Epstein Equestrian Enterprises Inc. v. Cyro Canada Inc., [2012] O.J. No. 3798

Ontario Judgments

Ontario Superior Court of Justice

E.M. Morgan J.

Heard: August 10, 2012.

Judgment: August 10, 2012.

Court File No. 00-CV-197311-000A

[2012] O.J. No. 3798 | 2012 ONSC 4653 | 12 C.C.L.I. (5th) 253 | 2012 CarswellOnt 9984 | 219 A.C.W.S. (3d) 797 | 40 C.P.C. (7th) 266

RE: Epstein Equestrian Enterprises Inc., and Cyro Canada Inc. and Frank Jonkman and Sons Limited

(23 paras.)

Case Summary

Civil litigation — Civil procedure — Pre-trial procedures — Request to admit — Motion by defendant to set aside request to admit allowed — Plaintiff served request to admit on defendant, which did not respond — There would be triable issues in claim against defendant if deemed admissions were withdrawn — There was reasonable explanation for defendant's change in position — Plaintiff was not necessarily prejudiced by defendant's changed circumstances.

Motion by a defendant to set aside a request to admit. The plaintiff served a request to admit on the defendant, which did not respond. The issue was whether it was appropriate to allow the defendant to withdraw the deemed admissions.

HELD: Motion allowed.

There would be triable issues in the claim against the defendant if the deemed admissions were withdrawn. There was a reasonable explanation for the defendant's change in position. At the time of the request to admit, the defendant had no money to fund the litigation and its counsel was attempting to remove himself from the record. The defendant now had insurance coverage and new counsel who only recently discovered the request. The plaintiff was not necessarily prejudiced by the defendant's changed circumstances. Although the plaintiff settled with two third parties by agreeing to limit its claim to the proportionate share of fault of the defendants, it stood to reason that an insured defendant was better than an insolvent one.

Statutes, Regulations and Rules Cited:

Rules, Rule 51.01(2), Rule 51.02(1), Rule 51.03(1), Rule 51.03(2), Rule 51.05

Counsel

David McCutcheon and Jeremy Millard, for the Plaintiff.

Albert Wallrap, for the Defendant Frank Jonkman and Sons Limited.

Angelo Sciacca, for the Defendant Cyro Canada Inc.

ENDORSEMENT

E.M. MORGAN J.

1 This motion is brought by the Defendant, Frank Jonkman and Sons Limited ("Jonkman"), to set aside the Request to Admit dated September 9, 2010, or, alternatively, to withdraw the deemed admissions contained within the Request to Admit.

2 Jonkman also seeks leave to amend its pleadings in order to respond to amendments made by the Plaintiff and the other Defendant, Cyro Canada Inc. ("Cyro"), to their own respective pleadings.

3 After nearly 12 years since issuance of the Statement of Claim and several adjourned trial dates during that time, the action is scheduled to go to trial exactly one month from now, on September 10, 2012. It has recently been pre-tried, and all counsel before me are proceeding on the basis that the trial must at last go ahead. There is therefore some urgency in sorting out the question of Jonkman's admissions and pleadings so that the parties can plan for the trial in an efficient and orderly way.

4 The Plaintiff served a Request to Admit on Jonkman on September 9, 2010, some 11 days before the scheduled commencement of trial on September 20, 2010. That trial was subsequently adjourned for a week, to September 27, 2010, and on what was to be the opening day of trial was, on motions brought by the Plaintiff and Cyro, bifurcated into separate liability and damages trials of three weeks each and further adjourned.

5 Jonkman never responded to the Request to Admit. Under Rule 51.02(1), a Request to Admit may be served by any party at any time, and under Rules 51.01(2) and 51.03(1) a party receiving a Request to Admit must respond "within twenty days after it is served", failing which they "shall be deemed ... to admit the truth of the facts or the authenticity of the documents mentioned" therein. Jonkman's position is that the Request to Admit was not served properly to trigger the deemed admissions as it was served less than twenty days before the scheduled commencement of trial on September 20, 2010. The Plaintiff's position is that since the trial was adjourned, and the Request to Admit remains unresponded to, the last scheduled starting date for the trial is irrelevant and the documents and facts set out in the Request to Admit have now long been deemed to be admitted.

6 Cyro supports Jonkman in its position on the improper service of the Request to Admit, and adds that although the Request to Admit was addressed only to Jonkman, Cyro should have been copied on it as many of the facts whose admission is requested implicate Cyro and impact on its case. Cyro does not go so far as to say that the Rules oblige the Plaintiff to serve all parties with a Request to Admit even if the Request is addressed only to one of

them; but it maintains that it would be good practice, and would add to the clarity and fairness of the trial process, if all parties were apprised of all other parties' deemed admissions.

7 This court has held that a Request to Admit "may be served at any time more than 20 days prior to trial so that the time for response expires before the commencement of trial." *Orlan Karigan & Assoc. Ltd. v. Hoffman*, [2000] O.J. No. 4852, 2000 CanLII 22725, at para. 22 (Ont SC). If the Request is served with fewer than 20 days to go until the trial starts it does not trigger any deemed admissions; on the other hand, if the trial is then adjourned and does not start until more than 20 days hence, there is no reason for the Request not to trigger the deeming function provided for in Rule 51.03(2). The whole point is that a party receiving the Request must have at least 20 days before trial begins to consider it and to respond before any consequences are drawn from it. Former counsel for Jonkman, Howard Manis, has stated in an affidavit that he received the Request when it was sent by the Plaintiff. It has now been more than 20 months since service of the Request.

8 The pertinent question, therefore, is not whether the Request to Admit was served properly or in a timely fashion. It was. Rather, the question which needs to be addressed is whether this is an appropriate case to grant leave to Jonkman to withdraw the deemed admissions. The court may grant leave to withdraw admissions under Rule 51.05 if the party seeking the withdrawal establishes that: (1) the proposed change raises a triable issue; (2) that there is a reasonable explanation for the change of position; and (3) that the withdrawal will not result in any prejudice that cannot be compensated for in costs. *Antipas v. Coroneos*, [1988] O.J. No. 137, 1988 CarswellOnt 358, at paras. 14, 20 (Ont SC). In my view, Jonkman has demonstrated that this three-part test has been met.

9 On the question of a triable issue, counsel for Jonkman points out that the Request to Admit is sweeping in its terms, and encompasses virtually every document and fact relevant to the claim against Jonkman. It was, Plaintiff's counsel acknowledges, designed to eliminate all triable issues from the claim against Jonkman, and effectively deprives Jonkman of any chance of a defense or factual presentation that is different than the Plaintiff's version of the facts. The parties spent some time during the motion arguing about whether certain issues and defenses that Jonkman might raise would have been foreclosed or doomed to fail even without the Request to Admit, but it is undeniable that if the deemed admissions were withdrawn there would be triable issues in the claim against Jonkman that do not exist in the face of those deemed admissions.

10 As a reasonable explanation for the change, counsel for Jonkman submits that its client was all but without legal representation at the time the Request to Admit was served, as it had no money to fund the litigation and its then counsel was in the process of attempting to remove himself from the record. Jonkman now has insurance coverage and new counsel that are in a position to fully defend its rights, but can only do so if the deemed admissions are withdrawn. For their part, Plaintiff's counsel states that they served the Request on Howard Manis, who was Jonkman's solicitor of record in September 2010 and remained so until replaced by Jonkman's current counsel in November 2011, and that Mr. Manis has confirmed in his affidavit that his failure to respond to the Request was not inadvertent - that is, he was specifically instructed to ignore it. They further submit that they were specifically advised by Mr. Manis on August 3, 2010 that Jonkman intended to let the trial go undefended, and that the Request was served in light of that context.

11 As Saunders J. pointed out in *Antipas*, *supra*, at para. 20, "[o]n one hand, in the interests of justice, the right of a party to have an issue tried should not be limited except in special circumstances. On the other hand, in the interests of expedient and responsible litigation, a party should not be permitted to blow hot and cold..." In the present case, it is fair to say that the right of Jonkman to have not just an issue, but virtually every issue, tried will be limited by the deemed admissions, and there do not seem to be an special circumstances that would require that state of affairs to persist. At the same time, it would not be fair to say that Jonkman has blown hot and cold - at least not in the whimsical fashion suggested by that phrase.

12 Jonkman's change in circumstances is not only understandable, it is a prospect that the Plaintiff could have foreseen. Correspondence from Plaintiff's counsel dated May 19, 2011, when Jonkman's application for coverage was pending, indicates that the Plaintiff filed a Notice of Appearance and supported Jonkman's coverage

application. Moreover, the endorsement by Lederman J. dated November 18, 2011 indicates that that application had been one which sought to require that the insurer provide Jonkman with a defense. The Plaintiff must have understood that if coverage is achieved a defense will be pursued.

13 I am also moved to conclude that the deemed admissions should be withdrawn by the fact that Jonkman's insurer and its present counsel were apparently unaware of the existence of the Request to Admit until it was found in a box of documents by Jonkman's counsel this past spring when they were going over their voluminous file. Plaintiff's counsel never alerted Jonkman's new counsel to this, and since Cyro had never been copied on it they were also unable to alert their co-defendant's new counsel to it. Of course, Plaintiff's counsel is not obliged to assist Defendant's counsel in preparing its case; likewise, Plaintiff's counsel was not obliged to serve the Request on Cyro when it was not addressed to Cyro. However, the fact is that the Request was undiscovered by Jonkman's new lawyers until quite recently. Lederman J's endorsement shows that the coverage application with Jonkman's insurer was settled on terms that have not been disclosed, but one can speculate that the application and settlement with the insurer may have taken a different course had it been known that Jonkman had effectively deprived itself of a defense by failing to respond to a wide ranging Request to Admit.

14 There is, accordingly, a reasonable explanation for Jonkman's change in position. It is my view that in the interest of justice Jonkman should not be deprived of the ability to have the issues raised against it tried.

15 Finally, there is the question of possible prejudice to the Plaintiff. If withdrawal of the deemed admissions lengthens the trial, it likely will not do so inordinately. Counsel for Cyro points out that in any case the factual issues have to be canvassed in full with respect to his client. The Amended Statement of Claim identifies Jonkman and Cyro as contractors and suppliers, respectively, for a construction project on the Plaintiff's property, and many of the factual issues raised against them overlap. Any extra burden suffered by the Plaintiff resulting from a lengthening of the trial could be addressed through the scheduling process and costs.

16 Of greater concern is the Plaintiff's contention that it is prejudiced by the fact that it has settled with two Third Parties on the basis of a so-called *Pierringer* agreement, in which it has agreed to limit its claim to the proportionate share of fault of the non-settling defendants (i.e. Jonkman and Cyro). This agreement was negotiated with the Third Parties in September 2010, just about the time when the Request to Admit was served and at a time when the Plaintiff had been advised by Mr. Manis that Jonkman would not be defending. Plaintiff's counsel submits that if Jonkman is now permitted a full defense it may be better able to apportion fault away from itself and onto the Third Parties, thus prejudicing the Plaintiff's potential recovery in view of the settlement agreement. The change, in other words, changes the economic calculus on which the settlement with the Third Parties was entered, and that settlement cannot be undone or compensated with costs.

17 While there is some strength to the Plaintiff's argument, there is also another way to view the change. When the Plaintiff negotiated the *Pierringer* agreement, it had in mind that Jonkman was an insolvent defendant. Now Jonkman is a funded defendant with insurance coverage. The economic calculus may have changed not to the Plaintiff's prejudice but to its advantage. Although we do not know the specific terms of Jonkman's coverage, it stands to reason that from a plaintiff's point of view an insured defendant, albeit one that can now defend itself, is better than an insolvent defendant, albeit one that could not defend itself. On the balance, I do not see that the Plaintiff is necessarily prejudiced by Jonkman's changed circumstances.

18 Last, there remains Jonkman's request for leave to deliver a Further Amended Statement of Defence and Counterclaim and an Amended Defence to Crossclaim. Jonkman submits that since the other parties have amended their pleadings, it must correspondingly amend its own pleadings in response. The Plaintiff makes no independent argument against these amendments, and merely reiterates its positions regarding the deemed admissions, triable issues, and prejudice. Cyro supports Jonkman's request. I therefore see no reason not to grant Jonkman leave to amend its pleadings as set out in its Motion Record.

19 Jonkman asks for costs on a substantial indemnity basis and Cyro requests costs on a partial indemnity basis.

The Plaintiff submits that it should have its costs regardless of the outcome of the motion, plus costs thrown away on a full indemnity basis for its adjournment of the trial and its participation in the coverage application.

20 Ordinarily, costs would go to the successful parties. Here, Jonkman as the moving party (with Cyro in support), has succeeded in the request for leave to withdraw Jonkman's deemed admissions and the request to amend Jonkman's pleadings. On the other hand, this is not quite an ordinary case. The Plaintiff was within its rights to serve a Request to Admit, and Jonkman waited two years, until a month before trial, to do anything about it. While Jonkman now explains that it and its present counsel did not know about the Request, Plaintiff's counsel did what is expected when they served the Request - they sent it to opposing counsel at the time, Mr. Manis. Having served a document on the opposing side's lawyer during the course of litigation, counsel are not expected to later follow up and make sure that opposing counsel has properly forwarded it to his client and successor law firm. It is hard to fault the Plaintiff for pursuing what it perceived as its rights in this motion, even though they have ultimately not been successful.

21 On the other side, the Plaintiff bases its request for costs regardless of the outcome, and for costs thrown away, on several cases in which courts have granted relief in order to remedy a situation for which the moving party is itself at fault. In *Ting v. Grenier*, *[2008] O.J. No. 5615*, *2008 CarswellOnt 5799* (Ont SC), the defendant managed to set aside a default judgment after delaying for three years for no apparent reason beyond his own negligence. Given that the plaintiff had proceeded in good faith and the defendant apparently had not, the court awarded costs to the plaintiff despite the defendant's success on the motion. As for costs thrown away, in *Propjet Management (Ontario) Inc. v. Pascan Aviation Inc.*, *2007 ONCA 855* (Ont CA), the Court of Appeal reversed a summary judgment ruling where fresh evidence that would have changed the result and that should have been produced at the motion stage was adduced by the appellant only upon appeal. The court granted the appellant's request but awarded the respondent costs thrown away below - i.e. at the earlier stage of the very motion that it was reversing. Neither of these cases is analogous to the situation here.

22 Although the Plaintiff cannot be blamed for pursuing its rights in this motion, one also cannot say that Jonkman is at fault for the changed circumstances. Unlike in *Ting*, this is not a case where there is no reasonable explanation for the change. Moreover, although the Plaintiff no doubt incurred some time and expense in supporting Jonkman's insurance coverage application, the Plaintiff will continue to benefit from that application by having an insured defendant. Unlike in *Propjet*, those costs have not truly been "thrown away".

23 I am therefore inclined to see the arguments for costs as cancelling each other out. There will be no costs of this motion for or against any party.

E.M. MORGAN J.
