FILE/DIRECTION/ORDER

KOEHNEN J.

ACTION # CV-17-577020

DATE: December 31, 2019

WISEAU STUDIO, LLC et al.

Plaintiff(s)

V.

RICHARD HARPER et al.

Defendant(s)

CASE MANAGEMENT: YES [x] NO [ ]

COUNSEL: D. Brinza for the plaintiffs

M. Diskin and M. Bacal for defendants

Background to the Motion

[1] This was a motion that plaintiffs served on December 30, 2019 returnable December 31, 2019. The motion is for an order adjourning the 10-day trial that is scheduled to begin in this matter on January 6, 2020. The notice of motion calls for the motion to be returnable before Justice Schabas, the designated trial judge. The plaintiffs had made no arrangements to have Justice Schabas hear the matter on December 31, 2019.

[2] The plaintiffs submit that the motion should be heard by the designated trial judge or any other judge of the court other than me. While the plaintiffs did not advance any reason for that request, I presume it is based on the fact that, on December 10, 2019 while presiding over the trial management conference in this matter, I declined the plaintiffs' motion to adjourn the trial. At that point, the plaintiffs asked me to adjourn the trial so that they could pursue allegations of perjury against the defendants with the Crown. My reasons for declining that request are contained in my endorsement of December 10, 2019. In addition, I presume that the plaintiffs are unhappy to have me hear the motion because, in my capacity as case management judge, I have indicated on numerous occasions in the past that the trial would proceed on January 6, 2020 and would not be adjourned.

[3] On being advised of the motion to adjourn, I got in touch with the designated trial judge to see if he was available to hear the motion, by telephone conference if necessary, before the trial began. He was not available.

[4] While in a perfect world it might be desirable for the designated trial judge to hear the motion, it was also in the interests of the parties to have the motion dealt with before January 6, 2020 to avoid unnecessary costs of preparing for trial should the motion be granted. The plaintiffs' witnesses reside in California and should know before January 6 whether they will need to travel to Toronto.

[5] In those circumstances it was appropriate in my view for me to hear the motion as opposed to another judge (apart from the designated trial judge). I have acted as case management judge in this matter since March 2018. Motions in matters that are case managed must be brought before the case management judge. The whole purpose of the case management is to have matters disposed of by a judge who is familiar with the history of the proceeding.

The Motion

[6] The plaintiffs seek an adjournment because they do not have counsel despite what they say are reasonable efforts to obtain counsel. Shortly before the trial management conference in this matter over which I presided on December 10, 2019, the plaintiffs had tried to retain Mr. Matthew Frontini. The defendants objected because of Mr. Frontini had been a lawyer with Gilberts LLP until earlier this year. Defendants' counsel were also with Gilberts LLP until earlier this year.

[7] Mr. Brinza appeared on behalf of the plaintiffs on this motion on a limited retainer basis. He is the plaintiffs' sixth lawyer in this proceeding. He has explained to the plaintiffs that he cannot adequately prepare for a trial beginning on January 6, 2020 given the large volume of documentation.

[8] Mr. Wiseau filed an affidavit on the motion in which he says:

> "It would be a major disservice to justice if I am forced to represent myself at the trial because the system did not give me sufficient time to engage the services of qualified Ontario trial counsel."

[9] The defendants object to the adjournment.

[10] I decline to grant the adjournment.

[11] While I will summarize part of the history of the proceeding in these reasons, the reasons should be read together with my endorsements of June 4, 2019 and December 2, 2019 to fully understand the history of the proceeding.

The Test for an Adjournment

[12] In considering a request for an adjournment, a judge must balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits: *Turbo Logistics Canada Inc. v. HSBC Bank Canada*, 2016 ONCA 222, para. 18.

(a) The interests of the Plaintiffs

[13] The plaintiffs have a legitimate interest in having access to counsel and in being represented by counsel at trial. The refusal to grant an adjournment may jeopardize that right. Whether it is appropriate to jeopardize that right depends on the circumstances of the individual case. In this case, any limitation on the plaintiffs' access to counsel is a limitation of their own making about which they have been warned on numerous occasions in the past.

[14] A bit of history is required to put the plaintiffs' rights and interests their proper context.

[15] By way of summary, in February 2019, the defendants sought to bring an anti-SLAPP motion to dismiss the plaintiffs' claim. As a result of a case management conference, it was agreed that it would be preferable for all parties to proceed to an expedited trial instead of proceeding with an anti-SLAPP motion. This was a concession by the defendants to the plaintiffs. Anti-SLAPP motions are designed to proceed on an expedited timetable and would likely have been disposed of within two or three months. The parties therefore agreed to an expedited timetable that would get the matter to trial by the end of 2019.

[16] Shortly thereafter, the plaintiffs' relationship with their lawyer broke down. That was the plaintiffs' second lawyer. A delay of several months ensued before the plaintiffs retained new counsel. A new timetable was then created to accommodate the plaintiffs and their new counsel. On June 4, 2019 I set January 6, 2020 as the trial date.

[17] Since February 2019 I have dealt with three motions by three different lawyers for the plaintiffs to remove themselves from the record. The reasons for all three motions similar. In essence, the plaintiffs refused to provide counsel with anything approaching a reasonable retainer for trial and prohibited counsel from beginning work on any single task unless the plaintiffs specifically approved that task in advance. Litigation lawyers cannot be expected to work on those terms. I have made that clear to the plaintiffs on numerous occasions. I have told Mr. Wiseau that no lawyer would represent him on the trial unless he provided the lawyer with a retainer that covered the cost to prepare for and attend a 10-day trial, plus a generous contingency in the event their time estimates were incorrect.

[18] If the plaintiffs now find themselves without counsel, that is a situation entirely of their own making and one about which I have warned Mr. Wiseau on many occasions. On each of those occasions I have made it clear to Mr. Wiseau that the trial would proceed on January 6, 2020 and would not be adjourned.

[19] While a refusal to adjourn should never be entirely absolute because there will always be the possibility of totally unforeseen circumstances, the plaintiffs' request for an adjournment does not fall into the category of unforeseen events.

[20] The plaintiffs have known since June 2019 that the trial would begin on January 6, 2020. They have treated their own lawyers in a commercially unreasonable manner and forced them to remove themselves from the record.

[21] Given that Mr. Brinza is the plaintiffs' sixth law firm to represent them in this action, they have had ample time and opportunity to avail themselves of the right to counsel. They have failed to act responsibly in doing so. They should not be able to visit the consequences of their failure to act responsibly on the defendants or other participants in the justice system.

(b) The Interests of the Defendants

[22] As noted in paragraph eight of my endorsement of June 4, 2019 the mere presence of this action imposes a restraint on the freedom of speech and the commercial rights of the defendants. The defendants are the weaker of the two sides. That was why the defendants sought to bring an anti-SLAPP.

[23] The defendants have a right to know whether the restraints on their freedom of speech and their commercial rights are legally justified or not. An adjournment of the trial further delays their legitimate interest in adjudicating these issues.

[24] If the court permits the plaintiffs to act irresponsibly with respect to numerous sets of lawyers and then allows the plaintiffs to delay the trial because of their own lack of responsibility, it would be doing a grave injustice to the defendants. The defendants would presumably never have agreed to forgo their anti-SLAPP motion had they known the court would act in that way.

[25] In addition, the defendants have made arrangements to have a large number of witnesses attend in Toronto during the weeks of January 6 and 13, 2020. Many of those witnesses are travelling from outside of Toronto and have presumably rearranged their own schedules to be available for trial.

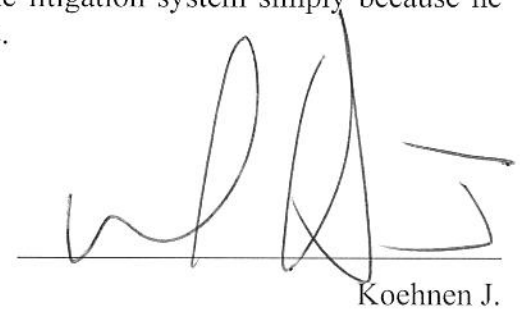
(c) The Interests of the Administration of Justice

[26] The adjournment request also creates larger concerns for the administration of justice and the rights of others to access to justice.

[27] As noted earlier, the trial date was set in June, 2019. It was set for 10 days. That means that a judge of this court has been taken out of play for 10 days. To adjourn the trial amounts to a waste of 10 days of judicial time that could have been available for other litigants, but no longer is.

[28] While the plaintiffs have a right to counsel, that right should not be used to deny other litigants waiting for court dates access to justice.

[29] To use Mr. Wiseau's language it would be a "major disservice to justice" to allow him to delay access to justice to the defendants and others in the litigation system simply because he refuses to deal with lawyers on ordinary commercial terms.



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