CITATION: Think Research Corporation v. N & M Medical Enterprises 2023 ONSC 6910
COURT FILE NO.: CV-22-00688028
DATE:20231207

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Think Research Corporation

Applicant

AND:

N & M Medical Enterprises Inc., Alina Tsymbalarou, Sina Kashani and Dr. Magdi Gaid

Respondents

BEFORE: Koehnen J.

COUNSEL: *Christina Fulop* for the applicant

Paul Fruitman, Brendan Bohn for the respondents,

HEARD: November 28, 2023

ENDORSEMENT

[1] This endorsement addresses the sort of relief that can be provided at a case conference. The applicant seeks relief on the merits of the application. The respondents submit that providing relief on the merits is not appropriate given the absence of an evidentiary record.

[2] For the reasons set out below I find that it is appropriate to grant relief on the merits notwithstanding the absence of a formal evidentiary record.

Factual Background

[3] The applicant acquired a business known as Clinic 360. The share purchase agreement pursuant to which the acquisition was made provided for an adjustment after closing based on the calculation of net working capital as defined in the agreement. If the parties were unable to agree on that calculation, the share purchase agreement provided that Ernst & Young LLP would be appointed to determine the appropriate calculation. If Ernst & Young were unable to act, KPMG LLP would be appointed.

[4] The parties have not been able to agree on the calculation and the applicant seeks to appoint KPMG to resolve the dispute because Ernst & Young has a conflict.

[5] The share purchase agreement calls for the applicants to have provided networking capital calculations within 60 days of closing. Closing occurred on January 29, 2021. The applicant did not provide it working capital calculations to the respondent until October 22, 2021.

[6] It appears from contemporaneous emails produced for the case conference that there were complications in arriving at the calculation and that those calculations turned in part upon the applicant receiving information from the respondent. It also appears that the parties worked cooperatively, although perhaps slowly, on the exchange of information. On October 6, 2021 the respondent, Alina Tsymbalarou wrote to the applicant stating among other things:

> Can you please arrange to have the Closing statements delivered to us and we will ensure that you will have our comments/approval within the stipulated time period.

[7] As noted, the applicant delivered its calculations on October 22, 2021. Between November 2021 and January 2022 the parties had further discussions about the differences in their calculations. On February 3, 2022 the applicant delivered its notice to appoint Ernst & Young or KPMG.

[8] In answer, the applicant received a letter from respondents' counsel taking the position that, since draft closing statements were not delivered within 60 days of closing, the ability to appoint an independent accountant "is spent" and that the independent accountant has "no role to play."

[9] This was the first time that the respondents took the position that the request for the appointment of an independent accountant was out of time.

[10] At the case conference, defence counsel advised that they have now issued their own application for a declaration that the time for the appointment of the independent accountant has expired.

Analysis

[11] The respondents submit that, the share purchase agreement required post-closing financial statements within 60 days of closing as a result of which, under a plain reading of the agreement, the applicant has lost the right to seek post-closing adjustments because of its failure to make timely delivery. In doing so, the respondents rely on a time is of the essence clause in the share purchase agreement. I do not accept that submission. Section 2.5 (1) of the share purchase agreement allows the applicant to deliver its draft closing statements on "such other date as is mutually agreed to by the Vendors and the Purchaser in writing." The email quoted in paragraph 6 above is an email in which the respondent vendor is implicitly agreeing in writing to accept the draft closing statements outside of the 60 day time period that was originally envisaged.

[12] The respondents next submit that substantive relief cannot be granted at this stage of the proceeding. I disagree. The matter first came to me as a case conference on November 6, 2023. At that time I issued an endorsement scheduling a further case conference for November 28, 2023. The endorsement indicated that:

> "The object of the case conference will be to make a determination on the merits of the application.
>
> If the application cannot be determined on November 28, the next question will be whether the application can be determined in writing. Only if the application cannot be determined at the case conference or in writing will it be directed to an oral hearing.
>
> To facilitate this, both sides should deliver a case conference memo of up to 10 double spaced pages setting out their position and why they should succeed.

[13] This clearly gave the respondent notice that the purpose of the attendance on November 28 was to determine the issue on the merits if at all possible.

[14] On November 28, respondents' counsel submitted that evidence was necessary because the court did not know whether the email of October 6, 2021 on which the applicant relies was being read in its proper context. If that is the case, however, the onus was on the respondent to demonstrate, at the case conference, that there was an issue about whether the email was being taken in its proper context. Asking a question about context or making a bald allegation about context is not enough. I was given no information or submission about the email other than the statement that the court did not know whether email was being taken in its proper context.

[15] The respondents further submit that the email was from Ms. Tsymbalarou. The respondents argue that she did not have authority to bind all of the respondents in that regard. The mere making of that statement is not sufficient in circumstances where I have advised the parties that the object of the attendance on November 28, 2023 would be to resolve the matter on the merits. While it is correct that the email was from Ms. Tsymbalarou, she was one of the persons authorized to communicate with the applicant on behalf of the corporate respondent. Moreover, the other two individual respondents were copied on that email. There is no suggestion before me that they disavowed the email or took the position that any delivery of financial statements was out of time before the letter from respondents' counsel in response to the applicant's effort to appoint an independent accountant. The other respondents also appear to have participated in the cooperative process to arrive at post-adjustments long after 60 days following closing.

[16] The respondents further submit that no substantive relief can be given at a case conference because, pursuant to Rule 50.13 (6), the powers of the case conference judge are limited to the power to:

> (a) make a procedural order;
>
> (b) convene a pre-trial conference;
>
> (c) give directions; and
>
> (d) in the case of a judge,
>
> (i) make an order for interlocutory relief, or
>
> (ii) convene a hearing.

[17] There does not appear to be any dispute that a judge can grant substantive relief at a hearing. As noted above, at the case conference on November 6, 2023 I convened a further case conference for November 28, 2023 the object of which

was to make a determination on the merits of the application. With the benefit of hindsight, it may have been preferable to have referred to the attendance on November 28 as a hearing rather than as a case conference. Given the wording of my direction, however, there could be no doubt in the minds of the parties that the object of the November 28 attendance was to determine the application on the merits if possible.

[18] While it is open to the parties on any such attendance to try to persuade the court that it is not appropriate to grant substantive relief without all of the trappings of a full application including exchange of application records, cross examinations, exchange of factums and oral argument, counsel must do so with more than bald assertions. I am not saying that counsel had to come to the attendance on November 28 with full affidavits and cross-examination transcripts. Pointing me to other emails that would have cast doubt on the applicant's interpretation of the October 6 email may well have sufficed.

[19] In *Miller v. Ledra*,[1] I recently addressed the type of relief that is appropriate to award at a case conference. Many of the comments in those reasons are directly applicable here.

[20] As in *Miller*, the starting point of the analysis is the backlog of cases on the Toronto Civil List. I am releasing these reasons on December 7, 2023. On December 6, 2023 I sat in Civil Practice Court. At that time, the first date available for a motion of less than two hours was February 3, 2025. The first date for a motion of over two hours was June 24, 2025. Approximately halfway through Civil Practice Court, the first date available for a motion over 2 hours was in July 2025. In other words, a wait of between 14 and 20 months for a motion.

[1] *Miller v. Ledra* 2023 ONSC 4656

[21] As noted in *Miller,* delay begets delay.[2] If a litigant knows that it can delay litigation by between 14 and 20 months simply by bringing a motion or by insisting on a full blown application process, it will often have an interest in doing so. As ever more parties learn of those delays, the number of motions and insistence on full blown applications increases, thereby creating even longer delays. This is evident in the evolution of events even in the short time since *Miller* was released on August 28, 2023. *Miller* refers to delays of between 14 and 16 months. By the time these reasons are being written in early December 2023, the delays have increased to between 14 and 20 months.

[22] The issues that these sorts of delays cause for the civil justice system issues were canvassed in *Miller,* the relevant portions of which I reproduce and adopt here:

> [22] For years, courts, judges and counsel have commented on the dangerous state of the civil justice system. In in his remarks at the Opening of the Courts in September 2014, former Chief Justice of the Ontario Court of Appeal, George Strathy, stated:
>
> > Having been a lawyer and a judge in this province for over 40 years, it strikes me that we have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect. With the best of intentions we have designed elaborate rules and practices, engineered to ensure fairness and achieve just results. But perfection can be the enemy of the good, and our justice system has become so

[2] *Miller* at para. 21.

> cumbersome and expensive that it is inaccessible to many of our own citizens.

[23] In 2016, Justice David M. Brown of the Ontario Court of Appeal delivered a paper to the Hamilton Law Association entitled “Commercial Litigation in the Next 10 Years: A Call for Reform” in which he stated:

> What I call the “Fundamental Goal” of our public civil justice system is the fast, fair and cost-effective determinations of civil cases on their merits. As it currently operates, our public justice system is not achieving the Fundamental Goal. In my view, all three players in the civil justice system [the Bench, the Bar and the Government] need to ditch the old way of doing things and adopt new practices. And we need to do so quickly. Time is not on our side … To stand by as civil courts continue to atrophy risks jeopardizing the health of our democracy, our economy, and our private law, at least in this judge’s assessment. To avoid that risk, we must change our ways and work to re-invigorate our public civil courts.

[24] Supreme Court of Canada Justice Rosalie Abella has stated:

> “And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without

fundamental experimentation and reform, we still conduct civil trials almost exactly the same as we did in 1906. With a few hours of instruction, a lawyer from 1906 would feel perfectly at home in today's courtroom. Could we say that about a doctor from 1906 and today's operating room?

….

…we have to figure out what information the judge needs and how best to get it there; and who should be there when he or she gets it; and whether he or she even needs to be a judge.

….

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession reasonably resist experimenting with old systems of justice in order to find better ways to deliver it? People want their day in court, not their years.

…

We may find to our surprise, that neither the Rule of Law, nor due process, nor clients, nor lifestyles will be impaired. There is even the

> possibility that our experiment may in fact improve justice's performance."

But for the introduction of video hearings and electronic documents as a result of the Covid-19 Pandemic, Justice Abella's comments continue to hold true.

[25] In *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 Karakatsanis J, stated for a unanimous Supreme Court:

> "[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality

> principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> [56] …The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability.
>
> [57]…A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly."

[26] The Canadian Bar Association has stated:

> "…people interviewed… consistently describe the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people."

[27] The World Justice Project is an independent organization that was founded in 2006 as a presidential initiative of the American Bar Association. It conducts an annual survey of the rule of law in countries around the world. In its 2022 survey, Canada ranked 56 out of 140 countries when considering whether the administration of civil justice was free from unreasonable delay. It ranked 68 out of 140 when considering access and affordability of the civil justice system. (Citations omitted)

[23] I turn now to apply those principles to the facts of this case.

[24] The thrust of the comments quoted above is that civil courts have become burdened by their own procedures to the point that those procedures impede the

very justice civil courts are tasked to administer. As a result, civil courts are atrophying and risk harming our democracy and economy. In response, courts must develop proportionate procedures tailored to the needs of the particular case.

[25] When it takes between 14 and 20 months to schedule a simple motion, it is incumbent upon courts as the stewards of the justice system to take proactive steps to develop more proportionate procedures to diminish those delays. It is insisting on the one-size-fits-all model that has contributed to the delays that plague the civil justice system.

[26] The principle of proportionality is already enshrined in the *Rules of Civil Procedure*. Rule 1.04 provides:

> (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[27] What then is a proportionate procedure to address this application? The parties had a commercial agreement which clearly contemplated post closing adjustments based on the working capital calculation. The emails that were produced to me and the submission of the applicant is that the parties were working cooperatively to arrive at the post closing adjustments but that doing so was not quite as simple as had been hoped and that it required information from the respondents to do so. I was not taken to any emails that suggest the contrary. Nor did respondent's counsel make any submissions that suggested the contrary. On that state of

affairs, there would not appear to be any reason to refuse the appointment of the independent accountant as the applicant requests. If there were issues that made that appointment unfair, it was incumbent on the respondents to bring those to the court's attention with more than just bald assertions that evidence is required or a question about whether emails were being read in their proper context.

[28] I also consider the prejudice to the respondent in appointing the independent accountant. The prejudice to the respondents is that they are being forced to live with the agreement that they entered into. The court is not making a determination about the actual net working capital calculation, it is simply enforcing the agreed-upon mechanism of arriving at that calculation if the parties could not arrive at it on consent. The situation might be quite different if there were some sort of explanation before me to the effect that the respondents had advised the applicants that they were relying on the 60 day timeline in the share purchase agreement despite their apparently cooperative approach to the issue even long after the 60 days had expired or if the respondents were able to demonstrate some sort of prejudice to themselves apart from being obliged to live by the bargain they made.

[29] As Justice Abella stated, in fashioning proportionate procedures "we have to figure out what information the judge needs and how best to get it there." What I needed on November 28 was, at a minimum, a real reason for agreeing to the respondents' request for a full-blown application procedure with all of its attendant delays and cost. That could have been done by showing me emails to suggest that the October 6 email was being read out of context or through some other explanation that went beyond bald assertions. In the absence of any such explanation I am satisfied that appointing the independent accountant at this stage is a proportional procedure tailored to the needs of this particular case and one that does no injustice to the respondents.

[30] The failure to provide the relief requested would, in the words of Chief Justice Strathy, allow the court to be “burdened by its own procedures” to the point that it would “impede the very justice we are striving to protect.”

[31] As a result of the foregoing, I grant the application to appoint KPMG as the independent accountant under the share purchase agreement and dismissed the respondents’ competing application bearing Court file number CV-23-00709969.

[32] Any party seeking costs as a result of these reasons may deliver written submissions within 14 days. Responding submissions to be delivered by January 12, 2024. Reply submissions, if any, to be delivered by January 19, 2024.

Date: December 7, 2023

Koehnen J.