SUPREME COURT OF NOVA SCOTIA
Citation: *Countway v. Deschamps*, 2022 NSSC 4

Date: 2022-01-06
Docket: Hfx No. 491385
Registry: Halifax

Between:

RENE PAUL RON COUNTWAY

Plaintiff

v.

ERIN DESCHAMPS and **THOMAS BRENT DESCHAMPS**

Defendants

DECISION ON MOTION TO REVOKE DISCOVERY SUBPOENA

Judge:	The Honourable Justice Scott C. Norton
Heard:	January 5, 2022, in Halifax, Nova Scotia
Decision:	January 6, 2022
Counsel:	Nicolle A. Snow, for the Plaintiff Leon S. Tovey, for the Defendants

By the Court:

Introduction

[1] Modern procedure rules for civil litigation require disclosure of relevant documents and questioning under oath of the parties and other witnesses. These procedures allow the parties to know the case they must meet at trial and avoid trial by ambush. Disclosure and discovery are principal elements of the object of this Court's procedures for the just, speedy, and inexpensive determination of every proceeding.

[2] The Plaintiff brings this motion to revoke a discovery subpoena served on the Plaintiff to attend a second discovery in this proceeding. The Plaintiff asserts that the service of a discovery subpoena is an abuse of process.

[3] The evidence before me on the motion is comprised of affidavits, filed by counsel, attaching copies of correspondence, pleadings and documents produced in the litigation process.

[4] At the conclusion of the hearing, I dismissed the motion and gave directions for the conduct of the second discovery with reasons to follow. These are my reasons.

Facts

[5] This proceeding claims damages for personal injury alleged to have resulted from a motor vehicle collision on December 2, 2018, when the Plaintiff was 16. The Plaintiff, by his litigation guardian, filed a Notice of Action and Statement of Claim on August 26, 2019. It alleged that the Plaintiff sustained injuries including concussion; straining injury to soft tissues in the neck, back, arm, and shoulder; radiating pain; and anxiety and sleep disruption. The claim seeks damages for pain and suffering; loss of past income and other special damages; diminished earning capacity or loss of future income; loss of valuable services; and cost of care.

[6] The Plaintiff was questioned by discovery by consent on June 16, 2020, and the Defendants were discovered on June 20, 2020. A Request for Date Assignment Conference ("DAC") was filed on July 23, 2020. The Defendant's Memorandum was filed on August 7, 2020. There was no request made for additional discovery of the Plaintiff. The DAC was held by Justice Ann Smith on November 6, 2020. The Memorandum of the DAC does not record any request for additional discovery of the Plaintiff. It does record that production of relevant documents by the Plaintiff is "ongoing". Justice Smith assigned trial dates commencing April 19, 2022, and a Finish Date was set for January 7, 2022.

[7] Interrogatories dated February 4, 2021, were served on the Plaintiff by the Defendants and were Answered by the Plaintiff's litigation guardian on March 11, 2021. The litigation guardian was removed by consent Order on April 20, 2021.

[8] The Plaintiff filed expert reports on July 7 and 8, 2021 and the Defendant filed an expert report on October 6, 2021.

[9] By email dated November 30, 2022, the counsel for the Defendants requested an updated discovery of the Plaintiff "given the passage of time and new developments since Mr. Countway's discovery" and provided a list of possible dates. Counsel for the Plaintiff inquired as to what the new developments were. In reply, counsel for the Defendants advised:

> … As I understand it, [the Plaintiff] started a job then left it. He's also been referred to a neurologist (in addition to having seen Dr. King) and been recommended a number of additional treatments by your experts and it is not clear to me what of those he may be exploring. It also appears he may have applied for some education program following his graduation…

[10] Counsel for the Plaintiff replied and disagreed that a further discovery was required. The Defendants obtained a discovery subpoena that was delivered by email to Plaintiff counsel on December 7, 2021. The subpoena required the Plaintiff to attend for questioning on December 30, 2021 at 10:00 am.

[11] The Plaintiff's motion to revoke the discovery subpoena was filed on December 15, 2021, and scheduled for hearing in regular Chambers on December 23, 2021. Justice John Keith convened a telephone conference with counsel and determined that the matter could not be argued within the 30 minutes allotted for motions heard in regular Chambers. The motion was re-scheduled for hearing at a Special Chambers time before me on January 5, 2022.

[12] Counsel agreed that if the subpoena was not revoked, the discovery would proceed on January 14, 2022, from 9:30 am to 11:30 am, subject to any additional directions provided by me.

Position of the Parties

[13] The Plaintiff asserts that the Defendants are robbing the Plaintiff of due process by serving him with a subpoena when the Plaintiff has already voluntarily submitted to questioning under the Rules. The Plaintiff speculates that the Defendants have conducted surveillance investigation of the Plaintiff and wish to elicit contradictory evidence from the Plaintiff to use to impeach the Plaintiff's credibility at trial. The Plaintiff further asserts that there are no special circumstances that justify a second discovery examination in this case.

[14] The Defendants respond that they are following the process that the Court has directed parties to follow where they seek discovery of a party who does not consent to discovery; that there is no set limit on discovery of an individual party under the Nova Scotia *Civil Procedure Rules*; there is no restriction on discovery where interrogatories have been served so long as there is no overlap of the questions asked; and changes to the Plaintiff's circumstances are sufficient to warrant further discovery examination.

Law

[15] *Civil Procedure Rule* 18 governs the right to questioning by discovery. Rule 18.03(3) permits a party to discover another party by agreement. Rule 18.04 allows a party to serve a discovery subpoena for questioning of another party:

> 18.04 **Discovery subpoena in an action (party)**
>
> **(1)** A party to an action who provides required representations may obtain a discovery subpoena (party) to discover any of the following witnesses:
>
> (a) an individual party;
>
> (b) the designated manager and one other officer or employee of a corporate party;
>
> (c) further officers and employees, if the party also provides required undertakings to pay expenses.
>
> **(2)** A party requesting a discovery subpoena (party) directed to an individual party must provide both of the following representations to the court:

(a) that the party is in compliance with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information;

(b) that the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief and an explanation of why a discovery subpoena is required instead of, or in addition to, an agreement.

(3) A party requesting a discovery subpoena (party) directed to a designated manager, or one other officer or employee of a corporate party, must provide all representations required for a subpoena directed to an individual party and a representation that the designated manager, or the other officer or employee, has not yet been discovered in the proceeding.

(4) A party requesting a discovery subpoena (party) directed to a further officer or employee must provide all of the following representations to the court and file the following undertaking:

(a) all representations required for a subpoena directed to an individual party;

(b) a representation that the designated manager and one other officer or employee have been discovered;

(c) an undertaking to pay the charges of the reporter to record and transcribe the discovery and the reasonable expenses of the witness to attend the discovery, including transportation, accommodation, and meals.

(5) The subpoena must contain the standard heading, be entitled "Discovery Subpoena (Party)", be issued by the prothonotary, and include all of the following:

(a) the name of the witness;

(b) if the witness is an individual party, the address for delivery designated by the witness, and, if the witness is an officer or employee of a corporate party, the address for delivery designated by the corporate party;

(c) requirements that the witness attend the discovery, answer questions properly asked by a party and bring, or provide access to, described documents, electronic information, or other things;

(d) the time, date, and place of the discovery;

(e) a warning that failure to obey the subpoena may be punished as contempt of court.

> **(6)** A party who obtains a discovery subpoena (party) must deliver a certified copy of subpoena to the address for delivery of the individual party to be discovered or the party whose officer or employee is to be discovered no less than ten days before the day the discovery is to be held.
>
> **(7)** The party who obtains the subpoena must notify each other party by delivering a copy of the subpoena to the other party no less than ten days before the day the discovery is to be held.
>
> **(8)** A corporate party whose officer or employee is to be discovered under subpoena must do both of the following:
>
> (a) deliver a copy of the discovery subpoena (party) to the officer or employee;
>
> (b) take all reasonable steps to have the officer or employee attend the discovery.
>
> **(9)** The subpoena may be in Form 18.04A.
>
> **(10)** The undertakings and representations may be attached to, or printed on the back of, the subpoena and they may be in Form 18.04B.

[16] *Rule* 18.08(1) permits a judge to revoke a discovery subpoena "that results from, or would lead to, an abuse of process in an action".

[17] In *Gill v Little*, 2017 NSSC 53, this Court considered a motion by a defendant in a personal injury claim for an order for further discovery of a plaintiff who, since the original discovery, had graduated from law school and taken a job with an Ontario law firm. Associate Chief Justice Smith (as she then was) refused to grant the order on the grounds that the appropriate path was for the defendant to first obtain a discovery subpoena. At paras 5-6 she instructed:

> [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.

Analysis

[18] The Plaintiff's first argument is that the Defendants are abusing the Court's process by obtaining a discovery subpoena instead of bringing a motion for an Order for discovery. With respect, this argument misapprehends the discovery process set out in Rule 18 as described by Justice Fichaud in *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, and Associate Chief Justice Smith in *Gill*. The Defendants have followed the recommended process.

[19] The Plaintiff next asserts that there has been no "material change in circumstances" to justify a second discovery, relying on the decision in *McLeod v Leonowicz*, 2021 ONSC 7733. However, as pointed out by the Defendants in their brief, the approach taken by the Court in *McLeod* must be read in the context of the Ontario *Rules of Civil Procedure* that explicitly require leave of the court to examine a party more than once, per 31.03(1):

> **31.03** (1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8).

[20] The Nova Scotia *Civil Procedure Rules* contain no such restriction. As Smith, A.C.J., stated in *Gill* at para 25:

> 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.

[21] In *Royal Insurance Co. v. Schwartz*, (1978), 26 N.S.R. (2d) 223, the plaintiffs brought an action against their fire insurers, for a loss caused by fire damage to the plaintiffs' property. The plaintiffs had previously been tried on a charge of arson and had been acquitted. At a pre-trial conference conducted pursuant to the *former Nova Scotia Civil Procedure Rules (1972)*, the presiding Judge directed that the

examination for discovery of the plaintiffs be confined to matters not encompassed in the transcript of evidence in the criminal proceedings, and that such transcript would constitute the examination for discovery of the plaintiffs on the matters therein testified to. An appeal by the defendant from such order was dismissed. Justice MacDonald, for the court, reasoned as follows:

> 19 In *Graydon v. Graydon* (1921), 51 O.L.R. 301, 67 D.L.R. 116 Middleton J. said that the Ontario Rules contemplate only one examination for discovery of any party and that therefore (per headnote):
>
> > Where the action was against three defendants, one of whom severed in his defence from the other two, and the plaintiff had been examined for discovery by counsel for the two, without notice to the third, who was not represented upon the examination, and who desired to have a full examination of the plaintiff on his own account, it was directed that the plaintiff should attend for such examination, but that the examination should be confined to matters not dealt with upon the former examination and matters which might be set up or be intended to be set up against the third defendant alone.
>
> 20 Neither counsel could find any authority directly on point nor, may I add, could I. Counsel for the respondent drew an analogy between the situation that exists here and those cases involving applications for subsequent or second examination for discovery of the same person. In the latter situation the Courts have uniformly refused to allow such re-examination unless special circumstances existed or the Justice of the case required it. See *Hellofs v. Royal Bank*, [1940] 1 W.W.R. 6 (Sask.); *Hosie v. Hosie*, [1975] 1 W.W.R. 597, 18 R.F.L. 385 (Sask.)
>
> 21 If re-examination is permitted then in my view the principle set forth in the Graydon case is sound and the re-examination should be confined to matters not dealt with on the former examination. Indeed, this appears to be the practice followed not only in Ontario but in other provinces as well.
>
> [Emphasis added]

[22] Whether the test is cast in terms of significant change of circumstances, special circumstances, or material change in circumstances, the ultimate question is

whether allowing a second discovery examination would promote the goals of the *Rules*. The answer to that question will depend on the circumstances of each case. As Justice Fichaud instructed in *Homburg*, at para 41:

> [41] With this approach we see the symmetry of Rule 18 as a whole. It provides a complete manual for the scope of discovery examination in this jurisdiction. While the applicability of certain parts of the Rule will depend upon which of the three routes to discovery has been chosen, and how the particular factual matrix underpins such a selection, the overarching consideration (for parties, counsel and judges) must always be to recognize the explicit purpose of these Rules which is to provide:
>
> > 1.01 …for the just, speedy, and inexpensive determination of every proceeding.
>
> The interpretation and application of the Rules as a whole, and the interaction between its various constituents should be informed by that preeminent goal.

[23] The Plaintiff asserts that there has not been a sufficient passage of time since the first discovery (19 months). The Defendants respond that when he was discovered the Plaintiff was only 18 years old, had just completed high school, and the Province was just exiting from the first COVID-19 pandemic lockdown. Accordingly, there was little the Plaintiff could offer to answer questions related to loss of future earnings or loss of earning capacity.

[24] As a general comment, the longer the period since the first discovery, the more likely it is that there will have been changes in the circumstances of the party sought to be questioned and the more likely that it would be unjust to not permit a second discovery. However, in any particular case, human experience teaches us that there

can be significant change, positive or negative, in a very short period of time. Claims for injuries by children and adolescents are one example. In my view, it would be ill-advised for a court to set an artificial time period before which a second discovery examination could be conducted. When justified, the second discovery should be conducted in time to inform any dispute resolution process and trial preparation. Except in very unique circumstances, the second examination must be completed before the Finish Date.

[25] In *Gill*, the court found that further discovery was warranted because of significant changes in the plaintiff's personal circumstances since the first discovery was held. At paras 23 and 24, Smith, ACJ, stated:

> [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.
>
> [Emphasis added]

[26] Other circumstances that would justify a second discovery might include production of undertakings given at the first discovery or, ongoing production of relevant documents, including, in personal injury claims, new medical records and reports from treatment providers. This new documentary evidence may justify questioning to clarify facts in advance of the trial.

[27] The Plaintiff's counsel suggests that the Defendants should be satisfied with counsel's answer to questions raised by the Defendants. With respect, the Defendants are entitled to the Plaintiff's evidence. Communication from a party's counsel would place that counsel in a very difficult position if opposing counsel sought to use the communication to impeach the credibility of the party.

[28] The Plaintiff says that a second discovery is not justified here because the Defendants questioned the Plaintiff by interrogatories in February 2021.

[29] *Rule* 18.13 gives direction as to the scope of a discovery examination:

> **18.13 Scope of discovery**
>
> **(1)** A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> **(2)** A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.

[30] *Rule* 18.01(1) does not permit a question by discovery that was answered in response to interrogatories. This repeats the contents of *Rule* 14.04 that states:

> **14.04 Relationship between discovery and interrogatories**
>
> A party may only demand an answer to a question under Rule 19 - Interrogatories not already answered by the same witness under Rule 18 - Discovery, and a party may only ask a question at discovery not already answered by the same witness in answer to a demand under Rule 19 - Interrogatories.

[31] In this case, for example, the Plaintiff answered an Interrogatory as to whether he was currently enrolled in any educational program. That does not prevent a question on discovery of whether he applied for admission to any educational program. This shows the limitations of Interrogatories and the nuance of questions and answers that are more easily followed up on during questioning by discovery. As Smith, ACJ, in *Gill* noted:

> [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.

[32] The Plaintiff has raised a concern that the Defendant is seeking evidence from the plaintiff that will be contradicted at trial by surveillance evidence (commonly, video, and photographic evidence of the activities of a plaintiff in a personal injury

claim). The Defendant does not acknowledge having conducted any surveillance of the plaintiff. There is no direct evidence of surveillance being conducted and the evidence before me does not permit me to draw this inference. It is merely speculation. No witness telling the truth about their abilities and activities has ever been impeached by surveillance evidence. Whether a second discovery for this purpose alone would be just is best left to be decided on a proper factual record.

Conclusion

[33] Like *Gill,* the evidence in the present case persuades me that there have been changes to the Plaintiff's personal circumstances and production of new documentary evidence sufficient to justify additional questioning before trial. For example, the documents produced from the Plaintiff's employer do not provide a complete picture of the Plaintiff's hours of work or total compensation received. There is information that his employment ended without detail as to why. There is documentation that suggests the receipt of government assistance based on application to post-secondary educational programs but no documentary evidence of such an application being made. There are updated medical records and reports that raise new symptoms that the Defendants should want to be informed of in preparation for a scheduled settlement conference and the trial. I therefore find that conducting the second discovery is just.

[34] The second discovery to be held on January 14, 2022 will not delay the scheduled trial. There is no evidence before me that the expense of conducting a second discovery, limited to two hours in duration, is unreasonable. The cost of the court reporter is to be borne by the Defendants.

[35] A second discovery in this case meets the purpose of the *Rules*. Accordingly, I will permit the second discovery of the Plaintiff in this case subject to the *Rules* as to scope and limitations referred to herein and the following additional directions:

(a) The discovery examination of the Plaintiff shall proceed on January 14, 2022, from 9:30 a.m. to 11:30 a.m. at the offices of the Defendants' counsel, or elsewhere, including by videoconference, if the parties consent.

(b) The Defendants shall not ask any questions regarding documents that were received by the Defendants before the first discovery examination.

(c) The Defendants shall not ask any question concerning any time period prior to the date of the first discovery unless it arises expressly in relation to a document produced since the fist discovery examination.

(d) The expense of the court reporter will be borne by the Defendants, subject to taxation at the conclusion of the matter.

[36] The Plaintiff's motion to revoke the discovery subpoena is dismissed. The costs of this motion are set in the amount of $750 inclusive of disbursements and shall be payable in the cause to the successful party at the conclusion of the proceeding.

[37] The Defendant shall prepare an Order accordingly.

Norton, J.