CITATION: Buttar v. Cheema, 2021 ONSC 5504
COURT FILE NO.: CV-19-624755
DATE: 2021 08 12

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RUMANJOT BUTTAR, KAWALJIT BUTTAR, HARDEEP BUTTAR, SUKHJOT BUTTAR and CHANDEEP BUTTAR, *Plaintiffs*

- and -

BALWINDER CHEEMA and KAMALJIT CHEEMA, *Defendants*

BEFORE: Master Todd Robinson

COUNSEL: I. Kirtsman, *for the plaintiffs (moving party)*

K. Shand, *for the defendants (responding party)*

HEARD: July 29, 2021 (by videoconference)

REASONS FOR DECISION

[1] Rumanjot Buttar has sued her uncle and aunt, Balwinder and Kamaljit Cheema, regarding injuries she sustained from a dog when visiting their house. Ms. Buttar alleges that she suffered permanent and serious physical and psychological injuries. Her mother, father, and siblings also advance claims under the *Family Law Act,* RSO 1990, c F.3. Ownership of the dog is a disputed issue. Although not in the motion materials, and although not specifically pleaded in the statement of defence, I am told that the defendants' position is that the dog is (or was) owned by Sunny Cheema, whose relationship to the defendants is unclear.

[2] The plaintiffs seek a myriad of relief on this motion arising from the defendants' repeated failure to attend mandatory mediation, Balwinder Cheema's failure to attend multiple scheduled examinations for discovery, and Kamaljit Cheema's argued failure to answer her undertakings and provide a response to a question taken under advisement.

[3] Prior to arguing the motion, agreement was reached on the majority of relief, with a form of order also substantially agreed. In particular, the parties agreed to a deadline for completing mandatory mediation, a deadline for the defendants to serve their sworn affidavits of documents, and a deadline for Balwinder Cheema to attend his examination for discovery.

[4] Argument proceeded on the following issues:

(a) whether a court-ordered deadline for answers to outstanding undertakings from Kamaljit Cheema's examination for discovery is premature;

(b) whether production of the particulars of a statement given by Sunny Cheema to the defendants' insurance adjuster should be ordered, despite the defendants now asserting litigation privilege;

(c) whether the plaintiffs should be permitted to move without notice to strike the statement of defence if the defendants fail to comply with further ordered deadlines; and

(d) the appropriate amount of costs thrown away from aborted mediations and the defendants' non-attendance at examinations for discovery.

[5] I have determined that (a) a deadline for answers to undertakings should be ordered, (b) neither relevance of the question under advisement nor the defendants' claim of litigation privilege can fairly be determined on the record before me, and (c) any plaintiffs' motion to strike the defendants' defence should be brought on notice. I also fix costs thrown away from the mediations and examinations for discovery on a substantial indemnity basis, but in a reduced amount from that sought by the plaintiffs.

ANALYSIS

Is it premature to order a deadline for outstanding answers to undertakings?

[6] Kamaljit Cheema's examination for discovery took place on June 3, 2021. The plaintiffs seek an order compelling answers to seven undertakings given and one question taken under advisement at the examination (which I will deal with separately).

[7] The defendants argue that this motion is premature, since the 60-day deadline to answer the undertakings and provide a position on the question under advisement provided in Rule 31.07(1) of the *Rules of Civil Procedure,* RRO 1990, Reg 194 has not yet expired. Kamaljit Cheema is thereby not in default of her obligations under the *Rules*. For that reason, they oppose an order compelling answers by September 30, 2021. The defendants submit that Kamaljit Cheema's intention is to comply with the deadline in the *Rules.*

[8] The plaintiffs submit that the motion date booked was the only available date for months. It was only a few days prior to the formal deadline under Rule 31.07(1) (only two business days, in fact), and there had been no indication of any intention to answer the undertakings or to cooperate in advancing the litigation until this motion was brought. The defendants' pattern of conduct is argued to support the need for an order, even though the formal deadline for answers had not yet passed.

[9] I am satisfied that the requested order should be made. While the defendants' position is technically correct, it is overly formalistic in all the circumstances, particularly given the defendants' representation to me that Ms. Cheema intended to provide answers within the 60-day

period under the *Rules*. If that is true, then the answers ought to have already been provided prior to release of these reasons.

[10] Considering the defendants' conduct to date, the plaintiffs' concerns that Ms. Cheema will not answer her undertakings without a court order have foundation. If Ms. Cheema has not answered them since the motion was argued, it will likely be months until a further motion to compel answers can be heard.

[11] The plaintiffs' requested relief is, in effect, a nearly two-month extension in the time to provide answers. Ms. Cheema's counsel has said is not needed. If so, then the order will be practically moot. If not, then the order seems necessary.

Should an answer to the question taken under advisement be compelled?

[12] Ms. Cheema took under advisement a request for particulars of a statement given by Sunny Cheema to the defendants' insurance adjuster. The plaintiffs argue that an answer to the question under advisement should be ordered, since Ms. Cheema has already conceded relevance by separately undertaking to advise of any material differences between what Sunny Cheema told the adjuster and what he told Svet Ivanov (one of the defendants' lawyer).

[13] Ms. Cheema's position is two-fold: the motion is premature, since the time to provide a position on the under advisement has not yet expired, and the requested information and documents are privileged. Defendants' counsel confirmed at the hearing, apparently for the first time, that Ms. Cheema will be refusing the question on the basis of litigation privilege.

[14] First, I agree that it is premature to compel an answer to the question. In my view, it cannot be treated the same as Ms. Cheema's undertakings. An undertaking is a promise to provide an answer. Taking a question under advisement is effectively an agreement to consider the question further and provide either an answer or a position on why it will not be answered. Rule 31.07(1)(b) provides a 60-day period for a party to do that, failing which the question is deemed refused. When this motion was argued that time has not yet lapsed. Defendants' counsel confirmed at the hearing that litigation privilege would be claimed, but I did not have the defendants' formal position on litigation privilege, including the basis for saying the file is privileged. They were not yet required to have done so.

[15] Second, in any event, the record is insufficient for me to assess if the question is relevant. I asked plaintiffs' counsel to explain the relevance based on the pleadings. I was directed to paragraphs 9 and 10 of the statement of claim, which allege that the defendants (or one of them) owned, possessed, and harboured a dog and were owners within the meaning of the *Dog Owners' Liability Act,* RSO 1990, c D.16. Both of those paragraphs are denied in the statement of defence. Plaintiffs' counsel submitted that Ms. Cheema's discovery evidence is that Sunny Cheema was the owner of the dog and that particulars of the statement made by Sunny Cheema to the insurance adjuster are thereby relevant. As already noted, the plaintiffs argue that relevance has been conceded by Ms. Cheema giving the undertaking to provide material differences between what Sunny Cheema told the insurance adjuster and what was said to defendants' counsel.

[16] My problem with the plaintiffs' arguments is that I have no evidentiary context to find that the question is relevant. There are no transcript extracts in the materials. The lawyer's affidavit filed says nothing about Sunny Cheema's relationship to the defendants, that he is alleged to be the owner of the dog, or what was said on Kamaljit Cheema's discovery about Sunny Cheema, his discussion(s) with defendants' counsel, or the insurance adjuster. The lawyer swearing the affidavit does not say how she knows what happened at the discovery, referring only to being "advised by file review". That could mean she reviewed a memorandum to file, a reporting email, correspondence sent to opposing counsel, or the transcripts. The affidavit evidence is nothing more than uncorroborated hearsay evidence.

[17] Third, litigation privilege also cannot be properly assessed or decided on the record before me. For me to properly determine whether particulars of the statement made during the adjuster's claim investigation are litigation privileged, I first need to see at least the discovery evidence about the adjuster's investigation and have a position from the defendants on why the particulars sought are not producible.

[18] Litigation privilege over an insurance adjuster's investigation and file is not a black and white issue. Although not cited by either party, there is a body of case law discussing the extent to which litigation privilege protects an adjuster's file. For example, in *Panetta v. Retrocom*, 2013 ONSC 2386, at paras. 27-59, Quinn J. reviewed various case law on relevance and litigation privilege over different portions of an adjuster's file. Numerous other cases also address litigation privilege in the context of an adjuster's investigation and file.

[19] Relief regarding particulars of the statement, if pursued, will need to be addressed in a future motion on a proper evidentiary record. Before any such motion is brought, though, I strongly encourage counsel to review the relevant case law, discuss relevance and the extent of privilege, and distill the specific dispute over refusing the particulars, which will permit more focused argument than that presented to me.

Should notice be required for a motion to strike?

[20] I do not accept the plaintiffs' arguments that the defendants' conduct warrants denying them the right to notice of a motion to strike the statement of defence. There is no prejudice to the plaintiffs from providing such notice if the defendants fail to abide by the ordered deadlines. I am not prepared to deny them an opportunity to at least attempt to explain a default, should it occur.

What is the appropriate amount of costs thrown away?

[21] The plaintiffs seek costs in the amount of $14,447.13, including HST and disbursements, on a substantial indemnity basis. The defendants agree that there should be costs thrown away, but they suggest $4,000 is more appropriate.

[22] I agree that substantial indemnity costs are warranted for the costs thrown away. Substantial indemnity costs are justified where the unsuccessful party has engaged in behaviour worthy of sanction and the court wishes to express its disapproval of that conduct: *Net Connect Installation Inc. v. Mobile Zone Inc.,* 2017 ONCA 766 at para. 8. The defendants' failure to attend

scheduled mediations and examinations for discovery is unexplained. No responding materials were filed, so the plaintiffs' evidence is undisputed. That evidence supports deliberate disregard of the defendants' obligation to produce themselves for examinations and participate in mandatory mediation, including an unexplained breach of a court order for mediation to which they consented. In my view, it would be inequitable to award only partial indemnity costs in circumstances where I am satisfied the plaintiffs have no fault and were forced to incur what should have been unnecessary costs.

[23] The costs outline filed includes both costs thrown away and costs of the motion. I have discounted the 8.6 hours of time for preparing and arguing this motion, since that is properly addressed as costs of this motion. The remainder of the costs outline comprises 26.7 hours of time claimed for the aborted mediations and unattended examinations.

[24] With respect to mandatory mediation, the defendants repeatedly failed to attend mediation. That includes the mediation fixed by consent order at a chambers appointment, which I am satisfied was necessary to force the defendants to cooperate in rescheduling the prior aborted mediation. Nevertheless, the defendants correctly point out that the mediation costs claimed by the plaintiffs include drafting the mediation statement of issues. I do not accept those costs will be fully thrown away (contrary to the argument by plaintiffs' counsel, who suggested a substantially new mediation brief will now be required). I do accept, however, that discovery evidence will inevitably lead to changes in the mediation materials, and associated costs, which would have been unnecessary had the defendants produced themselves for discovery at either of the two examination dates scheduled prior to the first mediation.

[25] With respect to examinations for discovery, there is no explanation for the defendants' failure to attend scheduled discoveries. Kamaljit Cheema did not attend her first two examinations, although ultimately attended her third one. Balwinder Cheema has failed to attend any of his three scheduled examinations. No reasons were given for the repeated failures to attend. I find the claim for costs thrown away are within the reasonable expectation of the parties and not disproportionate.

[26] I fix costs thrown away from the aborted mediations and unattended examinations for discovery in the amount of $7,000.00, including HST and disbursements, on a substantial indemnity basis, payable within fourteen (14) days.

DISPOSITION

[27] I accordingly order as follows:

(a) The defendants shall participate in mediation by November 15, 2021.

(b) The defendants shall serve their sworn affidavits of documents, together with Schedule "A" productions, by September 15, 2021.

(c) Kamaljit Cheema shall answer the seven undertakings given at her examination for discovery on June 3, 2021 by September 30, 2021.

(d) Balwinder Cheema shall attend an examination for discovery by September 30, 2021.

(e) The defendants shall pay to the plaintiffs costs thrown away from prior mediations and unattended examinations for discovery fixed in the amount of $7,000.00, including HST and disbursements, within fourteen (14) days.

(f) In the event of default by the defendants in compliance with any of the foregoing, the plaintiffs may move, on notice, to strike the statement of defence of the defaulting defendant(s).

(g) On consent, the deadlines set out above may be varied by mutual written consent of all parties.

(h) Relief compelling an answer to the question taken under advisement at Kamaljit Cheema's examination for discovery on June 3, 2021 is hereby dismissed, without prejudice to moving again at a later date.

[28] I have signed an amended version of the draft order submitted, as amended electronically prior to signing.

COSTS

[29] The parties are encouraged to settle costs of this motion. If they cannot, then they may book a thirty (30) minute case teleconference with me to make oral submissions as to costs, to be arranged through my Assistant Trial Coordinator, Christine Meditskos. The plaintiffs and the defendants will each be entitled to ten (10) minutes for their submissions, with five (5) minutes of reply. Case law and any offers to settle shall be exchanged and filed directly with my Assistant Trial Coordinator at least five (5) days prior to the case teleconference.

[30] Unless a case teleconference has been booked (but not necessarily heard) within thirty (30) days of the date of these reasons for decision, the parties shall be deemed to have agreed on costs.

MASTER TODD ROBINSON

DATE: August 12, 2021