CITATION: *Fraser v. IBM Canada Limited*, 2023 ONSC 7009
COURT FILE NO.: CV-22-90607
DATE: 2023/12/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:		
ANDERSON FRASER	Plaintiff	Melynda Layton, for the plaintiff
– and –		
IBM CANADA LIMITED	Defendant	Andrew McCreary, for the defendant corporation
		HEARD: December 11, 2023 (By videoconference)

CASE CONFERENCE ENDORSEMENT

CORTHORN J.

Introduction

[1] The plaintiff alleges that he was wrongfully dismissed from his employment with the defendant corporation. Mediation was conducted in 2023. The plaintiff's position is that a settlement of the action was negotiated at mediation. The plaintiff brings a motion, returnable on February 8, 2024, to enforce the terms of the settlement.

[2] The defendant corporation opposes the motion. The defendant corporation's position is that the settlement, if reached, is not enforceable.

[3] The parties are before the court for a third case conference to address steps to be completed before the motion is heard. The primary issue at this third case conference is whether the parties are entitled to cross-examinations on the affidavits filed in support of or in response to the plaintiff's motion.

[4] Neither party filed a case conference brief or any other document for the purpose of the case conference.

[5] The plaintiff submits that his claim is advanced pursuant to Rule 76 – the Simplified Procedure – of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The plaintiff relies on r. 76.04(1), item 2, which he submits prohibits cross-examination of a deponent on an affidavit. To date, the plaintiff has refused to attend for cross-examination and for his counsel to conduct cross-examination of the deponent of the affidavit(s) upon which the defendant corporation relies in response to the plaintiff's motion.

[6] In response, the defendant corporation first points to the order of Kaufman A.J. (as he then was) made at a case conference in August 2023 ("the August order"). Pursuant to the August order, the parties are entitled to cross-examinations; a November 30, 2023 deadline is set for the completion of cross-examinations.

[7] Second, the defendant corporation disputes that the action was either commenced or is now continued under Rule 76.

[8] Third, the defendant corporation relies on the specific type of motion brought by the plaintiff – a motion pursuant to r. 49.09 for judgment in the terms of an offer the plaintiff asserts he accepted. The defendant corporation submits the test to be met on a motion of this kind is the same as the test to be met on a motion for summary judgment. For the defendant corporation to be in a position to put its best foot forward on the motion, it must be entitled to cross-examine the plaintiff on the affidavit or affidavits sworn by him in support of the motion.

[9] For the reasons which follow, the parties remain entitled to conduct cross-examinations and the deadline by which cross-examinations shall be conducted is extended from November 30, 2023 to January 10, 2024. All other terms of the August order are unchanged and remain in force and effect.

[10] Pursuant to the August order, the plaintiff is required to serve his factum by January 24, 2024. The two-week period between January 10, 2024 (the new, extended deadline for cross-examinations) and January 24, 2024 is a reasonable amount of time for (a) counsel for both parties to obtain and serve transcripts of cross-examinations conducted, and for (b) the plaintiff's counsel to complete preparation of the factum to be delivered on the plaintiff's behalf.

[11] I turn, then, to the reasons for the relief set out in paragraph 9, above.

Rule 76 and the Simplified Procedure

a) It is unclear whether this is a Simplified Procedure action

[12] The originating process was not before the court for the case conference. The parties disagree as to whether the plaintiff's claim is being pursued under the ordinary procedure or under the Rule 76, Simplified Procedure.

[13] In April 2023, Gomery J. (as she then was) heard a motion by the plaintiff for various forms of procedural relief. When determining the number of hours of examination for discovery to which the parties are each entitled, Gomery J. said the following:

> At the motion hearing, Ms. Layton explained that she proposed to limit examinations to three hours apiece because this is a r. 76 action. The amended statement of claim does not say it is being brought as a simplified procedure, and the plaintiff has not waived his right to recover more than $200,000. A time limit on examinations would, however, be justified under r. 29.1.03(1)(e), given the relatively straightforward nature of the claim and the amounts at issue.[1]

[14] At the December 11, 2023 case conference, plaintiff's counsel informed the court that the plaintiff is seeking leave, from the Divisional Court, to appeal the decision of Gomery J. The motion for leave to appeal is described by counsel for both parties as being "on hold" pending the outcome of the plaintiff's February 8, 2024 motion.

[15] The plaintiff disagrees with Gomery J.'s description of the claim falling outside the scope of Rule 76. The plaintiff submits that he took steps which, in any event, clearly bring the action under the Simplified Procedure. The plaintiff submits that, between the date of Gomery J.'s decision and the date of the case conference before Kaufman A.J. in August 2023, he took the steps necessary to (a) formally amend the statement of claim, (b) bring the claim within the Simplified Procedure, and (c) serve the amended statement of claim on the defendant corporation.

[16] The amended statement of claim was not before the court for the December 2023 case conference. For the purpose of this case conference, it is not necessary for the court to make a finding as to whether the statement of claim has been amended so as to bring the action within the scope of Rule 76. I note, however, that the description provided by plaintiff's counsel of the steps taken to amend the statement of claim does not necessarily support a conclusion that the statement of claim has been formally amended within the meaning of the *Rules*.

---

[1] *Fraser v. IBM Canada Limited* (4 May 2023), Ottawa CV-22-90607 (Ont. S.C), at para. 21. I believe that the rule cited includes a typographical error and should instead read "r. 29.1.03(3)(e)".

[17] For example, the plaintiff's counsel acknowledged that pleadings were closed when steps were taken to amend the statement of claim. Plaintiff's counsel also acknowledged that the plaintiff did not have either the defendant corporation's consent or leave of the court to amend the statement of claim in the spring/summer of 2023. It is therefore difficult to understand how the plaintiff could establish that the claim was amended in compliance with r. 26.01 (as required pursuant to r. 76.02(7)(b)). On what basis does the plaintiff believe he was entitled, after the close of pleadings, to unilaterally amend the statement of claim without either the defendant corporation's consent or an order granting him leave to amend his pleading?

[18] The fact that the plaintiff was able to electronically file a document purporting to be a formally amended statement of claim (together with a Form 76A) is not evidence that the statement of claim was amended in compliance with r. 26.01. I intend no criticism of the court's administrative staff. No doubt managing documents electronically filed is challenging. It is in any event, unclear whether the court's administrative staff has the discretion to reject such a document.

b) Cross-examination is permissible, in limited circumstances, under Rule 76

[19] The plaintiff submits that r. 76.04(1) is an absolute bar to cross-examinations on the affidavits filed in support of or in response to the plaintiff's r. 49.09 motion. That subrule states that "Cross-examination of a deponent on an affidavit under rule 39.02" is not permitted in an action under Rule 76. Rule 39.02 governs cross-examinations on affidavits, generally

[20] The plaintiff did not provide the court with any case law of his position regarding an absolute bar to cross-examination on any affidavit filed in a Rule 76 proceeding. The annotations to r. 76.04, which appear in the Watson & McGowan edition of the *Rules* include references to two decisions in which the court permitted cross-examinations in an action under Rule 76. In one decision, the court permitted cross-examination on an affidavit of documents: *Mackie v. Steppingstone Funding Partners I Inc.* (2004), 9 C.P.C. (6th) 369 (Ont. Master).

[21] In another decision, the court concluded that r. 76.04(1) does not prevent cross-examination on an affidavit filed regarding enforcement procedures under rule 60: *Canadian Imperial Bank of Commerce v. Glackin* (1999), 36 C.P.C. (4th) 255 (Ont. Gen. Div.).

[22] The defendant corporation before this court, asks the court to draw an analogy between an enforcement procedure under rule 60 and a motion under r. 49.09 for the enforcement of a settlement.

[23] I agree with the defendant corporation that r. 76.04(1) is not an absolute bar to the court permitting cross-examinations in certain contexts even when the action falls within the Simplified Procedure. For the reasons already given, a motion under r. 49.09 is a context in which parties must be entitled to conduct cross-examinations if they so choose.

c) Conclusion – Rule 76

[24] In summary, I am not satisfied that, in the circumstances of this action, Rule 76 is a basis upon which to dispense with cross-examinations on the affidavits filed in support of or in response to the plaintiff's motion.

The Type of Motion the Plaintiff is Bringing

[25] It is undisputed that the plaintiff brings his motion pursuant to r. 49.09 – for judgment in the terms of an accepted offer.

[26] A two-step approach is required on a motion to enforce a settlement: *Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.* (2007), 87 O.R. (3d) 464 (Div. Ct.). At paras. 9 and 10 of that decision, Carnwarth J. summarized the two-step approach:

> [9] The first step is to consider whether an agreement to settle was reached. In doing so, the proper approach is to treat the motion like a rule 20 motion for summary judgment. If there are material issues of fact or genuine issues of credibility in dispute regarding whether (i) the parties intended to create a legal-binding relation or (ii) there was an agreement on all essential terms a court must refuse to grant judgment. [*Citations omitted*.]
>
> [10] The second step, once an agreement has been found to exist, is to consider whether, on all the evidence, the agreement should be enforced. In this second step, a Rule 20 approach is not applied, but rather a broader approach, taking into account evidence not relevant to a Rule 20 inquiry.

[27] *Capital Gains* was decided in 2007 – before the Supreme Court of Canada decision in *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. The latter decision altered the framework for granting summary judgment. Regardless, the two-step approach summarized by Carnwarth J. continues to apply to motions pursuant to r. 49.09: *Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839, 41 C.P.C. (8th) 246, at para. 28.

[28] Treating the plaintiff's r. 49.09 motion like a motion for summary judgment requires that both parties put their respective best foot forward and that the court be in a position to assess whether there are any credibility issues. Neither task can be carried out in the absence of cross-examinations. When it comes to the second step in the analysis, a determination "on all the evidence" implies that the court has the benefit of cross-examinations.

[29] I see no reason why the court would, on the plaintiff's motion returnable on February 8, 2024, deviate from the two-step approach set out in *Capital Gains*. For the motion to be argued and determined in accordance with that approach, the parties must be entitled to conduct cross-examinations.

The August 11, 2023 Order Remains in Force and Effect

[30] The parties disagree as to whether the August 2023 order was made on the consent of the parties. The defendant corporation's position is that it was; the plaintiff asserts before this court that he did not consent to the order, specifically the entitlement of the parties to conduct cross-examinations.

[31] The plaintiff did not bring a motion to set aside or vary any terms of the August order. This court is not aware of any steps taken by the plaintiff in an effort to pursue an appeal from the August order.

[32] The parties are now slightly less than two months away from the return date for the plaintiff's r. 49.09 motion. The date for the motion was set in August and the parties have exchanged materials on the motion. A cost-effective and proportionate approach to the matter is for the August order to remain in force and effect and to simply extend the deadline by which the parties are to complete the cross-examinations they wish to conduct.

Disposition

[33] For the reasons set out above, this court orders that the deadline of November 30, 2023, set out at item 6 of the order of Kaufman A.J. dated August 11, 2023, is extended to January 10, 2024. The parties shall complete cross-examinations by the latter date.

[34] The court understands that the action is important to both the plaintiff and the defendant corporation. That said, to date, this action has consumed judicial resources that are disproportionate to the complexity of the matter and to the monetary amounts at stake. The responsibility for the over-consumption of judicial resources rests with the plaintiff. The court encourages the plaintiff to comply with court orders and to move forward with his r. 49.09 motion efficiently and cost-effectively.

[35] The defendant corporation is successful on this case conference in maintaining the right to conduct cross-examinations. The plaintiff shall, in any event of the cause, pay the defendant corporation its costs of this case conference. The judge presiding over the plaintiff's r. 49.09 motion shall determine (a) the scale upon which said costs shall be paid, (b) the quantum of the costs to be paid, and (c) the time frame within which the costs shall be paid. In the event the plaintiff does not proceed with his r. 49.09 motion, then the costs of the case conference to which the defendant is entitled (scale, quantum, and timing) are reserved to the trial judge.

Madam Justice Sylvia Corthorn

Released: December 12, 2023

CITATION: *Fraser v. IBM Canada Limited*, 2023 ONSC 7009
COURT FILE NO.: CV-22-90607
DATE: 2023/12/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANDERSON FRASER

Plaintiff

– and –

IBM CANADA LIMITED

Defendant

CASE CONFERENCE ENDORSEMENT

Madam Justice Sylvia Corthorn

Released: December 12, 2023