CITATION: Ferguson v. Yorkwest Plumbing Supply Inc., 2023 ONSC 3720
DIVISIONAL COURT FILE NO.: 538/22
DATE: 20230621

2023 ONSC 3720 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
	)	
JAN FERGUSON	)	*Gurlal Kler and A. Levitin,*
	)	Lawyers for the Plaintiff/Respondent
	)	
Plaintiff	)	
(Respondent)	)	
and	)	
	)	
	)	
YORKWEST PLUMBING SUPPLY INC.	)	*David Morawetz,*
	)	Lawyer for the Defendant/Appellant
Defendant	)	
(Appellant)	)	
	)	
	)	
	)	**HEARD by videoconference at Toronto:**
	)	June 20, 2023

REASONS FOR JUDGMENT

Leiper J.

PART I INTRODUCTION

[1] The Defendant, Yorkwest Plumbing Supply Inc. appeals from a decision of Associate Justice K. Jolley which ordered the striking of its statement of defence.[1]

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[1] *Ferguson v. Yorkwest Plumbing Supply Inc*., 2022 ONSC 4792;

[2] The record before the Associate Justice revealed a fruitless, months-long attempt by counsel for the Plaintiff to schedule an examination for discovery of the Defendant, communications that were ignored by counsel for the Defendant (who is not counsel on this appeal) and a case conference at which the Defendant was put on notice to stop putting up roadblocks to the examination.

[3] The Plaintiff is a former employee of the Defendant. She issued her Statement of Claim for damages for wrongful dismissal and unpaid commissions on August 8, 2018. The Defendant served a Statement of Defence on September 11, 2018.

[4] The parties attended mediation on July 29, 2021. Mediation was unsuccessful.

[5] Immediately after the mediation and into the fall of 2021, Plaintiff's counsel sent several communications to Defendant's counsel attempting to schedule examinations for discovery. The Defendant ignored these requests and failed to cooperate by providing available dates.

[6] The Plaintiff tried to move the matter ahead by serving unilateral notices of examination. These were cancelled because the Defendant representative or counsel were said to be unavailable.

[7] This happened three times. The Plaintiff put the Defendant on notice that if the pattern of cancelling and delaying the examinations continued, the Plaintiff would issue a certificate of non-attendance and the Plaintiff would bring a motion to strike the Statement of Defence. Ultimately, the Plaintiff sought the case conference before Justice Morgan on January 19 of 2022.

[8] At the case conference, Justice Morgan ordered that the examinations for discovery be completed by February 28, 2022. He admonished the Defendant for delaying the discoveries and required counsel to cooperate with the scheduling of discoveries and "stop putting up roadblocks." Justice Morgan put the Defendant (and his counsel) on notice that a further incident of non-attendance should lead the Plaintiff to seek "whatever remedy is available under the *Rules of Civil Procedure*."

[9] After the case conference, the Defendant suggested the last date before the deadline imposed by Justice Morgan: February 28, 2022. The Plaintiff served the notice for the examinations, and counsel for the Defendant objected to being examined first. The Plaintiff resisted and requested caselaw in support of the Defendant's position. The Defendant did not provide the caselaw, nor did it bring a motion or seek a case conference to resolve the conflict over the order of examination.

[10] On January 28, 2022 the Plaintiff put the Defendant on notice that if its representative did not attend the scheduled discovery, it would seek to strike the Statement of Defence.

[11] The examinations did not proceed. Counsel to the Defendant ceased responding to communications from the Plaintiff's counsel, who ultimately cancelled the appointment to avoid incurring additional costs.

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[12] On August 16, 2022, the Plaintiff brought the motion to strike the Statement of Defence before the Associate Justice, who considered the history of the litigation and determined that in the unique and fact-specific circumstances of this case, the Statement of Defence should be struck.

[13] The Associate Justice made several findings of fact in her detailed review of the procedural history including:

- The first several attempts by the Plaintiff to schedule examinations for discovery in the summer and fall of 2021 were frustrated by the Defendant counsel's non-response, which required service of unilateral notices of examination and then the series of cancellations at the Defendant's behest;

- Justice Morgan's endorsement following the January 2022 case conference should have been a warning to the Defendant that "enough was enough" (para. 7, Reasons for Decision);

- Had the January-February 2022 issue of order of discoveries been an isolated incident, it would not warrant striking the Statement of Defence; and

- The combination of the four prior Notices of Examination, a pattern of Defendant counsel ignoring Plaintiff counsel's emails and the raising of the final issue of refusing to examine first, led the Associate Justice to find that "this [final] objection was just another attempt to kick the discovery can further down the road."

[14] In two places in the reasons, the Associate Justice referred, erroneously to this being a "simplified rules" or Rule 76 matter. The parties agree this was a mistaken description. The misunderstanding may stem from the fact that the Plaintiff began her action under Rule 76 and used those forms in the motion argued before the Associate Justice. However, it was being litigated under the normal procedure, given that the damages claimed exceeded the limits for Rule 76 cases.

ISSUES

[15] The issues on this appeal are whether the Associate Justice erred:

i. in describing the action as a simplified procedure matter,
ii. in referring to the *Wallace v. Grain Grower* decision, which did not apply in this case;
iii. in finding that the party who served a notice of examination for discovery had the right to determine the order of discovery, and
iv. in failing to consider prejudice and whether less severe sanctions should be imposed instead of striking the Defendant's statement of defence.

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STANDARD OF REVIEW

[16] The standard of review on appeal is one of correctness for questions of law, and palpable and overriding error for questions of fact and the application of legal principles to a set of facts: *Housen v. Nikolaisen* 2002 SCC 33 at paras. 36-37.

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ANALYSIS OF THE ISSUES

The Description of the Litigation as a "Simplified Rules Matter"

[17] The Defendant submits that the Associate Justice's understanding that this was a simplified rules matter was a significant factor in her decision to strike the Statement of Defence, and thus amounts to an error which coloured and undermined the Associate Justice's exercise of her discretion.

[18] I disagree. The Associate Justice mis-described the case as a simplified rules matter at para. 17 of her reasons, and as a point of emphasis at para. 18 where she observed: "This kind of jockeying is particularly inappropriate in a small simplified rules case like this one."

[19] A fair reading of this sentence is that "this kind of jockeying" is inappropriate in civil litigation writ large, but is "particularly inappropriate" in simplified rules cases. There is nothing in the Associate Justice's reasons to suggest that but for this being a simplified rules case, she would have exercised her discretion differently. The conduct was egregious, ongoing and had been the subject of warning from another judge.

[20] While it was an error to describe the action in these terms, it does not rise to the level of an "overriding" error in fact going to the core of the decision. It was a minor misstatement, potentially caused by the use of the simplified rules forms in the motion put before the Associate Justice. I would not give effect to this argument.

The Issue of the Wallace v. Grain Growers Decision

[21] Counsel for the Defendant submits that this case was not about *Wallace* damages which exist to remedy bad faith conduct by an employer in the manner of termination from employment: *Wallace v. United Grain Growers Ltd.* [1997] 3 SCR 70. Thus, the Associate Judge, in the Defendant's submission erred in referring to good faith principles discussed in this decision.

[22] I disagree. At para. 107 of the *Wallace* decision, the majority was talking about more than just the method of dismissal, but about the power differential between employer and employee, both at and after termination. Indeed, in the succeeding paragraphs, the court considered certain litigation conduct, noting that the employer there made a conscious decision to "play hardball" and maintained unfounded allegations that the employee had been dismissed for cause: *Wallace* at para. 109.

[23] I conclude that the Associate Justice made no error in law in referring to the *Wallace* decision.

The Issue of Order of Examination

[24] The Defendant submits that the Associate Justice erred in law by finding that the party who first serves a notice of examination has the right to determine the order of examination. The Defendant had insisted that his client had the right to be examined first, and that he would then have 60 days to decide whether to examine the Plaintiff.

[25] The Associate Justice disagreed with the Defendant's submission based on the schedule set by Justice Morgan which required all discoveries to be completed by February 28, 2022 and by the Defendant's decision to offer the last possible day in the timetable. On the general question of order of examination, the Associate Justice found "that serving a notice of examination first preserves that party's right to set the order of discoveries (see *Ferguson v. Peel Mutual Insurance Co.* 2017 ONSC 2318 at para. 12)."

[26] The Defendant on appeal submits that the observation made by Justice MacLeod in *1479021 Ontario Inc v. Hawkesbury (Town of) et al*, 2020 ONSC 4570, discussed below, supports its position, and that the holding in *Ferguson v Peel Mutual Insurance Co.*, at para. 12 is "*obiter*, and if so, wrongly decided."

[27] Alternatively, the Defendant submits that the Ontario Rules are unclear as to which party has the right to determine the order of discoveries.

[28] Rule 31.04 of the *Rules of Civil Procedure* R.R.O. 1990, Regulation 194 provides that:

> 31.04 (1) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents.
>
> (2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,
>
> (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
>
> (b) the defendant has been noted in default.
>
> (3) The party who serves on another party a notice of examination under rule 34.04 or written questions under rule 35.01 may examine first and may complete the examination before being examined by another party, unless the court orders otherwise.

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[29] In *Ferguson*, Justice De Luca considered Rule 31.04(3) and prior decisions of this court. He noted that "the desired practice is that the party who first initiates the discovery process should ordinarily have the option of examining first even if the party failed to serve a notice of examination first."

[30] The Defendant submits that the Ontario rules are not clear as to the order of examination and it was an error for the Associate Justice to decide otherwise. Although not provided to Plaintiff counsel at the time, nor at the motion, on appeal, the Defendant relies on the decision in *1479021 Ontario Inc v Hawkesbury (Town of) et al*, There, the parties brought motions in the aftermath of their four day examination for discovery plan falling apart. The defendant had made a last-minute request for a different representative, leading the plaintiff to cancel the examinations. Both parties sought their costs for the wasted time caused by the other. Justice MacLeod made several observations about Ontario's discovery regime, including:

- Counsel are expected to discuss and adopt a discovery plan dealing with document production, examination for discovery and other related steps in advance of trial;

- The goal of a discovery plan is to avoid disputes, delays and costs, with counsel being duty-bound to continue discussions and making adjustments where necessary and reasonable;

- The *Principles of Civility for Advocates*, and the *Rules of Professional Conduct* contain guidance about civility and collaboration in procedural matters;

- Here, there was discourtesy displayed by both sides: by the defendants in seeking a last minute switch in representative and by the plaintiffs by "overreacting" and cancelling the discovery.

[31] Justice MacLeod stated, at para. 21:

> I consider the unilateral decision to cancel discoveries to be unreasonable. The plaintiff has no automatic right to decide the order of examinations. Rule 31.04(3) provides that the person who first serves notice may examine first unless the court orders otherwise, but there is no rule that provides that any party may insist they be examined first or at the same time as other parties. Certainly, if it is possible to do so, agreement on the order of examinations, location of examinations and date of examinations is desirable. All counsel should be seeking a discovery schedule that is convenient, cost effective and reasonable for everyone concerned.

[32] Contrary to the Defendant's submission, I do not see *1479021 Ontario Inc.* as inconsistent with Justice De Luca's decision in *Ferguson.* Each of these decisions were practical interpretations of Rule 31.04 as applied to the circumstances of each case. The first party to give notice, "may"

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examine first. Or not. The plaintiff does not have the "automatic" right to decide the order of examinations.

[33] Justice MacLeod was stating the obvious by saying that "there is no rule that provides that any party may insist they be examined first or at the same time as other parties." The rule provides the court with the discretion to make other orders, but the overarching policy for civil discovery is the expectation that counsel work to agree on the logistics and do so in a timely, collaborative manner.

[34] Returning to the facts and the decision of Associate Justice Jolley, the Defendant objected to the order of examinations scheduled by the Plaintiff. When the parties disagreed, the Defendant did not substantiate its position, nor work to resolve the conflict. Although saying he was prepared to litigate the issue, counsel for the Defendant sought no Case Conference, nor did he bring a motion for directions.

[35]

[36] The manner in which this issue was used by the Defendant made it appear to be yet another "roadblock" employed to delay or frustrate the process. Justice Jolley found that the Defendant was not permitted to ignore the schedule and in this case, relying on *Ferguson*, the Plaintiff was entitled to complete her examination first (or not, as the corollary to that *prima facie* entitlement).

[37] Although this was not a motion to set the order of examinations of discovery, it is implicit in Justice Jolley's reasoning that had she been applying r. 31.04(3) it would have been in favour of the Plaintiff for the reasons she gave for rejecting the Defendant's submissions that it was in the right by insisting on the order of examinations.

[38] I conclude that Justice Jolley did not err in law in making this decision.

Did Justice Jolley err in failing to consider less severe sanctions than striking the Defendant's Statement of Defence?

[39] The Defendant submits that Justice Jolley's order striking its Statement of Defence was "wildly disproportionate" to its admitted failure to be more cooperative in scheduling the examination and the warning received from Justice Morgan.

[40] The Defendant relies on the holding in *Environmental v. Huron*, 2017 ONSC 7697 at para. 18. Striking a statement of defence is not a remedy of first resort and should not be made without providing the defaulting party an opportunity to cure the default.

[41] The Defendant also submits that the Associate Justice failed to consider the lack of prejudice to the Plaintiff. It submits that other orders would have been more proportionate, including an order requiring attendance for examination on a certain date, or an elevated order as to costs.

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[42] I disagree. First, it is implicit in Justice Jolley's reasons at para. 18, that she considered the prejudice in the form of costs and the "grinding down" by conduct such as this to dissuade plaintiffs from pursuing their rights. Given the multiple attempts to move this litigation along, the prejudice in the form of frustration and the cost of having counsel communicate without response from the opposing counsel is obvious.

[43] Second, Justice Jolley noted the unique factual circumstances, and reviewed in detail the pattern of dilatory conduct, as well as the warnings of consequences from both Plaintiff counsel and from Justice Morgan. The Defendant had ample opportunity to respond, cooperate and move the litigation ahead, in keeping with counsel's obligations and statements such as those in Justice MacLeod's decision in *1479021 Ontario Inc.* Setting a new schedule would have rewarded conduct that had persisted for months.

[44] Finally, none of these obligations are new. Intermediate measures were tried and repeated. The Defendant did not change its approach. I conclude that the decision to strike the Statement of Defence was not disproportionate in any respect to the litigation conduct in this case. It was entirely within the Associate Justice's discretion to make the order, and she did not err in doing so.

CONCLUSION

[45] Despite the able and fair submissions by Mr. Morawetz on behalf of his client, I cannot conclude that the Associate Justice exercised her discretion on any incorrect principle or erred in law in striking the Statement of Defence.

[46] The Appeal is dismissed. Costs are ordered in favour of the Plaintiff in the amount of $10,000.

Leiper J.

Date: June 21, 2023

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SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

JAN FERGUSON

Plaintiff
(Respondent)

– **and** –

YORKWEST PLUMBING SUPPLY INC.

Defendant
(Appellant)

REASONS FOR JUDGMENT

Leiper J.

Date of Release: June 21, 2023