CITATION: Siddiqui v. Franchetto, 2016 ONSC 2499
COURT FILE NO.: CV-15-0700-00
DATE: 20160415

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ERUM SIDDIQUI, Plaintiff

AND:

THOMAS FRANCHETTO, Defendant

BEFORE: Sproat J.

COUNSEL: Fawad Siddiqui, Counsel, for the Plaintiff - Applicant

Matthew MacIsaac, Counsel, for the Defendant - Respondent

ENDORSEMENT

Introduction

[1] This is an application in writing by the plaintiff for an order to extend the time for seeking, and granting, leave to appeal to the Divisional Court.

[2] The proposed appeal relates to whether the plaintiff in this personal injury action was obliged to pay the costs charged by third party record holders to produce relevant documents. For example, in this case charges ranging from $30 for the clinical notes of his family doctor, to $50 for his prescription history to $250 for the clinical notes and records of his orthopaedic surgeon. The motion judge ruled that the plaintiff was obliged to bear these costs.

[3] The motion judge made the order on December 3, 2015. On December 23, 2015 he provided a further endorsement clarifying his earlier endorsement on an issue unrelated to the proposed appeal and awarded costs of the motion to the defendant. The plaintiff served his Notice of Motion for leave to appeal on December 29, 2015.

Extension of Time to Seek Leave to Appeal

[4] In *DMello v. Law Society of Upper Canada*, 2013 ONSC 6857, Himel J. reviewed the general principles governing an extension of time, as well as the *Byers* decision that holds that the time to appeal runs from the date of judgment not the date costs are awarded, as follows:

> [12] The *Byers* decision sets out a detailed analysis of the effect of a costs judgment rendered after the rendering or release of the judgment on its merits. Justice Borins noted that the two decisions are separate determinations and concluded at para. 16 that "...a decision on the merits is final for the purpose of appeal when it is rendered, notwithstanding the pendency of the determination of the costs attributable to the case." He disagreed with counsel's position that the release of the trial judge's costs decision in effect extended the time for serving the appellant's notice of appeal from the merits judgment to thirty days following that date. Following a historical review of the jurisprudence, he determined that a judgment on the merits is final and appealable when it finally disposes of the proceeding, that the time for appealing runs from the date that the judgment is pronounced and that the awarding of costs does not have the effect of extending the time for filing an appeal.
>
> [13] At the conclusion of the case, Borins J.A. considered the issue of an extension of time to serve the plaintiff's notice of appeal. He commented that the appellants neglected to request that the court exercise its discretion under Rule 3.02(1) to extend the time for service of their notice of appeal in the event that the court found that it was not served with the time stipulated by Rule 61.04. He requested that counsel file written submissions on that issue while the court was considering the merits of the motion to quash the appeal as being out of time.
>
> [14] Rule 3.02 of the *Rules of Civil Procedure* states:

> (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
>
> (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.
>
> (3) An order under under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.
>
> (4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

> [15] The factors that apply when determining whether to exercise discretion to extend the time for filing a notice of appeal include: a firm intention to appeal within the relevant period, a reasonable explanation for the delay, prejudice to the respondent, lack of merit such that the court could reasonably deny the appellant this important right and the "justice of the case": see *Mauldin v. Cassels Brock & Blackwell LLP* (2011) 274 O.A.C. 353, 2011 ONCA 67 (CanLII); *Kefeli v. Centennial College of Applied Arts and Technology*, [2002] O.J. No. 3023 (C.A.) citing *Frey v. MacDonald* (1989) 33 C.P.C. (2d) 13 (Ont. C.A.) The length of the delay and an explanation for it is also relevant: see *Mignacca v. Merck Frosst Canada Ltd.* (2009) 2009 ONCA 393 (CanLII), 96 O.R, (3d) 164, 249 O.A.C. 19 (C.A.).
>
> [16] In *Byers*, the court described the situation as "a close call" but was satisfied that the appellants had met two of the factors and applied the overriding objective on a motion to extend the time to appeal as reflected in Rule 1.04(1) to deal with cases justly and if fairness demands, an extension of time should be granted. He found that the "justice of the case" requires that an extension of the time for service of the notice of appeal should be granted.

[5] While counsel Mr. Siddiqui has applied for an extension of time, he has not filed any material to indicate whether the plaintiff had a firm intention to seek leave to appeal within the time period for seeking leave to appeal or to explain the delay.

[6] Having said that, in *Byers* only two factors were met. It is very clear there is no prejudice to the defendant in the short period of delay. Further, as I will explain, I find there are conflicting decisions and it is desirable that leave to

appeal be granted. This supports my conclusion that the "justice of the case" requires that the plaintiff not be denied the important right of appeal. There is also a public interest in having this issue addressed by the Divisional Court. As such I grant the requested extension of time to seek leave to appeal.

The Merit of the Application for leave to Appeal

[7]

[8] Rule 30.03 provides that a party must list in the Affidavit of Documents ("AOD") all relevant documents that are or have been in the "possession, control or power" of the party. Rule 30.04 (1) provides that a party is entitled to inspect any such document. Rule 30.04(4) provides that documents listed in the AOD that are not privileged shall be produced at the examination for discovery and at trial.

[9] There are two lines of authority which I will outline. I appreciate that certain of the cases cited in each line of authority offer somewhat different rationales in support of the conclusion reached. I need not review the nuances of the caselaw on either side, although the fact that different rationales are put forward provides additional support to the argument that it is desirable that leave be granted.

[10] The first line of authority holds that the plaintiff has an obligation to list these third party records in the AOD, and to produce them at examination for discovery. As such it follows that it is the obligation of the plaintiff to obtain the

documents and incur any third party charge. See for example: *Demiroglu v. Kwarteng*, [2000] O.J. No. 4256 (Ont. S.C.J. Master); 1999 CarswellOnt 4752 (Ont. S.C.J. Judge); *Hollo v. Toronto Transit Commission*, 2010 ONSC 1656 and *Yang v. Gazey*, [2011] O.J. No. 6137.

[11] The second line of authority holds that the defendant seeking production of the documents must pay the third party charge. The Rule 30.04 obligation to produce documents listed in the AOD for inspection does not apply to documents for which are within the power or control of the plaintiff but not in the actual possession of the plaintiff. Production for inspection of such documents may be satisfied by providing a direction allowing the opposite party to obtain the documents themselves. See for example, *Bazzi v. Allstate Insurance*, [1994] O.J. No. 1310; *Pollard v. Esses*, [1994] O.J. No. 4163; *Velloci v. Jain*, [2001] O.J. No. 5567; *Williams v. Martinez*, 2002 CarswellOnt 578.

[12] This issue was raised before the Divisional Court in *Demiroglu v. Kwarteng* [2000] O.J. No. 4526 (Div. Ct.). The Court held, however, that "... this is not the proper case in which a general pronouncement can be made on the issue of who pays for the production of documents relating to the plaintiff's injuries but in the possession of others". This was because leave was granted on a narrow question which presumed that such documents were within the "possession, power or control" of the plaintiff. The Court reasoned that a decision of general application should not be made when it was not in a position to consider the

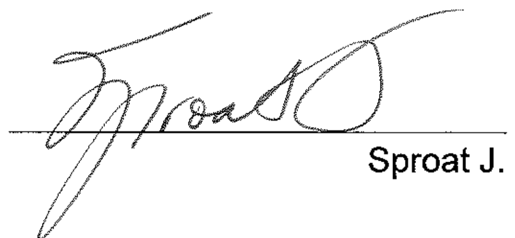
broader issue of whether such documents were properly categorized as within the "possession, power or control of the plaintiff". This broader issue can be addressed on an appeal from the decision of the motion judge.

Conclusion

[13] This case raises a significant and recurring issue. Motions continue to be brought and the conflicting lines of authority cited. An appeal decision could resolve this conflict and clarify the law. As such, in accordance with Rule 62.02(4)(a), I am of the opinion that it is desirable, and I order, that leave to appeal be granted.

[14] I intend to fix the quantum of costs of the leave application. The payment of the costs will be in the discretion of the Divisional Court hearing the appeal. The Applicant shall provide brief cost submissions within 10 days and the Respondent shall provide his cost submissions within a further 10 days. The Applicant shall have an additional five days to reply.

[15] Given that the Ontario Trial Lawyers Association intervened in the Divisional Court in *Demiroglu* I direct that Mr. Siddiqui provide a copy of this endorsement to the President of the Association so it can consider whether it wishes to apply to intervene on this appeal.



Sproat J.

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Justice Sproat

Released: April 15, 2016