

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
MIRELLA CAPPELLA) Monica Chakravarti, for the Plaintiff
)
Plaintiff)
)
- and -)
)
)
PREMIER FITNESS CLUBS INC. o/a) Scott Turton, for the Defendant
PREMIER & CURZONS FITNESS)
CLUBS)
)
Defendant)
)
)
HEARD: March 9, 2009
)

REASONS FOR DECISION

PRICE J

Purpose of these Reasons

[1] This motion, which arises in an action for damages for a personal injury alleged to have taken place at the defendant fitness club on June 8, 2005, was made by the plaintiff November 18, returnable November 28, 2008.

[2] The motion cannot proceed today because the defendant has recently retained new counsel, Scott Turton, its seventh to date in the history of this action. Mr. Turton has informed the Court that the defendant first consulted him in the second half of February and that he first contacted plaintiff's counsel on February 18th to advise her that he had been retained in connection with the contempt motion. A notice of change of solicitors was served on March 2, 2009.

[3] Plaintiff's counsel is not opposing the defendant's request for an adjournment of this motion. She has confirmed that the production of documents and examinations that gave rise to the present motion have for the most part been completed, subject to further examinations that are to take place by May 30, 2009 to deal with the answers that have been given to undertakings given at past examinations. The remaining issue, then, is whether the defendant or its representative Mr. Cardillo or both were in contempt in the past and, if so, the penalty that should be imposed upon them.

[4] While I have advised counsel that I am adjourning this motion, I have reviewed with them the chronology of events in relation to the issues in the motion as I have understood them from the written material filed and have asked them to bring the Court up to date on recent developments and their current

positions so that I can set these out in my endorsement to assist whatever judge may be called upon to deal with the motion on the next date.

Nature of the Motion

[5] The plaintiff sought the following relief in this motion:

(a) An Order striking the Statement of Defence;

(b) An Order finding the defendant or its directing mind John Cardillo in contempt of the following orders:

1. Lemon J.'s Order dated June 27, 2008, which required:

- i) The defendant serve its affidavit of documents on or before July 18, 2008;
- ii) The examination for discovery of the defendant's representative take place on or before August 12, 2008;

2. Belleghem J.'s Order dated September 19, 2008, which required:

- i) The representative (John Cardillo) of the defendant to answer all outstanding undertakings from the examination for discovery held August 11, 2008, as set out in the chart attached to the Order;
- ii) The representative of the defendant to apprise himself of the issues arising from the

pleadings and to re-attend continued examination within 45 days of the Order;

iii) The defendant to submit a further and better affidavit of documents sworn by John Cardillo pursuant to the Rules of Civil Procedure; and

3. Van Rensburg J.'s Order dated September 26, 2008, which required the defendant to pay costs of \$ 1,993.25 to the plaintiff forthwith for the two motions of June 24 and September 19, 2008;

(collectively referred to as "the three orders") and for sanctions pursuant to the *Rules of Civil Procedure*; or, in the alternative,

(c) An Order compelling the defendant to comply with the three orders;

The History of this Motion

[6] On November 28, 2008, defendant's counsel was not available, being required to attend a trial in Kitchener, and the defendant's Chief Financial Officer Mr. Proctor requested an adjournment. Lemon J. therefore adjourned the motion to December 5, 2008.

[7] On Friday, December 5, 2008, at 1 p.m., Lemon J. noted that although contempt was in issue, the alleged Contemnor had not appeared for the second time. He ordered him to attend on Monday, December 8, to set a date for the

hearing of that motion. He adjourned the motion to strike the defence to December 8th at 10 a.m. before him and reserved costs of the motion until then.

[8] On December 8th, Lemon J., dismissed the motion to strike the defence on the following terms, which he noted had been agreed to by counsel:

- (a) The contempt motion was adjourned to January 7, 2009 at 10 a.m.
- (b) Responding material was to be filed by noon, December 22, 2008;
- (c) Plaintiff's counsel was to provide a list of any outstanding information from the undertakings given at the examination of August 11, 2008 by December 12, 2008 and the defendant was to answer those undertakings by January 16, 2009;
- (d) Examinations of both parties were to be completed by February 15, 2009 unless otherwise ordered by the Court;
- (e) Both parties were to comply with undertakings by March 30, 2008;
- (f) Examinations arising from the answers to undertakings were to be completed by May 30, 2009;

[9] Lemon J. fixed the plaintiff's costs of the motion (for contempt and to strike the defence) to that date at \$ 5,000.00 to be paid within 30 days.

[10] Lemon J. noted on December 8, 2008, with respect to the issue of undertakings as it related to the motion to have Mr. Cardillo found in contempt, that the "Pink Binder" had been served on Friday, December 5, 2008 and the four tab document dated December 8, 2008 had been delivered on December 8th.

[11] With regard to terms imposed by Lemon J. on the adjournment of the contempt motion on December 8, 2008, the defendant asserts (in para. 4 of its factum) that the further discoveries ordered by Lemon J. were held, the undertakings dealt with and the costs of \$5,000 paid. It notes that Lemon J.'s timetable provided that answers to undertakings (given on the examinations to be completed by February 15, 2009) were to be complied with by March 30 and any necessary re-attendance was to take place by May 30, 2009.

[12] It would appear that the re-attendance which was to have been made, according to Belleghem J.'s Order within 45 days of his order of September 19, 2008 (that is, by November 3, 2008) was to have taken place on that date according to Monica Chakravarti's letter of October 7, 2008 to Mr. Verbanac (Exhibit "BBB" to Amon Sekhon's affidavit of November 18, 2008) which asked Verbanac to confirm his client's availability on that date, Verbanac's reply of October 9th stating that Mr. Cardillo will be available for the afternoon beginning at 1 p.m. on November 3rd and asking Chakravarti to confirm whether it is still her

intention to examine him on that date and attaching a Notice of Examination for Mirella Cappella to take place at 2 pm on November 3rd (Exhibit “EEE” of Mr. Sekhon’s affidavit). Ms. Chakravarti then indicated on October 14th that she is awaiting answers to undertakings and payment of costs so that she can schedule and complete her examination of Mr. Cardillo (Exhibit “FFF” of Mr. Sekhon’s affidavit). Then there is an e-mail from Mr. Verbanac on November 3, 2008 at 2:12 pm stating that in house counsel for Premier (who gives Mr. Vernbanac instructions) had left his position which “creates a bit of an issue with communication” (Exhibit “NNN” of Mr. Sekhon’s affidavit).

The Defendant’s Position

[13] The defendant’s position regarding the alleged contempt is as follows:

(a) With regard to Lemon J.’s Order of June 27, 2008, the defendant has asserted at paragraphs 14 and 15 of its factum that:

1. The affidavit that was to have been served on or before July 18 was served by fax on July 16, 2008 (Exhibit EE to the affidavit of Aman Sekhon sworn November 18, 2008);

2. The examination for discovery of the defendant which was to have taken place on or before August 12 took place on August 11, 2008.

(b) With regard to Bellegem J.'s Order of September 19, 2008:

1. The Order required the defendant's representative to answer all outstanding undertakings given at the examination on August 11, 2008, as set out in Schedule "A" to the Order. The defendant has noted in paragraph 18 of its factum that the Order does not specify when or how the undertakings were to be answered. It has stated (in paragraph 22 of its factum) that while it is common for counsel to agree to accept answers to undertakings in written form, in the absence of agreement, the proper manner of answering is by re-attendance and the defendant agreed to re-attend on November 3, 2008 and

the plaintiff failed to proceed with the examination on that date;

2. The Order required that the defendant's representative re-attend within 45 days of the Order. The defendant has asserted (in paragraph 19 of the factum) that counsel agreed that the examination would resume on November 3, 2008 and that the plaintiff did not proceed with the examination on that date.
3. The Order required a further and better affidavit. The defendant has asserted in paragraph 23 of its factum that the Order did not specify the date by which the affidavit was to have been delivered and a further and better affidavit was in fact served sworn on December 5, 2008, which was before Lemon J. on that date and he made no further order regarding it.

(c) With regard to Van Rensburg J.'s Order of September 26, 2008, the defendant has stated in paragraph 12 of its factum that the costs ordered by Van Rensburg J. have been paid.

The Plaintiff's Position

[14] The plaintiff took the following position in the Supplementary Affidavit of Aman Sekhon sworn December 29, 2008:

(a) With regard to Lemon J.'s Order of June 27, 2008:

1. The plaintiff took no issue with the defendant's assertion at paragraphs 14 and 15 of its factum that the affidavit of documents that was to have been served on or before July 18, 2008 was served by fax on July 16th (Exhibit EE to Aman Sekhon's affidavit of November 18, 2008).
2. However, the plaintiff states that pursuant to Lemon J.'s endorsement of December 8, 2008, the plaintiff sent a letter of December 12, 2008 to defendant's counsel with a chart of the defendant's outstanding undertakings (Exhibit "B" to Aman Sekhon's affidavit of December 29, 2008). The letter noted that the defendant had failed to answer twelve undertakings and had provided deficient answers to three further undertakings. Mr. Sekhon stated in paragraph

10 of his affidavit that the defendant had failed to answer any of these undertakings or cure the deficiencies in them.

3. Mr. Sekhon stated (in paragraph 13 of his affidavit of December 29, 2008) that the affidavit which the defendant delivered on December 8, 2008 listed only seven additional documents, including repair invoices for the building and its equipment. It did not list the following records contained in the four-tab document handed to the Court on December 8, 2008:

- i. Payroll Journals for the maintenance employees;
- ii. Time sheets for the hourly employees;
- iii. The defendant's copy of the Accident Injury Report of June 10, 2005 which had been attached as an exhibit to the plaintiff's affidavit on an earlier motion.

4. The plaintiff takes no issue with the defendant's assertion that the examination for discovery of the defendant which pursuant to Lemon J.'s order of June 27, 2008 was to have taken place on or before August 12, 2008 took place on

August 11, 2008. However, it states that that examination was largely a fruitless exercise because of the obstructionist tactics Mr. Cardillo employed on that date, for which he has since apologized (in his affidavit of December 22, 2008, contained in the defendant's motion record).

(b) With regard to Belleghem J.'s Order of September 19, 2008:

1. The plaintiff states (in paragraph 14 of Sekhon's affidavit of December 29, 2008) that the defendant has failed to provide a proper supplementary affidavit of documents in compliance with the Rules, despite Belleghem J.'s Order requiring it to do so.

(c) With regard to Van Rensburg J.'s Order of September 26, 2008, the plaintiff takes no issue with the defendant's assertion in paragraph 12 of its factum that the costs ordered by Van Rensburg J. have been paid. However, it states that those costs, which were to have been paid forthwith after September 26, 2008, were only paid at the hearing before Lemon J. on December 8, 2008 and it required the plaintiff's contempt motion to bring about payment.

[15] With regard to the defendant's and Mr. Cardillo's knowledge of the contents of the Orders, the plaintiff states that:

- (a) both the defendant and Mr. Cardillo as the representative of the defendant were served by courier at the defendant's head office on November 20, 2008 with the plaintiff's motion record for the contempt motion returnable November 28, 2008. That motion record contained the Orders and the particulars of the breaches, as appears from the affidavit of service of Courtney Nevins sworn November 21, 2008, attached as exhibit "E" to Mr. Sekhon's affidavit of December 29, 2008.
- (b) Mr. Sekhon states in paragraph 22 of his affidavit of December 29th that he was in attendance at the third appearance on December 8th, 2008 at which time the defendant and Mr. Cardillo apologized for the breaches of the three orders. Plaintiff's counsel relies on page 56 of the transcript of that proceeding at line 20.
- (c) Plaintiff's counsel also notes that at the hearing before Lemon J. on November 28, 2008, Mr. Proctor attended as counsel on behalf of both the defendant and Mr. Cardillo and his knowledge of the Orders and of the breaches should be imputed to Mr. Cardillo. She

also relies on Mr. Cardillo's affidavit sworn December 22, 2008, contained in the defendant's motion record of December 23, 2008, to demonstrate that Mr. Cardillo did not deny that he had knowledge of the Orders when it was reasonable to expect that if he had not had such knowledge, he would have asserted it

[16] With respect to the current status of the motion, plaintiff's counsel has informed the Court that the examination of Mr. Cardillo on August 11th (which was to have been completed by August 16, 2008 pursuant to the order of Lemon J. of June 27, 2008), was largely a fruitless exercise because he was unprepared and insulted opposing counsel. The examination, which lasted two hours and twenty minutes, was abandoned at that point. It was not until the contempt motion was brought and just before January 28, 2009 that Mr. Cardillo answered his remaining undertakings from the August 11, 2008 examination and re-attended on January 28, 2009 to complete his examination.

[17] Plaintiff's counsel states that the examinations for discovery of both parties were completed on January 28, 2009. There were undertakings given by both parties on that date. Plaintiff's counsel provided some of the answers to the plaintiff's undertakings to Mr. Verbanac on January 30, 2009 (income tax returns) and will be providing the balance of the answers to the undertakings by March

30, 2009 pursuant to the terms of Lemon J.'s adjournment on December 8, 2008 of the present motion. Mr. Cardillo also gave undertakings at the completion of his examination on January 28th which he is also required to answer by March 30, 2009.

CONCLUSION

[18] Based on the foregoing, it is ordered that:

- (1) the present motion is adjourned on consent to June 3, 2009:
- (2) Costs of today (at 1:30 p.m.) are fixed at \$ 1,500.00 and to be paid by the defendant by March 30, 2009;

PRICE J

Released: March 9, 2009

COURT FILE NO.: CV-06-1902-00
DATE: 20090309

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Plaintiff

- and -

PREMIER FITNESS CLUBS INC. o/a
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