CITATION: Pegus v. Ecorite, 2012 ONSC 2487
COURT FILE NO.: 2441/09
DATE: 2012-04-25

2012 ONSC 2487 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
STEVEN PEGUS Plaintiff	David A. Seed, Counsel for the Plaintiff
– and –	
ECORITE DISTRIBUTORS LTD. Defendant	Gurpreet S. Jassal, Counsel for the Defendant
	HEARD: April 24, 2012

REASONS FOR JUDGMENT

GRAY J.

[1] In this wrongful dismissal action, there is now before me a motion and a cross-motion. The plaintiff moves for summary judgment on the basis of deemed admissions arising out of the failure of the defendant to respond to a Request to Admit. The defendant, in its cross-motion, requests an order granting leave to withdraw the deemed admissions and an order granting an extension of time to respond to the Request to Admit.

[2] For the reasons that follow, I grant summary judgment to the plaintiff and I dismiss the defendant's cross-motion.

Background

[3] This action has a somewhat unfortunate procedural history.

[4] Before becoming employed by the defendant, the plaintiff worked for another company in a marketing capacity. He alleges that, after a number of entreaties, the defendant persuaded him to leave his former employment and accept a job with the defendant at a slightly lower rate of pay. There is no disagreement that the plaintiff's rate of pay with the defendant was $48,000 per annum.

[5] The plaintiff was employed by the defendant effective February 11, 2008, and was terminated slightly more than two months later, on April 18, 2008.

[6] The plaintiff's employment with the defendant was in marketing. It was not managerial in any sense, but may have had some minor supervisory involvement. For the most part, according to the plaintiff's job description, he was to coordinate activities associated with sales and marketing, and create and disseminate sales and marketing material.

[7] As noted, the plaintiff's employment was terminated on or about April 18, 2008. He alleges that it took him approximately nine months to secure alternate employment. On February 3, 2009, the plaintiff's counsel wrote the defendant and requested compensation in lieu of reasonable notice. It is not in dispute that the defendant gave the plaintiff no notice or any compensation in lieu thereof on termination.

[8] The statement of claim was issued on April 1, 2009. A statement of defence dated May 14, 2009 was prepared by one Brij Kapur on behalf of the defendant. Mr. Kapur is not a lawyer.

[9] A motion and cross-motion were heard by Daley J. on June 30, 2010. Mr. Kapur sought leave to represent the defendant. That request was denied. Further, the defendant was ordered to retain counsel. Daley J. ordered costs to the plaintiff fixed in the amount of $1,500. Those costs remained unpaid.

[10] Notwithstanding Daley J.'s order, the defendant did not retain counsel for some considerable time.

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[11] On January 26, 2011, one Jordan Rodney, a lawyer, wrote to the plaintiff's counsel, indicating that he had been retained. Subsequently, Mr. Rodney advised that he had not been retained.

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[12] In January, 2011, and August, 2011, the plaintiff's counsel wrote to Mr. Kapur and reminded him that he was required to retain counsel.

[13] On January 26, 2011, the plaintiff's counsel served a comprehensive Request to Admit on the defendant. It consists of 139 paragraphs, with several attachments. The defendant did not respond to the Request to Admit.

[14] Finally, the plaintiff brought this motion, originally returnable on January 25, 2012, for summary judgment. That motion was adjourned on consent to April 24, 2012.

[15] By notice of motion dated April 16, 2012, returnable April 24, 2012, the defendant, through counsel, now brings a motion requesting leave to withdraw the deemed admissions, and requesting an extension of time to respond to the Request to Admit.

[16] In his affidavit filed in support of the defendant's motion, Mr. Kapur deposes that he did not respond to the Request to Admit because, as a layperson with no formal legal training or education, he was not aware of or familiar with the *Rules of Civil Procedure*, or the deadlines by which the defendant had to respond to the Request to Admit, nor was he aware of the ramifications of any failure to respond.

[17] Mr. Kapur deposes that the defendant retained counsel to represent it in this matter on or about November 18, 2011.

[18] Mr. Kapur swears that the deemed admissions by the defendant were inadvertent in that they were the result of a failure to respond to the Request to Admit. He says there remain genuine issues with respect to the action.

[19] There is a single paragraph in Mr. Kapur's affidavit in which he elaborates on what he says are the genuine issues for trial. In its entirety, that paragraph reads as follows:

15. There are several areas of dispute, issues which are contentious and which require a trial, including, *inter alia*, the following:

a) whether the Plaintiff had job security with his former employer;

b) whether I solicited the Plaintiff or if the Plaintiff responded to an advertisement for the job with Ecorite;

c) whether the Plaintiff was enticed to leave existing employment;

d) whether Ecorite made certain representations to the Plaintiff as plead in the Statement of Claim;

e) whether the Plaintiff's former employer made certain statements as alleged in paragraph 11 of the Statement of Claim;

f) whether the Plaintiff was instructed to perform menial tasks for Ecorite;

g) whether the Plaintiff was wrongfully dismissed and as such, is entitled to any damages;

h) what the quantum of damages, if any, should be;

i) whether Ecorite repudiated any contract with the Plaintiff; and

j) whether the Plaintiff is entitled to any notice or pay in lieu of notice.

[20] Apart from the issues outlined in paragraph 15 of Mr. Kapur's affidavit, there are no other facts specified that are said to give rise to the triable issues.

Submissions

[21] Mr. Jassal, on the cross-motion, submits that leave should be granted to the defendant to withdraw the deemed admissions, and the defendant should be granted an extension of time to respond to the Request to Admit. He submits that the failure to respond to the Request to Admit was inadvertent. At the time the Request to Admit was served, the defendant was represented only by Mr. Kapur, and he is not legally trained. He is not familiar with the *Rules of Civil Procedure* or any deadline for responding to the Request to Admit. Nor was he aware of any consequence that would follow as a result of the failure to respond.

[22] Mr. Jassal submits that there are clearly triable issues, and it is in the interests of justice to allow the defendant to respond to the Request to Admit, and to permit the action to proceed in the normal course.

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[23] Mr. Jassal submits that there is no prejudice to the plaintiff, and any inconvenience or delay can be compensated for in costs. Mr. Jassal points out that the defendant is willing to pay the outstanding costs order made by Daley J.

[24] Mr. Seed opposes the defendant's motion for leave to withdraw the deemed admissions. Further, he submits that summary judgment should issue on the plaintiff's claim.

[25] Mr. Seed submits that the defendant cannot demonstrate that there are any triable issues. Counsel notes that in the statement of defence, there is no pleading that the plaintiff was dismissed for cause. Neither is there any suggestion in Mr. Kapur's affidavit that the plaintiff was dismissed for cause. Further, there is no suggestion in the statement of defence or the affidavit that there was any probationary period to which the plaintiff was subject. Accordingly, the only issue in the case is the measure of the plaintiff's damages.

[26] Mr. Seed submits that in this case the appropriate range of notice is between four and six months.

[27] At the time of his hiring by the defendant, the plaintiff had approximately ten years' work experience. The job into which he was hired by the defendant was a responsible one, with some supervisory responsibility. He had been enticed to leave his former employment and accepted a job with the defendant for less money than he had been earning before. After the termination of his employment by the defendant, it took the plaintiff about nine months to secure other employment, and he was forced to use some of his savings in order to survive.

[28] Mr. Seed submits that the defendant, through Mr. Kapur's affidavit, has given no particulars whatsoever as to the issues that are said to be genuine issues for trial. In these circumstances, it is not appropriate to permit the defendant to resile from the deemed admissions.

[29] This is particularly so, Mr. Seed submits, because of the dilatory conduct exhibited by the defendant. It is no answer to assert, as the defendant does, that Mr. Kapur is not legally trained. He made the decision to defend the action on his own, and he must accept the responsibility that comes with making such a decision. Furthermore, the defendant delayed significantly before retaining counsel, even in the face of an order of Daley J. that required it to

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do so. This action was commenced three years ago, and it is not in the interests of the parties or the administration of justice to allow the matter to be delayed any further.

[30] Mr. Jassal submits that summary judgment should not be granted. He submits that there are triable issues, including whether the plaintiff was induced to leave his former employment, and whether he had job security with his former employer; the nature of his employment with the defendant; and whether the plaintiff is entitled to any damages, and if so, the quantum of those damages. Mr. Jassal submits that these issues are highly contested, and will require evidence to resolve them.

[31] Relevant cases referred to by the parties include: *Zellers Inc. v. Group Resources Inc.* (1995), 21 O.R. (3d) 522 (Gen. Div.); *Docouto v. Ontario* (2000), 3 C.P.C. (5th) 341 (Ont. S.C.J.); *National Utilities Service (Canada) Ltd. v. Kendoc Tools Inc.* (1995), 34 C.P.C. (3d) 362 (Ont. Gen. Div.); *Forewell v. Savoia Canada Inc.*, [2005] O.J. No. 2126 (Master); *Antipas v. Coroneos* (1988), 26 C.P.C. (2d) 63 (Ont. H.C.J.); *Szelazek Investments Ltd. v. Orzech* (1996), 44 C.P.C. (3d) 102 (Ont. C.A.); *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.); *Lalingo v. A. & A. Jewellers Ltd.* (1997), 27 C.C.E.L. (2d) 211 (Ont. Gen. Div.); *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.); and *Main Air Systems Inc. v. Premier Fitness*, 2010 ONSC 4864.

Analysis

[32] Rule 51.05 provides as follows:

> **Withdrawal of Admission**
>
> 51.05 An admission made in response to a Request to Admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

[33] In the context of the withdrawal of an admission contained in a pleading, the appropriate tests are those set out by Saunders J. in *Antipas, supra*, as follows:

> A review of the cases indicates that a party requesting leave to withdraw an admission must pass three tests by establishing (1) that the proposed amendment raises a triable issue; (2) that the admission was inadvertent or resulted from wrong instructions; and

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> (3) that the withdrawal will not result in any prejudice that cannot be compensated for in costs.

[34] These tests were subsequently approved by the Court of Appeal in *Szelazek Investments, supra*.

[35] While these tests were set out in the context of the potential withdrawal of an admission made in a pleading, I think they have some application to the withdrawal of a deemed admission made as a result of a failure to respond to a Request to Admit. The same Rule covers both types of admissions.

[36] In this case, I am prepared to assume that the failure to respond to the Request to Admit was inadvertent. Furthermore, I have no difficulty concluding that the withdrawal of the deemed admissions will not result in any prejudice to the plaintiff that cannot be compensated for in costs. However, in the context of this particular action, I am not persuaded that there are any issues that require a trial for their resolution.

[37] In considering whether a trial is necessary, it is important to bear in mind the nature of the action. This is a very simple wrongful dismissal action. Even on the plaintiff's highest and best theory of the case, it is not worth more than $25,000. Proportionality is an important consideration, and must be borne in mind in considering whether a trial is necessary. Absent an allegation of cause, or a claim for exemplary or punitive damages, many wrongful dismissal actions are suitable for summary judgment motions. The factors affecting the length of notice are objective in nature, and the evidence is usually straightforward.

[38] As noted earlier, the defendant has not pleaded cause for dismissal. The only apparent issues are whether the plaintiff was induced to leave his former employment; the nature of the duties he undertook with the defendant; and whether his difficulty in securing alternate employment subsequent to his dismissal should affect the amount of his damages.

[39] In my view, there is no serious dispute as to the main factors that affect the quantum of the plaintiff's damages, and the issues that are said to be in dispute do not materially affect the quantum of the plaintiff's damages.

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[40] The starting point in terms of the factors to be assessed in determining damages for wrongful dismissal is the following passage from the judgment of McRuer C.J.H.C. in *Bardal*, *supra*:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

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[41] This is not a closed list, and other factors may come into play.

[42] In this case, no matter which factors predominate, it is undoubtable that a rather short period of notice is appropriate in the circumstances.

[43] While there is nothing in the material that specifically states the plaintiff's age, he had approximately ten years' working experience before joining the defendant. It is likely that his age would not affect the availability of alternate employment.

[44] The plaintiff was not a managerial employee, either in his former employment or in his employment with the defendant.

[45] His length of service with the defendant was very short, slightly in excess of two months.

[46] In my view, assuming that there was a degree of enticement in persuading the plaintiff to join the defendant, this would not affect the matter very much. The plaintiff's employment with his former employer was itself very brief, approximately five months. Whether or not the plaintiff believed he had secure employment with his former employer, the fact remains that he could have been dismissed from his former employment with a fairly short period of notice or compensation in lieu thereof. It is likely that most new employees accept their new employment after some degree of persuasion by the new employer, and except in unusual circumstances I do not think this should result in a significant lengthening of the notice period, particularly where employment with the previous employer was short. Clearly, the plaintiff made a deliberate

decision to join the defendant, and there is no suggestion that he was promised any degree of job security with the defendant.

[47] The fact that it took the plaintiff nine months to secure alternate employment may result in a slight increase in the appropriate notice period, but not by much.

[48] Absent the nine month period to secure alternate employment, I think a reasonable period of notice in the circumstances would be two months. Having regard to the period of search for alternate employment, I think a reasonable period of notice is three months.

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Disposition

[49] For the foregoing reasons, judgment shall issue in favour of the plaintiff in the amount of $12,000, together with pre-judgment interest at the statutory rate from the date of issuance of the statement of claim. The cross-motion is dismissed.

[50] I will entertain written submissions with respect to costs, not to exceed three pages, together with a costs outline. Mr. Seed shall have five days to file his submissions and Mr. Jassal shall have five days to respond. Mr. Seed shall have three days to reply.

[51] I simply note that the $1,500 in costs awarded by Daley J. are still outstanding, and can be enforced through the order of Daley J.

GRAY J.

Released: April 25, 2012

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