CITATION: Antczak v. Avakian, 2024 ONSC 1715
COURT FILE NO.: CV-22-00079547-0000
DATE: 20240322

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Zbigniew S. Antczak et al v. Mihran Avakian*

BEFORE: Associate Justice Rappos

COUNSEL: *Braden Adsett*, for the Plaintiffs

Alanna Pink, for the Defendant

HEARD: November 21, 2023 (via videoconference)

REASONS FOR DECISION

Overview

[1] This action is with respect to a collision between a motor vehicle and a bicycle. The action was commenced in August 2022. Examinations for discovery have yet to taken place.

[2] The Plaintiffs bring a motion for an order striking the statement of defence due to the Defendant's failure to serve a sworn and complete affidavit of documents and to attend examination for discovery. Alternatively, the Plaintiffs seek an order compelling the delivery of the affidavit of documents and the Defendant's attendance for examination.

[3] The Defendant brings a cross-motion for an order compelling Zbigniew Antczak, the individual who was injured in the collision, to attend for examination.

[4] For the reasons that follow, the Plaintiffs' motion to strike the statement of defence is dismissed, as is the Defendant's motion to compel Zbigniew Antczak to attend for examination.

Facts

Background

[5] On July 16, 2021, Zbigniew Antczak ("**Zbigniew**") was riding his bicycle and was struck by a motor vehicle owned and operated by Mihran Avakian ("**Mihran**").

[6] On August 31, 2022, Zbigniew, by his litigation guardian Kazimierz Antczak ("**Kazimierz**"), commenced this action against Mihran for damages in connection with personal

injuries sustained from the collision. Kazimierz, who is Zbigniew's brother, and Jonathan Antczak, who is Zbigniew's son, are also included as Plaintiffs seeking *Family Law Act* damages.

[7] On October 3, 2022, counsel to the Plaintiffs advised counsel to the Defendant that Zbigniew was incapable and had no memory of the collision due to his brain injury. Counsel indicated that the other two Plaintiffs would be produced for examination.

[8] Mihran denies liability and damages and has defended the claim with a statement of defence dated October 4, 2022.

[9] On January 13, 2023, counsel to the Plaintiffs advised again that they would not be producing Zbigniew for examination.

[10] On January 30, 2023, the Defendant served a draft affidavit of documents and a draft discovery plan, which provided that Zbigniew would be examined for discovery.

[11] Examinations for discovery have yet to take place. They were initially scheduled for April 24, 2023, which was changed to October 26, 2023 at the request of counsel to the Defendant, as he had been called to commence a trial in April.

[12] On September 7, 2023, counsel to the Plaintiffs reiterated his position that Zbigniew would not be produced for examination.

[13] The examination of Kazimierz was re-scheduled for November 27, 2023 due to him being out of the country on October 26, 2023.

[14] On September 27, 2023, counsel for the Defendant asked that all examinations occur on November 27, 2023 or thereafter. Counsel to the Plaintiffs did not consent to this request on the basis that there was urgency to move the matter forward given Zbigniew's age and health.

[15] On October 20, 2023, the Defendant's counsel advised that he was in possession of a Crown Brief for the Defendant's *Highway Traffic Act* charges and would not be producing it prior to the examination due to a deemed undertaking. He noted that it was anticipated that the documents would eventually be produced in this litigation.

[16] Counsel took the position that Mihran would not show up for the examination on October 26, 2023 unless the Plaintiffs provided an undertaking not to seek continued discovery subsequent to the Crown Brief and/or police file being produced.

[17] The Defendant also requested that Zbigniew be produced to be examined for discovery.

[18] The Plaintiffs took the position that Mihran had failed to disclose the Crown Brief and that the Plaintiffs were not required to, and would not, provide the undertaking sought by Mihran.

[19] With respect to their decision not to produce Zbigniew, the Plaintiffs reiterated their position that he would not be produced for examination given his traumatic brain injury, the appointment of Kazimierz as his substituted decision maker, and the results of medical examinations conducted of Zbigniew.

[20] Mihran did not appear for the examination on October 26, 2023, and a certificate of non-attendance was obtained by the Plaintiffs.

[21] The Defendant served his sworn affidavit of documents on November 17, 2023.

[22] Mihran's trial with respect to charges filed against him under the *Highway Traffic Act* with respect to the collision was scheduled to be heard in January 2024.

Zbigniew's Health

[23] As a result of the collision, Zbigniew suffered a severe traumatic brain injury.

[24] Kazimierz brought an application under the *Substitute Decisions Act, 1992* for a declaration that Zbigniew was incapable of managing his personal care and property.

[25] Pursuant to an Order dated June 20, 2023, Justice Harper declared that Zbigniew is incapable of managing his property and his personal care and appointed Kazimierz as his Guardian of Property and Guardian of his Person.

[26] The parties have filed the following documents concerning Zbigniew's health:

(a) Occupational Therapy Attendant Care Assessment Report dated March 15, 2022, prepared by Naomi Hazlett, OT Reg. (Ont.) (the "**OT Assessment Report**"), based on an assessment completed on March 2, 2022;

(b) Occupational Therapy Progress Report dated August 24, 2022, prepared by Naomi Hazlett, OT Reg. (Ont.) (the "**OT Progress Report**");

(c) Form C *Substitute Decisions Act* Assessment Reports for Property and Personal Care dated November 6, 2022, prepared by Amirah Hassan, MSW, RSW (the "**SDA Assessment Report**"), based on an interview conducted on October 2, 2022; and

(d) Speech-Language Pathology Update Report dated July 9, 2023, prepared by Rachelle Dunne, SLP Reg. CASLPO (the "**Speech-Language Report**"), based on assessments completed on January 20 and 27, 2023.

[27] The OT Assessment Report contains the following statements concerning Zbigniew:

(a) "Mr. Antczak affirmed that he has no memory of the accident, nor was he able to provide details of his treatment while in hospital";

(b) Mr. Antczak is "receiving treatment in the complex continuing care unit at Lakeridge Health Centre…the unit is locked…";

(c) "Mr. Antczak emphasized over the course of functional testing that he has no memory of the MVA nor does he have memory of his recent life prior to or following it. He required instructions to be delivered in the form of concise steps or information to be given one concept or idea at a time";

(d) "While Mr. Antczak demonstrated some strengths in cognitive domain, such as visuospatial activities and praxis, he has some challenges with short-term memory and demonstrates significant deficit related to judgment and safety awareness";

(e) "Mr. Antczak's cognition should be closely monitored and addressed through neuropsychological testing and a cognitive remediation program if needed under the direction of the neuropsychologist";

(f) "Mr. Antczak requires cueing and guidance in the form of one-step instructions to complete tasks…based on his cognitive limitations, Mr. Antczak would likely be unable to complete complex activities of daily living and/or instrumental activities of daily living independently";

(g) "Mr. Antczak was able to maintain focus/attention throughout the duration of the functional assessment with cueing. He was able to follow simple, one-step directions with occasional repetition. When more complex instructions were provided, the client would remain silent until the instructions were rephrased. When rephrased to simple, one-concept instructions, Mr. Antczak would respond by completing the task"; and

(h) "Mr. Antczak continues to experience profound cognitive and emotional deficits because of the motor vehicle accident he experienced…".

[28] The OT Progress Report contains the following statements concerning Zbigniew:

(a) Mr. Antczak "is currently residing in a locked unit at Lakeridge Gardens long-term care facility";

(b) "the writer of this report observed… during the assessment… memory loss, including difficulty with short-term and anterograde memory";

(c) "this therapist has observed the following additional sequalae: Lack of insight or awareness into Mr. Antczak's cognitive limitations";

(d) Mr. Antczak "can engage in discussion of the news at a high, abstract level, with some connection with lived experience; for example, Mr. Antczak is able to read a story about the war in Ukraine and describe his family's experience in Poland during wartime"; and

(e) "Mr. Antczak's main challenges continue to be cognitive and behavioural…. Compounding a lack of insight are the ongoing, persistent memory challenges experienced by Mr. Antczak. He has great difficulty forming new memories… and continues to neither have a memory of the motor vehicle accident nor remember being told what happened to him or why he is currently residing at Lakeridge Gardens".

[29] The SDA Assessment Report contains the following statements concerning Zbigniew:

(a) "Mr. Antczak fails to understand the basic information relevant to his finances and does not meet the standard for understanding the information relevant to managing his property";

(b) "As Mr. Antczak does not have the knowledge base or skills required to make decisions about his finances, he is unable to understand the options for meeting his financial needs. He lacks insight into his cognitive difficulties and therefore is unable to weigh the foreseeable risks and benefits of a decision or lack of decision";

(c) "in my opinion, Mr. Zbigniew Antczak is incapable with respect to his property";

(d) "He lacks the capacity to manage his financial affairs on his own, and therefore he would benefit from having a guardian of property appointed"; and

(e) "Clinical records from Lakeridge Health Whitby indicated a persistent level of confusion or disorientation…".

[30] The SDA Assessment Report also refers to an Independent Insurer's Examination – Neurology conducted by Dr. Rehan Dost on July 18, 2022, and states that "Dr. Dost opined that Mr. Antczak sustained a severe traumatic brain injury with multiple hemorrhages, and he satisfied the criterial for critical impairment".

[31] The Speech-Language Report contains the following statements concerning Zbigniew:

(a) "It was observed Mr. Antczak had difficulty comprehending the complexity of the discussion focused on topics of attention, memory, judgment and reasoning and how deficits in these areas impacted his communication";

(b) "Currently Mr. Aztczak has displayed improvements in his planning and organization of outings with supports of phone or text reminders, wall calendar, cues on how to plan and recall items he needs in the community and building routine. The therapy team is working on fading the level of cues, reminders and models in order to build independence";

(c) "Through assessment, Mr. Antczak was observed to display difficulties with cognitive-communication functions including memory, expressive and receptive language, social communication, and executive functioning skills… Mr. Antczak's cognitive-communication deficits appear to impact all levels of communication, his ability to use his computer or phone for communication, his ability to recall conversations, his ability to learn new skills and his ability to express himself"; and

(d) "deficits in attention, memory, planning, organization, insight, judgement and reasoning".

[32] Counsel for the Plaintiffs has sworn an affidavit setting out his view that Zbigniew's brain injury will have reduced his life expectancy, and he will be prejudiced if he is forced to proceed to trial without having discovery.

[33] Counsel for the Defendant has sworn an affidavit setting out her view that Zbigniew's injuries do not prevent him from following questions or instructions, nor does he present with issues in relation to focus or concentration. She believes that suitable accommodations can be made throughout his examination for discovery.

Legal Principles – Motion to Strike

[34] With respect to the Plaintiffs' motion to strike the statement of defence, they rely on subrule 30.08(2) and subrule 34.15(1) of the *Rules of Civil Procedure* (the "***Rules***").

[35] Subrule 30.08(2)(b) provides the Court with the authority to strike out a statement of defence where the defendant fails to serve an affidavit of documents in compliance with the *Rules*.

[36] Subrule 34.15(1)(b) provides the Court with the authority to strike out a statement of defence where a person fails to attend an examination for discovery.

[37] As stated by Associate Justice Robinson in *Ponnampalam v. Thiravianathan*, "[w]hether to strike a pleading is a discretionary decision. On motions of this nature, given the severity of the relief, courts are concerned with the balance between having claims defences adjudicated on their merits and ensuring that the administration of justice is not undermined by litigants failing to comply with court orders and their statutory obligations as litigants."[1]

[38] In *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)* ("***Falcon Lumber***"), the Court of Appeal stressed the "importance of the obligation to disclose and produce relevant documents to the proper and fair functioning of the civil litigation process" and that the "fundamental obligation to disclose relevant documents and produce those that are not privileged should be performed automatically by a party, without the need for court intervention."[2]

[39] *Falcon Lumber* dealt with the appropriateness of striking a party's pleading under subrule 30.08(2)(b) for breach of documentary disclosure and production obligations. The Court of Appeal noted that the relief is not restricted to "last resort" situations, but that "courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading."[3]

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[1] *Ponnampalam v. Thiravianathan*, 2023 ONSC 1361, para. 6.
[2] *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310, paras. 42-43.
[3] *Ibid.*, para. 50.

[40] The Court of Appeal went on to list principles that guide the exercise of the discretion to strike a pleading, which include:

> "a court should consider a number of common sense factors when deciding whether to strike out a pleading under r. 30.08(2): (i) whether the party's failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case"[4]
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> …
>
> "a court must consider whether an order to strike out a pleading would constitute a proportional remedy that is consistent with the recent calls of the Supreme Court of Canada to alter the Canadian litigation culture."[5]

[41] In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider: the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute.[6]

[42] The striking of a pleading is extraordinary and a severe remedy.[7] It should not be made without providing the defaulting party an opportunity to cure the default.[8] The court should strike to find a fair balance between the need to move the action along and the maintenance of procedural fairness.[9]

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[4] *Ibid.*, para. 51.
[5] *Ibid.*, para. 53.
[6] *Advanced Farm Technologies-JA v. Yung Soon Farm Inc.*, 2021 ONCA 569, para. 10.
[7] *Herman's Building Centres v. Belaoussoff*, 2021 ONSC 413, para. 4; *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85, para. 35.
[8] *Ferguson v Yorkwest Plumbing Supply Inc.*, 2023 ONSC 3720 (Div. Ct.), para. 40.
[9] *1649050 Ontario LTD. v. Hargadon*, 2022 ONSC 5187, para. 12.

Analysis – Motion to Strike

[43] The Defendant served a draft affidavit of documents on January 30, 2023 and, following service of the Plaintiffs' motion record, the Defendant served a sworn affidavit of documents.

[44] As a result of the Defendant curing its non-compliance, in my view the Plaintiffs' request for the severe remedy of striking the statement of defence under subrule 30.08(2)(b) is not warranted, proportionate or appropriate in the circumstances.

[45] With respect to the Defendant's failure to attend to be examined for discovery to date, in reviewing the "common sense" factors listed above, the failure was clear and unequivocal.

[46] The Plaintiffs rely on the decision of Justice Tranquilli in *Herman's Building Centres v. Belaoussoff* in support of its request to strike the statement of defence. In that case, the Court struck the statement of defence due to, among other things, the defendant's failure to attend for examination. The Court held that none of the commonsense factors militated away from considering striking the statement of defence, and that striking the defence was a proportionate remedy since "[t]here has been deliberate and ongoing non-compliance by the defendants with their discovery obligations. There is no realistic prospect of the action advancing through discovery on its merits in the foreseeable future. The court has been given no credible commitment that the defendants will comply with their obligations."[10]

[47] The Court also noted that it had "no confidence the defendants would take any proactive step to cure the defaults and advance the proceeding short of further court intervention."[11]

[48] The Defendant relies on the fact that the Crown Brief from the criminal charges cannot be produced due to privilege and deemed undertaking concerns. The Defendant does not want to be examined now and examined again later when the Crown Brief and/or police report has been produced to the Plaintiffs.

[49] Having considered the commonsense factors listed above, in my view the circumstances of this case do not warrant striking the statement of defence due to the Defendant's current failure to be examined for discovery.

[50] While the Defendant's refusal to be examined is deliberate, clear and unequivocal, he has provided a credible commitment to cure the default after the completion of the criminal trial and once the Crown Brief and/or police report may be produced which, in my view, is a reasonable explanation for his default. As noted by the motion judge in *Falcon Lumber*, "[a] party is not required to proceed to examine for discovery of the opposing party until the opposing party has produced all relevant documents. Not only is the Plaintiff's refusal to proceed with the examination for discovery in these circumstances consistent with the Rules (see R. 34.14), it would

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[10] *Herman's Building Centres v. Belaoussoff*, 2021 ONSC 413, paras. 51, and 57-58
[11] *Ibid.*, para. 57.

also be negligent of the Plaintiff's counsel to conduct an examination for discovery where there are obvious missing documentation."[12]

[51] Given that the charges under the *Highway Traffic Act* are with respect to the collision, there is a very real possibility that the Crown Brief and/or police report may have relevant information regarding details of the accident that may not be available given Zbigiew's current mental state.

[52] As a result, in my view, the Defendant's position that his examination for discovery be held after the completion of the *Highway Traffic Act* and production of the Crown Brief and/or police report was reasonable in the circumstances, and does not constitute conduct that warrants a dismissal of his statement of defence.

[53] As a result, the Plaintiffs' motion to strike the statement of defence is dismissed.

[54] In the alternative, the Plaintiffs requested that a specific date be set down for the Defendant's examination for discovery. Given that I do not know whether the *Highway Traffic Act* trial has been completed and the Crown Brief and/or police report have been produced to date, I am not prepared to compel the Defendant to attend to be examined on a specific date.

Legal Principles and Analysis – Motion to Compel Zbigniew to Attend for Examination

[55] Subrule 31.02(5) of the *Rules of Civil Procedure* provides that, where an action is brought by or against a party under disability, (a) the litigation guardian may be examined in place of the person under disability, or (b) the option of the examining party, the person under disability may be examined if he or she is competent to give evidence.

[56] The Defendant does not refer to this subrule in his notice of cross-motion. Neither party has directed me to any case law that decided under this subrule.

[57] However, the Defendant relies on *McGowan et al. v. Haslehurst et al.*, which, under the former *Rules of Practice*, contained a similar rule. In that case, the Court held that a party's "unsoundness of mind" constituted a valid reason for refusing to order the party's attending at examination.[13] The Court stated that "it is only in the clearest of cases that an appointment for discovery should be struck out on the grounds of the unsoundness of mind of a party."[14]

[58] In *R. v. Marquard*, the Supreme Court of Canada said the following regarding testimonial competency:

> "Testimonial competence comprehends: (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate… The judge must satisfy him- or herself

[12] *Falcon Lumber Limited v. 24803375 Ontario Inc.*, 2019 ONSC 4280, para. 27.
[13] *McGowan et al. v. Haslehurst et al.*, 1977 CanLII 1192 (ON SC).
[14] *Ibid.*

> that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. The enquiry is into capacity to perceive, recollect and communicate, not whether the witness actually perceived, recollects and can communicate about the events in question."[15]

[59] In *Vokes Estate v. Palmer*, a motion was brought to compel a party to submit to a new examination for discovery under oath or solemn affirmation. The party had suffered a brain injury in a motor vehicle accident. The party was previously examined for discovery, but he did not take an oath or solemn affirmation.[16]

[60] Justice Price noted that "where a party submits that he is not competent to give evidence at an examination for discovery, he bears the onus of establishing the requisite degree of unsoundness of mind".[17] Justice Price referred to provisions of the *Ontario Evidence Act* and the *Canada Evidence Act* regarding competence to provide evidence at trial. Price J. held that it was the party who bears the onus of satisfying the court that there is an issue as to his capacity to give evidence under oath or solemn affirmation."[18]

[61] The party had, prior to his examination, twice testified under oath at trial and once under oath at a previous examination for discovery. The Court had the ability to review the transcript of the party's examination that was not under oath, which demonstrated that he understood the duty to tell the truth. Justice Price concluded that, while the party suffered from cognitive impairments derived from his acquired brain injury, they did not render him incompetent to testify under oath or solemn affirmation."[19]

[62] The Defendant also relies on the decision of Master Mills (as she then was) in *Scuglia v. RBC Life Insurance Company*. Having review the decision, in my view that case is distinguishable, as it does not deal with a party under disability who had a litigation guardian appointed in the case.[20]

[63] The reports are clear that Zbigniew has suffered a severe traumatic brain injury. He has no memory of the motor vehicle accident. He has difficulty communicating. He has been found to be incapable and the Court has appointed a guardian for personal care and property under the

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[15] *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 SCR 223.
[16] *Vokes Estate v. Palmer*, 2009 CanLII 70132 (ON SC), paras. 2, 5 and 7.
[17] *Ibid.*, para. 14.
[18] *Ibid.*, para. 19.
[19] *Ibid.*, para. 49.
[20] *Scuglia v. RBC Life Insurance Company*, 2019 ONSC 1038.

Substitute Decisions Act, 1992. All of the reports from medical practitioners note his cognitive deficits and concerns about his judgment. He is often confused and disoriented. He lacks insight into his limitations and his issues with executive functioning skills.

[64] Having reviewed the principles set out in these decisions, and having reviewed the medical reports detailed above, I am of the view that Zbigniew is not competent to give evidence and should not be compelled to be examined for discovery.

Disposition

[65] For the reasons above, I have dismissed both the Plaintiffs' motion and the Defendant's cross motion.

[66] I strongly urge the parties to come to an agreement on costs. If they are unable to do so, they may contact the Assistant Trial Coordinator to request direction as to a timetable for the delivery of written cost submissions.

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Associate Justice Rappos

DATE: March 22, 2024