Fedorczenko et al. v. Jamieson et al.

56 O.R. (2d) 252
[1986] O.J. No. 855

ONTARIO
HIGH COURT OF JUSTICE
STEELE J.
10TH SEPTEMBER 1986.

Civil procedure -- Discovery -- Documents -- Medical records -- Employment records -- Personal injury action -- Plaintiff properly ordered to use best efforts to obtain relevant medical and employment records -- Rules 30, 34.10.

In a personal injury action, the plaintiff may be required to use his or her best efforts to obtain clinical notes and records of medical doctors and a summary of hospital services received as well as copies of employment records. Rules 30.02 and 34.10 requiring a party to produce documents "in his or her possession, control or power" do not substantially differ from the former rule which required the party to produce documents "in his possession, custody or power" and, accordingly, the former practice of requiring a party to make the best efforts to obtain such documents for production is still to be followed.

Gravlev v. Venturetek Int'l Ltd. et al. (1979), 15 C.P.C. 18; Golwala et al. v. Chin et al. (1985), 31 A.C.W.S. (2d) 441, 2 W.D.C.P. 179; Tilly et al. v. Crangle (1981), 31 O.R. (2d) 641, 120 D.L.R. (3d) 563; Woods et al. v Harris (1979), 25 O.R. (2d) 14, 12 C.P.C. 119, apld

Statutes referred to

Health Insurance Act, R.S.O. 1980, c. 197, s. 44(2)

Rules and regulations referred to

Rules of Civil Procedure, rules 1.04(1), 30.01(1)(b), 30.02(1), (2), 30.10(1), 34.10(1), (2)
Rules of Practice, Rules 340, 347, 349

APPEAL from an order of Scime D.C.J. dismissing a motion to require the plaintiff to reattend at discovery to make production of certain documents.

P. A. Gemmink, for appellants.

Michael Kelly, for respondents.

STEELE J.:-- This is an appeal from the order of the Honourable Judge Scime dismissing a motion to require the plaintiffs to reattend at discovery and make production of, or attempt to obtain, various types of documents.

The appeal requests only an order that the plaintiffs use their best efforts to obtain clinical notes and records of medical doctors, a summary of the OHIP services, and an employment file.

The basic issue is whether the new rules have altered the law with respect to productions. Cases decided under former Rules 340 and 347 for the production of documents not in the possession of a party held that the party could be ordered to make "reasonable efforts" to obtain them in appropriate cases: see Gravlev v. Venturetek Int'l Ltd. et al. (1979), 15 C.P.C. 18. Judge Scime, following the reasoning of the Honourable Judge Haley in Golwala et al. v. Chin et al. (1985), 31 A.C.W.S. (2d) 441, 2 W.D.C.P. 179, and similar decisions, held that the new rules do not permit such an order.

The relevant old rules are:

340. The person to be examined or any party to the action shall, if so required by the subpoena or notice, produce on the examination all books, papers and documents relating to the matters in issue that he could be required to produce at a trial.

. . . . .

347. Each party, after the defence is delivered or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents that are to have been in his possession, custody or power relating to any matters in question in the action, and to produce and deposit them with the proper officer for the usual purposes and a copy of such affidavit shall be served forthwith after filing.

. . . . .

349. Where a document is in the possession of a person not a party to the action and the production of such document at a trial might be compelled, the court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy that may be used for all purposes in lieu of the original.

The relevant new rules are:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

. . . . .

30.01(1) In rules 30.02 to 30.11,

. . . . .

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

. . . . .

30.02(1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

. . . . .

30.10(1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

. . . . .

34.10(1) Subrule 30.01(1) (meaning of "document", "power") applies to subrules (2), (3) and (4).

(2) The person to be examined shall bring to the examination and produce for inspection,

(a) on an examination for discovery, all documents in his

or her possession, control or power that are not privileged and that subrule 30.04(4) requires the person to bring; and

(b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that the notice of examination or summons to witness requires the person to bring.

The issue of clinical notes was not argued before Judge Scime and the details and relevance thereof were not made clear to the court on appeal. Based on Tilly et al. v. Crangle (1981), 31 O.R. (2d) 641, 120 D.L.R. (3d) 563, the requested motion is too wide and the appeal is dismissed on this point without prejudice to a proper application being brought on narrower grounds.

Section 44(2) of the Health Insurance Act, R.S.O. 1980, c. 197, permits the person receiving the services to obtain limited information with respect to services rendered. The plaintiff does not have that information and the question is should he or she be required to request it.

An employee is not entitled, as of right, to a copy of his employment records. However, relevant information therein should be obtainable from the employer: see Woods et al. v. Harris (1979), 25 O.R. (2d) 14, 12 C.P.C. 119. If the former test of "reasonable efforts" by a party is applicable, such may be obtained if the relevant information is specified. The present appeal relates to the entire file and is therefore too broad, and the appeal is dismissed in this regard.

As stated, the basic issue is whether the former practice of ordering a party to use "reasonable efforts" to obtain proper information still applies rather than requiring a motion to be brought against a third party under rule 30.10 in every instance.

The words in the old rules were, "in his possession, custody or power": see Rule 347.

The words in the new rules are "in his or her possession,

control or power": see rules 30.02(1) and 34.10(2).

There is no substantial difference between these words. If anything, the word "control" is wider than "custody".

In Golwala v. Chin, supra, Judge Haley felt that the definition of "power" in s. 30.01(1)(b) prohibited the application of the prior "reasonable efforts" rulings. With respect, I disagree. The principle of "reasonable efforts" related to the broader principle of full disclosure and that a party who might reasonably be expected to be able to obtain documents should be obliged to attempt to do so without requiring a motion under rule 30.10 in every case. The definition in rule 30.01(1)(b) relates only to "power" and is not restrictive and does not change the law in this regard. In fact, rule 1.04(1) requiring liberal construction of the rules reinforces the previous jurisprudence.

The wording of rule 30.02 relating to disclosure, and rule 34.10 relating to examination is the same and there is no difference between respect to the obligation to attempt to obtain the documents in either case. However, there may be differences with respect to what orders may issue as a result of specificity.

For these reasons the appeal is allowed with respect to the OHIP summary, but is dismissed in the other aspects, with leave to reapply on specific material. The order of Judge Scime is set aside and in its place will be an order to implement the above decision.

Costs to the appellant in the cause.

Appeal allowed; order accordingly.