Citation: Marchese v. Fiture, 2010 ONSC 1111

Court File No: 07-CV-330556PD2

Superior Court of Justice – Ontario

Re: Giuseppe Vito Marchese, Plaintiff

And:

Dr. Ali Otman Fiture, Defendant

Before: Master Sproat

Counsel: K. Cahill, Counsel for the plaintiff

M. Leon, Counsel for the defendant

Heard: November 6, 2009

Reasons for Decision

1. These are my reasons in relation to the plaintiff's refusals motion. The defendant conceded that the questions refused on discovery are relevant and has or will answer the questions. The parties disagreed on the sole issue of whether the defendant should be required to reattend for further oral examination on the follow up questions arising from the answers to refusals and answers to undertakings.

2. For the reasons that follow, I order that the defendant reattend for further oral examination in relation to the answers to the refusals and undertakings and follow up questions arising therefrom.

3. The background facts are not in dispute, for the purposes of this motion. This action is a medical malpractice action in relation to the medical treatment that the plaintiff received following a fireworks injury on May 24, 2004. The plaintiff had various surgeries in May, June and November 2002. Later, in September 2005, the plaintiff had surgery on his right arm. An infection developed and the plaintiff under further surgery on November, 2005. An xray of the plaintiff arm on November 28, 2005 revealed a foreign body and the plaintiff underwent further surgery on December 2, 2005. Following this latest surgery, the plaintiff suffered numbness and impaired functioning of his arm.

4. The plaintiff took the position that what the defendant considered on a specific date relative to the plaintiff's treatment is relevant and of particular importance since these matters are entirely within the defendant's knowledge. The plaintiff submits that given the nature of the action and

the onus on the plaintiff to establish malpractice, it is crucial to have the defendant's attendance on examination.

5. The defendant took the position that reattendance is a discretionary matter and required a consideration as to whether a useful purpose would be served, whether it would be abusive or onerous to reattend and whether the costs outweigh the benefits.

6. I agree that the court has discretion to relieve a party from reattendance.

7. In disposing of this motion, I start from the premise that the plaintiff is entitled to an oral examination for discovery. An examination by written questions and answers is at the option of the plaintiff. See rule 31.02.

8. At no time did the plaintiff opt for written questions and, further, at no time did the parties agree on written questions. To the contrary, counsel for the plaintiff, on discovery of the defendant, expressly stated that a reattendance would be required (see p. 46, q. 229).

9. Rule 34.15 also provides for the court's discretion to order a reattendance. In the exercise of this discretion, the court may consider a number of factors, including: whether an objection was improper, whether a discovery is interrupted by the improper objections, whether a question should be answered under oath, whether the ability to ask follow up questions has been denied and whether the examining party insists upon a reattendance (see *Senechal v. Muskoka* [2005] OJ No. 1405 (SCJ) at paras 5, 7, 9 and *SE Lyons and Son Ltd v. Nawoc Holdings Ltd.* (1978), 23 OR(2d) 727 (SC)).

10. On this motion, I view the defendant's position as akin to requiring the plaintiff to conduct the examination for discovery by written questions, contrary to the entitlement of the plaintiff to insist upon an oral examination. The principles in *Senechal and SE Lyon, supra*, apply to this case.

11. In particular, addressing the factors considered in *Senechal, supra*, I am of the view that the defendant's refusals interfered with the right of the plaintiff to an oral examination. This case is a medical malpractice action where the plaintiff bears a not insignificant onus. Had the questions been answered in the first instance, the plaintiff would easily and without interruption have been in a position to ask all follow up questions and have answers to the follow up questions on the record. The defendant ought not by his improper refusals be in a position to thwart the plaintiff's entitlement to an oral examination.

12. I would also note the nature of the case. I agree with the plaintiff's suggestion that the full extent of the defendant's knowledge, information and belief as to the matters giving rise to the action are uniquely the defendant's. It is vital to the plaintiff's case to know precisely what the defendant considered and when, in determining the plaintiff's medical treatment. I agree with plaintiff's counsel that the plaintiff in the circumstances of this case should not be required to "settle" for the answers of counsel on behalf of the defendant.

13. I would add that when a discovery is interrupted by objections that are later determined improper (which I find is the case here, since the defendant has agreed to answer the questions), the natural ebb and flow of questions and answers are interrupted. The plaintiff is entitled to pose questions as might appear to flow from the answers. There is something to be said about the ability to immediately respond to questions and to clarify any misunderstandings, particularly if, as was suggested by defence counsel, English is not the defendant's first language (there being no evidence on this point either).

14. The defendant is not entitled to a preview of the questions that might be put to the defendant. To require the plaintiff to proceed by written questions would give the defendant unfair advantage.

15. I do not view this case as a "second kick at the can" as suggested by defence counsel. The questions put to the defendant were clearly relevant and ought to have been answered.

16. I cannot conclude that the plaintiff's request would serve "no useful purpose" or would be "prejudicial" to the defendant. There is nothing in the record to support these submissions. It is of note that the affidavits sworn in response to the motion were of a legal secretary in the office of defence counsel and did not address in any way these matters.

17. It was also submitted by defence counsel that it was not customary or normal practice for reattendances in medical malpractice cases. Again, there was nothing in the record to support this submission. Thus, I am not able to consider this factor (if it is one). I would observe in any event that simply because other plaintiffs may not require a reattendance does not mean that this particular plaintiff's desires as to how he wishes to conduct the litigation should be overridden or discounted. In my view, each case has to be considered on its own facts.

18. It was also submitted by defence counsel that the costs vs. benefits of a reattendance must be considered. There was nothing in the record on this issue or to support that the costs would outweigh the benefits of the reattendance.

19. In fact, it may be that it is more efficient to reattend and have all questions put and answered on the record. It was clear from the hearing that the parties disagreed as to whether the questions had already been asked and answered. This issue arose directly from the answers to the refusals given by letter from counsel for the defendant where other answers to other questions on the discovery were stated as "the" answer. If follow up questions were to be put in writing, I have a concern that there will be a lengthy correspondence trail for "clarification".

20. The plaintiff is entitled to have a clear transcript of the defendant's knowledge, information and belief and not defence counsel's spin or interpretation as what the defendant meant to say (given the defendant's alleged lack of facility with the English language) or how answers previously given also apply to the question refused (or the follow up question to be posed). The refusals had the effect of allowing defence counsel to parse together the defendant's answers to the refusals with the benefit of the transcript.

21. A reattendance will avoid the very difficulty encountered on the motion – whether a previous answer was indeed responsive to the refused question.

22. Lastly, it was suggested that plaintiff's counsel did not seek a reattendance and therefore, should be denied the reattendance. I do not agree. The plaintiff is entitled to an oral examination. This entitlement can be displaced only at the plaintiff's option. The failure to seek the reattendance in the notice of motion cannot be said to amount to a plaintiff's election to proceed by written questions. I view the failure to specifically seek a reattendance as an irregularity that I would otherwise have been inclined to remedy. It was clear that the defendant knew that the reattendance was the issue to be addressed on the motion (see defence counsel's letter date June 1, 2009, Tab D to the supplemental affidavit). In any event, plaintiff's counsel specifically indicated on the defendant's examination that he sought a reattendance (see p. 46, q. 229).

23. I wish to address the defendant's submission that the reattendance be limited to follow up questions on the refusals only and that the plaintiff not be entitled to ask follow up questions on the defendant's answers to undertakings. This position is incomprehensible. There is no logic to reattending to answer follow up questions on refusals but then insist that the plaintiff put follow up questions on undertakings in writing. It is far more efficient and less expensive to have all such follow up questions to undertakings addressed on the record.

24. The issue of costs was reserved. If the issue cannot be resolved, the plaintiff shall deliver a costs outline (maximum three pages) to the defendant by March 17, 2010, responding submissions (maximum three pages) shall be delivered by March 31, 2010 and reply submissions if any (maximum two pages) shall be delivered by April 7, 2010. The plaintiff shall file one complete package of costs submissions to me by no later than April 14, 2010.

Master Sproat
signed February 18, 2010