Date: 2007 07 17
Docket: S-0001-CV-2002000101

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WILLIAM MCLEOD

Plaintiff

- and -

BRUNO'S PIZZA LTD., and BRUNO'S PIZZA LTD.,
doing business as Bruno's Deli and Pizza and
882531 N.W.T. LTD.

Defendants

Corrected judgment: A corrigendum was issued on February 4, 2011; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

[1] The Plaintiff has filed a Statement of Claim seeking damages from the Defendants arising from an injury he sustained in 2001. The Defendants conducted their Examination for Discovery of the Plaintiff in March 2006. The Plaintiff gave a number of undertakings to the Defendants during this process. On November 3, 2006, as the undertakings had not been complied with, the Defendants obtained an Order from this Court directing that the Plaintiff comply with his undertakings no later than November 30, 2006.

[2] The Defendants claim that the Plaintiff has not complied with the Order. They ask that he be found in contempt and seek various remedies, including a stay of the

action until all the undertakings have been complied with. The Defendants also seek solicitor-client costs for this application.

A. Whether the Plaintiff should be found in contempt

[3] There are three basic elements to civil contempt: the presence of a court order, knowledge of the order, and breach of the order. For a person to be found in contempt, these three elements must be proven beyond a reasonable doubt. *Sheppard and Sheppard* 62 D.L.R. (3d) 35 (Ont. CA); *TG Industries Ltd.* v. *Williams* [2001] N.S.J. No. 241 (N.S.C.A.); *Baton* v. *Kenny* 2005 NWTSC 50.

[4] It is not disputed that this Court made an Order on November 3, 2006 and that the Plaintiff was aware of its terms. It is also apparent from the materials filed that the Plaintiff did not comply with this Order. As of the date of the hearing of this application, a number of undertakings had still not been complied with.

[5] The Plaintiff concedes that there were significant delays in complying with his undertakings. He says, however, that much of the information he undertook to provide to the Defendants was in the possession of third parties, that he has now made every reasonable effort to obtain it, and that he has provided the Defendants with everything he has been able to obtain to date. He says that he is not ignoring or deliberately breaching the Order and that he should not be found in contempt. He also alleges that certain shortcomings in the Defendants' handling of this matter should be taken into consideration on this application.

[6] The first point that must be emphasized is that my decision on this application must be based on the evidence that has been presented. I cannot speculate about matters that are not in evidence. I must also be very cautious not to treat either counsel's representations as evidence, particularly on subject-matters that have a direct bearing on key issues.

[7] The Defendants have adduced evidence that they received no information from the Plaintiff in the months that followed the Examination for Discovery. They obtained an Order from this Court to force the Plaintiff to comply with his undertakings. They later agreed to an informal extension of the deadline that had been set in the Order. Four of the undertakings were complied with in February 2007. The contempt proceedings were initiated when, a number of months later, several other undertakings remained outstanding.

[8] The only evidence adduced by the Plaintiff is an affidavit sworn on June 14, 2007 by his counsel of record (who was not counsel who argued this application). That affidavit exhibits correspondence dated June 13, 2007 which sets out steps taken to comply with the undertakings but the materials include very little detail as to when those steps were taken. There is no specific evidence showing what steps the Plaintiff took immediately after being served with the Order.

[9] In civil contempt proceedings, it is not necessary that a deliberate intention to disobey the court order be established. The breach of the order must be more than accidental or casual, but the intention that must be established is simply the intention to do or not do the act that constitutes the breach of the order. *Sheppard and Sheppard*, *supra*, at pp.595-596; *TG Industries Ltd.* v. *Williams*, *supra*, at paras 21 to 29.

[10] Where an order requires a person to do something, that person must use a sufficient degree of diligence to perform or have the act performed by someone else. An order from a court requires reasonable care in doing the act personally, or in delegating the matter to someone and then ensuring that it has been carried out in a prompt and proper fashion. *Michel* v. *Lafrentz*, 1998 ABCA 213, at paras 21 to 24.

[11] Obviously, no one can be held to impossible standards. Many of the undertakings given by the Plaintiff were to obtain information that was in the hands of third parties. Compliance with this type of undertaking can present some challenges. Had the Plaintiff adduced evidence showing that he diligently attempted to obtain the information after he was served with the Order, he may have been in a good position to defend this application. However, he has adduced no such evidence.

[12] The evidence before me is that for months after the undertakings were given, no information was provided to the Defendants. This continued for some time even after the Plaintiff was served with this Court's Order. On that evidence, even if I accept that the Plaintiff did not deliberately intend to disobey the Order, I can only conclude that for a period of time he did not treat this matter seriously and was negligent about his obligations. His recent efforts to comply are relevant to the question of what sanction should be imposed, but not to the question of whether he is in contempt of the Order.

[13] The Plaintiff argues that certain aspects of the Defendants' conduct of this litigation should be taken into account in deciding this application. The Plaintiff

points, for example, to the very recent filing of the Statement of Defence of one of the Defendants and to the fact that the Defendants have not filed their Statement as to Documents.

[14] A party who seeks to have another found in contempt should ensure that it has not itself engaged in dubious conduct. *Fullowka et al.* v. *Royal Oak Ventures Inc. et al.* 2003 NWTSC 32, at para. 13. There is no evidence of dubious conduct in this case. The Defendants may not have strictly followed all the procedural steps set out in the *Rules of Court*, but neither has the Plaintiff. There is no evidence that the Defendants have attempted to obstruct or delay the proceedings, or that they have engaged in questionable tactics.

[15] Based on the evidence that has been adduced, and in particular the lack of explanation for the Plaintiff's failure to comply with the November Order in a timely fashion, I am satisfied that the elements of civil contempt have been established beyond a reasonable doubt.

B) Remedy

[16] The Defendants are asking that the action be stayed until the undertakings have been fully complied with. They also ask that time lines be set for compliance, leaving them the option to apply for dismissal of the action if those time lines are not met. The Plaintiff says he will comply with any time lines the Court might impose. He in fact suggests a deadline for compliance that is shorter than what the Defendants suggest. The Plaintiff also invites the Court to set additional time lines to move this litigation forward.

[17] Rule 705 of the *Rules of the Supreme Court of the Northwest Territories* sets out a number of sanctions that can be imposed following a finding of contempt. The Court has considerable discretion in deciding which of these remedies are appropriate.

[18] In civil contempt proceedings, the primary purpose of sanction is to coerce compliance with the Court's order. This is especially so where the contempt consists of a failure to give discovery. *Michel* v. *Lafrentz*, *supra*, at para. 31.

[19] I accept that the Plaintiff has now deployed considerable effort to comply with this Court's Order. That is a fact that carries significant weight in deciding what

sanctions should be imposed. It is also important to take into account the nature of the contempt shown: contempt by way of negligence is less blameworthy than deliberate defiance of a court order. *Michel* v. *Lafrentz, supra,* at para.31.

[20] Under the circumstances, I have decided not to impose any sanctions on the Plaintiff at this time. Instead, I will defer my decision on that issue and set further time lines for him to comply with all the undertakings that remain outstanding. If he purges his contempt within those time lines, there will be no further sanctions. If he does not, the question of sanctions can be revisited and the Defendants will be at liberty to seek any of the sanctions provided for in the *Rules of Court*, including a stay or dismissal of the action.

[21] The Plaintiff has suggested that I set other time lines to advance this litigation. I am not inclined to do so. The Plaintiff is in charge of this action and can take whatever steps he feels are necessary to advance it. As matters progress, if either party considers it has grounds to ask the Court to set deadlines or otherwise engage in the management of this case, that party can make an application to the Court. That, however, it outside the purview of the application before me at this time.

C) Status of compliance with undertakings as of July 11, 2007

[22] I recognize, as the Defendants' counsel fairly did during her submissions, that there is only so much the Plaintiff can do about obtaining documents that are in the hands of third parties. My understanding is that where attempt to obtain the information have failed, the Defendants want the Plaintiff to produce documents showing that he has taken steps to obtain the information and the responses received. In my view, that is a fair expectation. The Plaintiff undertook to provide certain documents or attempt to obtain them. Providing the documents is one way he can fulfill his undertakings. Showing that he has taken all reasonable steps to obtain them, without success, is another way for him to demonstrate that he has met his obligations.

[23] With this in mind, in the interests of setting out clearly what is expected of the Plaintiff at this point, it may be helpful to set out the status of the various undertakings as of the date of the hearing of this application. Having reviewed the undertakings and the transcript of the Examination for Discovery, it appears the following matters remained outstanding as of July 11, 2007:

a) Undertaking #2:

The Plaintiff has undertaken to provide copies of all tax returns in his possession and to request the remainder of the returns and T-4 slips from Revenue Canada, going back to 1998 if possible. The Defendants have only received the Plaintiff's tax returns for the years 2003 and 2006. The evidence shows the returns for other years have been requested from Revenue Canada. The Plaintiff has the onus of following up on this request with Revenue Canada if necessary.

b) Undertaking #4:

The Plaintiff undertook to ask Tli Cho Landtran for a Record of Employment for 2001 if that document was not included in the materials provided pursuant to undertaking #3 (Employment Insurance records). The evidence is somewhat unclear about whether this undertaking has been complied with. There is a suggestion in the materials filed by the Plaintiff that the Record of Employment for Tli Cho Landtran was included in the documents provided pursuant to undertaking #3. If that is so, undertaking #4 has been complied with. If the Record of Employment was not part of the documents provided pursuant to Undertaking #3, and if Tli Cho Landtran have advised that they do not have the document, then the Plaintiff should provide the Defendants copies of the correspondence on this issue to show the steps that he has taken to try to comply with this undertaking.

During submissions, the Defendants' counsel appeared to suggest that undertaking #4 covered not just Tli Cho Lantran, but any of the Plaintiff's employers in 2001. In my view the transcript of the Examination for Discovery does not support that submission.

c) Undertaking #7

The transcript of the Examination for Discovery shows that the Plaintiff undertook to provide records related to treatment he received before the accident. This included treatment received from Dr. Glasgow and some physiotherapy treatment. Again, the Plaintiff must either provide those records or demonstrate the steps he has taken to obtain them from the hospital.

d) Undertaking #10:

The Defendants have received some records but are concerned that those records are not complete. The Plaintiff says all the records he received from the hospital have been provided to the Defendants. Again, if no further records are obtained from the hospital, the Plaintiff must show the specific requests made and the responses received.

e) Undertakings #11 and #12:

These records are also believed to be in the possession of third parties. My understanding from submissions is that the Plaintiff is still attempting to obtain these documents. Again, if he is unable to obtain what he has asked for, he must be able to show the requests made and responses received.

f) Undertaking #13:

The Defendants acknowledge that this undertaking overlaps with some of the others. Compliance with undertakings #2 and #4 will also result in compliance with undertaking #13.

g) Undertaking #14:

The Defendants have received most of the information covered by this undertaking. The only additional information they require is the value of the claim for the replacement of the sneakers, and confirmation that there are no further special damages items that the Plaintiff intends to seek.

[24] The Plaintiff will have another month to comply with the remaining undertakings. Hopefully, by that point, the Defendants will have received either the missing information or records showing that the Plaintiff took all reasonable steps to obtain it from third parties. If that is the case this litigation can continue taking its course in the usual manner. If the Defendants are not satisfied with the materials and explanations provided, the matter can be brought back before me for submissions as to whether the Plaintiff's contempt has been purged and if not, whether sanctions ought to be imposed.

D) COSTS

[25] The Defendants obtained undertakings from the Plaintiff, as is their right when conducting examinations for discovery. The evidence shows that for months the Plaintiff did not comply with his undertakings. The Defendants should not have been forced to initiate separate applications to have the Plaintiff comply with those undertakings.

[26] In addition, a party who is successful on a contempt application, and who essentially has assisted the Court in ensuring compliance with its order, should not generally bear the expenses of having done so, particularly if the application had merit and was necessary to ensure compliance. *Fullowka et al.* v. *Royal Oak Ventures Inc. et al.*, *supra*, at para.25.

[27] For those reasons I am satisfied that the Defendants are entitled to their solicitor-client costs on this application. Those costs will be payable forthwith.

[28] There was some reference during submissions about the costs of the proceedings that led to the issuance of Order on November 3. That Order is silent as to costs and the transcript of the proceedings show that the question of costs was not addressed on that date. The costs of those proceedings will be left to be dealt with along with other costs of the cause.

[29] The following Order will issue:

1. The Plaintiff is hereby declared to be in civil contempt, having failed to comply with the Order issued by this Court on November 3, 2006.

2. The Plaintiff shall comply with all his remaining undertakings no later than August 17, 2007 at 4:00PM. After that date, the Defendants may, on five days' notice, bring the matter back before me for submissions on sanctions to be imposed.

3. The Defendants are awarded their costs of this application on a solicitor-client basis. These costs shall be payable by the Plaintiff forthwith.

"L.A. Charbonneau"
L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
17th day of July 2007

Counsel for the Plaintiff: Hugh Latimer
Counsel for the Defendants: Cynthia Levy

Corrigendum of the Memorandum of Judgment

of

The Honourable Justice L.A. Charbonneau

On the signature page (page 9) Counsel for the Plaintiff was corrected to show Hugh Latimer and Counsel for the Defendants was corrected to show Cynthia Levy.

Counsel for the Plaintiff:	Hugh Latimer
Counsel for the Defendants:	Cynthia Levy

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