

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jose Manuel Martinez, Plaintiff (Respondent)
and
Morton Dublin, Defendant (Appellant)

BEFORE: Schreck J.

COUNSEL: N. Tischler, for the Plaintiff (Respondent)
R. Myndiuk, for the Defendant (Appellant)

HEARD: April 17, 2018.

ENDORSEMENT

[1] The appellant appeals the decision of a Master made pursuant to s. 105 of the *Courts of Justice Act* and Rule 33 of the *Rules of Civil Procedure* declining to order the plaintiff to attend for a psychiatric or medical examination. I agree with the appellant's counsel that the reasons of the Master in this case, which essentially amounted to one sentence, were inadequate. The reasons did not explain the basis for the decision, thus foreclosing any meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 100.

[2] The parties agreed that if I concluded that the reasons were inadequate, I should determine the issue of whether a further examination should be ordered. For the reasons that follow, I decline to make such an order.

[3] This action arises from a motor vehicle accident that occurred in December 2012. In the Statement of Claim filed by the plaintiff in 2013, the plaintiff alleged that in addition to a number of physical injuries, the accident caused several psychological injuries.

[4] The trial in this matter is scheduled for June 2018, although counsel have advised me that they have been notified by the trial co-ordinator that it will likely not be able to proceed at that time and will have to be adjourned.

[5] The genesis for the defendant's motion was the service by the plaintiff in September 2017 of a Form 53 and a report prepared by Dr. Peter Waxer, a psychologist. Dr. Waxer had conducted an examination of the plaintiff in 2013 and had prepared a report at that time which was served on the defendant. In 2015, at the request of the defendant the plaintiff was examined by Dr. Donald Young, a neuropsychologist. While the plaintiff was generally cooperative, he

refused to participate in one test which Dr. Young wished to administer, the Million Clinical Multiaxial Inventory-III (“MCMII-III”). The defendant did not take steps to compel the plaintiff to undergo an additional examination at that time.

[6] Dr. Waxer’s 2017 report was not based on a new examination but, rather, was a “paper review” of his own earlier report and other information in the possession of both parties. In the 2017 report, Dr. Waxer is critical of some of the findings made by Dr. Young. In particular, he is critical of Dr. Young’s willingness to provide an opinion that the plaintiff does not suffer from a major depressive disorder or anxiety despite having no test results because of the plaintiff’s refusal to participate in the testing. The defendant now wishes to have the plaintiff undergo a psychiatric or psychological examination to address these deficiencies in Dr. Young’s report.

[7] Whether or not to order a party to undergo an examination by a health practitioner pursuant to s. 105 of the *Courts of Justice Act* and Rule 33 is a discretionary decision and such orders are not made as a matter of course: *Fromm v. Rajani* (2009), 82 C.P.C. (6th) 249 (Ont. S.C.J.), at para. 9. The party seeking the order must establish through evidence why it is required: *Bonello v. Taylor*, 2010 ONSC 5723, 100 C.P.C. (6th) 399, at para. 16; *Ananthamoorthy (Litigation guardian of) v. Ellison*, 2013 ONSC 340, at paras. 25-28. A very helpful list of the factors a court should consider in exercising its discretion can be found in the judgment of D.M. Brown J. (as he then was) in *Bonello v. Taylor*. Ultimately, the issue to be determined is whether the party seeking the order has established that it is required to “level the playing field” and ensure that the proceedings are fair.

[8] Having considered the factors in *Bonello v. Taylor*, I decline to exercise my discretion to order a further examination of the plaintiff for several reasons. The plaintiff’s psychological condition has been a live issue from the outset: *Goodridge (Litigation Guardian of) v. Corken*, [2004] O.T.C. 903 (S.C.J.), at para. 8; *Fromm v. Rajani*, at para. 16. The 2017 report by Dr. Waxer is essentially a “paper review” of material already in the possession of the parties. It is nothing new: *Fromm v. Rajani*, at paras. 14-17. Other than the fact that the plaintiff is taking an anti-depressant which he did not mention to Dr. Young, there is little evidence that there has been any substantial change in his psychological condition: *Bonello v. Taylor*, at para. 16. In any event, nothing precludes the defendant from retaining an expert to conduct its own “paper review”.

[9] The defendant has presented no evidence to demonstrate that a further examination is necessary in order to obtain an expert opinion to respond to Dr. Waxer’s report: *Bonello v. Taylor*, at para. 16; *Ananthamoorthy (Litigation guardian of) v. Ellison*, at paras. 26-28. I recognize that the court in *Bonello v. Taylor* held that the request for a further examination need not necessarily be based on medical evidence. However, in this case there is nothing other than an assertion by the defendant’s counsel that a further examination is necessary to respond to Dr. Waxer’s report. In the circumstances of this case, that evidence does not satisfy the onus on the defendant to establish that the order being sought is necessary.

[10] Despite the plaintiff’s refusal to participate in the MCMII-III testing, Dr. Young expressed the opinion that the plaintiff does not suffer from a major depressive disorder or anxiety. The fact that Dr. Waxer is critical of Dr. Young’s conclusions in the absence of test results is hardly

surprising. The defendant could have sought an order for a further examination in 2015 after the plaintiff refused to participate in the tests but chose not to until Dr. Young's opinion was criticized. It would appear that a further examination is now being sought to simply corroborate Dr. Young's opinion now that it has been questioned: *Bonello v. Taylor*, at para. 16.

[11] Finally, I note that at the request of the defendant, the plaintiff has already undergone examinations by a neuropsychologist (Dr. Young), an orthopaedic surgeon, and a physiatrist: *Bonello v. Taylor*, at para. 16.

[12] For the foregoing reasons, despite the inadequacy of the Master's reasons, I have concluded that he reached the correct result and the appeal must therefore be dismissed.

[13] If the parties cannot agree on costs, the plaintiff may make written submissions of no more than three pages within 10 days of the release of this endorsement and the defendant may provide a written reply of the same length within 10 days of receiving the plaintiff's submissions.

Appeal dismissed

Schreck J.

Date: April 24, 2018