CITATION: Glycobiosciences Inc. v. Magna Pharmaceuticals Inc., 2024 ONSC 4175
COURT FILE NO.: CV-24-00000097-0000
DATE: 2024 07 24

SUPERIOR COURT OF JUSTICE – ONTARIO
10 Louisa Street, Orangeville ON L9W 3P9

RE: GLYCOBIOSCIENCES INC., Applicant

AND:

MAGNA PHARMACEUTICALS INC., and ROBERT VAN OSDEL, Respondents

BEFORE: Justice L. McSweeney

COUNSEL: Kevin Drizen, Self-represented Applicant – kdrizen@glycobiosciences.com

Andrew Moeser and Dan Malone, for the Respondents – amoeser@litigate.com / dmalone@litigate.com

HEARD: July 15, 2024, in person

ENDORSEMENT

[1] Mr. Drizen seeks leave to represent the corporate applicant, GlycoBioSciences Inc. (Glyco) as a non-lawyer pursuant to r.15.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990., Reg. 194.

[2] It is common ground that Kevin Drizen is the principal of Glycobiosciences Inc., a closely held family corporation with lucrative patents relating to a "wound gel". The Court accepts that he has been granted leave to represent Glyco as a non-lawyer in several other proceedings, and denied leave in others.

[3] The relief sought on this attendance does not relate to the within application. Rather Mr Drizen brings this application for leave to represent Glyco in a different lawsuit against these same defendants: action CV-23-197. The only relief sought in this application is the 15.01(2) order.

[4] The Respondents Magna Pharmaceuticals Inc. and Robert van Osdel (collectively "Magna"), oppose the application as an abuse of process.

[5] The Court inquired of Mr. Drizen why the relief sought is brought as a stand-alone application rather than an interlocutory motion in action CV-23-197. Mr. Drizen submitted that he started an application instead because it was an option. He explained his basis for this understanding of the law, specifically that he has noted that courts may refer to relief sought by motions as "application" for the relief.

[6] Mr. Drizen made no reference to Rule 14.05, nor did he describe how the relief sought on Glyco's application can be commenced by application rather than action under the *Rules*.

[7] Mr. Drizen assured the Court in his submissions that he can be taken to "know what [he is] doing". He confirmed making a deliberate choice to start a new proceeding. For that reason he issued a new application for Glyco, CV-24-097, solely to seek leave to represent Glyco against Magna in its action CV-23-197.

[8] The Respondents argue that Mr. Drizen knows that leave under r.15.01(2) must be sought as an interlocutory motion in action CV-23-197. In support of their

position, Respondents' counsel filed evidence that Mr. Drizen had, in fact, booked a r.15.01(2) motion in the CV-23-197 action a few months ago, first as a short motion, then re-booked as a long motion. He pursued neither, but commenced this new application instead.

[9] Magna counsel filed a ruling it obtained against Glyco recently in the Ontario Court of Appeal. Huscroft JA denied Mr. Drizen leave to represent Glyco.

[10] The Respondents argue it is an abuse of process for Drizen to try to avoid the consequence of the Court of Appeal ruling by seeking an order by fresh application which it can then appeal separately if denied.

[11] The Respondents contend that that Mr. Drizen is therefore attempting to use this new application to do indirectly, that which he cannot now do directly.

Legal framework:

[12] Under r.15.01(2) of the *Rules of Civil Procedure*, a corporation must be represented by a lawyer "except with leave of the court".

[13] In *GlycoBioSciences Inc. (Glyco) v. Industria Farmaceutica Andromaco, S.A., de C.V. (Andromaco),* 2024 ONCA 481, Huscroft JA sets out the legal and analytical framework for determining whether to grant a non-lawyer leave to represent a corporation:

> [5] Rule 15.01(2) provides as follows:

a. A party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the court.

[6] In other words, the default position is that corporations must be represented in legal proceedings by a lawyer. The court may permit otherwise, but the granting of leave is exceptional. Leave is discretionary but cannot be granted in a manner that normalizes what the rule otherwise prohibits.

[7] The rationale for the rule requiring representation by a lawyer is plain. A non-lawyer who is closely tied to the corporation granted leave under r. 15.01(2) is akin to a self-represented party, but the separate legal personhood of the corporation means, in effect, that the non-lawyer is providing legal services to another person, contrary to s. 26.1(1) of the *Law Society Act*, R.S.O. 1990, c. L.8. Moreover, non-lawyers are not bound by the *Rules of Professional Conduct*, nor are they subject to the personal financial consequences associated with cost orders that self-represented litigants face: *Leisure Farm Construction Limited v. Dalew Farms Inc. et.al.*, 2021 ONSC 105 at paras. 12-15. Permitting a non-lawyer to act also risks creating an undue burden on the respondents and the court. These considerations must be balanced with any concerns that may arise about access to justice, as discussed below.

Discussion

[8] There is little authority concerning r. 15.01(2) from this court. It appears that individuals have sometimes been permitted to act because their participation was not contested, or in some cases the rule was overlooked. I do not intend to canvas the caselaw. It suffices to say that the decision to permit a non-lawyer to represent a corporation is a discretionary decision that must be made having regard to all of the circumstances in a particular case.

[9] I begin with two threshold matters. First, Mr. Drizen's history of acting for the corporation, even in this court, is not determinative of whether he should be permitted to act on this or any other matter in future. Mr. Drizen seems to have assumed that he is entitled to act because he has acted for the corporation on other occasions, typically in bringing actions in the corporation's name. Indeed, he appears to have acted as a sort of in-house counsel for the corporation. But he has no entitlement to do so. The agreement of the parties or the failure of a party to object neither requires nor justifies the decision to grant permission to a non-lawyer to represent a corporation.

[10] Second, a corporation's authorization of an individual to represent it is a necessary condition for an order under r. 15.01(2) but it is not sufficient. Thus, the resolution of the directors of GlycoBioSciences Inc. authorizing Mr. Drizen to act for the corporation is not determinative, nor is the nature of his position within the corporation.

[11] Mr. Drizen submits that his representation is necessary to ensure that the corporation has access to justice. He says that the corporation used to retain lawyers but can no longer afford to do so, and that he has acted for the corporation since 2017. At the same time, however, Mr. Drizen stated that the company had obtained several million dollars in settlement payments and millions of dollars in revenue. He says that he is the directing mind of the corporation – effectively its

> alter ego – but adds that the corporation has four directors and several shareholders. When pressed, he said there were many more shareholders, perhaps 30.
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> [12] I am left in some doubt as to the nature of this corporation and its financial affairs. The respondents say that GlycoBioSciences Inc. has commenced numerous proceedings in the Ontario Superior Court against foreign entities with no Canadian operations, proceedings designed to pressure them into settling for an amount they would otherwise be required to pay to defend the claims. Similar claims have been made about GlycoBioSciences Inc. in other cases. I need not resolve the matter here. The burden is on Mr. Drizen to establish that he should be permitted to represent the corporation on this appeal and he has failed to meet that burden. This is not a case in which access to justice supports the granting of his motion.
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> [13] There are additional concerns. Despite Mr. Drizen's confidence in his abilities, he is not a lawyer and is not entitled to practice law. His performance in recent litigation, as well as on this motion, demonstrate some of the problems.
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> [14] For example, his recent application for judicial review to challenge a costs order was dismissed as an abuse of process: *GlycoBioSciences Inc. v. Herrero and Associates*, 2023 ONSC 4143. In recent litigation in this court, *GlycoBioSciences Inc. v. Herrero and Associates*, 2023 ONCA 331, substantial indemnity costs were ordered to be paid by the corporation, among other things because of Mr. Drizen's "reckless allegations" impugning the integrity of opposing counsel and the motion judge and "an improperly voluminous record". The respondents note that the corporation has not paid the outstanding costs – $50,000 from the jurisdiction motion and $26,000 from the appeal. For his part, Mr. Drizen acknowledges the costs have not been paid but says that is because counsel for Herrero has not sought to collect them. I do not know what the true situation is.

Analysis and conclusion on this application:

[14] Huscroft J.A. applied the legal framework to the evidence filed by Glyco and concluded that Mr. Drizen had not met the evidentiary burden on him, and denied him leave to represent Glyco as a non-lawyer.

[15] Mr. Drizen advised this Court by way of update that he is now seeking to have the ruling of Huscroft JA reconsidered by a three-judge panel of the Court of Appeal.

[16] As noted earlier, the matter in the Court of Appeal includes the same present parties, and considers the similar issue of the appropriateness of Mr. Drizen representing Glyco company as a non-lawyer, albeit in the appellate court.

[17] Having reviewed the materials filed and considered the submissions of Mr. Drizen and of counsel for the Respondents, I find as follows:

a. The relief requested does not raise a legal issue falling within rule 14.05; I conclude that it cannot, at law, be advanced as an application;

b. The order sought relates to the proceeding CV-23-197, and relief must be sought by interlocutory motion in that proceeding.

[18] The application is therefore dismissed, without prejudice to Mr. Drizen bringing a motion in action CV-23-197.

[19] The parties are directed that, as a matter of judicial and court resource allocation, motions for leave to represent a corporation as a non-lawyer should be scheduled for hearing as a short motion. All materials must comply with the Rules and the Practice directions / Notice to the Profession of the SCJ and the CW Region.

Costs:

[20] The Respondents were fully successful and are entitled to their costs.

[21] Modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* 1999 CanLII 2052 (ON C.A.), (1999), 46 O.R. (3d) 330, at para. 22.

[22] The Respondents seek substantial indemnity costs, arguing that the application was frivolous, vexatious, without legal foundation, and constitutes an abuse of process.

[23] The following factors support an elevated scale of costs against Glyco:

a. Although Mr. Drizen is not a lawyer, he has extensive experience seeking leave to represent Glyco. Mr. Drizen intentionally started a new application, despite knowing that motions are the appropriate method for obtaining the order he seeks;

b. Mr. Drizen started a new application in Glyco's name rather than following through with his scheduled interlocutory motion in the CV-23-197 action; in doing so, he sought to circumvent the consequences of the recent adverse finding at the Court of Appeal on the same issue against these Respondents;

c. Mr. Drizen provides instructions on behalf of Glyco to its retained counsel in other jurisdictions, but referenced no legal advice on the merits of his "start a new application" strategy for obtaining leave to represent Glyco;

d. This application was devoid of legal merit and a misuse of court time.

e. In pursuing this new application, Mr. Drizen put the Respondents to needless time and legal costs of opposing the application.

[24] This application was, in short, an abuse of the court's process. The Court should not condone such strategic manoeuvring. A cost award in these circumstances should discourage and sanction the Applicant's behaviour.

[25] The Respondents are therefore entitled to their costs on a substantial indemnity scale.

[26] Having determined the applicable scale, I must now review the Respondents' Bill of Costs.

[27] The Respondents' Bill of Costs claims substantial indemnity costs inclusive of HST of $19,209.60.

[28] I find that the hourly rates at substantial indemnity are consistent with the commercial litigation market.

[29] Steps required to be taken included cross-examination and preparation of responding materials.

[30] Two lawyers billed for their time and attended before the court: the junior lawyer at 14.2 hours, and 11.1 hours for Mr. Moeser who made the submissions for the Respondents; plus an additional hour each for attending court. Three law clerk hours were billed.

[31] I find that overall the time spent was reasonable. Some reduction in time claimed the Respondents is appropriate, however, as it was not clear to the court that two counsel were required at the final stages of the application.

[32] Further, I have specifically considered the factors in Rule 57.1 regarding costs in civil matters, including what the unsuccessful party would expect to pay.

[33] Having done so, a fair and reasonable cost award, at substantially indemnity scale, is fixed in the amount of $17,500, inclusive of HST, payable by Glyco to the Respondents.

[34] The Respondents asked the Court to order costs payable against Mr. Drizen personally. They submit that Glyco does has not paid past costs as ordered.

[35] The Respondents acknowledged that Mr. Drizen was only advised quite recently of their intention to seek costs against him personally.

[36] In these circumstances I decline to hear submissions regarding ordering costs personally as against Mr. Drizen.

[37] In the Huscroft JA ruling at paragraph 14, His Honour notes that Glyco may have as much as $76,000 outstanding in unpaid cost awards against it in other litigation, which Mr. Drizen did not deny. Rather, he advised the Court of Appeal that costs may be unpaid because successful parties' counsel "has not sought to collect them".

[38] This Court is concerned, however, that Mr. Drizen may not, as a non-lawyer, appreciate the importance of ensuring that Glyco pays costs ordered against it by the Court unless otherwise ordered or agreed.

[39] Accordingly, to be clear to Mr. Drizen as to Glyco's obligation, the Court specifies in its order the date/time by which costs shall be paid by Glyco.

ORDER:

[40] This application is dismissed with costs.

[41] Glycobiosciences Inc. is ordered to pay costs fixed in the amount of $17,500 to the Respondents no later than 4pm on August 29, 2024.

[42] The dismissal of this application is without prejudice to the same relief being sought as an interlocutory motion in action CV-23-197.

[43] Respondent counsel may take out an order incorporating the terms ordered herein, without the necessity of approval of the draft order as to form and content by Mr. Drizen. His consent is hereby dispensed with.

[44] So ordered.

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McSweeney, J.

Released: July 24, 2024

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McSWEENEY J

Released: July 24, 2024