

CITATION: Economical Insurance Co. v. Fairview Assessment Centre, 2013 ONSC 4037
COURT FILE NO.: CV-10-414992
DATE: 20130611

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Economical Insurance Company, Perth Insurance Company, and Waterloo Insurance Company, Plaintiffs

– AND –

Fairview Assessment Centre Inc., Pacific Assessment Centre Inc., Yan Tam, Alexandre Lobatch, Vitali Tourkov, and Danny Grossi, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Melvyn Solmon and J. McReynolds*, for the Defendants, Fairview Assessment Centre Inc., Pacific Assessment Centre Inc., Yan Tam, Alexandre Lobatch, Vitali Tourkov

Ryan Kirshenblatt, for the Plaintiffs

HEARD: June 7, 2013

ENDORSEMENT

I. The Appeal

[1] The Defendants, Fairview Assessment Centre Inc., Pacific Assessment Centre Inc., Yan Tam, Alexandre Lobatch, Vitali Tourkov (“Fairview”), appeal an order of Master McAfee dated August 14, 2012 dismissing a motion to compel the Plaintiff to provide answers to a Demand for Particulars. For the reasons that follow, I am of the view that the Master erred and that the Plaintiffs must provide Fairview with the particulars that they seek.

[2] In her reasons for decision dated June 25, 2012, the learned Master found that there was no affidavit filed by Fairview indicating that the particulars sought are not within its knowledge and that they are necessary in order to plead. Master McAfee also found that the Amended Fresh as Amended Statement of Claim (hereinafter the “Statement of Claim”) was not so general or so bald that pleadings were manifestly necessary absent an affidavit from the moving parties.

[3] In addition to the Statement of Claim, the record before the Master included the Plaintiffs’ affidavit of documents. As Plaintiffs’ counsel describes it in his factum, this affidavit of documents “listed each and every document forming the basis of the [Plaintiffs’] claim against

the Appellants, and enclosed a CD that contained the [Plaintiffs'] entire Schedule 'A' productions."

[4] Two issues present themselves on this appeal: i) did the learned Master err in dismissing the motion for particulars because there was no sworn affidavit testifying to its necessity; and ii) if so, had the Plaintiffs' affidavit of documents already answered the demand for particulars?

II. Is an affidavit needed?

[5] The Statement of Claim contains allegations of fraud and misrepresentation against the Defendants. Under these circumstances, Rule 25.06(8) of the *Rules of Civil Procedure* requires that the pleading "shall contain full particulars". This is a mandatory rule. "The required elements of fraudulent misrepresentation must be pleaded and supported by adequate particulars." *Corfax Benefit Systems Ltd. v Fiducie Desjardins Inc.* (1997), 37 OR (3d) 50, at para 32.

[6] Rule 25.06(8) specifically requires full particulars of each allegation of fraud made in the Statement of Claim. "[T]he Plaintiffs must set out precisely what each allegation of misrepresentation or defamation is, when the particular incident occurred, what was alleged to have been said, by whom and to whom." *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 OR (3d) 343, at para 16 (Ont Gen Div).

[7] In her endorsement, Master McAfee relied on *Obonsawin (cob Native Leasing Services v Canada*, [2001] OJ No 369 (SCJ) for her ruling that particulars should be ordered only when they are not within the knowledge of the party demanding them and are necessary to enable the other party to plead. The Master reasoned that the question of whether the particulars are within the knowledge of Fairview requires sworn evidence.

[8] The *Obonsawin* case correctly sets out the test that is generally applied on a motion for particulars. However, *Obonsawin* was not a fraud case and does not advert to the special requirements for pleading when fraudulent misrepresentation is the cause of action. Cases dealing with pleadings of fraud have generally followed a different logic.

[9] Rule 25.06(8) is clear that a pleading of fraud would be deficient if it did not contain full particulars. *Banalyk v University of Toronto*, [1999] OJ No 2162, at para 65. That fact removes the element of discretion from the question of whether particulars should be ordered where they are not already contained in the Statement of Claim. I can put the point no better than Master Muir put it in *D'Aguanna v VIPR Industries Inc.*, 2010 ONSC 3369, at para 7:

Ordinarily, I would agree with the plaintiffs' argument that particulars will only be ordered where the party seeking the particulars swears an affidavit that states that he or she is unable to plead without them and they are not otherwise within his or her knowledge. However, I do not view that requirement as mandatory when the allegations in question are in the nature of fraud, misrepresentation or breach of trust.

[10] Courts have said repeatedly that while Rule 25.10 dealing with particulars is generally discretionary, Rule 25.06(8) makes particulars mandatory where fraud and/or fraudulent misrepresentation is alleged. That type of allegation puts the pleading into an altogether different category. Thus, for example, in *Diamond & Diamond in Trust v Maniatokos*, [2003] OJ No 2336, the court dealt with a pleading that contained numerous causes of action. The defendant's motion for particulars contained merely perfunctory affidavit support, which did not establish whether the particulars were already within the defendant's knowledge. At paragraph 15, Master Egan stated:

The motion for particulars is therefore dismissed with one exception. Rule 25.06(8) requires full particulars of fraud. Despite the delay tactics and deficiencies of the defendant's material, I reluctantly conclude that the plaintiff should provide particulars of the allegations of fraud and bribery. Fraudulent documents are alleged to have been produced by the defendants in the absence of a denial. I assume the defendants have the documents; however, the defendants cannot know what documents the plaintiff alleges are fraudulent.

[11] The terms of Rule 25.06(8) eliminate the need for affidavit support in a motion for particulars involving allegations of fraud. Fairview is entitled to receive full particularization of each allegation of fraud made against it before pleading in defence. There is no need for a representative of Fairview to swear an affidavit stating that these particulars are necessary for *its* pleading, since the relevant Rule already states that they are necessary for *the Plaintiffs'* pleading.

[12] Master McAfee erred in dismissing the motion on the basis that no affidavit was filed in its support. That error is one of law, requiring that the motion be reconsidered on its merits. *Zeitoun v Economical Insurance Group* (2008), 91 OR (3d) 131 (Div Ct), aff'd (2009), 96 OR (3d) 639 (Ont CA).

III. Does the Plaintiffs' affidavit of documents suffice?

[13] The Plaintiffs take the position that even if Fairview is entitled to particulars, they have already provided all that is necessary in the form of their affidavit of documents and copies of the documents listed in their Schedule "A". According to the Plaintiffs, it is only a matter of combing through those documents, which consist primarily of invoices and medical documentation submitted in the first place by the Defendants to the Plaintiffs, in order to discern the details of each of the alleged frauds.

[14] Fairview concedes that the documentary disclosure made by the Plaintiffs is voluminous and probably does contain all of the information that it seeks. Its point, however, is that it cannot identify with sufficient specificity what information in those documents is alleged to be fraudulent.

[15] Mr. Solmon, on behalf of Fairview, explains that if he looks at an invoice contained in Schedule "A", he cannot tell if the alleged fraud is the amount of the invoice, the authorization for the invoice, whether the invoiced services were or were not provided, etc. Each invoice and

medical record may well contain the information on which the Plaintiffs' allegations are based, but the documentation provided by the Plaintiffs is in its raw state and does not truly disclose the details that Fairview requires.

[16] In *Duncan v Carrington Homes Ltd.*, 2007 CarswellOnt 3109 (SCJ), the court dismissed a motion seeking an answer to a demand for particulars made by the plaintiff after service of the defendant's affidavit of documents. In arriving at that result, it reviewed the materials submitted by defendant's counsel, including some correspondence between counsel, and commented at para 10:

In this letter the Defendant's solicitor indicates that the Plaintiff's Motion Record was served after the Defendant had delivered its Brief of Documentary Productions and that a substantial portion of the particulars which are requested have been effectively answered by the delivery of the Defendant's Affidavit of Documents and Brief of Documentary Productions. The letter directs the Plaintiff's solicitor to where answers to the Plaintiff's Demand for Particulars can be found in the Brief of Documentary Productions of the Defendant.

[17] Had Plaintiffs' counsel here accompanied his clients' affidavit of documents with a letter such as that described in *Duncan*, I would be inclined to dismiss Fairview's motion. The requirement of particulars is a matter of substance, not form, and it would certainly suffice for the Plaintiffs to make clear in a letter, or chart, or some other suitable type of written explanation, what it is that forms the basis of each fraud allegation. The affidavit of documents and the copies of the Schedule "A" documents alone are simply not enough.

IV. Disposition

[18] Greer J. held in *Lana International, supra*, at para 16, that "the Plaintiffs must set out precisely what each allegation of misrepresentation or defamation is, when the particular incident occurred, what was alleged to have been said, by whom and to whom." I likewise require the Plaintiffs here to convey to Fairview an explanation that will permit them to identify the alleged frauds with sufficient particularity to satisfy the pleading requirement.

[19] The Plaintiffs shall provide Fairview with the precise details – i.e. when, where, how, to and by whom, how much, etc. – of each allegation of fraud. As indicated, this need not take any special form and may be done as a letter of explanation that refers to the affidavit of documents and Schedule "A" documents already provided.

[20] Counsel have each provided me with an outline of costs. There is a surprisingly large discrepancy between Fairview's counsel and the Plaintiffs' counsel, with the former requesting exactly 10 times more on a partial indemnity basis than the latter. While I am sure that Fairview's counsel invested its time well – Fairview's success in this motion and the able arguments of its counsel demonstrate that – its request of approximately \$15,000 strikes me as a bit high under the circumstances. I do not think that a successful party's request for costs need be measured precisely against the unsuccessful party's cost outline, but the discrepancy here does give me some pause and provides some guidance in exercising my discretion in fixing costs.

[21] The Plaintiffs shall pay costs to Fairview in the total amount of \$10,000, inclusive of disbursements and HST.

Morgan J.

Date: June 11, 2013