

CITATION: Hockley v. Moy and Agar, 2010 ONSC 7121
COURT FILE NO.: CV-10-41117
DATE: 2010/12/20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Hockley v. Joanne Moy and Helen Agar, Estate Trustees of the Estate of Dorothy Madeline McKillop

BEFORE: Justice Corrick

COUNSEL: Ingrid Matchkars for James Hockley, Plaintiff/Responding Party
David M. Lobl for Joanne Moy and Helen Agar, Defendant/Moving Party

DATE HEARD: December 20, 2010

ENDORSEMENT

[1] The defendants move for the following order:

- a) That Lesley Burns attend at a *de ben esse* examination.
- b) Alternatively, that the defendants be granted leave to examine Lesley Burns at such time and place as directed by the court.
- c) The production of the notes and records of Lesley Burns' medical practitioners and caregivers made during the period November 1, 2010 – November 30, 2010 touching on Ms. Burns' capacity to have sworn her affidavit on November 22, 2010.
- d) That the plaintiff produce all drafts of the Lesley Burns affidavit, sworn November 22, 2010, and any documents exchanged between the plaintiff and Lesley Burns and between Lesley Burns and the plaintiff's counsel.
- e) That the affidavit of Lesley Burns be struck if she is unable or unwilling to accede to a cross-examination or a *de bene esse* examination.
- f) That the plaintiff pay the defendants the costs arising from the examination of Lesley Burns, in advance of such examination, if ordered.

[2] Given that the order sought by the defendants will significantly affect Ms. Burns and that there is no evidence before me that Ms. Burns has been notified of this motion, I order that the matter be adjourned, that Ms. Burns be served personally with the notice of motion, and that the

matter be brought back before the court on two days notice to the plaintiff and Ms. Burns. I am not seized of the matter, but am available to hear the matter on December 28 or 29.

[3] This matter has been subject to some procedural irregularities, and it is worth setting out the history. It began in April 2010 when a statement of claim was issued. On July 7, 2010, the parties agreed to have the action transferred to the Estates List. The matter was not converted into an application, but remained an action. A statement of defence was filed on August 11, 2010. No other steps in the action occurred until November 24, 2010, when the plaintiff delivered to the defendants an affidavit sworn on November 22, 2010 by Lesley Burns. Ms. Burns is terminally ill and, according to counsel for the plaintiff, has only two or three months to live.

[4] Since November 25, 2010, counsel for the defendant has sought to cross-examine Ms. Burns on her affidavit. To date, the plaintiff has not produced Ms. Burns for cross-examination. Notwithstanding this, the plaintiff served the defendants with a Request to Admit, which sets out many of the facts Ms. Burns deposes to in her affidavit.

[5] It is unclear pursuant to what authority Ms. Burns' affidavit was delivered. It was certainly not done pursuant to rule 36.01 of the *Rules of Civil Procedure*, which requires leave of the court or the consent of both parties to examine a person on oath before trial.

[6] The procedural difficulty in this case has been created by the party seeking to rely on Ms. Burns' affidavit. There is a very serious question about whether this affidavit would be admissible at trial if Ms. Burns is unavailable to testify at trial, and she has not been cross-examined on it. The defendants are entitled, as of right, to cross-examine Ms. Burns if the plaintiff wishes to rely on the affidavit.

[7] Mr. Lobl has been entirely appropriate in his requests to cross-examine Ms. Burns. He has offered to accommodate Ms. Burns in any way possible. It is not appropriate for plaintiff's counsel, Mr. Kacaba, to suggest, as he did in correspondence, that the defendants wish to subject Ms. Burns to an ordeal by seeking to cross-examine her.

[8] The plaintiff submits that he has no control over the witness, and cannot make the witness attend for cross-examination. He obviously had enough control over the witness to obtain an affidavit from her, and should be making every effort to produce her for cross-examination.

[9] In summary, my order is as follows:

1. This action bearing court file #CV-10-401117 commenced in the civil court at Toronto by statement of claim issued April 14, 2010 is transferred to the Estates List at Toronto.
2. This motion is adjourned to permit the moving party to personally serve notice of the motion on Lesley Burns.

3. This motion may be brought back before the court on two days notice.

Corrick J.

DATE: December 21, 2010