

Action stayed as a result of plaintiff's failure to disclose settlement

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Litigation often involves claims by a plaintiff against multiple parties. Defendants in such actions may or may not crossclaim against each other but they are presumed to be adverse to the plaintiff unless their pleadings state otherwise. In multi-party litigation in Ontario, there is an obligation to disclose a settlement agreement made between parties that has the effect of changing their adversarial positions into a cooperative one. The courts impose harsh sanctions if such disclosure is not immediately made.

In *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, the Ontario Court of Appeal upheld a motion judge's decision to permanently stay an ongoing action due to the plaintiff's failure to immediately disclose a settlement with one defendant to the other defendant.

The appeal arose from an action in which the plaintiff sought to enforce a right of first refusal against one of the defendants ("K.S.P.") in the context of a complex real estate transaction. The plaintiff sought damages against a second defendant ("Secure") concerning a leaseback agreement that it alleged existed between the two defendants, which the defendants denied in their pleadings.

K.S.P. and Secure did not cross-claim against each other as their dispute had been addressed in earlier litigation that settled.

In the spring of 2018, the plaintiff commenced a summary judgment motion for specific performance of the right of first refusal against K.S.P.

Counsel for K.S.P. attempted to contact Secure's counsel to ascertain whether Secure could provide helpful evidence to K.S.P. concerning the alleged leaseback arrangement, consistent with their pleaded positions. Counsel for Secure did not respond. As it turned out, Secure was in settlement discussions with the plaintiff.

Unbeknownst to K.S.P., the plaintiff was negotiating a settlement whereby Secure would support the plaintiff's summary judgment motion by providing affidavit evidence in which it acknowledged the existence of the leaseback arrangement. In return, the plaintiff agreed to discontinue the claim against Secure.

In addition, Secure agreed to a "continuing obligation" to provide support and cooperation to the plaintiff throughout the litigation if the summary judgment motion was unsuccessful. Secure would then receive a full and final release, which was being held in escrow by plaintiff's counsel.

On 12 April 2018, plaintiff's counsel drafted an affidavit for the principal of Secure to swear, which acknowledged the existence of a leaseback arrangement. The final version was sworn on 22 May 2018, and was held by counsel for Secure.

The terms of the settlement between the plaintiff and Secure were formally reduced to writing and accepted by Secure on 7 June 2018. The motion judge described the settlement agreement as follows: "Secure was no longer adverse in interest to the plaintiff. Rather, to obtain its bargained-for release, the quality of its continuing support of the plaintiff was subject to the plaintiff's approval."

Secure's counsel then served his client's affidavit in a responding motion record for the summary judgment motion, which purported to be sworn in response to the motion for summary judgment brought by the plaintiff. In reality, however, the affidavit was sworn in support of the motion, given the undisclosed settlement.

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On 8 June 2018, the plaintiff served a notice of discontinuance of the action against Secure. However, the consent of K.S.P. was required for the discontinuance to be effective.

Upon receiving the plaintiff's request for consent to discontinue the action against Secure, counsel for K.S.P. astutely suspected that a settlement had been reached between the other parties. K.S.P. then sought confirmation that a settlement had been reached.

On 27 June 2018, the settlement agreement (but not the release) was disclosed by the plaintiff to K.S.P., three weeks after it was signed by the parties.

K.S.P. then moved to stay or dismiss the action on the basis that the plaintiff and Secure failed to immediately disclose the settlement agreement under which Secure reversed its pleaded position, switched sides, and joined cause with the plaintiff.

The issue on the motion was whether disclosure of most of the settlement terms three weeks after the agreement was finalized was disclosed as soon as the agreement was made. The motion found the answer to be self-evident in the question: no. As a result, the motion judge permanently stayed the action based on the authority of the Court of Appeal's decision in *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 (CanLII).

On appeal, the plaintiff argued that the motion judge erred in finding that the settlement agreement changed the entire litigation landscape between the parties and that a more measured remedial response, short of a stay of proceedings, was warranted.

The Court of Appeal disagreed.

In the Court of Appeal's view, the motion judge did not misapprehend the nature of the relationship between the defendants. Even though there were no cross-claims between K.S.P. and Secure, Secure's realignment with the plaintiff was a dramatic change from K.S.P.'s perspective. After the settlement between the plaintiff and Secure, Secure reversed its position and went from opposing the plaintiff to supporting the plaintiff's claim. It was no longer taking a position in the litigation that was adverse in interest to the plaintiff.

The plaintiff further argued that it made "functional disclosure" of the settlement agreement when it served its notice of discontinuance. Combined with the delivery of Secure's affidavit (which purported to respond to the summary judgment motion), the change in the litigation landscape ought to have been obvious to K.S.P.

In the Court of Appeal's view, however, the obligation to disclose a settlement cannot turn on hints offered by opposing counsel since this would leave the matter to guesswork, which would be "an especially hazardous situation where counsel is less experienced or when parties are self-represented."

Further, the requirement to disclose an agreement where a party switches sides from its pleaded position is *immediate*. That there was only a three-week period between the agreement between the plaintiff and Secure and the disclosure to K.S.P. did not matter. Of further concern was that the agreement was only disclosed after counsel for K.S.P. demanded it, and even then, it was disclosed for tactical reasons rather than to comply with a legal obligation.

Lastly, the plaintiff argued that the failure to immediately disclose did not warrant a stay of proceedings. The settlement did not egregious circumstances such as *Handley Estate*, where a sham process was perpetrated for five years after an undisclosed settlement agreement. Here, there was no bad faith, the delay was comparatively brief, and K.S.P. suffered no prejudice as a result of what happened.

In rejecting this argument, the Court of Appeal affirmed prior authority which determined that any failure of compliance amounts to an abuse of process and must result in consequences of the most serious nature for the defaulting party: *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898. The seemingly harsh remedy of a stay is designed to achieve justice between the parties and enables the court to enforce and control its own process by deterring future breaches of the well-established rule.

As a result, the plaintiff's appeal was dismissed with costs payable to K.S.P. of \$25,000. The plaintiff achieved a settlement with one defendant but cannot pursue the action against the other.

The takeaway is that a settlement between a plaintiff and one of multiple defendants has to be disclosed immediately once the terms are formally agreed upon. In many cases, the settling defendant may not share the plaintiff's concerns about the action continuing and there may be resistance to disclosure of the agreement. However, the decision affirms that the obligation to disclose a settlement reached with one defendant to the others is immediate and cannot be delayed for tactical or any other reasons. A PDF version is available to download [here](#).

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com