

CITATION: Lipovetsky v. Sun Life Assurance Company of Canada, 2018 ONSC 1664
COURT FILE NO.: CV-15-530166
MOTION HEARD: 20180308

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Julia Lipovetsky, Plaintiff

AND:

Sun Life Assurance Company of Canada, Defendant

BEFORE: Master Jolley

COUNSEL: S. Simpson, Counsel for the Moving Party Defendant

Alon Rooz, Counsel for the Responding Party Plaintiff

HEARD: 8 March 2018

REASONS FOR DECISION

- [1] The defendant brings this motion for an order compelling the plaintiff to attend an independent medical examination with Dr. Bentley or another doctor with a specialty in physiatry and an independent psychiatry examination with Dr. Siu without conditions attached to those attendances. The defendant also seeks its costs thrown away as a result of the plaintiff's failure to attend the IME that had been scheduled with Dr. Bentley on 31 January 2018.
- [2] The plaintiff is prepared to attend those IMEs but on conditions, namely that she be allowed to bring a companion with her to each IME as a support person to her and that she be allowed to audio record the examinations.
- [3] In the negotiation of these IMEs, counsel for the defendant took no position on the plaintiff's request that she attend with a support person. Counsel indicated that it would advise the doctors that the plaintiff may bring someone with her but that it would be up to the doctor whether he allowed the friend into the examination room. In response to the plaintiff's position, Dr. Bentley has advised that he does not allow for individuals to be present during an examination.
- [4] Defence counsel objects to the audio recording of the IME. At the conclusion of the motion, I was advised that Dr. Siu has withdrawn as the potential psychiatry IME doctor. As a result, the plaintiff has also withdrawn her request to audio record the psychiatric examination, given it is no longer being carried out by Dr. Siu. Only the audio recording of Dr. Bentley is in issue.

- [5] Both the recording and the attendance of a companion are in the discretion of the court. Rule 33.03 provides that the court may, on motion, determine any dispute relating to the scope of an examination. That has included whether an examination may be recorded. On the issue of a companion attending the examination, the starting point, as set out in Rule 33.05, is that no other person can be present at the IME, unless the court orders otherwise. The cases are clear that these orders and terms are fact specific.

Attendance of the Companion

- [6] The plaintiff deposes that the pending IMEs cause her stress and she believes having a companion attend with her will reduce her stress and risk of self-harm. There is no affidavit from a psychologist but the plaintiff has appended to her affidavit a letter from her treating psychologist. Based on the plaintiff reporting to her about the stress the upcoming IMEs are causing her, the psychologist recommends that a person of the plaintiff's choice be allowed to attend with her to provide an emotional anchor and reduce "her current state of stress and anxiety."
- [7] The plaintiff commenced this action in June 2015 for a declaration that she is entitled to long term disability benefits. She alleges that she was forced to cease work in April 2011 as a result of her medical condition. Among her conditions, she pleads that she suffers from anxiety and depression and has been diagnosed with bipolar disorder (II) and borderline personality disorder. She pleads that she suffers from persistent emotional dysregulation and becomes easily overwhelmed and is vulnerable to stress. She filed an affidavit on this motion confirming that she suffers from those illnesses and that, as a result of her emotional dysregulation, she has great difficulty adjusting to stressful situations and her stress response is generally more sensitive than that of an average person. I understand that this is contested by Sun Life.
- [8] Against this request is the position of Dr. Bentley that he does not permit any friends, family, counsel, personal health care aides, etc. to be present during the examination. The plaintiff wishes Dr. Bentley to conduct the IME as he has already seen the plaintiff in October 2013 and can provide an assessment as to how her condition is changing over time. To permit the plaintiff to have a companion attend may negate the defendant's choice of Dr. Bentley as the IME doctor.
- [9] As noted in *Bellamy v. Johnson*, [1992] O.J. No. 864 (C.A.) "the judgment of the doctor as to how the examination is to be conducted is not final, and the court has jurisdiction to set terms and conditions relating to the examination...". I also note that in *Dempsey v. Wax* 2007 CanLII 19419 (ON SC), the defendant's preferred doctor was not prepared to conduct the IME if it were video recorded. The court did not put much weight on that position and ordered that the IME be videotaped, in light of the specific circumstances of that case.
- [10] There is no evidence before me that the presence of a third party support person would skew the results. However, there is enough evidence of the plaintiff's mental condition for me to exercise my discretion and allow her to have a support person present for the

IMEs. It is to be noted that the support person must be a passive presence at the examination and must not attempt to participate or interject. There is to be no communication between the support person and the plaintiff during the IME. The support person shall not be called as a witness at trial. His or her role is exclusively to be present, not to testify as to what went on at the IME or otherwise comment.

Audio Recording of IME

- [11] The plaintiff requests permission to audio record the appointment with Dr. Bentley. She does so because she believes, based on his earlier examination of her and his report, that he is biased.
- [12] Looking at the plaintiff's affidavit, she deposes that she reported information to Dr. Bentley that he did not include in his report. Further, his physical examination was not carried out in the same way as other doctors she has seen. For instance, he did not have her lie down to examine her lower back and shoulder/neck. Lastly, his examination did not last as long as that of other doctors she has seen. Based on Dr. Bentley's report, she feels he is accusing her of lying about her pain issues.
- [13] The Court of Appeal in *Adams v. Cook* 2010 ONCA 293 dealt with the tape recording of IMEs. There the request to allow the tape recording was denied because there was no evidence that the doctor in question was biased. The plaintiff's argument was one of systemic bias among doctors who conducted defence medicals. Here the plaintiff does make specific allegations about why she believes Dr. Bentley is biased against her. However, in my view, they fall short of what is required for the court to exercise its discretion to permit the plaintiff to audio record the IME. There is no evidence of a lack of accuracy in Dr. Bentley's earlier report. The fact that not everything the plaintiff told him about her pain issues is set out in the report does not make the report inaccurate and is not a sufficient basis to allege bias. It falls short of the requirement that the plaintiff demonstrate the potential for a *bona fide* concern as to the reliability of the doctor's or plaintiff's account of any statements made during the examination. Lastly, because Dr. Bentley examined the plaintiff differently or for a different length of time than other doctors is not evidence that he is biased.
- [14] On the facts of this case, I decline to exercise my jurisdiction to permit the plaintiff to audio record the IME conducted by Dr. Bentley.

Claim for costs thrown away

- [15] On 10 January 2018 the defendant booked the IME with Dr. Bentley for January 31. On January 30 the plaintiff advised that she would not attend. Cancellations costs were incurred for Dr. Bentley (\$1,875) and for the arranged transportation (\$42.50) as a result. Additionally, defence counsel submitted its time printout showing it incurred costs of approximately \$2,800 to negotiate and organize the IMEs. It seeks costs thrown away of \$4,719.45.

- [16] The plaintiff takes the position that the defendant was premature in booking the IME with Dr. Bentley as the parties had not agreed on terms.
- [17] It argues that the plaintiff was aware well in advance of January 30 that the plaintiff would not attend unless there was an agreement on terms. On 4 January 2018 defence counsel requested the plaintiff's availability for January 31 for the appointment with Dr. Bentley. On 5 January 2018 plaintiff's counsel confirmed his client's availability and stated that the plaintiff may wish to record the examination. "Please advise whether that poses an issue." On 8 January 2018 defence counsel confirmed that this was an examination under the Rules and advised that the plaintiff would need to obtain the consent of the doctors to any recording. On 9 January 2018 plaintiff's counsel advised that the defendant should advise the doctors of her intention and noted that his client would not sign any consents that he had not seen in advance. On 10 January 2018 defence counsel advised plaintiff's counsel that he disagreed with the plaintiff's view on the right to record an examination absent a court order. With known disagreement on the audio recording, defence counsel proceeded to book the IME with Dr. Bentley on January 10.
- [18] On 14 January 2018 plaintiff's counsel advised that his client intended to bring a companion to the IME with her. On 18 January 2018 defence counsel wrote that he would advise the doctor of this intention but that it would be up to the doctor whether that would be allowed. That same day defence counsel sent the forms of consents from the doctors. On 22 January 2018 plaintiff's counsel revised the forms to delete the prohibitions on the attendance of a companion and on recording the examination.
- [19] It was clear on 10 January 2018 when the IME was booked that the parties did not agree on the terms under which it would be conducted. If it was not clear then, it was clear by 22 January 2018 that there were fundamental disagreements. There is no evidence before me on the cancellation terms of Dr. Bentley but it would have been prudent either to not book the IME until the terms were sorted out or to cancel by January 22.
- [20] I do not fault the defendant for attempting to move this matter along by securing IME dates. However, it turned out to be premature to book the examination without an agreement on terms and I will not order the plaintiff to pay the attendant cancellation costs.

Miscellaneous

- [21] There was evidence in the record of consent forms that were required by either Dr. Siu or Dr. Bentley that contained terms outlining at least what Dr. Siu saw his professional obligation and to which he required the plaintiff's consent. While the plaintiff viewed those forms as consents, what they are are acknowledgements of the limitations on confidentiality in the circumstances of the examination. For instance, one term particularly troubling to the plaintiff was that Dr. Siu could certify and admit the plaintiff to hospital against her will for psychiatric treatment if he felt she was a danger to herself.

The plaintiff is not prepared to sign such a form as a condition of the defendant's chosen doctor conducting an IME.

[22] As cited in *Tanguay v. Brouse* (2002) 20 C.P.C. (5th) 376 (S.C.J.):

In *Bellamy v. Johnson*, the court made the distinction in roles between that of a doctor conducting a defence medical assessment under s. 105 of the *Courts of Justice Act* and a doctor examining a patient within the bounds of the traditional doctor-patient relationship. That distinction lies at the core of this decision. In my view, a medical examination conducted under s. 105 of the *Courts of Justice Act* and Rule 33 enables a health practitioner in Ontario to (a) carry out the examination and (b) report his/her findings to the adversary of the party examined without fear of successful prosecution for professional misconduct based on the absence of written consent to do either or both of (a) and (b).

[23] I adopt the *dicta* of Valin, J. in *Tanguay*, as follows:

I am of the view that s. 105 of the *Courts of Justice Act* and Rule 33 contain a complete code and procedure for court ordered medical examinations in Ontario. Neither s. 105 of the *Act* nor Rule 33 contain a requirement that the party being examined execute any consent, authorization or agreement presented by an examining health practitioner in advance of or during an examination.

[24] I hold that the plaintiff is not required to sign a release, consent or agreement as a condition of undergoing the IMEs.

[25] Lastly, counsel for the plaintiff asked me to make an order prohibiting the doctors conducting the IMEs from speaking to defence counsel. I am not prepared to make such an order. As noted in *Moore v. Getahun* 2015 ONCA 55, consultation between counsel and expert witnesses in preparing reports is necessary to ensure the efficient and orderly presentation of expert evidence and timely, affordable and just resolution of claims.

Costs

[26] There has been divided success on the motion and I make no order as to costs.

Master Jolley

Date: 12 March 2018