CITATION: Bosworth v. Coleman, 2014 ONSC 6135
COURT FILE NO.: CV-08-364780
DATE: 20141021

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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JOAN BOSWORTH AND JENNIFER ANNE BOSWORTH	)	*Kenneth Arenson*, for the Plaintiffs
Plaintiffs	)	
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	)	
- and -	)	
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	)	
KENNETH COLEMAN, NICOLA BERTINI AND DAIMLER CHRYSLER SERVICE INC.	)	*David N. Delagran & A. Small*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	
	)	**READ**: October 21, 2014

F.L. MYERS J.

REASONS FOR DECISION

[1] The plaintiff moves by letter dated October 16, 2014 to ask me to set aside or vary my order dated October 14, 2014. By oral reasons dictated at the hearing on October 14, 2014, the court dismissed the plaintiff's motion for an order that her evidence for trial be taken *de bene esse* under rule 36 on October 20, 2014. The reasons recited that the evidence concerning the plaintiff's likely prognosis while undergoing chemotherapy was "thin". While the plaintiff provided reasons to be concerned that she may suffer fatigue and possibly some memory or cognitive lapses, the concern itself was not proven to be more than a possibility – one which a trial judge would be able to deal with or which could be dealt with by an examination under rule 36 at a later date if necessary. Were this the only issue, the court might have ordered the examination. After all, what is the harm of recording an examination that might never be needed but will be available if it is needed?

[2] The defendants pointed to possible prejudice. Credibility is a very significant issue in this case. Both the plaintiff's credibility and the credibility and reliability of the opinion of the plaintiff's NY medical expert will be the central issues at the trial. On August 20, 2014 the court ruled that the trial of this action could take no more than 10 days as agreed by the parties despite the fact that new counsel for the defendants believes that it will take longer. The plaintiff had altered her position to her detriment in an agreement with the defendant (by its former counsel) to reduce the trial length and thereby speed up the scheduling of the trial. It was the plaintiff's evidence that she very much wanted an early trial and the court found in her favour. The August 20 endorsement discussed the need for active case management to cut through the very large amount of medical evidence being put forward by the plaintiff and to see if witness lists and issues can be trimmed by admissions or other time and costs saving techniques.

[3] In the first two case conferences to start to deal with trial management, the plaintiff's counsel picked up on the court's suggestion that evidence-in-chief at trial may be provided by witness statement or affidavit as is the case in nearly all civil cases in England and many on our own Commercial List. He suggested on September 26, 2014, that he would have a draft will-say prepared and then the defendants' counsel should conduct his cross-examination *de bene esse*. In addition, the plaintiff's counsel advised that it would be difficult to arrange to have his NY expert examined at trial so that perhaps she too should be examined out of court. So the plaintiff was suggesting that the two key witnesses in the case both be examined out of court as part of the trial management process to have the case readied for a 10-day trial. What counsel did not do, however, was engage in any meaningful discussion concerning the issues that are said to be the cause of the expansion of the trial. In the two months since the August 20, 2014 endorsement, there has not yet been any meaningful discussion concerning issues such as: what facts can be admitted; what facts and opinions are truly at the core of the case that require full-on trial cross-examination; which of the many medical reports can be admitted on consent; which might be jettisoned altogether; which contain opinion that might prevent them from being simply filed under the *Evidence Act*; whether any such reports might be amended to remove any objectionable parts on consent.

[4] Moreover the defendants complain that the plaintiffs have not produced all appropriate insurance files. The complaint was made at the hearing on August 15, 2014, at the first case conference, and then again at the second case conference. The parties exchanged positional emails each denying responsibility to help the other and taking positions opposing the other.

[5] What neither party's counsel has yet to do, it appears, is to sit down and cooperate with the other to try to find a way to schedule the trial to fit within the 10-day window agreed upon by the parties. Instead they have advanced positions and adopted tactics designed to secure a leg up for their clients at the expense of the other. When the plaintiff moved for *de bene esse* testimony, she asked for the cross-examination to take place within one week, but her counsel had yet to provide the evidence-in-chief promised more than two weeks earlier and document requests had only just been made from various insurers by the plaintiff's counsel. Some evidence that the plaintiff's counsel had possessed for a long period of time was provided to the defendants' counsel only on the long weekend before the motion was heard last week. So not only is the plaintiff seeking to have her two key witnesses examined out of court, but she asked the defendants to examine the plaintiff before delivering the plaintiff's promised evidence-in-chief, with very late production on some documents and without full document disclosure which

had been on the table for months. The plaintiff's counsel was working to avoid having his two key witnesses testify at trial, while taking no steps to help get the case ready for trial by addressing the issues that drove the August 20 endorsement. In addition, the plaintiff's counsel submitted at the hearing that because the plaintiff expected to be taking a course of chemotherapy for six months, if the *de bene esse* evidence did not occur right away (i.e. before productions are completed and short-serving her evidence-in-chief), then the trial would have to be adjourned for a full year. This submission was directly contrary to the evidence and submissions in August in which the plaintiff expressed her heartfelt desire to be done with this litigation. With the lack of medical evidence to show a truly urgent situation and given the tactics at play, I dismissed the motion to require a rule 36 examination at this time although I left open the possibility of the motion being made if there was a material change in circumstances. Moreover, I indicated that in my view the trial should be scheduled as soon as possible with the trial judge able to accommodate for the plaintiff's chemotherapy if necessary.

[6] Two days later, on October 16, 2014, the plaintiff's counsel wrote an urgent request for an order under rule 59.06(2) to vary or set aside the dismissal order. The basis for the request was that after the hearing, the plaintiff's counsel sought and obtained an unsworn letter from the plaintiff's doctor. The letter says, in effect, that the 10 year survival rate for people with the plaintiff's illness is 35% and the doctor confirmed that the symptoms of chemotherapy that the plaintiff says may occur to her are indeed symptoms that may occur from the type of chemotherapy that the plaintiff is taking. The plaintiff's counsel was aware that the trial was to be scheduled the next day in Trial Scheduling Court. He submitted in his letter that *de bene esse* evidence would allow the trial to be scheduled sooner. Moreover, the plaintiff's counsel purported to retract his request to have the plaintiff testify by will-say in light of the court's concern with the parties' tactics.

[7] I invited the defendants' counsel to respond by the end of day on October 17, 2014. In his response, the defendants' counsel discussed possible ways to resolve the motion. I invited the defendants' counsel to send a draft order to the plaintiff's counsel. I also indicated that I would be available throughout the weekend if I could assist the parties. I asked to hear by 5:00 p.m. on October 20, 2014 whether the matter had settled or if a decision was required. I wrote to counsel after that deadline to inquire if there was a settlement of the motion. The defendants' counsel advised that he had not heard from the plaintiff's counsel. The plaintiff's counsel advised me today that he is still taking instructions and he will talk to the defendants' counsel later today. I have no confidence in an early resolution being reached by the parties. As the matter has a degree of time-sensitivity, with the plaintiff due to start another round of chemotherapy this week, I determined to release these reasons.

[8] It is self-evident that rule 59.06(2) has no application. The medical issue was front and centre in the motion and in the prior case conference in which the motion was scheduled and discussed. Moreover, there is no change of circumstances as referred to in my oral endorsement that would justify bringing the motion back on two days later. The doctor's note, even if it were sworn, would not change my view that there is no urgency mandating that trial cross-examination occur right now before the plaintiff has delivered her evidence-in-chief and documents.

[9] I do not understand why the plaintiff's counsel thought that it might be helpful to withdraw his request to provide the plaintiff's evidence-in-chief in writing. That is actually the one idea that appears to be helpful towards controlling the trial length. The court will assess whether one or more witnesses ought to give evidence-in-chief in writing as the trial management process proceeds.

[10] It is apparent from comments made by the plaintiff's counsel after the court read its oral endorsement on October 14, 2014 and again in his letter of October 16, 2014, that the plaintiff's counsel takes umbrage at the court's recognition of the tactics at play. By tactics, the court is referring to steps design to obtain an advantage or a leg up beyond resolving the immediate issue. The immediate issue is the scheduling a 10 day trial to hear the plaintiff's claim on the merits as soon as possible accommodating for her need for chemotherapy that was not a factor on August 15, 2014. The parties' counsel have sent each other letters and emails full of positions and accusations. They have not sat down to focus on the immediate issue – fairly fitting this case into a 10 day trial accommodating the plaintiff's health.

[11] In Toronto, the civil bar is divided among a number of different divisions of the court. While outside Toronto most judges hear all types of cases. In Toronto, civil cases are heard by separate judicial teams including: civil, commercial, family, estates, and class action. The different specialties have, to a degree, adopted different practices. Case management, for example, is the rule on the Commercial List and in Family. It is still the exception on the general civil list where it varies judge by judge. On the Commercial List, it has been understood by counsel for over 20 years that the "Three C's" govern the management of all proceedings. Counsel are required to govern the case guided by notions of "Communication, Cooperation, and Common Sense." Every counsel who has appeared on the Commercial List since the time of its inception in the early 1990's came to understand that counsel are positively required to cooperate when it comes to matters of scheduling and hearing procedures in court. They are required to speak in advance. They are required to cooperate on documents and agree how matters are to be handled in court. They are to simplify issues. They are to agree on ways to have the case prepared and heard in a reasonable, timely manner, under an agreed schedule, in a way to allow all parties to fairly and efficiently present their cases.

[12] All cases need a strategy. But tactics are generally unhelpful when it comes to case management. In 1992, the Lord Templeman wrote:[1]

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. *It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.* [emphasis added]

[13] In citing this paragraph with approval, the Divisional Court wrote, *per curiam*, as follows:[2]

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[1] *Ashmore v. Corp of Lloyd's*, [1992] 2 All ER 486, 493 (H.L.)

> A party is entitled to a fair opportunity to present its case in a focused way. Counsel, as officers of the court, are expected in furthering the best interests of their clients to present their case on its merits, its true merits.

[14] The civil bar in Toronto has not yet undergone the transformation that happened to the commercial bar on the establishment of the Commercial List. In discussing that transformation on the occasion of the retirement from the bench of the Honourable Mr. Justice James M. Farley, I wrote:

> Others recognized that, although untraditional, Farley J. saw himself as bringing the corporate deal into the courtroom, itself a paradigm shift. One suspects that many might have preferred a less bumpy road. But change is not easy and litigators are not known for shirking away from fights. The advent of the "C's" was seen as a threat to litigators because it involved precisely that: litigation counsel being required to back away from fights in order to facilitate a business deal.[3]

[15] In 2014, no one would suggest that case management on the Commercial List has been anything other than a success. No one recites the Three C's in open court any more. The Three C's are internalized and institutionalized in the commercial bar and judges. But, in 2014 there is a new paradigm shift occurring in the general civil bar. I refer, of course, to the "culture shift" mandated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. In *Hryniak*, the Supreme Court declared that the inaccessibility of civil justice was the greatest challenge to the rule of law in Canada today. It mandated a change whereby civil cases were to be resolved by processes that take into account the goals of efficiency, affordability and proportionality. The ultimate goal remains the same – securing a fair and just resolution on the merits. But costs must come down; delays must be reduced. Canadians are entitled to affordable, speedy access to civil justice in their courts of law.

[16] The civil bar in Toronto is starting to see more case management as a result of *Hryniak* and the efforts of many judges, administrators and representatives of the bar and users to implement new processes deigned to improve access to civil justice. Active case management will not undermine counsel's control of the strategic management and presentation of the case. But it will enforce counsel's recognized duties to communicate, cooperate and exercise common sense in trial preparation and presentation. As Lord Roskill wrote in *Ashmore, supra,* at p. 488,

> It is part of [the judge's] duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. *It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty*. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their

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[2] *Authorson (Litigation Guardian of) v. Canada (Attorney General)***,** 2002 CarswellOnt 1724

[3] F. Myers, "Justice Farley in Real Time", *Annual Review of Insolvency Law 2006* (J.P. Sarra Ed.) (Thomson Carswell, Toronto 2007) page 19 at page 25

> turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. [emphasis added]

[17] In a case management environment, counsel are expected and required to engage in cooperative steps designed to get the case ready for trial in an efficient manner focusing on the true merits. This is especially the case here, where the plaintiff has given evidence that her well-being turns on an early resolution of the lawsuit under which she has been labouring for nearly a decade – and that was before her cancer recurred. Counsel are not required to sacrifice one iota on the true substantive merits of their clients' claims. But steps transparently seeking to obtain a procedural or tactical advantage in trial preparation and trial management are no longer appropriate (if they ever were). This may well represent a culture shift for some counsel, litigants, administrators and judges too. But it is one driven by the failure of the system to achieve many of its goals. As Justice Karakatsanis wrote in *Hryniak*, supra, at para. 28:

> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. *However, that process is illusory unless it is also accessible — proportionate, timely and affordable*. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[18] The court will work to assist the parties to develop accessible, i.e. proportionate, timely and affordable, processes. This will include requiring counsel to fulfill their duties as officers of the court and may well include explicit recognition and eschewing of tactics and gamesmanship from another era. As with all paradigm shifts undertaken in a bureaucratic system, there may be bumps in the road. It is up to all participants in the system to work to surmount and lessen the bumps and provide a level and accessible playing field for all.

[19] Accordingly, the plaintiff's urgent motion for relief under rule 59.06(2) is dismissed. Costs, if demanded, are reserved to the case conference already scheduled for November 4, 2014.

[20] Counsel are directed to meet, in person, at one or more convenient times prior to the case conference on November 4, 2014, so as to work cooperatively on managing the trial process within the 10 days that have now been set for February, 2015 by Himel J.

F.L. Myers, J.

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B E T W E E N:

JOAN BOSWORTH AND JENNIFER ANNE BOSWORTH

Plaintiffs

- and -

KENNETH COLEMAN, NICOLA BERTINI AND DAIMLER CHRYSLER SERVICE INC.

Defendants

REASONS FOR DECISION

F.L. MYERS J.

Released: October 21, 2014