

CITATION: Zaker v. Security National Insurance Company, 2022 ONSC 6031
COURT FILE NO.: CV-18-00607703
MOTION HEARD IN WRITING: 20221011

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Azadeh Sani Zaker and Mohammadreza Tehrani, Plaintiffs

AND:

Security National Insurance Company, Defendant

BEFORE: Associate Justice B. McAfee

COUNSEL: S. E. Barclay, Counsel, for the Moving Party, the Defendant

V. Kats and K. Barretto, Counsel, for the Responding Parties, the Plaintiffs

HEARD: In Writing on October 11, 2022

ENDORSEMENT

- [1] Further to my endorsement dated April 11, 2022, further motion material for the opposed in writing motion of the defendant Security National Insurance Company (the defendant) was submitted on July 14, 2022.
- [2] The defendant seeks an order for leave to examine a non-party, Paul Kennedy (Kennedy), for discovery. The defendant also seeks an order validating service of the within motion on Kennedy. Kennedy has not delivered any responding material or communicated a position on this motion.
- [3] The plaintiffs Azadeh Sani Zaker and Mohammadreza Tehrani (the plaintiffs) oppose the motion as it relates to the request for leave to examine Kennedy for discovery. The plaintiffs do not oppose the motion as it relates to validation of service.
- [4] With respect to validation of service of the motion material on Kennedy, the defendant served Kennedy by courier. Service by courier is only authorized by the *Rules of Civil Procedure* on a lawyer of record (Rule 16.05(1)(e)). The affidavit of service in this regard now attaches courier tracking information to confirm that the material was delivered (affidavit of service of K. Quinn sworn June 3, 2022). Kennedy was also served with the motion material by plaintiffs' counsel, by email. Kennedy acknowledged receipt of the email and attachments (affidavit of service of K. Barretto sworn June 30, 2022). I am satisfied that the motion material has come to the attention of Kennedy. Service of the motion material on Kennedy in the manner set forth in the above noted affidavits of service is validated.

- [5] In June 2017 the plaintiffs drained all of the water from their backyard concrete swimming pool in order to paint the pool. Within hours of emptying the pool, it began to float out of the ground, resulting in damage.
- [6] The plaintiffs reported the damage to Security National, their homeowner's insurance company, who denied the claim.
- [7] On October 26, 2018, the plaintiffs commenced the within action seeking, among other things, damages in the amount of \$200,000.00 and indemnification under the policy of insurance. On or about January 15, 2019, the statement of defence was delivered. On July 21, 2021, leave was granted to amend the statement of defence.
- [8] Rule 31.10 of the *Rules of Civil Procedure* provides as follows:
- 31.10(1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.
- (2) An order under subrule (1) shall not be made unless the court is satisfied that,
- (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person he or she seeks to examine;
- (b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
- (c) the examination will not,
- (i) unduly delay the commencement of the trial of the action,
- (ii) entail unreasonable expense for the other parties, or
- (iii) result in unfairness to the person moving party seeks to examine.
- [9] Kennedy is an expert engaged by the plaintiffs whom the plaintiffs intend to call at trial. Kennedy has provided two expert reports and completed an acknowledgement of expert's duty. It is the plaintiffs' position that Rule 31.10 expressly prohibits an examination of Kennedy, an expert engaged by the plaintiffs.
- [10] The defendant's factum does not specifically contain legal argument on this issue.
- [11] In *Snivley v. Schacher*, [1986] O.J. No. 1510 (S.C.O.), the defendant sought an order pursuant to Rule 31.10 to examine the plaintiff's treating dentist whom the plaintiff was

tendering as an expert at trial. The court held that the that the expert witness could not be examined under Rule 31.10 because he was being tendered as an expert witness at trial. The court went on to explain that the sole purpose of Rule 31.10 is to allow non-parties to be examined for discovery, but experts are exempt.

- [12] To the extent that the defendant may object to Kennedy being qualified as an expert, such a determination is made by the trial Judge. The material before me does not contain authority that such a determination could be made on this motion by an Associate Judge.
- [13] Kennedy is an expert engaged by the plaintiffs. The material before me does not satisfy me that an examination for discovery of Kennedy is permitted pursuant to Rule 31.10(1). Rule 31.10 not applying to experts, it is not necessary for me to review the test set out at Rule 31.10(2).
- [14] The motion for leave to examine Kennedy for discovery is dismissed.
- [15] No costs outlines were submitted with the in writing motion material. Should any party seek costs of the motion, I am prepared to provide the parties with an opportunity to make submissions on costs in writing. If after reasonable attempts to agree to costs the parties are unable to agree, any party seeking costs shall serve and email to assistant trial coordinator teanna.charlebois@ontario.ca, their costs submissions not to exceed two pages in length and a copy of their costs outline on or before November 1, 2022. Any responding costs submissions not to exceed two pages in length, together with any costs outline shall be served and emailed on or before November 15, 2022. Reply costs submissions, if any, not to exceed one page in length, shall be served and emailed on or before November 22, 2022. The material shall be submitted with an affidavit of service.
- [16] Order to go as follows:
1. Service of the motion material on Kennedy in the manner set forth in the affidavit of service of K. Quinn sworn June 3, 2022, and in the affidavit of service of K. Barretto sworn June 30, 2022, is validated.
 2. The motion for leave to examine Kennedy for discovery is dismissed.

Associate Justice B. McAfee

Date: October 11, 2022