Case Name:

Saliba v. Swiss Reinsurance Co.

Re: Pauline Saliba, and
Swiss Reinsurance Company Ltd.

[2015] O.J. No. 1000

2015 ONSC 1351

Court File No.: CV-11-436151

Ontario Superior Court of Justice

Master R.A. Muir

Heard: February 27, 2015.
Judgment: March 2, 2015.

(21 paras.)

Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Attendance -- Order to attend or re-attend -- Range of examination -- Objections and compelling answers -- Production and inspection of documents -- Objections and compelling production -- Orders for production -- Motion by defendant for order compelling plaintiff to produce certain emails, to answer refusals and to re-attend for further examination for discovery allowed -- Defendant dismissed plaintiff from employment after it learned she was working as part-time real estate agent and doing some of real estate agent work during time she should have been working for defendant -- Defendant's prior motion for similar relief was dismissed as speculative and too broad, but defendant now requesting only a few emails, which would be simple to retrieve, plaintiff had increased claim for damages and defendant had amended defence to include allegation of dishonesty.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.04(1.1), Rule 29.2.03, Rule 30.06, Rule 31.06(2)

Counsel:

David Hager for the moving party/defendant.

John S. McNeil Q.C. for the responding party/plaintiff.

REASONS FOR DECISION

1 MASTER R.A. MUIR:-- The defendant brings this motion pursuant to Rules 30.06 and 34.15 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order requiring the plaintiff to produce certain personal email messages related to her real estate business. The defendant also seeks an order requiring the plaintiff to answer questions refused at discovery and re-attend at a further examination for discovery.

2 The plaintiff is opposed to the relief sought with respect to the email messages and one of the refused questions. She takes the position that the requested documents are not relevant to the matters in issue in this proceeding. The plaintiff also argues that the motion should be dismissed on the basis of *res judicata*, proportionality and for general policy reasons in relation to the defendant's allegations of after discovered cause for her dismissal.

3 The principles applicable to the scope of discovery are summarized in the decision of Justice Perell in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 (SCJ) at paragraph 129. Of particular importance on this motion is the proposition that the scope of discovery is defined by the pleadings.

4 The principle of proportionality, as set out in Rules 1.04(1.1) and 29.2.03 is also applicable to this motion.

5 I heard a similar motion in this action in January 2013. I released my endorsement on January 25, 2013. The background facts to this action can be found at paragraphs 3 and 4 of that decision which read, in part, as follows:

> 3 This is a wrongful dismissal action. The plaintiff was employed by the defendant and its predecessor corporation from August 1997 to June 30, 2011. She appears to have held several different positions. The plaintiff worked from home for most of the time period relevant to this motion. At the time of her dismissal, she was earning approximately $140,000.00 per year, including benefits.
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> 4 Before it dismissed the plaintiff, the defendant knew that the plaintiff was working as a part time real estate agent. However, the plaintiff had apparently assured the defendant that she was only doing so during evening and weekend hours. The defendant alleges that after the plaintiff was dismissed, the defendant learned that the plaintiff was in fact doing at least some of her real estate agent work during the time she should have been working for the defendant (Monday to Friday -- 8:00 a.m. to 4:00 p.m.).

6 On that motion the defendant sought production of a large number of email messages. On this motion the defendant has limited its request to a relatively small number of email messages.

7 I dismissed the defendant's January 2013 motion for several reasons. Those reasons are set out at paragraphs 7 to 9 of my 2013 decision as follows:

> 7 In my view, the documents requested by the defendant are of only marginal relevance to the matters in issue in this action. The "significant number" of real estate related emails the defendant refers to in paragraph 18 of its statement of defence turns out to be about seven over a time period of 18 months. It is also my view that the information about the plaintiff's email and cell phone use requested by the defendant is not particularly probative of the issue of the plaintiff's alleged breach of her duties to the defendant. The defendant's employee handbook is far from clear about whether such activity was strictly prohibited, as the defendant suggests, or whether it was prohibited only when the activity interfered with an employee's job performance. I note that there is no suggestion in the statement of defence that the plaintiff's job performance failed to meet the defendant's required standards in any way. In my view, the defendant's arguments about what the email messages and cell phone records might reveal are highly speculative. Their request for these documents simply amounts to a fishing expedition.
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> 8 In addition, I accept the plaintiff's evidence that the email production requested would require the plaintiff to review thousands of email messages and that the work involved in retrieving, reviewing and redacting those messages would be enormously time consuming. Hundreds of hours would be required. The defendant has suggested, through hearsay evidence from its lawyer's Litigation Support Manager, that there may be "work arounds for extracting relevant data" that would make the process less time consuming. However, it appears that such a solution is only applicable to web based email applications and not to the non-web based email application where about 99% of the subject email messages are located.
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> 9 In my view, in the circumstances of this action, it would be unreasonable and not in keeping with the principle of proportionality, to require the plaintiff to expend the kind of time and effort she has described in order to produce these documents. In the event that the defendant fails to prove cause, a reasonable notice period for the plaintiff would be in the 12 month range. That notice period would be subject to a reduction for mitigation. There is also an issue of whether the plaintiff was given six months of working notice from January to June 2011, which may lead to a further reduction in her claim. Her salary and benefits were paid until September 23, 2011, which must also be deducted from her claim. Taking all of this into account, it is my view, for the purposes of this motion, that the plaintiff's claim is probably within the simplified procedure range. Therefore, the application of Rule 29.2.03 also leads me to conclude that the requested production need not be made.

8 An appeal from my January 25, 2013 decision was dismissed by Justice Perell on October 10, 2013, primarily on the basis of my conclusions regarding proportionality.

9 As can be seen from the paragraphs quoted above, I dismissed the defendant's 2013 motion for three reasons. First, I viewed the requested documents as only marginally relevant to or probative of the defendant's allegations that the plaintiff breached her duties of loyalty and good faith. Second, it was my view that the defendant's request was speculative and amounted to a fishing ex-

pedition. Third, the very broad nature of the request was unreasonable and not in keeping with the principle of proportionality given the nature of the claim as it stood at the time.

10 In my view, this motion is very different from the motion before me in 2013 and the relief requested by the defendant should be granted.

11 I have come to this conclusion for a number of reasons. First, the email messages the defendant is requesting are far fewer in number. They are limited to one email address, by reference to specific properties and the defendant is only seeking those emails found in specific client identified files located on the plaintiff's computer. The evidence indicates that it would be relatively simple to download or print the requested email messages.

12 The previous request was for all of the plaintiff's email messages related to her real estate business from several email addresses wherever they might be stored. It is obvious to me that the task of producing the messages requested on this motion is far less onerous than was the case for the relief requested on the 2013 motion. In response to the 2013 motion, the plaintiff estimated that complying with the defendant's request would require 132 to 160 hours of her time. The plaintiff concedes that only about 16 hours of her time would be required to produce the email messages the defendant is now requesting.

13 Second, the statement of claim has been amended. The plaintiff has increased her claim for punitive damages from $50,000.00 to $500,000.00. The potential value of the overall claim the defendant is now facing is far more substantial than the claim that was before me in 2013. Mr. McNeil argued that the production requested on this motion is unrelated to the punitive damages claim. That may be so. However, the fact remains that this is now a significant claim, well above the simplified procedure limits. Rule 1.04(1.1) requires the court to make orders that are proportionate to the importance and complexity of the issues and to the amount involved in a proceeding. The rule refers to the proceeding as a whole and not to individual matters in issue. In any event, I do not view it as helpful or efficient to apply the proportionality provisions of the rules on an issue by issue basis. It is the overall nature of the proceeding that should be taken into account and not the value of any particular head of damages or the complexity of any particular matter in issue. From this perspective, 16 hours of time on the part of the plaintiff to produce the requested documents does not offend the principle of proportionality.

14 Third, the statement of defence has been amended. There is now a specific allegation of dishonesty made by the defendant in relation to the plaintiff's real estate activities and certain statements she made with respect to when she engaged in those activities. Moreover, there is at least some evidence to support this allegation. On April 6, 2011, the plaintiff sent an email to the defendant's vice president of human resources in which she stated that her real estate activities were "dealt with outside of [the defendant's] business hours". In her responding affidavit filed on this motion the plaintiff now states: "there were occasions in which I may have been required to deal with my real estate business during what would appear to be normal business hours of an insurance company". The plaintiff does go on to state that she always made up for this time. Nevertheless, this evidence does appear on its face to contradict the plaintiff's April 6, 2011 email.

15 In addition, the amended amended statement of defence now makes specific reference to the email messages requested and cites those emails as constituting a breach of the plaintiff's representation to the defendant that she was conducting her real estate business outside of the defendant's regular business hours.

16 It is not for me to decide as part of this motion whether the amendments to the statement of defence were proper in the circumstances of this action, especially in view of my January 25, 2013 order. The defence has now been amended and on consent. In my view, those amendments have the effect of moving the requested email messages from the category of marginally relevant to being clearly relevant.

17 I do not view this as a situation that would attract the doctrine of *res judicata* and issue estoppel. Issue estoppel requires a finding that the same question has been previously decided. See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 25. A motion seeking the production of documents is decided primarily on the basis of relevance. Relevance is defined by the pleadings. As the pleadings change so too does the ambit of relevance. Parties are generally entitled to amend their pleadings at any stage of a proceeding. New issues can be raised and new allegations can be made. Indeed, it is improper under the Rules for a party to make allegations of misrepresentation until full particulars can be provided. Simply put, this is a different motion. I decided a different question in 2013. It just happens to involve a request for some of the same documents.

18 Finally, I do not see the policy considerations articulated in *Doucet v. Spielo Manufacturing Incorporated*, 2011 NBCA 44 as being applicable to the facts before me on this motion. Unlike the motion before me in 2013, this is not a situation where the employer is engaged in a speculative fishing expedition in order to see if it can find some form of past misconduct or inadequate job performance on the part of the plaintiff. The requested relief on this motion is limited in scope, supported by at least some evidence and appropriately framed by the pleadings as they now stand.

19 The plaintiff's objection to answering the outstanding question refused on discovery was based on an argument that the defendant should not be permitted to obtain indirectly what it is not entitled to directly. The question in issue sought contact information for certain real estate clients of the plaintiff. Given my ruling on the issue regarding the email messages, it follows that the refused question should be answered. In any event, it is also a proper question pursuant to Rule 31.06(2) which requires disclosure of the contact information of persons who might reasonably be expected to have knowledge of matters in issue in a proceeding.

20 I can readily understand the plaintiff's opposition to this motion and I do not view her position as being unreasonable. In fact, the relief the defendant ultimately requested in its factum and during argument was somewhat narrower than the relief set out in its notice of motion. It appears from the evidence that the amendments to statement of defence could have been included before the 2013 motion was heard. The plaintiff might justifiably say to herself: "have we not been through this before?" A fair question. However, for the reasons I have set out above, I have concluded that this is simply a different matter.

21 I am therefore granting the relief requested by the defendant as particularized at paragraphs 30(a) and 30(b) of the defendant's factum. If the parties are unable to agree on the issue of costs, they may make brief submissions in writing by March 16, 2015.

MASTER R.A. MUIR

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Saturday, June 13, 2015 15:18:53