CITATION: Mullin v. Allstate, 2013 ONSC 2867
COURT FILE NO.: C-1579-11
DATE: 2013-06-07
CORRECTED DECISION RELEASED: 2014-05-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Brenda Mullin Plaintiff	A. Patrick Wymes, for the Plaintiff
– and –	
Allstate Insurance Company and NRCS Inc. Defendants	Ryan Kirshenblatt, for Allstate and as agent for Miss Henebery counsel for NRCS Inc.
	HEARD: April 25, 2013

CORRECTED DECISION ON MOTION

This decision corrects the spelling of the plaintiff's name from Brenda Mullen to Brenda Mullin

DEL FRATE J.:

[1] The defendants bring this motion to strike the plaintiff's numerous requests to admit as an abuse of process. Further they seek an order precluding the plaintiff from serving any further requests to admit.

[2] This matter arises as a result of a motor vehicle accident on December 11, 2003, whereby the plaintiff allegedly sustained numerous injuries which required the involvement of Allstate being her insurer and NRCS as the rehabilitation company.

[3] In anticipation of the discoveries of the defendants NRCS and Allstate, which were to be held on October 18, 2012 and January 17, 2013 respectively, the plaintiff served a request to admit on the following dates:

[4] To NRCS, requests were served on August 8, 2012, October 19, 2012 and January 24, 2013. A reply to these requests was given on August 14, 2012 and November 6, 2012. None was received from the January request.

[5] To the defendant Allstate, requests were served on July 30, 2012, October 24, 2012, November 9, 2012, November 21, 2012, two on January 21, 2013, January 22, 2013 and January 23, 2013. Responses were provided on August 16, 2012, a correction on November 5 and 7, 2012, on November 12, 2012 and November 23, 2012. No response was received to the request made in January.

Positions of the Parties

[6] The defendants submit that by serving so many requests to admit, the plaintiff is attempting to circumvent the rules for oral discovery, which limit her to three hours. Rule 31.02(1) of the *Rules of Civil Procedure* permits either an oral examination or a written examination but not both except with leave from the court.

[7] The defendants further contend that the requests for the most part are improperly drafted in that the documents that the plaintiff is seeking to admit speak for themselves, or deal with a question of law or are vague.

[8] Accordingly, they claim that the requests which have not been responded to should be struck and because of the numerous further requests forwarded in a very brief period of time, the plaintiff should be ordered not to serve additional requests in the future.

[9] The plaintiff submits that the defendants' motions should be dismissed since they have failed to establish an evidentiary basis to show that the plaintiff is attempting to circumvent Rule 31.02 by seeking both oral and written discovery. In fact, she argues, three of the requests were served before any of the discoveries took place.

[10] The plaintiff further submits that there is no rule that limits the number of requests that a party can make and that requests can be made up until 20 days before trial.

[11] Regardless, the plaintiff submits that the evidence she is asking to be admitted consists facts that will be critical to the litigation. The requests, if answered, would shorten the trial in that the issues would become more defined.

[12] Lastly, she submits that the requests are additionally important in this case as the plaintiff is alleging bad faith against both defendants.

The Law

[13] Rule 51 of the *Rules of Civil Procedure* provides as follows:

> **Interpretation**
>
> **51.01** In rules 51.02 to 51.06,
>
> "authenticity" includes the fact that,

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been,

(b) a document that is said to be a copy is a true copy of the original, and

(c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed. R.R.O. 1990, Reg. 194, r. 51.01.

REQUEST TO ADMIT FACT OR DOCUMENT

51.02 (1) A party may at any time, by serving a request to admit (Form 51A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document. R.R.O. 1990, Reg. 194, r. 51.02 (1).

(2) A copy of any document mentioned in the request to admit shall, where practicable, be served with the request, unless a copy is already in the possession of the other party. R.R.O. 1990, Reg. 194, r. 51.02 (2).

EFFECT OF REQUEST TO ADMIT

Response Required Within Twenty Days

51.03 (1) A party on whom a request to admit is served shall respond to it within twenty days after it is served by serving on the requesting party a response to request to admit (Form 51B). R.R.O. 1990, Reg. 194, r. 51.03 (1).

Deemed Admission Where No Response

(2) Where the party on whom the request is served fails to serve a response as required by subrule (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit. R.R.O. 1990, Reg. 194, r. 51.03 (2).

Deemed Admission Unless Response Contains Denial or Reason for Refusal to Admit

(3) A party shall also be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request, unless the party's response,

(a) specifically denies the truth of a fact or the authenticity of a document mentioned in the request; or

(b) refuses to admit the truth of a fact or the authenticity of a document and sets out the reason for the refusal. R.R.O. 1990, Reg. 194, r. 51.03 (3).

COSTS ON REFUSAL TO ADMIT

> **51.04** Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs. R.R.O. 1990, Reg. 194, r. 51.04.

Discussion

[14] Rule 51 was enacted to limit the issues in dispute and to avoid or lessen the amount of time required to establish the authenticity of documents.

[15] As Madam Justice Dunnett stated at p. 4 of a 2008 article entitled *Tactical Tools: Effective Use of Requests to Admit and Settlement Offers*, Ontario Bar Association Sharpening the Sword, "A properly written and concise request to admit can significantly narrow the issues in dispute and move litigation ahead quickly. It is prudent to move from the undisputed areas to the disputed ones."

[16] The defendants submit that the requests are improperly worded, general in nature, self-explanatory and repetitive.

[17] The plaintiff agrees that some may be improperly worded, but argues that the majority of the items she seeks to admit are relevant and if admitted, would shorten the trial proceedings.

[18] I agree that some are improperly worded but on the whole, the items the plaintiff is seeking to admit are relevant and a reply ought to have been served. If a particular demand is not clear, then the parties can make that observation in reply and the plaintiff could deal with it in due course. Here, the defendants have chosen not to reply any further without legitimate reason.

[19] The defendants have referred me to jurisprudence where orders were granted preventing a party from serving additional requests to admit. See G*ualtieri v. Canada (Attorney General)* [2008] O.J. No. 698; *Milani v. Milani* [2005] O.J. No. 693; *Muskoka Lakes Township v. 1679754 Ontario Limited* 2011 ONSC 1997; 106 O.R. (3d) 540 (Div. Ct.); *Slate Falls Nation v. Canada (Attorney General)* [2005] O.J. No. 5228.

[20] I have reviewed those cases, and it appears to me that the facts in those cases were so extreme that there was no other reasonable recourse. In *Gualtieri*, the plaintiff had attended 31 days of examinations, answered 10,579 questions and given and answered 117 undertakings. Still, the defendant delivered three requests to admit 153 additional items. Although the defendant was barred from issuing any further requests, a further eight hours were permitted to complete the examinations.

[21] In *Milani*, five requests totalling 576 questions were delivered in less than two months. Justice Rogers granted the order since the issues that were raised in the request were irrelevant to the trial. Likewise, in *Muskoka Lakes*, the Divisional Court upheld the motions judge on the basis that the plaintiff would be unreasonably burdened at that stage and that the information being requested may or may not have been relevant, considering the extent of production already

made. Lastly, in *Slate Falls Nation*, the party was attempting to obtain written discovery over and above the oral discovery.

[22] No such facts exist in this case.

[23] In the eight requests served on Allstate, there were 143 questions of which 68 had already been answered. There was an admission on 33 documents and no response on 17 documents.

[24] In the NRCS request, a reply was made on all of the requests except for the one served on January 24, 2013, which contained a total of 23 questions. It is noteworthy that in the responses to the requests to admit by both defendants, the response was made in one page.

[25] The plaintiff admits that the numerous requests were made to facilitate the various topics that were meant to be addressed by that particular request. In other words, one request dealt with issues related to the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Another request dealt with the SABS regulations. Another request dealt with the limitation issues. By setting out these requests on those particular topics, all parties would be or should be aware of what the issues are thus facilitate the proceedings or else shorten the trial.

[26] Unfortunately the Rules do not give much guidance as to how the requests to admit ought to be structured. The plaintiff's decision to organize them by topic/area is probably an effective way to structure the requests to admit provided that the requests specifically identify the issue. In turn, the response could be structured in the same fashion.

[27] Consideration should be given to structuring the question in a concise and clear fashion so as to prevent any ambiguities. Further, requests on issues of law should be avoided since ultimately, the judge will have to make a determination on any such questions.

Abuse of Process

[28] The defendants submit that the serving of eight requests to Allstate and four requests to NRSC from July to January would constitute an abuse of process, particularly when two were served on the same day. I agree that the timing of these requests is somewhat unusual; however, as I read the rule, there is no limitation on the number of requests that can be made or when they can be made except that none may be made later than 20 days before trial.

[29] As to the number of requests, in an article by J. Leon and G.T. Roccamo (as she then was), "Strategic Uses of a Neglected Rule: Rule 51 Request to Admit", (207, 32 Advocates' Quarterly. 247 at p. 250) the authors state: "Multiple requests: As new facts are learned or as new documents are disclosed, consider making multiple requests to admit as the proceeding advances."

[30] The authors also state that requests to admit may refine issues ahead of oral discovery and obviously ahead of trial.

[31] Although the plaintiff's approach was unorthodox, it is no reason to strike the requests on those grounds and to order that no further requests be delivered. Litigation is an evolving

process and to limit the number of requests would be contrary to the spirit of the Rules. It is always the Court's hope that counsel will not abuse the Rules and will act in a reasonable and responsible fashion to make the process as cost effective and efficient as possible.

[32] The defendants submit that the numerous requests are time consuming. One must consider, however, that if one of those matters has to be proven at trial, the same amount of time if not more would be consumed and would be quite disruptive and tedious in establishing uncontested issues, especially if a jury has been selected by the parties.

[33] Once a request to admit has been served, the other party has the obligation to respond to it otherwise the consequence pursuant to Rule 51.03(3) would be a deemed admission. More importantly, the costs principles enunciated under Rule 51.04 could result in drastic consequences following a trial.

[34] Under the circumstances, the motions brought by the defendants are dismissed. Should it be necessary to address me on the issue of costs, then the parties can make an appointment within the next 30 days through the trial coordinator's office in Sudbury. Order to issue as per reasons.

Mr. Justice Robert G.S. Del Frate

Released: May 23, 2014

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BETWEEN:

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Plaintiff

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Defendants

CORRECTED DECISION ON MOTION

THIS DECISION CORRECTS THE SPELLING OF THE PLAINTIFF'S NAME FROM BRENDA MULLEN TO BRENDA MULLIN

Del Frate J.

Released: May 23, 2014