SUPREME COURT OF NOVA SCOTIA
Citation: *Gill v. Little*, 2017 NSSC 53

Date: 2017 02 28
Docket: Halifax, No. 405960
Registry: Halifax

Between:

KELSY MARGARET MARIE GILL

Plaintiff

v.

TERRY LYNN LITTLE and HALIFAX REGIONAL MUNICIPALITY, carrying on business as METRO TRANSIT

Defendants

Judge:	The Honourable Associate Chief Justice Deborah K. Smith
Heard:	January 30th, 2017 in Halifax Nova Scotia
Final Written Submissions:	From the Plaintiff: February 7th, 2017 From the Defendants: February 2nd, 2017
Oral Decision:	February 28th, 2017
Counsel:	Joshua E. Bryson for the Plaintiff Lisa Richards for the Defendants

By the Court:

[1] Kelsey Gill, who is presently 27 years of age, is the Plaintiff in an action that was commenced as a result of a bus/pedestrian accident that is said to have occurred in Halifax, Nova Scotia, on September 9th, 2011. According to the Plaintiff's Statement of Claim, she was in a crosswalk on the day in question when she was struck by a Metro Transit bus operated by the Defendant, Terry Lynn Little. According to the pleadings, Ms. Gill sustained serious injuries as a result of this collision including a brain injury.

[2] On August 15th, 2012, the Plaintiff commenced this action. On July 30th, 2014, she was discovered by the Defendants' then solicitor for approximately 6 hours. Since that discovery, there have been a number of changes in the Plaintiff's circumstances. In particular, she has gone from being a law student to being employed at a law firm in London, Ontario. She apparently graduated law school with a *cum laude* designation. Further, the Plaintiff has undergone an extensive assessment by a clinical psychologist at the Defendants' request. The psychologist's report indicates that there has been improvement in the Plaintiff's condition.

[3] In addition, in 2016, the Plaintiff's solicitor disclosed a future care needs and costs assessment as well as a future loss of income/loss of earning capacity report.

The latter report includes the present value of what is said to be the Plaintiff's cost of future care. According to the Defendants' solicitor, this report advances a claim of between 1.2 and 1.8 million dollars for future loss of income and cost of care.

[4] Following receipt of these new reports, the Defendants' solicitor requested a further discovery examination of the Plaintiff. When terms of the discovery could not be agreed to, the Defendants brought this motion for a second discovery examination of the Plaintiff pursuant to Civil Procedure Rules 1, 14 and 18. Rules 1 and 18 are most germane in the circumstances of this case.

[5] Civil Procedure Rule 18 deals with discovery of witnesses. Rule 18.01(3) provides that a party may discover a witness by agreement, under a discovery subpoena or by order. These options, and the order in which they are listed, are not random. As noted by the Court of Appeal in ***Homburg v. Stichting Autoriteit Financiele Markten***, 2016 NSCA 38, Rule 18 provides a complete manual for discovery examination in this province. It is specifically designed to ensure the just, speedy and inexpensive determination of every proceeding (CPR 1.01). As noted in ***Homburg*** at ¶40:

> ..... One starts with the least formal and least expensive route (a simple interview or discovery by agreement). If that is not possible, one moves "up" to service of a subpoena upon the witness (provided certain stipulated representations and undertakings are fulfilled). Should those two avenues not be available, a judge's involvement may be requested so as to compel discovery by court order.

[6] If a party to an action is served with a discovery subpoena that they believe is improper, they can apply to have it revoked pursuant to CPR 18.08. In addition, a party who believes that a discovery is being conducted abusively may bring a motion to terminate or limit discovery pursuant to CPR 18.23. Otherwise, a witness who has been properly served with a discovery subpoena must attend to be discovered. An individual who refuses to attend or to answer a question properly put at discovery runs the risk of being found in contempt (see CPR 18.22).

[7] As is seen from the above, Rule 18 is designed to keep parties out of the courtroom, seeking orders for discovery, unless it is necessary.

[8] In the case before me, the parties originally appeared to agree that a second discovery of the Plaintiff would take place. On September 26th, 2016, Ms. Richards wrote to the Plaintiff's solicitor seeking a further discovery of the Plaintiff via Skype or video conference. She subsequently indicated that she did not intend to discover the Plaintiff on matters and documents that had already been covered in the first discovery examination, but would be covering the Plaintiff's medical condition, education, employment situation and lifestyle as it had evolved since the original discovery. Ms. Burrison (the Plaintiff's Ontario solicitor) indicated that she was prepared to consent to a further examination of her client but that it would be limited

to questions that arose due to further production of documents as per CPR 18.18(3). She further indicated that, in her view, questions that arose simply due to the passage of time would be impermissible.

[9] Unfortunately, the parties could not reach agreement on the scope of the Plaintiff's second discovery. On November 30th, 2016, the Plaintiff's solicitor wrote to Ms. Richards indicating that she had instructions to oppose a second discovery. Ms. Richards then brought this motion for an order compelling the Plaintiff to attend a further discovery examination via Skype. Further, she sought an order requiring the Plaintiff to respond to all questions pertaining to any information relevant to her claim for damages that is new or has changed since her initial discovery. Rather than arranging for a discovery subpoena to be served on the Plaintiff, Ms. Richards came directly to court seeking Ms. Gill's further attendance.

[10] Civil Procedure Rule 18.12 deals with the circumstances where a judge may order a witness to submit to discovery. Rule 18.12(3) deals with orders granted during the course of a proceeding and reads:

> (3) A judge may order a discovery during a proceeding if both of the following apply:
>
> (a) the person to be discovered is in a place outside Nova Scotia, and a discovery subpoena cannot be enforced, but an order would be enforced or obeyed;
>
> (b) the proceeding cannot be determined justly without the discovery.

[11] It is clear from Ms. Richards' submissions that she has difficulty with the notion that CPR 18 is intended to apply in the circumstances of this case. During the hearing, the court noted that the Defendants' solicitor had not yet served a discovery subpoena on the Plaintiff. In her post-hearing brief, Ms. Richards states that "... it is illogical for the Court to insist upon the issuance of a subpoena in these circumstances, and such an insistence departs from the spirit and intent of the Rules". Later in the same brief, counsel talks about the strict application of the Rules leading to "an absurd result" which would "leave litigants without a remedy". Further, reference is made to Rule 18.12(3)(a) leading to "an illogical result". In particular, Ms. Richards states at p. 2 of her post-hearing memorandum:

> In particular, the Defendants note that subsection (a), in addition to requiring a discovery subpoena, requires that the witness to be discovered be outside Nova Scotia.
>
> There are no other provisions in Rule 18 providing for an order for discovery during a proceeding. However, if Rule 18.12(3)(a) is strictly applied, there is no remedy available to a defendant seeking an order for further discovery of a party witness who is actually in Nova Scotia, whether a subpoena has been issued or not. This would be the case even if the Court was satisfied that the proceeding could not be determined justly without the discovery (the requirement in subsection (b)). The Defendants submit that it cannot be the intent of the Rule to effectively deprive defendants of an order for further discovery in circumstances where the interests of justice clearly require it, simply because the witness is present in Nova Scotia.
>
> [Emphasis in the original]

[12] In my view, these arguments miss the mark.

[13] Rule 18 is designed to avoid litigants having to come to court to get an order requiring an individual to submit to a discovery examination. This is in keeping with the overall purpose of the Rules which is to provide for the just, speedy and inexpensive determination of every proceeding. A party need only serve another party with a discovery subpoena (provided that certain requirements are met) in order to get that party's attendance at discovery. A motion in court is not required. A witness must respond to that subpoena or face the prospect of being found in contempt for failing to respond. This is exactly the same remedy that is available for failing to follow a court order.

[14] In the circumstances described in the Defendants' post-hearing memorandum, they would clearly have a remedy. Serve a discovery subpoena and apply to enforce it pursuant to CPR 18.22 if it is disobeyed. Only if the person to be discovered is outside of Nova Scotia, in a location where the subpoena cannot be enforced, will a court order be required.

[15] In addition, Ms. Richards submits that if CPR 18.12(3) is interpreted strictly, a party seeking discovery may be left without a remedy if a witness attends for discovery but refuses to answer relevant questions. Again, I find no merit in this argument.

[16] If counsel for a witness objects to a line of questions, a judge may be asked to determine whether the questions are proper (CPR 18.17(7)). A witness who continues to refuse to answer a properly put question is subject to a finding of contempt. Rule 18 provides a remedy for a witness who attends discovery but refuses to answer proper questions.

[17] During the hearing of this matter, Ms. Richards also suggested that Rule 18.12(3) does not apply in circumstances where one party is seeking a second discovery of another party. I see no principled basis upon which to reach such a conclusion. A party seeking an order requiring another party to submit to a discovery examination must satisfy the Rules governing discovery. In my view, this applies regardless of whether it is a first or a subsequent discovery examination.

[18] I return now to Rule 18.12(3). As indicated, this Rule requires that the moving party establish that the person to be discovered is outside of Nova Scotia, and that a discovery subpoena cannot be enforced. Further, they must establish that the proceeding cannot be determined justly without the discovery examination.

[19] The Defendants have satisfied me that the person to be discovered is in a place outside Nova Scotia. However, no suggestion has been made that a discovery subpoena could not be enforced in the circumstances of this case. The Defendants

have an obligation to satisfy *all* of the criteria in Rule 18.12(3) before the court will issue an order requiring discovery during a proceeding. In this case, since they have not satisfied me that a discovery subpoena could not be enforced, their motion must fail.

[20] Both counsel have asked that, regardless of my finding in relation to CPR 18.12(3)(a), I go on to consider whether the proceeding cannot be determined justly without a further discovery examination (Rule 18.12(3)(b)).

[21] Counsel have referred me to a number of cases that touch on or deal with the issue of a second discovery examination (see ***Royal Insurance Co. v. Schwartz*** (1978), 26 N.S.R. (2d) 223, where the Appeal Division referred to courts uniformly refusing to allow a second discovery unless special circumstances exist or the justice of the case requires it; ***Charm Jewelry Ltd. v. Pafco International Insurance Co.*** (1992), 115 N.S.R. (2d) 322 and ***DeBaie v. Wilson Fuel Co.***, 2004 NSSC 244. In addition, I have considered ***Tidgwell v. Browning-Ferris Industries Ltd.*** (2000), 186 N.S.R. (2d) 139)). Although these cases pre-date Rule 18.12(3), they help to inform my analysis.

[22] Ms. Gill has advanced a significant claim. During the course of the hearing, Mr. Bryson estimated that the Plaintiff's special damage claim alone would be in the range of 1.4 to 2 million dollars.

[23] In my view, there have been significant changes since the time of Ms. Gill's initial discovery. She has gone from being a law student to a law school graduate who is presently employed. Her employment future (which makes up a significant portion of her claim) has gone from theoretical to actual. In addition, it appears that her overall medical condition has improved.

[24] Discovery is designed to allow parties, prior to trial, to have a complete understanding of the case that they have to meet. Once that understanding is gained, settlement is more likely and trial issues can be narrowed. While in the vast majority of cases only one discovery of a party will be required, there will be some cases where a further discovery is warranted. In my view, the magnitude of the Plaintiff's claim, coupled with the fact that there appear to be significant changes in her circumstances since the time of her initial discovery examination, support a finding that this proceeding cannot be determined justly without a further discovery. This discovery should be limited to information that is new or has changed since the Plaintiff's initial discovery in July of 2014.

[25] There are two additional matters that I should comment upon. Mr. Bryson has suggested that re-examination of a witness is limited to the circumstances covered by Civil Procedure Rule 18.18(3) (adjourning a discovery while additional materials are obtained). With respect, I disagree. There is nothing in Rule 18 which specifically limits a party's ability to discover a witness more than once. While ordinarily, the just, speedy and inexpensive resolution of a matter will dictate that a party is only discovered once, there will be situations where justice requires a subsequent examination.

[26] Further, Mr. Bryson submits that the Defendants' solicitor could serve the Plaintiff with interrogatories rather than conduct a second examination. He submits that this would be a less costly alternative to discovery.

[27] In the circumstances of this case, I am not satisfied that interrogatories are an appropriate substitute for oral examination. Nor am I satisfied that it is a less costly alternative to discovery.

[28] Interrogatories produce lawyer-assisted responses to the questions that are asked. While in many cases this will not be a consideration, in a personal injury case of this magnitude, I am of the view that the best evidence will come from the Plaintiff herself.

[29] Further, follow-up questions can be asked and answered in a timely way in an oral examination. With interrogatories, there is built-in delay.

[30] Preparing properly-drafted interrogatories and responses can be time-consuming and expensive. In my view, it would be more efficient to conduct an oral examination of the Plaintiff by video link as was originally proposed.

[31] The Defendants' motion must fail as they are unable to satisfy CPR 18.12(3)(a). If the Defendants wish to re-discover the Plaintiff, they should serve her with a discovery subpoena as is envisioned by the Rules.

[32] Each party shall bear their own costs of this motion, regardless of the cause.

Deborah K. Smith
Associate Chief Justice