mr. Sivarajah’s company, Ameri-Can Pharma Inc. (“ACP”), whereby ACP gave Namena an exclusive license to develop and sell certain nutraceutical products ACP had created. On January 1, 2016 Namena and Mr. Sivarajah agreed that Mr. Sivarajah would become a consultant to Namena assisting in the commercialization of Namena products. This agreement provided that Namena would reimburse Mr. Sivarajah for expenses he incurred in the course of his work. There were subsequent confidentiality and non-competition agreements signed by Namena, Mr. Sivarajah and ACP.

[3] Issues arose whereby Namena accused Mr. Sivarajah of excessive expense reimbursement claims. There was then a Settlement Agreement dated November 27, 2018 between Namena, Mr. Sivarajah and ACP whereby these issues were resolved. The agreement terminated the consulting agreement, but reasserted the licensing agreement. The Settlement Agreement contained this handwritten clause: “On the date hereof, no party owes the other any money.” The parties executed a mutual release concerning these issues.

[4] On September 3, 2020 Namena commenced this action against ACP, Mr. Sivarajah and another Sivarajah company, 36 Pharma Consulting Services Inc. (“36 Pharma”) alleging that these

parties breached the agreements by failing to disclose all intellectual property necessary to develop and market the licensed products, and by transferring this information to companies owned by Mr. Sivarajah and others in competition with Namena. Namena also alleged that Mr. Sivarajah and 36 Pharma embarked on a scheme to misappropriate funds through excessive claims for expense reimbursement, and that only “some” of these claims were settled by the Settlement Agreement. On December 24, 2020 the defendants defended this action.

[5] Productions were done. There were then examinations for discovery. On March 31 and April 1, 2022 Mr. Sivarajah was examined on his own behalf and as representative of ACP and 36 Pharma. Mr. Sivarajah gave several undertakings and refused to answer several questions. On June 20, 2022, Namena commenced this motion.

[6] The motion has a bumpy history. It was originally scheduled by Namena as a short motion on May 23, 2023. On that day, I made it clear that this time was grossly inadequate, and rescheduled it as a long motion before me on August 17, 2023. I set a schedule for the motion.

[7] On June 20, 2023 Mr. Lesage emailed the court advising that the plaintiffs wanted to add a motion for leave to amend the statement of claim. The defendants opposed the addition. I gave Mr. Lesage the option of bringing the amendment motion on August 17, 2023 and adjourning the undertakings and refusals motion to a date to be determined, or leaving the schedule as is. He chose the former. On July 5, 2023 I rescheduled the August 17, 2023 appointment for the amendment motion.

[8] Two days later on July 7, 2023 counsel advised that the amendment motion was resolved, and that August 17, 2023 should now be used for a motion by Mr. Siddiqui for an order removing him and his firm as lawyers of record for 36 Pharma Consulting Services Inc. (“36 Pharma”) as that company had been sold and the new owner had not retained Mr. Siddiqui. I rescheduled the August 17, 2023 appointment for the removal motion and scheduled this motion to be argued on November 16, 2023.

[9] None of the parties, including 36 Pharma, opposed the removal motion on August 17, 2023. I granted the removal order on August 17, 2023. I heard argument on this motion on November 16, 2023. Namena filed six affidavits sworn by its president, Mohammed Benayoune. ACP and Mr. Sivarajah filed two affidavits sworn by Mr. Sivarajah.

b) RULE 30.10 MOTION

[10] The Rule 30.10 motion concerns production from the following third parties: the Natural and Non-prescription Health Products Directorate of Health Canada (“Health Canada”), which is the federal government body that registered the relevant products; and Omega Alpha Pharmaceuticals-Canada (“Omega”), Reva Nutrition Corp. (“Reva”) and Quality Smart Solutions (“Quality”), which are entities whose charges formed subject matters of reimbursement claims from Namena by the defendants. I am satisfied that these third parties have relevant documentation concerning both the issues of intellectual property disclosure and the excessive reimbursements.

[11] On November 16, 2023, Mr. Lesage advised me that the Rule 30.10 motion had “been resolved.” He advised that all the third parties were personally served with the motion material, and

that only Health Canada responded and was unopposed. He said that this order should require the requested third party production within 90 days of the order.

[12] In preparing these reasons I reviewed what had been uploaded. There were no consents from the third parties and no correspondence from them. Therefore, I looked for the affidavits of service proving proper service of the motion material on the third parties. Rule 30.10(2)(b) requires service of the motion material on the third parties to be done by personal service or by an alternative to personal service.

[13] I found that Namena had uploaded affidavits of service proving personal service of the original motion material in a timely way on the third parties except for Quality. I, therefore, order the requested third party production from Health Canada, Omega and Reva, and that it be done on or before 90 days from today. Concerning Quality, if Namena overlooked uploading the affidavit of service proving proper and timely service on that party, I am prepared to extend this order to include that third party as well.

c) UNDERTAKINGS AND REFUSALS

[14] Because the dismissal motion turns to a large extent on whether Mr. Sivarajah properly refused to answer questions at discovery, I will turn to that issue first.

[15] Concerning the undertakings, when this motion was brought on June 20, 2022 there were 8 outstanding Sivarajah undertakings. At the time of the argument on November 16, 2023, I was advised that all of these undertakings were complied with.

[16] The only issue was the refusals. I will deal with them in the groups in which they were argued, and by referring to the numbering system in the undertakings and refusals chart. In reaching my decision, I kept in mind the proportionality considerations outlined in Rule 29,2.03, namely the time, expense, and undue prejudice imposed on the producing party by the production, the delay to the proceeding and the availability of the documents from other sources.

c.1) Refusals 1, 2, 3 and 5

[17] These four refusals concern the request for the production of the tax returns for ACP and 36 Pharma from September 3, 2017 to the present, the bank statements of ACP and 36 Pharma from December 4, 2015 to the present, and the authorization to obtain the bank statements of 36 Pharma from January 1, 2016 to December 31, 2019.

[18] Mr. Lesage argued that these documents should be produced. Concerning the tax returns, he argued that they would show whether ACP and 36 Pharma received income from parties other than Namena, thereby showing that the defendants were in breach of the exclusive license agreement. He also argued that the tax returns would show whether expenses matched reimbursement requests, thereby showing whether the defendants had overclaimed reimbursement.

[19] I do not accept this argument. There must be a foundation for the claim for relevance. The court cannot authorize a “fishing expedition” for documents that “may” contain relevant information; see *Tanner v. McIlveen*, 2009 CanLII 18676 at paragraph 7. Tax returns are sensitive

corporate records, and this is not an examination in aid of execution. There must be a clearly demonstrated reason for their disclosure. The motion does not contain evidence that satisfies me that the tax returns of the corporate defendants have the information about income sources and income detail alleged by Mr. Lesage. I, therefore, refuse to order their disclosure.

[20] Concerning the bank statements, Mr. Lesage argued that these would be relevant to the excessive reimbursement allegation as they will show what was paid to third parties. In the factum, he also argued that the bank statements will show sources of income, which would be relevant to the allegations that ACP breached the exclusivity clause in the license agreement by selling its intellectual property to others. I accept these points as they were not disputed.

[21] The defendants' argument was that the bulk of these bank statements concern the period prior to the Settlement Agreement and that this agreement finally resolved the issues concerning the excessive reimbursement allegation for that period. During the oral argument, I warmed to the defendants' position given the court's historical inclination to enforce settlements.

[22] However, I have now reviewed the pleadings and revised my view. It is the pleadings that govern what documents are relevant; see *Yim et al. v. Song et al.*, 2015 ONSC 7605 (CanLII) at paragraph 25. Namena alleges that the Settlement Agreement was tied to ACP's ongoing performance of the license agreement and that ACP's alleged contract breaches amounted to a repudiation of the Settlement Agreement. Therefore, the Settlement Agreement may be found to be unenforceable, and in that event the accounting of the reimbursement issues that were purported to be resolved by the Settlement Agreement will have to be determined.

[23] The court takes judicial notice that bank statements by their nature show the in-flows and out-flows of money. This information would relate directly on the reimbursement issue. This would also relate to the exclusivity issue as the documents should show income from third parties.

[24] The defendants also argued that this information is readily available from third parties. I have granted the Rule 30.10 motion, but it is unclear whether the subject third parties have the documents with this information. In any event, there could be other third parties who were paid.

[25] Furthermore, it would be inefficient to bifurcate the trial by requiring Namena to prove the alleged repudiation of the Settlement Agreement before the accounting is discovered upon and determined. If production is done now and the alleged repudiation is not proved, the Settlement Agreement will be enforced, and the evidence will not be used. If the repudiation is proved, the damages can be determined without delay.

[26] I, therefore, require that the questions concerning the bank statements be answered.

c.2) Refusal 4

[27] This refusal seeks the disclosure of the "business partner" Mr. Sivarajah referred to in his email to Mr. Lesage dated September 3, 2020.

[28] Mr. Sivarajah clarified in his affidavit that there was no "partner." There was someone who was a potential investor, but this prospect fell through. I find that this question is answered.

c.3) Refusals 7, 8 and 9

[29] These refusals concern questions about specific payments ACP made to third parties as indicated in the affidavit of documents. They relate directly to the excessive reimbursement allegations. The defendants allege again that these were covered by the Settlement Agreement. For the reasons stated above about the bank statements, I find that these questions must be answered.

c.4) Refusals 10, 11 and 12

[30] These questions relate to communications between the defendants and third parties. Refusal 10 seeks the disclosure of the file at Health Canada for ACP. I find this question redundant in light of my Rule 30.10 order which includes the order that Health Canada disclose the documents in its possession concerning this action.

[31] Refusal 11 concerns the disclosure of the name of the company that did the Health Canada NPN (“new product number”) registrations for ACP. Mr. Sivarajah refused to disclose this name at discovery as he had not discussed the matter with that company. In the defendants’ factum there is the argument that this company would not have technical specifications as such knowledge is not necessary to do the registration. This statement is without corroboration. I find it difficult to believe that this company has none of the product technical specifications given its responsibility to register products with Health Canada. As a result, it appears to be a material witness concerning the product specifications issue, which is a key issue concerning the alleged breach of the licensing agreement. The identity of this company must be disclosed.

[32] Refusal 12 seeks the disclosure of the technical articles that the defendants relied upon for their statements about the positive effects of one of the animal products that is owned by a non-defendant company owned by Mr. Sivarajah. The name of the product is Regentis Flex-Guard. Mr. Lesage wanted this to show whether the defendants had made similar claims and similar full disclosure concerning the relevant products. I find the relevance of this evidence tenuous at best. None of the subject products are animal products. The relevant products are for human consumption. At most, the relevance of this question concerns the credibility of the defendants, but even as such the relevance is tenuous. This question does not have to be answered.

c.5) Under advisement 1

[33] This question, which is now a refusal, asks Mr. Sivarajah to recreate the master manufacturing documents for each of the relevant products. Mr. Sivarajah said at discovery that these documents were provided to Namena’s president, John Andrew. Namena alleges it does not have them. The specifications that compose these documents are what Namena alleges the defendants failed to provide to Namena.

[34] I do not order that this question be answered. I find that it is not a proper discovery question. It seeks what is in the nature of injunctive relief, as it seeks to compel Mr. Sivarajah to recreate relevant documents that are in none of the productions.

[35] Discovery is about disclosing documents that are in the power, possession and control or a party; see Rule 30.02(1). It is also about disclosing the relevant knowledge, information and belief of

the person being examined at discovery concerning the matters in issue; see Rule 31.06(1). It would appear that none of the parties has the master manufacturing documents. There is also no evidence in the motion that Mr. Sivarajah has the kind of photographic memory of the contents of the master manufacturing documents that would allow him to disclose those contents without effort. I would be shocked if he did, given what must be considerable technical detail in these documents. This means that Mr. Sivarajah would have to go about the difficult task of recreating the master manufacturing documents as best he can using other sources. That is not proper discovery.

[36] I also find that the probative value of the end product of such an endeavor would be dubious as there would be no way to compare the end product of this process to the actual master manufacturing document, which appears to be missing. For all these reasons, I rule that this question does not have to be answered.

c.6) Under advisement 2

[37] This question seeks the disclosure of the substance of the expected testimony and evidence of each of the defendants' witnesses 30 days prior to the pretrial conference. At discovery, Mr. Siddiqui stated that his client would comply with the *Rules*.

[38] In oral argument, I stated that I would order that the defendants serve their list of trial witnesses and the substance of their evidence in writing on or before 90 days prior to the pretrial conference. That is what I do here.

d) STRIKE PLEADING

[39] Namena seeks an order striking the statement of defence on account of the defendants alleged failure to disclose relevant documents (Rule 30.08(2)) and their alleged failure to answer proper questions at discovery (Rule 34.15(1)).

[40] This is a discretionary jurisdiction to be exercised within the context of each case. Both counsel referred me to the decision of the Court of Appeal in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310 (CanLII) at paragraph 50 to 53 as defining the test to be applied. In this decision, the Court of Appeal discussed the factors to be applied under Rule 30.08(2) in determining whether to strike pleadings due to a failure to disclose documents. The Court identified the following factors to be considered: (i) whether the party has been given an opportunity to cure the non-compliance; (ii) whether the party's conduct was deliberate or inadvertent; (iii) whether the non-compliance was clear and unequivocal; (iv) whether the defaulting party can give a reasonable explanation for the default; (v) whether the substance of the default is material or minimal; (vi) the extent to which the party remains in default at the time of the request to strike the pleadings; (vii) the impact of the default on the ability of the court to do justice in the case; (viii) the merits of the party's defence; and (ix) whether striking the pleadings is a proportional remedy.

[41] Applying this test, I do not find that there has been such a failure to disclose documents and answer proper questions as to merit a striking order. First, all the undertakings have been complied with, albeit quite late. Second, the defendants were successful in defending their position on 5 out of the 13 refusals that were argued. Concerning the 13 refusals on which the defendants were

unsuccessful, 6 dealt with the application of the Settlement Agreement, about which I also struggled given the court's historical inclination to enforce settlement agreements. Third, it is unclear to me how material the ordered answers will be. Fourth, concerning the refusals that were ordered to be answered, the defendants have been given a first opportunity to "cure" their default, and it remains an open question as to whether they will. In general, the defendants' position on this motion and the outcome convinces me that the defendants did not act in a way that deliberately delayed or undermined the proper and fair litigation of this case. A striking order is not at all appropriate.

[42] There is one issue that bears special attention. It is undisputed that during the pendency of the motion, Mr. Sivarajah sold 36 Pharma. The motion material was served on June 20, 2022. On February 22, 2023 36 Pharma was sold. On May 7, 2023 Mr. Sivarajah notified Namena of the sale. On May 8, 2023 Mr. Sivarajah also notified Namena of the sale of ACP, although it is undisputed that this sale was not completed. Mr. Lesage argued that Mr. Sivarajah intentionally "destroyed" evidence by creating the sale of 36 Pharma to put relevant documents in the possession, power and control of 36 Pharma beyond Mr. Sivarajah's access.

[43] I do not find that this sale merits a striking order. First, Mr. Sivarajah stated in his supplementary affidavit that he sold 36 Pharma to one, Saarthak Kokcha, who agreed to "assume" all proceedings by and against the business through his lawyer. Mr. Sivarajah was not cross-examined on his supplementary affidavit, and I, therefore, accept the statement. Therefore, the Sivarajah undertakings that relate to 36 Pharma may still be complied with when Mr. Sivarajah approaches the new owner seeking compliance.

[44] Second, Mr. Sivarajah stated in his supplementary affidavit that the sale was a genuine sale of the company's intellectual property and products that did not relate to this action. Again, Mr. Sivarajah was not cross-examined on this affidavit, and I, therefore, accept this statement. In his argument, Mr. Siddiqui also pointed out that only 3 refusals relate to 36 Pharma. Therefore, it appears that 36 Pharma is not a central figure in this litigation. All of these facts satisfy me that Mr. Sivarajah did not proceed with this sale for the purpose of rendering documents unavailable and undermining the fair prosecution and resolution of this action.

[45] As a result, I deny the motion for a striking order.

e) *REATTENDANCE AT DISCOVERY*

[46] Namena wants me to order that Mr. Sivarajah be ordered to reattend at discovery at his own expense to answer the questions ordered to be answered and any follow up questions. In one of his affidavits, Mr. Benayoune estimated the costs of such a reattendance, assuming the discovery takes 20 hours, at \$9,400.

[47] I am not prepared to do that. As stated earlier, the defendants' position on the refusals was in general not unreasonable. Also, they answered the undertakings, albeit late. I refused to strike pleadings as a result. Now I refuse to order that Mr. Sivarajah pay for a discovery reattendance for the same reason. I simply order that Mr. Sivarajah reattend at discovery to answer the questions ordered to be answered and any follow up questions.

[48] Since this is a discovery reattendance to complete the discovery of the defendants, I fail to see why I should allow more than seven (7) hours for this further discovery at this time. Mr. Lesage needs to be disciplined in his questioning. After this seven hours, should Mr. Lesage find that he really needs more time and cannot get an agreement for more time, he can apply to me on short notice for such relief. I will make sure to schedule the motion as soon as possible.

e) COSTS

[49] The parties filed costs outlines concerning the costs of this motion. Namena's costs outline shows \$10,471.09 in partial indemnity costs, \$12,200.46 in substantial indemnity costs and \$12,929.79 in full indemnity costs. The defendants filed a bill of costs which showed \$4,481.86 in what appears to be substantial indemnity costs.

[50] I believe I have enough to make a fair and reasonable award of costs in the circumstances. While there was divided success, the defendants were a cause of this motion by not answering Mr. Sivarajah's undertakings in a timely way. I take a failure to comply with undertakings seriously. The defendants must pay costs as a result.

[51] But I also take note of the fact that Namena caused delay in this motion by grossly underestimating the time for the argument at the initial attendance and then by trying to shoehorn an amendment motion into this motion. I also note that a part of the Namena motion, the Rule 30.10 motion, did not concern the conduct of the defendants. Furthermore, the plaintiff filed several affidavits, but I am not convinced that they were all necessary. The defendants' bill of costs is a fair reflection of what the defendants could reasonably expect to pay in the event of a loss.

[52] I have decided to award the plaintiff **\$4,000** in partial indemnity costs to be paid by the defendants in thirty (30) days from today.

[53] I am aware that I was not advised as to any offers to settle. If either party wants to challenge this costs award, they must serve and file with my Assistant Trial Coordinator written submissions of no more than one (1) page on or before five (5) days from today. If that happens, my award will be deemed to be set aside and the other party will have five (5) days to serve and file written responding submissions of no more than one (1) page. Keep in mind, that if my award is set aside, I may in the end go in any direction, or not change my award at all.

DATE: January 12, 2024

ASSOCIATE JUSTICE C. WIEBE