

CITATION: Pitt v. Carnival Nationz Inc., 2013 ONSC 5962
NEWMARKET COURT FILE NO.: CV-12-111688-A1
DATE: 20130930

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Dwayne Pitt

Plaintiff

Osborne G. Barnwell, for the Plaintiff

-and-

Carnival Nationz Inc.

Defendant

Tanya Walker, for the Defendant

BETWEEN:

Carnival Nationz Inc.

Plaintiff by Counterclaim

Tanya Walker, for the Plaintiff by
Counterclaim

-and-

Dwayne Pitt and D'Bandit Entertainment

Defendants by Counterclaim

Osborne G. Barnwell, for the Defendants by
Counterclaim

-and-

Toronto Mass Band Association and Bryce
Aguiton

Third Parties

Tanya Walker, for the Third Parties

HEARD: September 20, 2013

RULING ON MOTION

GILMORE J.:

[1] The defendants, plaintiffs by counterclaim and third party defendants have sought the following relief in this motion:

- (a) That the statement of claim be struck because the plaintiff, Dwayne Pitt (Pitt), has failed to submit the costs award of \$2,200 by Justice McDermot on May 9, 2013;
- (b) That those answers to the undertakings for the examinations for discovery of Pitt held on May 31, 2013 which have not yet been received, be provided by a specific date; and,
- (c) That the third party claim be struck because Pitt has failed to answer the demand for particulars and request to inspect, submitted on August 16, 2013.

[2] Pitt brings a motion for an order to set aside the costs award of \$2,200 and seeks an order to amend the statement claim by adding Marcus Eustace (Eustace) as a third party and to amend the pleadings in accordance with the draft amended claim contained in his motion record, dated September 16, 2013, at page 4.

Background

[3] The defendant Carnival Nationz (Carnival), is one of the bands that participates in Caribana each year. Bands which participate in Caribana are regulated by the Toronto Mass Bands Association (TMBA), which ensures that the bands have floats which comply with the rules, bylaws and constitution of the association. Compliance with those rules, bylaws and constitution ensures that the association receives certain funding from the City of Toronto. Carnival is a band that participates in Caribana and is therefore regulated by the TMBA. Pitt was an officer and director of Carnival until last year. Mr. Bryce Aguiton (Aguiton) is the president of the TMBA, as well as a director and officer of Carnival, and Eustace is a member of the board of directors of the TMBA.

[4] The issue in the main action is that Pitt was to receive approximately \$17,000 by way of a compensation package from Carnival. He was to complete certain tasks in order to receive those funds. Pitt claimed that he completed the tasks and now seeks to be paid. Carnival says that Pitt did not do as required. The action was originally commenced in small claims court, where Carnival issued a counterclaim in excess of \$25,000. Pitt would not consent to moving the matter to the simplified procedure stream in this court. As such, Carnival brought a motion in October 2012 and received an order allowing them to move the matter to simplified procedure in the Superior Court.

[5] The issues in this motion relate to some significant miscommunication with respect to the scheduling of a date for discovery and a subsequent motion brought to compel attendance of Pitt. Pitt's non-attendance resulted in a costs award being made against him, which he now seeks to set aside.

[6] A pretrial conference is scheduled in this matter for October 10, 2013, but that is no longer a realistic date, given the twists and turns that this matter has taken.

[7] Subsequent to the pretrial conference being scheduled, the third party claim relating to TMBA and Aguiton was served on the defendant. That claim seeks \$382,500 for damages for loss of business opportunity and loss of sponsorship revenue. An additional \$200,000 is sought for reputational, aggregated and punitive damages plus special damages in an amount to be determined before trial. The claim relates to facts which occurred after Pitt left Carnival and joined another band. He sought to name his new band to Carnival Angelz. That request was denied by the TMBA because of the similarity of the name to the defendant band Carnival Nationz.

[8] Pitt then incorporated Carnival Angelz and advertised events independent of the TMBA with this name. Pitt claims damages for loss of business opportunity as a result of TMBA denying his request. TMBA's position is that Pitt was purporting to be affiliated with the TMBA when he was not. Pitt then sent a letter to the mayor of Toronto, complaining about his inability to participate in Caribana as the Carnival Angelz band. TMBA's response was to ban Pitt from membership in the TMBA for life.

[9] Pitt submits that particulars demanded in relation to the claim have been properly answered. Carnival says that while answers have been received, they are insufficient with respect to reputational damages and punitive damages. Pitt's response in the demand for particulars indicating that TMBA and Aguiton will receive the particulars they seek in the affidavit of documents, is not sufficient. TMBA and Aguiton seek copies of correspondence or documents or be allowed to inspect same.

[10] Pitt seeks to amend the third party claim to include Eustace. Notice of the proposed amendment was given on September 16, 2013. Carnival objects to the amended third party claim being issued, given that discoveries have already been held and that insufficient particulars have been provided. Pitt argues that Eustace and Aguiton knew that their involvement in a vote on the TMBA against Pitt was a conflict of interest and alleges that they proceeded against him using the power of the TMBA to achieve their personal ends. Further, he alleges that their intent was to injure him financially and that their conduct caused him to suffer financially. He alleges that Eustace and Aguiton are personally liable because they acted contrary to their roles as TMBA board members for personal reasons.

The Motion to Set Aside the Costs Order

[11] The background facts to this matter are as follows. In late January 2013, the assistant to counsel for Pitt (Ms. Palomino) and the assistant to counsel for Carnival (Ms. Yorke-Edwards) selected the date of April 26, 2013 for the examinations for discovery of all parties. The notice of examination was served by Carnival on Pitt on February 11, 2013. On March 15, 2013, an email sent from Ms. Palomino to Ms. Yorke-Edwards which included a schedule for steps in the proceeding. The schedule indicated that examinations for discovery would take place on April 26, 2013. On April 19, 2013, counsel for Pitt served the notice of examination for discovery on

Aguiton, who was the director and officer of Carnival. The notice of examination set out that the examination of Aguiton was to take place on April 26, 2013.

[12] On April 25, 2013, at 4:34 p.m., counsel for Pitt informed counsel for Carnival, by way of email, that he had not prepared Pitt for discovery. The reasons indicated were that he did not receive the statement of defence and counterclaim until April 18, 2013 and he intended to file a defence to the counterclaim. Further, in preparing the defence, counsel discovered that there were facts which lent themselves to a claim in which TMBA and Aguiton would be named as third parties. As such, he "took for granted" that upon receipt of the statement of defence and counterclaim on April 18, 2013, the date set for discovery would be vacated.

[13] Carnival's position is that they had never been advised of any such assumption. Based on the notices of examination and the chart of proceedings agreed to by the parties, they prepared for and assumed that examinations would be proceeding on April 26, 2013. Counsel for Carnival advised Pitt upon receiving the cancellation so late that she had spent two days preparing and that she intended to obtain a certificate of non-attendance. Further, Aguiton had taken the day off work to attend the examinations for discovery and was told only on April 25, 2013 that he would not be examined for discovery on April 26, 2013.

[14] On May 6, 2013, counsel for Carnival wrote to counsel for Pitt, indicating that she intended to bring a motion returnable May 9, 2013, to compel the attendance of Pitt.

[15] Most unfortunately, there was a typographical error in the notice of motion. The notice of motion indicated that it was returnable on May 7, 2013 instead of May 9, 2013. Submissions from counsel for Carnival indicated that no request for clarification about the typographical error was received from Pitt's counsel's office. Counsel for Carnival took the position that Pitt clearly had notice of the motion as the materials were sent to Ms. Palomino on May 7, 2013 by email at 1:32 p.m. and courier as per the affidavit of Ms. Yorke-Edwards sworn September 16, 2013. Counsel for Pitt did not attend the motion on May 9, 2013.

[16] At the motion on May 9, 2013 an order was obtained from McDermot J. compelling the attendance of Pitt at examinations for discovery on May 31, 2013. Costs of \$2,200 were ordered against Pitt for costs thrown away and for failing to attend on April 26, 2013.

[17] According to the affidavit of Ms. Yorke-Edwards, the court was satisfied that Pitt's counsel had proper notice of the motion based on the letter sent on May 6, 2013 with respect to the motion date of May 9, 2013.

[18] Pitt attended examinations for discovery as ordered on May 31, 2013. Aguiton was served with a notice of examination for the May 31, 2013 examinations on May 30, 2013. At 11:11 p.m. on May 30, 2013, counsel for Carnival was informed by counsel for Pitt that Aguiton was not required to attend examinations for discovery on the following day. Again, Aguiton had taken the day off work and was told that his attendance was not required.

Positions of the Parties

[19] Counsel for Carnival argues that the rule applicable in this motion, but not cited in Pitt's notice of motion, is rule 37.14(1) of the *Rules of Civil Procedure*. That rule provides that,

A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or,
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

[20] Carnival argues that the moving party has failed to satisfy rule 37.14 as counsel has not provided an adequate explanation for the failure to appear in court on May 9, 2013. Carnival argues that it is uncontested that the moving party received confirmation that a motion was returnable on May 9, 2013. The moving party failed to explain why no adjournment was requested, why no one appeared on May 9, 2013 or why counsel or anyone in his office failed to address any alleged confusion regarding the return date as a result of the typographical error in the notice of motion. McDermot J. was satisfied that Pitt had notice of the motion and made an endorsement on that basis.

[21] Carnival also argues that Pitt has failed to meet the requirements under 37.14 in that he did not take steps to obtain the first available hearing date to set aside the costs order. Pitt received a copy of the order on May 9, 2013, but service of the notice of motion to set aside the order occurred on Monday September 16, 2013, four months after receiving a copy of the order. Although the motion date was set in June 2013, there is no explanation as to why the motion materials were received so close to the motion date. Further, the motion was served outside the time prescribed by the rules, in that it was served less than seven business days of the return date of the motion.

[22] Carnival submits that it would be unjust to set aside the costs award as Pitt's actions have prejudiced the resolution of this matter in that he continuously fails to provide materials in compliance with the *Rules of Civil Procedure*, fails to consent to requests and fails to provide counsel with sufficient notice when rescheduling examinations. Indeed, an agreed upon time table was available which set out that the examination for discovery was planned for April 26, 2013. It was not until the afternoon of day before the examination that Carnival was given notice that the examination would not take place. Even if the service of the defence and counterclaim on April 18, 2013 had prompted some change in strategy on the part of Pitt, that change was never communicated to Carnival, whose counsel spent time preparing for the examination. Nor was the change communicated in a timely way to Aguiton who took the day off work to attend.

[23] Pitt argues that there was no prior consultation with respect to the May 9, 2013 motion date. He was only aware of the May 7, 2013 notice of motion. The letter with respect to the clarification of the confusion between May 7, 2013 and May 9, 2013 never came to his attention. He argues that even before May 9, 2013, there were emails exchanged between his assistant and that of Ms. Walker, confirming a new May 31, 2013 date. Pitt argues it is improper to allege he was resistant to attending discoveries, although counsel conceded that his position on cancellation should have been made clear to Ms. Walker prior to April 25, 2013.

[24] Counsel for Pitt indicated that his understanding was that the motion was being heard on May 7, 2013. They assumed the matter was a “fait accompli” and so it did not seem to be reasonable to go to court in the circumstances. The costs order should be set aside as there is no evidence of deliberate non compliance. If indeed he had been properly notified that the motion was returnable on May 9, 2013, he would have been available.

[25] Pitt’s counsel submitted that he moved promptly to obtain a motion date. The fact that the motion could not be scheduled until September 2013 because of a lack of motion dates, should not be blamed on Pitt. In any event, the motion brought by Carnival was completely unnecessary as there had been a previously agreed upon alternate discovery date. Carnival’s counsel should not have brought a motion without confirming that the May 31, 2013 date was still agreeable.

Ruling on the Plaintiff’s Motion to Set Aside the Costs Order

[26] I find that the costs order should not be set aside for the following reasons:

- (a) The plaintiff has failed to establish a failure to appear on the motion through accident, mistake or insufficient notice. There was a concession that in fact, plaintiff’s counsel was available on May 9, 2013. It is bordering on implausible that when receiving a notice of motion returnable on the day it was served would not trigger some form of inquiry. Simply to let the matter slide and then not appear on the grounds that it was a “fait accompli” is in itself enough to attract costs, in my view.
- (b) While there can be no denying that scheduling motions in Newmarket can sometimes take several months, the plaintiff did not move promptly to schedule the motion. Indeed, the motion was not scheduled for five to six weeks after the receipt of the order.
- (c) The plaintiff has a history of late cancellations and non compliance with the *Rules of Civil Procedure*. For example,
 - (i) the factum in this matter was served a week late;
 - (ii) the response to the demand for particulars was not received within the time prescribed by the *Rules*;

- (iii) on two occasions, the Pitt cancelled the examinations of Aguiton the afternoon or evening before they were scheduled to take place;
- (iv) Pitt has not paid the cost award. The appropriate action in my view would have been to pay the costs award to Ms. Walker's firm in trust, or into court pending the results of the motion; and,
- (v) Pitt received Carnival's affidavit of documents the day before the examination for discovery. He argued that this was a reason for the cancellation. I do not find that this issue is relevant as the defendant was never discovered on that date, and indeed, his discovery was cancelled at the Pitt's request.

[27] I find that the plaintiff did have proper notice of the motion by way of the letter, dated May 6, 2013. A fax confirmation was included with this as exhibit "F" to the affidavit of Ms. Yorke-Edwards, sworn September 16, 2013. Justice McDermot accepted this as proof of valid notice of the motion, I do not see why I should not do the same.

[28] For all of the above reasons, the plaintiff's motion to set aside the costs order is denied on the grounds that the test in rule 37.14(1) of the *Rules of Civil Procedure* has not been met. The costs shall be paid to the defendant forthwith.

Defendant's Motion for Particulars and Answers to Undertakings

[29] Since this motion was served, Pitt has answered his undertakings. Pitt had indicated that for some of the undertakings an answer would be forthcoming. I will accede to Carnival's request to ensure that a specific date is given by which those undertakings must be provided.

[30] The third parties, TMBA and Aguiton, did not argue strenuously that the third party claim should be dismissed. The focus of that argument was on the demand for particulars. The demand for particulars is contained in schedule "A" to Carnival and the third parties' motion record and is dated August 16, 2013. The focus of Carnival on this issue was that the demand for particulars was intended to flesh out facts relating to piercing the corporate veil with respect to Aguiton. The third party claim seeks \$337,000.00 in damages for loss of business opportunity and \$45,000 for loss of opportunity for sponsorship revenue. The third parties are entitled to know what business opportunities were lost and to know what sponsorship revenue was lost. The defendants are required to assert a defence in relation to the \$50,000 in reputational damages and as such they also need to know what defamation of character is being claimed. Finally, with respect to the punitive and aggravated damages of \$150,000, the third parties are entitled to be informed as to what egregious behaviour entitles Pitt to that level of damages.

[31] Subsequent to serving this motion, Carnival received a response to the demand for particulars. Pitt concedes that the demand for particulars was received on August 16, 2013 and that he failed to submit the responses within the timeline set out within the *Ontario Rules of Civil Procedure*. In fact, the responses were only received on Monday September 16, 2013.

[32] Carnival insists that out of the eighty-eight questions asked with respect to particulars, there are only five answers which are of assistance. If Pitt is insisting on bringing a claim against an officer or director of a corporation personally, he must explain what they did outside of their duties to the organization. As the third party claim stands now, it does not provide the proper particulars.

[33] Pitt takes the position that although outside of the timeline prescribed by the Rules he has properly answered all of the eighty-eight questions in the demand for particulars. The fact that those answers may not have been to the liking of Carnival's counsel is not an issue with which this court can properly deal.

Ruling on Undertakings and Demand for Particulars

[34] I have reviewed Carnival's demand for particulars and the response. The affidavit of Aguiton, sworn September 10, 2013, sets out specific concerns in paragraphs 17 and 18. Specifically, Aguiton seeks.

- (a) the identity of the defendants referred to in the first paragraph of the third party claim;
- (b) particulars regarding the loss of business opportunity;
- (c) particulars regarding the loss of sponsorship opportunity;
- (d) the identity of the person who has alleged to have committed the act of bad faith in not accepting Pitt as a member;
- (e) the basis for the belief that Pitt could be ejected from the TMBA if he was never a member of that association;
- (f) particulars regarding the conclusion that people began to avoid the plaintiff;
- (g) the basis in law relied upon that Aguiton should be held personally responsible for the actions or inactions of the TMBA;
- (h) the basis for the belief that the TMBA was under the direction of Bryce Aguiton; and,
- (i) the basis of the belief that the issue was put to a vote under the directions of Bryce Aguiton.

[35] I have reviewed the particulars that are in issue and the responses of Pitt. In my view, additional information is required with respect to the answers to particulars number 2 and 3. I do not agree with Pitt that the breakdown of the loss of opportunity is not necessary to enable the defendants to prepare a defence. Further and better particulars are to be provided, as well as the amount to be attributed to each defendant.

[36] Question number 65 was not answered by Pitt. Proper particulars should be given with respect to question number 65. The answer to question 70 is not satisfactory and proper particulars should be provided regarding the conclusion as to why people began to avoid the plaintiff, as particularized in paragraph 28 of the third party claim.

[37] I also agree with Carnival that further and better particulars should be provided with respect to questions 57, 59 and 64 of the demand for particulars. The response of Pitt that a response is not necessary for preparing the parties defence is inadequate in my view.

[38] Where Pitt has indicated that his answers to undertakings are forthcoming, those answers shall be provided within ten days of the date of release of this endorsement.

[39] The parties agreed and it is ordered on consent that Carnival and the third parties shall have the right to inspect documents as per rule 30.04(2) of the *Rules of Civil Procedure* and as such, documents referred to in the originating process may be inspected by Carnival and the third parties within thirty days of the date of release of the endorsement.

[40] Given the above orders, it is not practical to have a pretrial on October 10, 2013. As such the pretrial shall be rescheduled to February 2014. Counsel are to contact the trial coordinator for a mutually agreeable date.

The Plaintiff's Motion to Amend the Statement of Claim

[41] The plaintiff moves to amend the statement of claim by adding Marcus Eustace to the third party claim and to amend the pleadings accordingly. A copy of the amended third party claim was provided in Pitt's motion record. The amended claim contains information that Eustace was a member of the board of the TMBA at all material times and alleges that Eustace and Aguiton participated in a vote to expel Pitt from the TMBA. It also alleges that Eustace's vote on the TMBA relating to Pitt was a conflict of interest and that he acted contrary to his role as a board member within the objectives of the TMBA and as such is personally liable for damages.

[42] Carnival and the third parties do not consent to the amended claim being issued. In the event it is issued, Pitt must provide better answers to the demand for particulars. As the third party claim stands now, according to Carnival, it does not provide adequate particulars. In addition, it is prejudicial to Carnival to issue the claim now as discoveries have already been completed and TMBA may be in a position of having to examine the same person again. Further, the pretrial was scheduled for October 10, 2013 (prior to the date being changed by this endorsement) and the amended claim was only submitted to Carnival on Monday September 16, 2013. The issues in the draft claim should have been addressed in the examinations for discovery that were held previously.

Ruling on the Third Party Claim

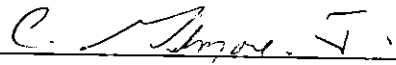
[43] The amended third party claim with respect to Eustace and the amendments contained in draft amended claim on page 4 of the plaintiff's motion record may proceed to be issued.

[44] Issuing of the third party claim is conditional on the plaintiff answering the particulars in relation to the third party claim as ordered in this endorsement and that such particulars as previously ordered include Eustace where relevant.

[45] The plaintiff to serve his affidavit of documents five days prior to the date upon which the defence to the third party claim is due under the *Rules of Civil Procedure*.

[46] With respect to any inconvenience or prejudice to Carnival in relation to the late issuance of this amended claim, that can be dealt with by way of submissions on costs.

[47] If the parties cannot agree on costs, I will receive written submissions on a seven day turnaround, commencing with the moving party, followed by responding submissions, then reply submissions, if any, commencing fourteen days from the date of release of this endorsement. Cost submissions shall be no more than two pages in length, exclusive of any costs outline or offers to settle. All costs submissions shall be delivered via email through my assistant at jennifer.beattie@ontario.ca.


Justice C.A. Gilmore

Released: September 30, 2013