“Two Wrongs Do Not Make a Right” – a Lesson in How Not to Settle a Lawsuit

By: Matt Maurer

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In the very entertaining decision of Ugovsek v. City of Toronto et al which was released last week, Master Haberman provided a lesson on how, and how not, to resolve a lawsuit.

The plaintiff, Ugovsek, slipped and fell on a piece of land in 2008. Having difficulty determining who was responsible for the piece of land in question, Ugovsek named the City of Toronto and others as defendants. By 2011 Ugovsek had determined that the non-City defendants (which I will refer to simply as the defendants) bore no responsibility and proposed to release the defendants from the lawsuit without costs. The defendants insisted on $5,500 in costs as a precondition to agreeing to be let out of the lawsuit. Although the plaintiff had indicated they would not be proceeding against the defendants and the defendants advised that they were content with this arrangement and had agreed to drop their crossclaim, the princely sum of $5,500 stood in the way.

$5,500 coincidentally happened to be the same amount of a costs award that was previously made against the defendants' insurers on a motion to compel attendance at a mediation. Master Haberman noted that it appeared to her that the defendants, now feeling vindicated that they were right all along and ought not to have been parties to the lawsuit, wanted those costs back.

What happened next, as stated by Master Haberman is that "one party went overboard. Instead of trying to rein him in, the other party simply jumped right in after him."

It appears that counsel never picked up the phone to try to resolve or discuss the issue. Instead, the defendants threatened to bring a motion for Summary Judgment. In response, the plaintiff proposed to have the defendants' costs assessed, a procedure by which an assessment officer determines how much costs a party ought to receive. The defendants ignored the request and served an affidavit which appeared to be in support of a motion for Summary Judgment. The plaintiff sought to cross-examine the affiant, the defendants refused, and the parties ended up in front of Master Haberman for a determination as to whether cross-examination was appropriate.

Master Haberman held that since the plaintiff had already agreed to dismiss the lawsuit, and the only issue was costs, the defendants' motion for Summary Judgment to have the lawsuit dismissed was redundant and not available in the circumstances. She held that the Summary Judgment motion amounted to an abuse and an improper use of court resources. Since the Summary Judgment motion could not be brought, then cross-examination on an affidavit filed in support of that motion was also unavailable.

Further and in the alternative, assuming that the defendants could in fact properly bring a Summary Judgment motion, Master Haberman also denied the right to cross-examine on the basis that cross-examination would only relate to the issue of costs in the action and that costs did not feature as either a legal or factual issue in the Summary Judgment motion.

Counsel for the defendants stated during the motion that this all could have been avoided if her clients had assessed costs, a statement that Master Haberman found outrageous in light of the fact that the plaintiff had offered this to the defendants nearly 8 months earlier. Master Haberman dismissed the motion and made each party bear its own costs. She also strongly encouraged the defendants to reconsider moving forward with their Summary Judgment motion.

Civil litigation is becoming increasingly expensive. In this case the parties did not do themselves any favours in this regard. When the plaintiff first proposed to let the defendants out of the lawsuit, only $5,500 separated the parties. In fact, it was probably even less than this amount since the plaintiff was prepared to have the defendants' costs assessed, meaning the plaintiff was probably prepared to pay the assessed amount (which very well could have ended up being the full amount). By the time that the parties appeared before Master Haberman, the costs being sought by the defendants exceeded $20,000. How much of this approximate $15,000 was incurred on the motion before Master Haberman and the Summary Judgment motion is uncertain. However, Master Haberman notes that clearly each party spent in excess of $5,500 preparing for the Summary Judgment motion and dealing with the motion before her.