

**CITATION:** EVE V WILHELM et al, 2013 ONSC 4264

**COURT FILE NO.:** ES-756-11

**DATE:** 2013-06-20

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Rosalyn Valera Eve - Plaintiff

**AND:**

Lillian Wilhelm as Estate Trustee et al - Defendants

**BEFORE:** The Honourable Mr. Justice J. W. Sloan

**COUNSEL:** Jarvis K Postnikoff - Counsel for the Plaintiff

David M. Lobl & Jacob Kaufman - Counsel for the Defendant Miller Thompson  
LLP

**HEARD:** May 27, 2013

**ENDORSEMENT**

[1] Several orders were made on a consent/unopposed basis and are recorded on the motion and cross-motion records and should form part of this order.

**PLAINTIFF'S MOTION**

[2] The questions left for the court to decide with respect to the plaintiff's motion appear at Volume 1 of 2, Tab 1C pages 17, 18 and 19. These pages form a refusals chart from the examination of Mr. Martin on behalf of Miller Thompson LLP, which took place on October 22 and 23, 2012. The issues currently outstanding are numbers 4, 5, 6, 7, 10, 11, 13, 16 and 18 on pages 17 -19 and 1 on page 24.

[3] Mr. Martin is a senior lawyer with Miller Thompson LLP.

[4] The questions that he has refused to answer can be generally categorized into two categories. One calling for his legal opinion and the other category being whether or not the question is relevant.

[5] I agree with counsel for Miller Thompson that the answers to refusals 4, 11 and 13 are decisions that will ultimately have to be made by a judge if this matter is not settled before trial. What Mr. Martin's thinks the law is does not matter. What will likely be an issue is what Mr. Martin did in response to the situation he was advising on.

[6] Plaintiff's counsel does not need the answers to these questions to obtain an expert legal opinion. He does not need to know what Mr. Martin's knowledge was of the law but what it should have been. It appears that what the plaintiff may require would be a legal opinion on the standard of care required for a lawyer with Mr. Martin's experience practicing in the estate area of law. To obtain this opinion the plaintiff does not require the answers to the refusals 4, 11 and 13 and question 13 may very well be beyond the expertise of Mr. Martin, who is a lawyer not a real estate appraiser.

[7] Questions 5 & 6 are not legal questions. In question 5 Mr. Martin is being asked for his personal interpretation of clause 3(c) and in question 6 he is being asked if he thinks clause 3(c) is ambiguous. Just because he is a lawyer does not make it a legal question. The final determination of its relevance will be up to the court to decide.

[8] Refusals 7, 10 and 16 are questions that do not appear to be relevant to this action.

[9] With respect to question 7, clients' can always do as they wish. All a lawyer can do is to advise them.

[10] Refusal 18 however goes to the heart of this action and shall be answered along with any questions that arise out of the answer to it.

[11] I view the under advisement Question 1, on page 24 to not be relevant to this proceeding.

[12] The defendant Miller Thompson LLP shall answer Refusal Questions 5, 6 and 18 from the Volume 1 of 2 of the Plaintiff's Motion Record, set out at Tab 1(C) pages 17 and 18 and 19.

MILLER THOMPSON'S MOTION

[13] The question left for the court to decide on Miller Thompson's cross-motion is set out in Volume 1 of 2, of their motion record at Tab 1B, page 12. This question arises from the examination of the plaintiff Eve, which took place on July 30, 2012 and is issue 2 on the chart at Tab 1B.

[14] Eve has hired BDO to prepare an expert opinion on damages. It is Miller Thompson's position that any and all draft reports prepared by BDO must be produced.

[15] The case law in this area appears to be mixed and some of the cases pre date the new obligations placed on experts.

[16] On this issue I prefer to follow the reasoning set out in *Leo Alaire v SNC-Lavalin*, 2010 ONSC 6078 where Justice Platana followed Justice Nordheimer in *Aviaco International v Boeing* 2002 CarswellOnt 3266.

[17] I therefore order that all draft reports of BDO shall be produced.

[18] Since success was clearly divided, I make no order as to costs.

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J.W. Sloan J.

**Date:** June 19, 2013