FILE/DIRECTION/ORDER

KOEHNEN J.

ACTION # ACTION # CV-17-577020

DATE: January 3, 2020

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

[1] This is a motion by the plaintiffs to discontinue the main action.

[2] On December 31, 2019 I heard and dismissed the plaintiffs' motion to adjourn the trial. The notice of motion for that hearing referred to the possibility of a discontinuance as an alternative form of relief. During the course of the motion, plaintiffs' counsel advised that they not be seeking to discontinue the claim.

[3] Shortly after releasing my reasons on December 31, Mr. Wiseau sent defence counsel and me a document entitled "Total Withdraw" in which he purported to discontinue the claim.

[4] On Wednesday, January 1, 2020 plaintiffs' counsel requested that this motion be heard on Friday, January 3, 2020. The trial in the main action and the counterclaim is scheduled to begin on Monday, January 6, 2020.

[5] The ability of a plaintiff to discontinue an action is governed by rule 23.01(1)(b) which provides that a plaintiff may discontinue an action after the close of pleadings only with leave of the court or consent of the defendant.

[6] In determining whether to grant leave to discontinue, the court must balance the rights and interests of the parties and consider the prejudice the plaintiff would suffer in not being permitted to discontinue against the prejudice to the defendant if leave were granted. The court should also take into account its ability to neutralize prejudice through the imposition of terms: *Simanic v. Ross*, 71 O.R. (3d) 161; [2004] O.J. No. 5764 at para. 25.

(a) The Interests of and Prejudice to the Plaintiffs

[7] In his oral submissions, Mr. Brinza, on behalf the plaintiffs, submitted that the prejudice to the plaintiffs if I refuse to grant leave to discontinue is serious because the plaintiffs are without counsel. Forcing them to trial in three days' time conduct a trial with legally complex issues without the assistance of counsel is seriously prejudicial to them.

[8] Mr. Brinza proposes that the main action be discontinued but that the defendants continue with their counterclaim on Monday. This, Mr. Brinza submits, would make the proceeding next week much more efficient.

[9] The absence of counsel was the basis for the plaintiffs' request to adjourn that was argued on December 31. I declined that motion because the plaintiffs' lack of counsel is a situation entirely of their own making.

[10] Mr. Brinza has been retained on a limited retainer basis to argue this and the adjournment motions. He is the plaintiffs' sixth lawyer in this proceeding. Since February 2019 I have, as case management judge, dealt with three motions by three different lawyers to remove themselves from the record as plaintiffs' counsel. 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. The plaintiffs have refused to pay counsel for tasks that they did not specifically authorized in advance. Litigation lawyers cannot be expected to work on those terms. I have made that clear to the plaintiffs on numerous occasions.

[11] I have also told Mr. Wiseau on several occasions 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 the lawyer's time estimate was incorrect.

[12] If the plaintiffs now find themselves without counsel, that is a situation entirely of their own making and one about they have been warned several times. Each of those warnings was also accompanied by a clear statement that the trial would proceed on January 6, 2020 and would not be adjourned.

[13] 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.

[14] If the absence of counsel was not a reason to adjourn the trial, it is certainly not a reason to discontinue the claim because, as discussed later in these reasons, a discontinuance puts the defendants to even greater prejudice than an adjournment does.

[15] In addition to Mr. Brinza's submissions on this motion, the plaintiffs also personally served a document entitled "Total Withdraw" on December 31, 2019 which Mr. Brinza had no role in drafting. It provides the following reasons for wanting to discontinue the claim:

> "-The Ontario justice system is stacked against foreigners and self-represented litigants;
>
> - Most of the preliminary matters and case management issues were decided against Plaintiffs;
>
> - Perjurious and misleading statements and doctored copies of documents have been admitted into the Defendants' evidence, leading to the entire proceeding becoming contaminated;
>
> - Tight and unrealistic deadlines have been strictly enforced against the foreign Plaintiffs, while the Ontario-based Defendants were not held to strict deadlines;
>
> - Unfamiliarity with the Ontario justice system was always held against the foreign Plaintiff, while the Ontario-based Defendants were allowed to use it to gain an unfair advantage in litigation.
>
> -Plaintiffs honestly believe that American courts offer a much higher level of justice, equal treatment and procedural fairness to litigants, whereas the Ontario courts have proven to be a frustrating and substandard venue for foreigners seeking justice, very much below the standard expected of a developed legal system."

[16] I will address each in an effort to explain to the plaintiffs why certain things occurred in the litigation to try to dispel their view that the system is stacked against them as foreign or self-represented litigants.

[17] The court has gone a considerable way to accommodate the plaintiffs. Case conference calls were generally held at 5 PM or later to accommodate Mr. Wiseau who resides in California which is three hours behind Toronto time and who wanted to participate in and make submissions during those case conferences even when represented by counsel.

[18] The court and the parties got to the point of a trial beginning on January 6, 2020 as a way of allowing the plaintiffs to avoid an anti-SLAPP motion that the defendants wanted to bring in February 2019. At that time, a compromise was reached whereby the plaintiffs refrained from bringing the anti-SLAPP motion in exchange for an expedited route to trial that would see the matter tried *before* the end of 2019. The plaintiffs were represented by counsel and agreed to a timetable to govern the action.

[19] The timetable was amended several months later at the plaintiffs' request. The change was brought about by the plaintiffs' second lawyer removing himself from the record. Although the plaintiffs were aware of this for several months, they took to steps to retain new counsel. When

new lawyers were retained, they and the plaintiffs required a change to the timetable which was granted.

[20] As a result of the change to the timetable, in June 2019 I set January 6, 2020 as the trial date.

[21] When Mr. Wiseau expressed concern about the commercial terms that his lawyers requested from him, I explained to him that the terms were conventional and, if anything, generously skewed in the plaintiffs' favour because the retainers they required were materially less than I would have thought necessary.

[22] When the plaintiffs' fifth lawyer removed himself from the record, there was a dispute about fees. The plaintiffs took the position that their fifth lawyer was obligated to return to them the initial $5,000 retainer they had paid. I explained to Mr. Wiseau the process to request an assessment of costs and explained that that decision would usually be made by an assessment officer, not a judge. To help Mr. Wiseau out, I offered to make myself available to determine the issue if he wanted me to. If he preferred to pursue an assessment, he could obviously do that as well. An assessment would, however require Mr. Wiseau to navigate the assessment process as a self-represented litigant who was outside of the country which made the logistics of doing some more challenging for him. An assessment would also take much longer than if I made myself available. Mr. Mr. Wiseau elected to use my services.

[23] As trial approached, it would ordinarily have been the plaintiffs' responsibility to file a trial record. Since the plaintiffs were not represented by counsel at the time, I asked the defendants to prepare and file a trial record. That caused the defendants to incur both time and the expense of a filing fee that would ordinarily be borne by the plaintiffs.

[24] In addition, I also requested the defendants to prepare books of documents and affidavits for trial. Ordinarily that would be an exercise undertaken by a plaintiff or by the two sides together. Given that the plaintiffs were outside of the jurisdiction and not represented by counsel, it offered considerable logistical convenience to the plaintiffs to have defence counsel undertake that task. That also resulted in time and expense to the defendants that they would not otherwise bare.

[25] Furthermore, Mr. Wiseau wanted to use the discovery transcripts of the defendants at trial. He had not, however, ordered copies of those transcripts and did not seem to know how to do that. To ensure that the lack of transcripts was not a barrier to the trial proceeding, I asked the defence counsel to order the transcripts. Once more the defendants were required to bare a cost that should have been born by the plaintiffs.

[26] With respect to the concern about "perjurious and misleading statements" having been admitted into the defendant's evidence, thereby "contaminating" the proceedings, I have explained to Mr. Wiseau on at least two occasions that each side is free to file whatever affidavits it wants to in lieu of cross examination. That was a procedure his second lawyer agreed to in February 2019. The fact that an affidavit is filed does not mean that the trial judge is bound to accept the evidence in the affidavit. Each party is free to cross-examine the other on affidavits and documents and to bring to the trial judge's attention anything they think is incorrect in the affidavit or in the documents.

[27] With respect to doctored copies of documents being admitted into evidence, I have explained to Mr. Wiseau that each party is to include in its book of documents whatever documents it wants. When logistical issues arose because the plaintiffs had no counsel, I asked the defendant's counsel to prepare document books which included whatever the plaintiffs wanted to include except discovery transcripts. Mr. Wiseau raised concerns during two case conferences about the defendants having included documents from the plaintiffs that were either doctored or were not faithful copies of the original. Mr. Wiseau could not point me to any specific documents during those case conferences. I gave Mr. Wiseau two options to correct the situation. He could either send the defendants what he thought was a true copy for inclusion in the document book and/or he could bring accurate copies and originals to trial and show the trial judge the original. He remains free to follow that course.

[28] With respect to tight or unrealistic deadlines, timelines were worked out in consultation with the plaintiffs' lawyers. The only deadline imposed over the objection of the plaintiffs was the trial date of January 6, 2020. Mr. Wiseau asked for and obtained changes to those timelines. As noted, the timetable that was set in February 2019 was changed several months later at his request. In addition, even though the revised timetable was peremptory to the plaintiffs', they were nevertheless permitted to file additional affidavits this past fall, well beyond the peremptory deadline for them to file materials.

[29] In the foregoing circumstances I am satisfied that not only has the justice system not been stacked against a foreign or self-represented party, but that the plaintiffs have been granted a series of accommodations because they were non-resident or self-represented.

(b) The Interests of and Prejudice to the Defendants

[30] The defendants would suffer significant prejudice if the plaintiffs were permitted to discontinue the action.

[31] The purpose of this action is to restrain the defendants from distributing a documentary they created. The basis of the complaint is breach of copyright and defamation. The presence of this action imposes a restraint on the freedom of speech and the commercial rights of the defendants. The plaintiffs initially obtained an injunction to restrain distribution of the documentary. I set aside that injunction. The plaintiffs' motion for leave to appeal that order was dismissed. While the presence of this lawsuit may not have been as effective as an injunction, it has accomplished very much the same end for the plaintiffs. That is to say, it has inhibited the defendants from exercising their freedom of speech and commercial rights.

[32] The defendants are entitled to have a court determine whether restraints on their freedom of speech or on their commercial rights are legally justified or not.

[33] The action began in 2017. The plaintiffs have lived with these restraints for over two years. The discontinuance the plaintiff proposes would not lift those restraints. Quite the contrary. The plaintiffs simply propose to bring a new action in another jurisdiction for the same relief. Thus, after having waited two years for an adjudication of the issue, the plaintiffs would deprive the defendants of an adjudication and would force them to wait another undetermined period of time

until the plaintiffs' new action is resolved. The plaintiffs do so simply because they do not like the way things have proceeded for them in this action.

[34] The injustice of that situation has long been recognized. In *Fox v. Star Newspaper Company*, [1898] 1 Q.B. 636, Chitty L.J. stated, at page 639 when speaking of a similar rule requiring leave to discontinue an action:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage, the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

[35] *Fox* was adopted and applied in *Sampson v. City of Kingston*, 1981 CarswellOnt 2747 and in *Simanic.* In *Simanic* Low J. observed that:

> The reality is that the more prolonged and the more contentious the litigation is, the greater the accumulation of incompensable inconvenience and prejudice to the defendant. Costs do not compensate the defending party for the expenditure of his own time and efforts. As the action moves toward trial and as the defendant is obliged to engage himself increasingly in the litigation, the equities will accumulate in favour of his obtaining a termination of the action that will shield him from being vexed by the matter anew -- whether by a judicial determination on the merits, a dismissal of the claim or a discontinuance on terms that no new action may be brought on the same cause.

[36] In *Simanic,* the Master had refused to allow the plaintiff to discontinue the action only a few weeks after pleadings closed. Justice Low upheld that ruling. Here, the plaintiffs want to discontinue the claim two years after commencement and three days before trial. Matters might be different if the plaintiffs were willing to discontinue with prejudice but that is not the case. They simply want to start another action in another jurisdiction for the same relief. That would impose incompensable inconvenience and prejudice on the defendants: *Simanac* at para. 38.

[37] There is no suggestion that this action was commenced in Ontario by mistake. The plaintiffs retained five lawyers to represent them over two years. None, before Mr. Brinza, sought to discontinue the action.

[38] Although I have the power to order a discontinuance on terms barring any future action asserting the same cause (*Sampson* at para. 11), I do not believe it would be appropriate to do so in this case where the plaintiffs object to the imposition of any such term. By doing so, I would effectively be barring the plaintiffs from proceeding in other jurisdictions which may have laws that differ from those of Ontario. I am not aware of what effect an Ontario judgment may have on the parties in other jurisdictions. Given that the motion came on with urgency and in circumstances where neither party has had the chance to address that issue, I think it more prudent to exercise judicial restraint and address only what is squarely before me: the discontinuance of the Ontario action.

[39] The plaintiffs submit that only the main action be discontinued and that the counterclaim be permitted to proceed next week. In my view, that is not an appropriate way to proceed because it would raise the serious possibility of inconsistent findings. The counterclaim asserts damages for improper issuance of the injunction and for damages the defendants have suffered as a result of the "cloud on title" of their documentary. Those issues are intricately bound up with the main action. The counterclaim can only succeed if the main action fails. As a result, discontinuing the main action would either, in effect, discontinue the counter-claim or would achieve nothing because the counter-claim requires the issues in the main action to be determined.

[40] In the foregoing circumstances, the prejudice to the defendants of granting the discontinuance far outweighs the prejudice to the plaintiffs of refusing the discontinuance. To the extent the plaintiffs suffer any prejudice it is of their own making and is the product of their persistent refusal to work with lawyers on ordinary commercial terms. As a result, I dismiss the plaintiffs' motion for leave to discontinue.

Video Conferencing

[41] Towards the end of his submissions, Mr. Brinza asked that, if Mr. Wiseau is represented by counsel, he be permitted to testify by videoconference. I declined that request.

[42] I am ordinarily favourably inclined to presenting evidence by videoconference. In my experience, it can offer significant efficiencies and results in considerably more convenience to the parties or witnesses without compromising the ability of an adjudicator to absorb the evidence and assess the witness.

[43] There are, however, several logistic complications involving video evidence that take time and coordination to address. The request for video evidence was made shortly before 11 AM on a Friday with the trial scheduled to commence on Monday morning. That does not allow sufficient time to work out the logistical issues that commonly arise with video evidence.

[44] The first of the issues involves video equipment in the courtroom. The civil trial office has advised that it has no videoconferencing equipment and that the parties would have to provide it. Videoconferencing is only successful if it is the fruit of an agreed-upon or court ordered technical protocol which specifies things like the nature of the equipment to be used in both locations and the bandwidth over which that equipment will operate. Those logistics take time to agree upon and test. The failure to agree upon those issues in advance results in either the absence of

videoconferencing, a videoconferencing connection that constantly collapses or one that is poor in sound or visual quality.

[45] While it might be humanly possible to work those issues out over the course of the weekend, it would not be fair to require defence counsel to spend time dealing with that issue in the three days before trial. At this stage, defence counsel are understandably focused on preparing witnesses and cross examinations. Requiring them to drop everything and focus on a last-minute accommodation to Mr. Wiseau would prejudice their ability to prepare for trial.

[46] In addition, video conferencing requires logistical coordination surrounding documentation. It is helpful to have someone with the witness to ensure that the witness has the right document and the right page in front of them when being examined about documents. This will be a document intensive case. My experience with Mr. Wiseau over the last two years is that communication with him can be challenging. In the absence of counsel in the room with him, there is serious risk of confusion and mis-communication. This is also a credibility case. It is not in Mr. Wiseau's interest to expose himself to circumstances which could lead a trier to draw adverse inferences about his credibility when the real issue is not credibility but confusion or miscommunication.

[47] Mr. Wiseau has known since February 2019 that a trial would occur in 2019 and has known since June 2019 that the trial would commence on January 6, 2020. At both times, he was represented by counsel. At no time did Mr. Wiseau or any of his lawyers suggest that he wanted to testify by video conference. During the trial management conference over which I presided in December 2019, Mr. Wiseau confirmed that he would be attending trial in person on January 6, 2020.

[48] In these circumstances, the late request to testify by video conference cannot be accommodated.

Miscellaneous Issues

[49] Two additional issues arose during the course of argument about witnesses and costs.

[50] Although Mr. Wiseau confirmed during the trial management conference in early December that his witnesses would be in Toronto to testify as of January 6, 2020 there appears to be some uncertainty about this. When defence counsel tried to contact one of Mr. Wiseau's experts, Ms. Chloe Sosa-Sims, she left a return voicemail for defence counsel indicating that she was not aware of any trial. As a result of this uncertainty, I order that:

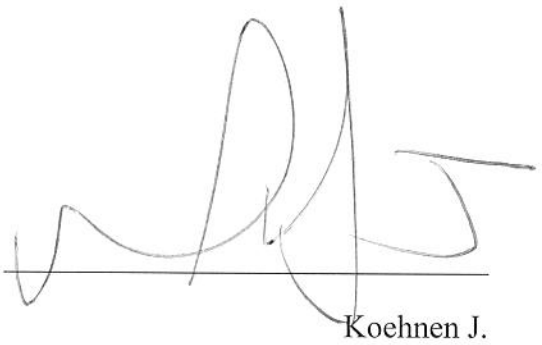
a. Each party shall be responsible for ensuring that its own witnesses attend trial in person in Toronto.

b. Mr. Wiseau shall advise defence counsel by email no later than Sunday, January 5 at noon Eastern time about the order in which the plaintiffs will be calling their witnesses.

[51] With respect to costs, over the past two years I have presided over a significant number of case conferences. Some proceeded as formal motions, some were less formal case conferences in

which I made orders that would ordinarily be made on a motion in matters that are not case managed. I did not make any cost orders on any of those attendances. Costs of all of past case conferences should, however, be in the cause.

[52] Finally, I wish to express my appreciation to Mr. Brinza for the plaintiffs and to Mr. Diskin and Ms. Bacal for the way in which they have dealt with the various motions and email communications in the past week. All three lawyers were facing challenging circumstances. All three behaved with courtesy, professionalism and common sense while at the same time vigorously advancing their clients' interests.



Koehnen J.

DATE: January 3, 2020