CITATION: Kamrani-Ghadjar v. Anaergia Inc., 2024 ONSC 4866
COURT FILE NO.: CV-23-00000919-00CP
DATE: 20240903

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MOHAMMAD REZA KAMRANI-GHADJAR, Plaintiff

AND:

ANAERGIA INC., ANDREW BENEDEK, HANI EL-KAISSI, NEO INTERNATIONAL INVESTMENTS LTD. and CIDEL TRUST COMPANY, TRUSTEE OF THE BENEDEK TRUST, Defendants

BEFORE: The Honourable Justice Ranjan K. Agarwal

COUNSEL: Paul Bates, Soheil Karkhaneshi, and Mahdi Hussein, for the plaintiff

Daniel Murdoch, for the defendants Anaergia Inc., Andrew Benedek, and Hani El-Kaissi

No one appearing for the defendants Neo International Investments Ltd. and Cidel Trust Company

HEARD: August 21, 2024

ENDORSEMENT

I. OVERVIEW

[1] The plaintiff Mohammad Reza Kamrani-Ghadjar seeks leave to represent a class of investors in a securities class action. He alleges that the defendants made misrepresentations to him and other investors in Anaergia Inc.'s public disclosure.

[2] Kamrani-Ghadjar served an affidavit from Lon Michael Kirsh, an Ontario lawyer. After Anaergia, Andrew Benedek, and Hani El-Kaissi moved to strike Mr. Kirsh's affidavit on the grounds that it contained inadmissible opinion evidence, Kamrani-

Ghadjar served another affidavit from Mr. Kirsh that removed Mr. Kirsh's opinions. Anaergia argues that this second affidavit should also be struck because it contains irrelevant and immaterial evidence.

[3] For the reasons I discuss below, Anaergia's motion is dismissed. That said, I endorse an order that Kamrani-Ghadjar shall pay Anaergia's costs thrown away.

II. BACKGROUND

[4] This class action was started in March 2023. Kamrani-Ghadjar moves for leave to proceed with this action under section 138.8(1) of the *Securities Act*, RSO 1990, c S.5, and for an order certifying this action as a class proceeding under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6. The hearing of his motions are scheduled for April 2025.

[5] Kamrani-Ghadjar intends to withdraw Mr. Kirsh's first affidavit. He asserts that there's no opinion evidence in Mr. Kirsh's second affidavit. This affidavit is divided into four parts:

- paragraphs 1 to 13 and 16 describe Mr. Kirsh's education, work experience, and other qualifications

- paragraphs 14 and 15 describe Mr. Kirsh's relationship to the action

- paragraph 18 lists Anaergia's public filings from the SEDAR+ database that Mr. Kirsh reviewed

- paragraphs 19 to 23 describe Mr. Kirsh's observations about these public filings

[6] The parties agree that the public filings referred to by Mr. Kirsh are 20,000-25,000 pages long.

III. ANALYSIS AND DISPOSITION

A. Legal Framework

[7] Evidence on a motion may be given by affidavit. An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. See *Rules of Civil Procedure*, r 39.01(1), (4).

[8] For evidence to be receivable, it must be relevant, material, and admissible. Evidence is relevant if "as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence of a fact more probable than it would be otherwise." Evidence is material if what it is "offered to prove is in issue" in the proceedings or assists the trier of fact in assessing other evidence. Evidence is admissible if the trier of fact is legally permitted to consider it. If the evidence is

relevant and material but inadmissible, the trier of fact can't consider it. See *R v Candir*, 2009 ONCA 915, at paras 48-49.

[9] Opinion evidence is prima facie inadmissible. Witnesses can only testify about the facts in their knowledge, observation, and experience, not the inferences or opinions that they drew from those facts. See *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, at para 14. But not all opinion evidence is excluded. There's an exception for expert opinion evidence on matters requiring specialized knowledge. See *White Burgess*, at para 15.

[10] The line between fact and opinion isn't always clear. A lay witness may give an opinion on certain matters (e.g., "a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly"). See *R v Graat*, [1982] 2 SCR 819 at 841; *R v Kruk*, 2024 SCC 7, at para 149.

B. The Parties' Positions

[11] Kamrani-Ghadjar argues that Mr. Kirsh's fresh affidavit contains facts or permissible lay opinions:

- in paragraph 19, Mr. Kirsh describes his understanding of the allegations in the statement of claim
- he used his knowledge and experience to search SEDAR+ to find relevant public filings, which he lists and describes in paragraph 20

- in paragraphs 19 to 23, he makes some observations about these filings

- paragraphs 1 to 18 provide the court with context to understand Mr. Kirsh's experience

[12] Anaergia responds that the evidence is nonetheless irrelevant and immaterial, meaning that it can't be admissible. First, Anaergia argues that there's no need for Mr. Kirsh to introduce Anaergia's public filings—this task can be accomplished by Kamrani-Ghadjar or a law clerk. Second, Anaergia contends that Mr. Kirsh's observations stray into opinion evidence. And the only reason for an extensive recitation of Mr. Kirsh's professional qualifications is to enhance his credibility when making the statements in those paragraphs. Finally, Anergia submits that nothing stops Class Counsel from making the same "observations" as Mr. Kirsh in its factum or oral submissions at the leave motion.

1. Should Mr. Kirsh's evidence have been introduced through Kamrani-Ghadjar or a law clerk?

[13] Though Kamrani-Ghadjar or a law clerk could've introduced the public filings into evidence, the law of evidence doesn't bar Kamrani-Ghadjar from engaging Mr. Kirsh to do so. Indeed, it's probably better that he did so.

[14] Kamrani-Ghadjar or Class Counsel's employees don't have experience reviewing SEDAR+ filings or using the SEDAR+ database. Anaergia's argument suggests that either someone with little or no experience should nonetheless introduce these types

of documents or someone like Mr. Kirsh should find the relevant documents, but give them to the plaintiff or a law clerk to introduce through a hearsay affidavit. Given these options, it's preferable that the person who found the documents introduces them into evidence.

[15] As an aside, many motions, in all areas of practice, are argued on a law clerk's, legal assistant's, or articling student's affidavit. Though the rules of court allow hearsay affidavits on motions, this practice should be discouraged. If all the affiant is doing is introducing documents from the party's file or the public record or reciting the proceeding's history, there's no reason the party themself can't introduce that evidence. Or if someone else found the documents using their expertise or experience (as here) or has direct knowledge of that history (like the party's lawyer), they should introduce the evidence. It's rare that an employee in the lawyer's office helped determine which documents to file or witnessed all of the litigation events.

[16] One reason to involve a lawyer's employee is to discourage cross-examination of a party. That justification shouldn't be tolerated. Another reason may be practical: it's more efficient, especially at the last minute, to have someone in the lawyer's office affirm the affidavit. But remote commissioning makes this explanation retrograde. Finally, the lawyer doesn't want to affirm an affidavit because they want to appear as an advocate at the hearing. If the evidence is "purely formal or uncontroverted" or the adverse party consents (so that, for example, a junior lawyer can appear on the

record on a case that contributed to), there should be no issue. See Law Society of Ontario, *Rules of Professional Conduct*, r 5.2-1. I'm also skeptical that a lawyer's employees, especially articling students, have enough agency to turn down a request to become a witness to a legal proceeding.

2. Is Mr. Kirsh giving opinion evidence?

[17] I don't accept that Mr. Kirsh is providing opinion evidence. He reviewed the public filings. He's telling the court what he sees (or doesn't see) in those documents. He's not providing the court with his inferences. He's telling the court, in paragraph 20, that certain things are missing from the public filings and, in paragraphs 21-23, that the public filing say certain things. Those are observations, not inferences.

3. Can Class Counsel make submissions about the alleged omissions in Anaergia's public filings?

[18] I agree with Anaergia that Class Counsel could make some of the same observations as Mr. Kirsh about Anaergia's public filings in its submissions.

[19] In paragraphs 21 to 24, Mr. Kirsh identifies several "admissions against interest" (Class Counsel's words) that he says are in Anergia's public filings. At the hearing, Class Counsel could point to these same passages in the record, and argue that they're admissible as evidence of the truth of their contents. Anaergia could respond by pointing to other evidence in the record to show that the statements aren't admissions because, for example, they're out of context or incomplete.

[20] That said, I don't agree that Class Counsel can do the same for Mr. Kirsh's evidence in paragraph 20:

> Until the Public Corrections identified in section VIII of the Statement of Claim were made, in none of the Reviewed Public Filings nor the Reviewed Investor Calls issued prior to the Public Corrections is there ever specific mention of (i) the reported financial results of Anaergia being misstated or incorrect, (ii) the Financial Outlook and Revised Financial Outlook being based on incorrect assumptions, (iii) the financial statements of the Company not having been prepared in accordance with IFRS, and (iv) there being weaknesses or deficiencies in the design and effectiveness of Anaergia's ICFR and DC&P.

[21] If, at the hearing, Class Counsel simply asserted that none of the public filings mention these misstatements or omissions, I anticipate Anaergia would challenge Kamrani-Ghadjar to prove that fact. I don't see how he could do that without taking the motion judge to each page of the public filings (which, again, are over 20,000 pages).

[22] It's also in Anaergia's interest to have this issue in play now, months before the written or oral submissions. I expect that if Class Counsel made this argument for the first time a few weeks before the hearing, Anaergia would argue unfairness—it would be put to the burden, on short notice, of identifying where there is mention of these omissions in the vast record.

[23] Anaergia replies that it may now be put to the cost and time of putting contradictory evidence into the record. I don't believe that's mandatory. Anaergia could cross-examine Mr. Kirsh on paragraph 20 by showing him where in the public filings the

omissions are mentioned. Or, like Anaergia proposes, it could point the motion judge to the contrary evidence in its factum or at the hearing.

[24] Anaergia says that it can't do that because there's a risk that the court gives more weight to Mr. Kirsh's evidence than Anaergia's submissions. If Anaergia, in written or oral submissions, contradicts Mr. Kirsh's observations about the public filings by pointing to the public filings in the record, I don't see how Mr. Kirsh's evidence about those filings would prevail. The parties are using two different procedural tools to make their arguments about the contents of the underlying documents.

[25] For all of these reasons, Anaergia's motion to strike Mr. Kirsh's fresh affidavit is dismissed.

IV. COSTS

[26] Subject to the provisions of an act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. See *Courts of Justice Act*, RSO 1990, c C.43, s 131.

[27] In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, together with the result in the proceeding and any offer to settle or to contribute made in writing, the factors listed in rule 57.01 of the *Rules of Civil Procedure*.

[28] In the usual case, costs are awarded to the prevailing party after judgment has been given. The traditional purpose of an award of costs is to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards are "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought". See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, at paras 20-1.

[29] The main objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant. See *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (Ont CA), at para 26.

[30] Kamrani-Ghadjar was the successful party. He sought an order, whether he was successful or not, that costs be in any event of the cause of his leave motion. Anaergia responds that it incurred costs thrown away because Kamrani-Ghadjar withdrew Mr. Kirsh's first affidavit.

[31] I agree that Anaergia incurred costs thrown away. As of at least May 2024, Anaergia put Kamrani-Ghadjar on notice that it challenged Mr. Kirsh's affidavit as

inadmissible opinion evidence. Anaergia incurred the cost of delivering a motion record and factum only to have Kamrani-Ghadjar withdraw that affidavit. Anaergia's factum is mostly useless because it's focused on whether Mr. Kirsh's first affidavit is inadmissible opinion evidence. Kamrani-Ghadjar acknowledges this when he argues that the issues raised by Anaergia are "moot".

[32] That said, I don't find Anaergia's costs to be proportionate. There was no affidavit evidence. The issues raised by Mr. Kirsh's first affidavit weren't novel. Though Kamrani-Ghadjar didn't file a costs outline to show his costs, I don't think it would've been helpful since he didn't have to prepare a factum on the same issues.

[33] I find that $10,000 inclusive of fees, costs, and disbursements is reasonable, proportionate, and fair for Kamrani-Ghadjar to pay in the circumstances of this motion. Kamrani-Ghadjar shall pay the costs thrown away within 30 days.

[34] I disagree that Kamrani-Ghadjar's costs should be in the cause of the motion. Costs should follow the event. See *Rules of Civil Procedure*, r 57.03(1). As Kamrani-Ghadjar didn't seek costs for this motion and didn't give a costs outline, I endorse an order that there shall be no costs of the motion.

Agarwal J

Date: September 3, 2024