

COURT OF APPEAL FOR ONTARIO

CITATION: Performance Analytics v. McNeely, 2022 ONCA 731

DATE: 20221028

DOCKET: C70225

Lauwers, Roberts and Trotter JJ.A.

BETWEEN

Performance Analytics Corporation, Performance Analytics Group Corporation
and Performance Analytics Consulting Corporation

Plaintiffs (Respondents)

and

Justin McNeely, Michael Matrick, Patrick Hickey, Sean Antonello and Jump
Analytics Inc.

Defendants (Appellants)

AND BETWEEN

Justin McNeely, Michael Matrick, Patrick Hickey, and Jump Analytics Inc.

Plaintiffs by Counterclaim

and

Performance Analytics Corporation, Performance Analytics Group Corporation,
Performance Analytics Consulting Corporation, 2504338 Ontario Inc., Grambo
Inc. Graham Finney in his personal capacity and as trustee of the Jadac 2016
Family Trust, and Peter Digby in his personal capacity and as a trustee of the
Digby 2016 Family Trust

Defendants by Counterclaim

Andrew J. MacDonald, for the appellants

Sean Dewart and Brett Hughes, for the respondents

Heard: October 13, 2022

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated December 16, 2021, with reasons reported at 2021 ONSC 8297.

REASONS FOR DECISION

[1] The appellants appeal the dismissal of their motion for a permanent stay of the plaintiffs' action because of the failure of the plaintiffs to immediately disclose the settlement agreement concluded with the former defendant, Sean Antonello. They argue that the motion judge's decision is a product of legal error and palpable and overriding error.

[2] We disagree. The motion judge considered and correctly applied the guiding principles from this court as to whether the settlement agreement between the plaintiffs and Mr. Antonello "change[d] entirely the landscape of the litigation" by altering the relationship among the parties and transforming the settling parties' adversarial relationship into a cooperative one. See: *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, at paras. 37, 39, 45; *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, 466 D.L.R. (4th) 324, leave to appeal to S.C.C. refused, 40118 (October 20, 2022), at para. 23; *Waxman v. Waxman*, 2022 ONCA 311, 471 D.L.R. (4th) 52, leave to appeal to S.C.C. refused, 40208 (October 20, 2022), at para. 24; *Poirier v. Logan*, 2022 ONCA 350, at para. 47; *Chu de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2022 ONCA 467, at para. 55. He determined that it did not.

[3] The motion judge's determination that the settlement agreement resulted in no significant change to the litigation landscape and therefore need not be disclosed immediately is a question of mixed fact and law and entitled to deference: *Waxman*, at para. 27. The motion judge reached that conclusion because he found that Mr. Antonello was a minor player who was exiting a lawsuit with no continuing obligations to the plaintiffs upon the disclosure of supplementary documents in his possession to all parties and the provision of an affidavit confirming the parameters and results of his document search, as well as the existence of an email with Jump that he did not use prior to his departure from the plaintiffs. The motion judge rejected the appellants' submission, repeated on appeal, that the supplementary affidavit of documents and affidavit represented private discovery and cooperation with the plaintiffs that materially altered the adversarial nature of the litigation landscape. The motion judge's findings were open to him to make, well grounded in the record before him, reasonable, and without error. They are therefore entitled to considerable deference from this court.

[4] The appellants contend that the motion judge's analysis of the nature of Mr. Antonello's supplementary affidavit of documents and affidavit was flawed because he failed to address that plaintiffs' counsel drafted the affidavits and that the non-disparagement clause in paragraph 7 of the settlement agreement acted

as financial and psychological pressure on Mr. Antonello to continue to cooperate with the plaintiffs lest he be drawn back into the litigation as a party.

[5] We are not persuaded by these submissions. That plaintiffs' counsel had a hand in drafting the affidavits does not, by itself, demonstrate a cooperative relationship that alters the adversarial relationship among the parties. The contents of the affidavits were banal and did not contain any strategic spin that would reasonably signify any alignment between the plaintiffs and Mr. Antonello, who at all times was represented by his own counsel. And the non-disparagement clause employed in this case, which provided that the parties would refrain from making any disparaging remarks or taking any actions that could cause damage to each other "unless otherwise required by law", could not reasonably be interpreted as exercising any detrimental influence on Mr. Antonello's obligation to provide truthful and complete evidence if called as a witness in this litigation.

[6] Accordingly, the appeal is dismissed. The plaintiffs are entitled to their partial indemnity costs from the appellants in the amount of \$11,757.75, inclusive of disbursements and applicable taxes.

"P. Lauwers J.A."
"L.B. Roberts J.A."
"Gary Trotter J.A."