

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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| COMTECH FIRE CREDIT UNION LIMITED |) | <i>Timothy Morgan</i> , Counsel for the Plaintiff |
| |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| - and - |) | |
| |) | |
| AHMAD ABDUL GHANI, WINESTONE LAVAL & CO. LTD., CARMINE D'AVINO, MICHEL LAVAL, C. ESPOSITO & ASSOCIATES LIMITED, CARLO ESPOSITO, CENTURY 21 EXPLORER REALTY INC., RALPH SHAW also known as RALPH H. SHAW, BARBARA WYNNE-EDWARDS AND ERCOLE FAGA also known as HERCULES FAGA also known as HERCULES E. FAGA |) | <i>Lauren Rakowski</i> , Counsel for Century 21 Explorer Realty Inc. and Ralph H. Shaw |
| |) | <i>Miriam Vale Peters</i> , Counsel for Barbara Wynne-Edwards |
| |) | <i>Adam Pantel</i> , Counsel for Ercole Faga |
| |) | <i>Nicole McAuley</i> , Counsel for Winestone Laval & Co. Ltd., Carmine D'Avino and Michel Laval |
| |) | |
| <i>Defendants</i> |) | |

REASONS FOR RULING ON MOTION

JOHNSTON, J.

[1] This is a motion for Direction commenced by the Plaintiff regarding a Motion for Summary Judgement commenced by two of the Defendants.

Issue:

[2] Should the Motions for Summary Judgement be stayed, pending documentary and oral discoveries on the basis that the Motions are premature or, in the alternative, because they are Motions for partial summary judgment?

Background:

[3] Comtech Fire Credit Union Limited ("Plaintiff/ Comtech") is a credit union carrying on business in the Province of Ontario. Its claim arises from events giving rise to a residential mortgage (the "Mortgage") registered in favour of Comtech against the property municipally known as Unit 7, 49 Mill Street, Carleton Place, Ontario (the "Property"). The Mortgage was made between Comtech and the defendant, Ahmad Abdul Ghani ("Ghani"), and was registered on February 2, 2018. Comtech advanced to Ghani the sum of \$796,000 (the "Mortgage Advance") under the Mortgage.

[4] The Claim against Ghani is for monies owed in respect of the Mortgage or, in the alternative, for damages for unlawful conduct conspiracy in the amount of \$1,500,000.00 The claim against all other defendants - other than Ercole Faga also known as Hercules Faga ("Faga") - is for damages in the amount of \$1,500,000.00 for unlawful conduct conspiracy. Alternative claims for breach of contract, negligence or negligent misrepresentation, and fraud or fraudulent misrepresentation are also advanced against the defendants, Winestone Laval & Co. Ltd. ("WLC"), Michel Laval ("Laval") and Carmine D'Avino ("D'Avino") (collectively the "WLC Defendants"), C. Esposito & Associates Limited ("EspositoCo") and Carlo Esposito ("Esposito").¹ The Claim as against Faga is for damages in negligence.

[5] EspositoCo, Esposito, and Ghani, have not defended the action; all other defendants have defended.

[6] In mid-June 2021, counsel for Century 21 Explorer Realty Inc. ("Century 21") and Ralph Shaw ("Shaw") and Barbara Wynne-Edwards ("Wynne-Edwards") informed counsel for the Plaintiff of their intention to bring motions for partial summary judgment, seeking dismissal of the

Claim as against these defendants (the "Moving Defendants"). Not all the Defendants against whom conspiracy is alleged seek to join these motions.

[7] The parties exchanged correspondence regarding the date for the Motions and a timetable ("Timetable") for the exchange of materials. The Motions were scheduled for February 14, 2022. A timetable was agreed upon by counsel including scheduling of cross examination upon affidavits to be filed. Cross examinations were set for November 19, 22 and 24, 2021.

[8] On September 15th, 2021 counsel for Shaw and Century 21 served the motion record for her client and counsel for Wynne-Edwards served her motion Record two days later.

[9] In accordance with the timetable, the Plaintiff served its responding motion record on the Moving Defendants (Shaw, Century 21 and Wynne-Edwards)

[10] Counsel for the Plaintiff at some point decided it opposed the Motion for Summary Judgment proceeding without the exchange of documents and prior to full discovery and that it was not appropriate because it would at best only be partial judgment. The Plaintiff's position was communicated via letters date November 12 and 17, 2021. Counsel advised the Moving Defendants counsel that she intended to commence a Motion seeking Directions, seeking an Order staying the Summary Judgment Motions pending the exchange of productions and oral examinations for discovery. Counsel advised on short notice that she would not be proceeding with the cross -examinations of Shaw or Wynne-Edwards on the date scheduled on November 19 and 22, 2021. Further she indicated she would not be producing Comtech's representative for cross-examination on her affidavit on November 24, 2021.

[11] The Defendant Wynne-Edwards served her sworn affidavit of documents and Schedule 'A' productions on November 29th, 2021. She provided a supplementary affidavit of documents January 10th, 2022.

[12] Shaw indicated through counsel he is unable to retrieve any of his emails due to a technical failure.

Plaintiff Position:

[13] The Plaintiff now argues that the Motion for Summary Judgment is premature because there has not been an exchange of documents and there have not been full discoveries scheduled. Second, the Motions likely will not be granted because it would be a partial Summary Judgment. The Motions, even if two are successful, would not resolve the matter there would still be a trial with respect to the other Defendants on the allegation of an unlawful conspiracy.

[14] According to the Plaintiff; the evidence in support of an unlawful conspiracy claim can effectively only be garnered through the exchange of documents and examinations for discovery of the alleged conspirators. It is only through that process that the Plaintiff can gather evidence necessary, among other things, to give rise to the presumption of a concerted purpose.

[15] In addition to being premature, these motions seek partial summary judgment. Three of the ten defendants seek the dismissal of the action as against them. If the Moving Defendants are successful in their Motions, the action would nevertheless continue against the remaining defendants (but for Ghani who has filed an assignment in bankruptcy), all of whom except Faga, are alleged to be the co-conspirators of the Moving Defendants. In similar circumstances, the Court in Mahrouh held as follows:

I should also note that, in this case, where the moving party is seeking a dismissal of the action against him, I would be reluctant to use my enhanced fact-finding powers to find that there is no issue requiring a trial against him. If summary judgment were granted in favour of the moving party, the action could still continue against the other defendants. Indeed, he would likely be called as a witness in that trial. Accordingly, to grant summary judgment would not end the proceeding, and could lead to potentially inconsistent findings.

[16] The Plaintiff argues that the case law makes clear that partial summary judgment ought only to be granted in the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim.

[17] As a result of these concerns, the Court of Appeal in *Malik v. Attia* recently articulated a three-part inquiry of the moving party that a Court should make in determining whether a motion for partial summary judgment ought to be permitted to proceed:

- a. how will be dividing the case into several parts prove cheaper for the parties;
- b. how will partial summary judgment get the parties in and out of the court system more quickly; and
- c. how will partial summary judgment not result in inconsistent findings.

[18] According to the Plaintiff, it is incumbent on the Moving Defendants to satisfy the Court regarding these three questions before being permitted to proceed with the Motions.

[19] The claims against the Moving Defendants and the claims against the other defendants are factually intertwined and the latter are not readily separable from the former. A determination of the potential liability of the Moving Defendants for unlawful conduct conspiracy will turn on the same factual matrix and evidence as the determination of the liability of the remaining defendants who are alleged to be co-conspirators of the Moving Defendants. As a result, there is the very real possibility that a trial judge's conclusions could conflict with the result reached on the Motions.

[20] The Motions have a fundamental problem according to the Plaintiff: Even if the moving Parties are successful, the Motions will not eliminate the need for a trial. Whether the Motions are successful or not, a trial judge would be required to consider the same issues and much of the same evidence as the judge who hears the Motions. This, in and of itself, is a valid basis for staying a motion for summary judgment motion.

[21] The risk of inconsistent findings is further increased given the paucity of evidence that would be before the Court on the Motions if they were to be heard prior to discoveries.

[22] The Plaintiff argues that an order to stay these Motions as premature is appropriate pursuant to Rule 1.04 on the basis that they would not sufficiently advance the litigation or serve the principles of proportionality, timeliness, and affordability.

[23] The Plaintiffs also argue that became necessary for them to commence this motion for Directions when they became aware that a Justice would inevitable conclude the motion was premature. The Plaintiff believes the Motion for Summary Judgment will be adjourned. The Plaintiff strongly argues that a Justice would not proceed to hear and render decision on the motions without a proper record. Accordingly, the Plaintiff argues the Court ought to decide now and adjourn the Motions until after the steps necessary to fairly hear the matter are taken. The Plaintiff states it is a waste of time money and resources to conduct cross examinations upon the affidavits for days, argue the Motion for a day; only to have the inevitable result of an adjournment. The Plaintiff argues that cross examination upon the affidavits produced for the motion are far less than the information that will be revealed in the broader examinations for Discovery.

[24] The Plaintiff argues use of the Motion for Directions before hearing of the Motions for Summary Judgment is the most efficient use of court time.

Position of the Moving Defendants:

[25] The Defendants, Shaw, Century 21 and Wynne-Edwards argue that the Motions were set months ago, the timetable was agreed to by the Plaintiff and it ought not to be permitted to now argue the Motions are premature or that the Motions will lead to the possibility of inconsistent verdicts. Shaw and Century 21 argue the allegations in the Claim are without foundation against them, but the mere allegations cause extreme prejudice. The impact on their business reputation is significant. The time to have objected to the Motions as either premature or not viable because it would at best result in only partial judgment and a trial would still be required, was at the time of scheduling the matters for a one day hearing, last summer.

[26] The Plaintiff advised only 8 days before the scheduled and agreed upon examinations that it would not proceed and instead would seek a motion of its own on short notice to postpone the Summary Judgment motions.

[27] According to the Moving Defendants, the Plaintiff is attempting to argue its case on the Summary Judgment motion at this motion for Directions.

[28] The Moving Defendants argue that the case law relied upon by the Plaintiff are in fact cases where adjournments were granted, not on a preliminary motion for directions, but on the Motion for Summary Judgment itself. By adding an additional layer of litigation to the Motions for Summary Judgment, that the Defendants are permitted to bring, is inappropriate and not a proper use of judicial resources or resources of the parties. The Moving Defendants argue the Motions for Judgment should proceed. On the hearing of the Motion the Plaintiff will argue many of the same issues as it did in this motion and the presiding Justice will decide. They state: "Let's get on with the Motions". If the Moving Defendants are wrong and the presiding Justice either adjourns or dismisses the motions for Judgment, the Plaintiff will be entitled to their reasonable costs.

[29] The Moving Defendants argue that there will be sufficient information before the Justice to determine the matter. On dealing with the merits of the Motion for Summary Judgment, the Moving Defendants argue the Plaintiff was a sophisticated lender, it obtained an independent appraiser on the property and in fact required the independent appraisal prior advancing the mortgage funds. This according to the Moving Defendants is a complete defence to the claims against them.

[30] The Moving Defendants further argue that the parties ought to be held to their agreement and litigation schedule. The delay is not because of some new development or change in circumstances since the initial agreement. The Plaintiff, in its factum, at paragraph 33, asserts that it was only in reviewing the matter and preparing for cross examination that they realized the Motions were premature. The Moving Defendants argues this is unreasonable. Particularly unreasonable in circumstances where the allegations of unlawful conduct conspiracy remain outstanding.

Analysis:

[31] The Moving Defendants are entitled to schedule and argue a Motion for Summary Judgement. The Plaintiff has no right to prohibit the motion from being argued. There are cases where the Court has Ordered further steps to be taken and adjourned matters.

[32] To say the least, this motion for Directions by the Plaintiff comes very late. The Court set aside one full day for the Summary Judgment Motions to be argued, the counsel that will be participating all agreed. There was no indication from the Plaintiff the schedule was tentative, or subject to another event, outside the agreed upon timetable.

[33] The Plaintiff on very short notice, approximately eight days before the first cross examination was to take place, notified its change in position. The Motion records have been prepared and served as was the Plaintiff's responding material. The only explanations provided is that it became clear the Motions were both premature and the result at best would lead to a partial judgement and therefore, could lead to conflicting decisions. Even if the Moving Defendants motion succeeded, the trial involving the others would still proceed.

[34] The fact remains, the Plaintiff agreed to the schedule of the Motions. If the Plaintiff was serious about efficient use of time in this litigation involving multiple parties and lawyers; it would have voiced objection at the time of scheduling. If the Moving Defendants insisted on scheduling a Summary Judgment motion, it may have been appropriate to have proceeded with the Motion for Direction at that time. However, it may not have. Considerable time and money has been expended, only to have this motion before the motion. The Plaintiff argues the materials can still be used and therefore most of the efforts expended will be used eventually. The fact remains, if the Plaintiff obtains the evidence it believes it will and needs in order to proceed with the Summary Judgment motion, the materials already produced will likely be inadequate. They will be redone to reflect the 'new' evidence the Plaintiff believes it will need in order to put its best foot forward on the Motion for Summary Judgment.

[35] One possible inference from the late request to delay the Motions for Summary Judgment is the Plaintiff fears the Moving Defendants may be successful. To be fair the position of the Plaintiff is the records and discoveries must be produced and conducted to allow it to put its best foot forward.

[36] The risk of partial judgment and potential inconsistent verdicts existed when the Plaintiff agreed to the litigation timetable, without objection. It is disingenuous at this late stage to argue

the Court and parties will be spared time and expense by deciding on the adjournment now, as opposed to at the Motion itself.

[37] This Motion for Directions has in part become an in-depth analysis on the merits of the Motion for Summary Judgment. Motions for Directions should not be a preview or even a defence to the Motions for Summary Judgment. Considerable time and effort has been utilized by the court, litigants and counsel in dealing with this motion before the motion.

[38] The Defendants are entitled pursuant to the Rules to schedule the motion they did. I agree the allegations of conspiracy are serious for all the Defendants, none more so than against the real estate agent Shaw and Century 21, who continue to carry on business in Carlton Place. Such serious allegations undoubtably have become the topic of conversation in Carlton Place and surrounding areas, which is not a large geographic area or population. Expert evidence is not required to conclude that the mere allegation will have significant impact. The Moving Defendants are entitled to proceed with the Motion. They face risks of cost consequences, but that is their choice. The Plaintiff will make the arguments that it has on this motion. In my view it is possible they may satisfy the presiding Justice of their viewpoint, in other words that the motions for Summary Judgment are premature. However the result of the Plaintiff argument is not predestined or absolute. If the Plaintiff is successful, it be entitled to costs. Any prejudice to the Plaintiff would be compensated by such costs. Prejudice of undue delay to the Moving Defendants, if they are ultimately successful, will be significant and costs will not likely properly compensate. Mr. Shaw has been a real estate agent in the jurisdiction for decades. If he is found liable on the conspiracy allegations his reputation will be significantly affected. However, if he is successful on the Motion for Summary Judgment there will always be the hint and suspicion that he is unethical. He and the other Moving Defendants have a right to hearing of their motion as soon as possible. If it is appropriate to grant the relief sought, it should be done at an early stage.

[39] Unfortunately, given the late notice by the Plaintiff of its change in position and refusal to participate in the November cross examinations, the date set aside for hearing of the two motions on February 14, 2022 cannot not proceed. A new date must be set, a new litigation timetable must be set. It will not be an essay matter to schedule a one-day Motion in a timely manner. I urge

counsel to agree upon an expediated timetable, if possible, agree to shorten submissions on the motion. I suggest counsel consult with the trial coordinator on Friday and attempt to arrive at a date agreeable to all for this Summary Judgment motion.

[40] The Plaintiff ought to have proceeded with the Cross-examination dates and should have produced its witness for cross examination as scheduled. However, I am not prepared to strike the Plaintiff's affidavit (filed by Ms. Deirdre Austen) All parties previously agreed to be cross examined and each shall be cross examined as quickly as possible.

[41] The Moving Defendants are entitled, and I order the Plaintiff to pay costs thrown away in this matter and the costs of obtaining a Certificate of Non-Attendance and the cancellation fee for the reporter. Neither party addressed the appropriate quantum. I direct counsel to consult one another and agree upon an amount, if possible. In the event no agreement is reached, within 21 days the Moving Defendants shall

- 1) Provide costs submissions for this motion: limited to three pages with Bill of Costs.
- 2) Provide submissions on the quantum of costs thrown away and for the non-attendance of the witness; also limited to three pages.

[42] The Plaintiff shall have a right to serve and file within 14 days of receiving the Moving Defendants submissions, their own submissions limited to a total of 8 pages.

Justice Johnston [virtual signature]

The Honourable Mr. Justice J.M. Johnston

Released: February 10, 2022

COURT FILE NO.: CV-20-006
DATE: 2022/02/10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

COMTECH FIRE CREDIT UNION LIMITED

Plaintiff

- and -

AHMAD ABDUL GHANI, WINESTONE LAVAL &
CO. LTD., CARMINE

D'AVINO, MICHEL LAVAL, C. ESPOSITO &
ASSOCIATES LIMITED,

CARLO ESPOSITO, CENTURY 21 EXPLORER
REALTY INC., RALPH

SHAW also known as RALPH H. SHAW, BARBARA
WYNNE-EDWARDS

AND ERCOLE FAGA also known as HERCULES
FAGA

also known as HERCULES E. FAGA

Defendants

REASONS FOR RULING ON MOTIONS

Johnston, J.