

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CNL STAMPING & TOOLING INC.

v.

LORWOOD HOLDINGS INCORPORATED

2015 ONSC 492

COURT FILE NO.: CV-10-408126

BEFORE: MASTER R.A. MUIR

**COUNSEL: Paul H. Starkman for the plaintiff
Neil G. Wilson for the defendant**

HEARD: January 16, 2015

ENDORSEMENT

[1] This is a motion brought by the defendant for, among other things, an order striking out certain paragraphs of the plaintiff's amended reply dated October 23, 2013. The defendant relies on Rules 25 and 26 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"). The defendant argues that the impugned paragraphs are improper reply. The defendant submits that certain paragraphs properly belong in the statement of claim and others are simply not responsive to the amended statement of defence.

[2] The plaintiff submits that the reply is proper and complies with the applicable rules of pleading. However, the plaintiff's primary argument is that the defendant has lost any rights it may have to challenge the pleading. The plaintiff submits that the defendant has taken further steps after the pleading was served. As a result, the defendant is estopped from challenging the pleading pursuant to Rule 2.02.

[3] Rule 2.02 provides as follows:

A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,

(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or

- 2 -

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

[4] A further step as contemplated by Rule 2.02 must amount to a waiver of an irregularity so as to disentitle a party from attacking a pleading. It must be determined whether the moving party has impliedly or expressly forgiven the defect or irregularity by taking a further step in the proceeding. See *Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (SCJ) at paragraph 11. In my view, there has been such an implied waiver in this case and the defendant should not be granted leave to bring this motion.

[5] The amended reply was served by the plaintiff in late October 2013. The defendant's lawyer immediately objected to the contents of the amended reply and took the position that it was an irregular pleading for the very same reasons the defendant relies upon on this motion. The plaintiff's lawyer responded to the defendant's lawyer on November 29, 2013 by stating that the amended reply was proper and that the defendant's objections were really more a matter of form rather than substance. The plaintiff's lawyer suggested that the upcoming trial date be adjourned for the purpose of conducting examinations on the new paragraphs in the amended reply and the amended statement of defence. The defendant's lawyer then responded on December 9, 2013. He reiterated his objections to the pleading but did, nevertheless, agree to the suggestion that the trial be adjourned.

[6] Over the next several months the parties exchanged various letters and email messages in relation to the further discoveries. Dates for the examinations were booked and re-booked. Notices of examination were served by the parties, including two notices of examination served by the defendant. At no time prior to the service of the notices of examination did the defendant's lawyer repeat his objections to the pleading or indicate that his continued discovery of the plaintiff would be without prejudice to the defendant's right to challenge the amended reply.

[7] The continued discovery was eventually scheduled for April 1, 2014. On March 27, 2014, three business days before the continued discovery, the defendant's lawyer sent an email message to the plaintiff's lawyer in which he indicated for the first time that his continued examination of the plaintiff's representative would be without prejudice to the objections he had made to the plaintiff's amended reply in October 2013. The plaintiff's lawyer refused to accept this reservation of rights by way of a responding email on March 31, 2014 and again at the examination on April 1, 2014. As a result, the defendant's lawyer declined to examine the plaintiff's representative on April 1, 2014 and this motion was then served and filed.

[8] In my view, in the circumstances of this motion, the defendant's notices of examination constitute further steps contemplated by Rule 2.02(b) and an implied waiver of the defendant's right to attack the pleading. The continued discoveries were scheduled and the notices served without any reservation of rights. It was only on the eve of the discoveries that the defendant sought to qualify the examination and attempt to preserve its rights to attack the amended reply at some future date. Moreover, the scheduling of the discoveries and the service of the notices of examination were not just any step in the litigation. The discoveries were scheduled in order to question the plaintiff's representative on the very paragraphs in the amended reply to which the

- 3 -

defendant objected. In my view, there can be no clearer example of a further step of the nature contemplated by Rule 2.02(b).

[9] In addition, I see no basis for granting leave to the defendant to bring this motion despite the further step. The defendant made a deliberate decision to agree to adjourn the trial and schedule the continued discoveries on the pleading to which it had previously objected. This is not a situation where the further step was taken in error or inadvertently. It is also not a situation where the further step was unrelated to the impugned document. In my view, the actions of the defendant clearly and unambiguously waived any rights it had to object to the amended reply. There is no basis for granting leave under these circumstances.

[10] As an alternative form of relief, the defendant sought leave to amend its amended statement of defence, presumably to respond to the amended reply. I see no basis for granting this alternative relief on this motion. By its actions, the defendant has waived its right to object to the amended reply. Moreover, the defendant has already been examined on its amended statement of defence. I would also note that the defendant's motion record does not contain a draft amended statement of defence for the court's consideration. The refusal to grant this relief, however, is without prejudice to the right of the defendant to bring a motion to amend its amended statement of defence pursuant to Rule 26 on proper grounds and on proper evidence.

[11] However, it is my view that the defendant remains entitled to a continued examination of the plaintiff's representative as previously agreed to by the parties. After receiving the plaintiff's lawyer's email of March 31, 2014, the defendant's lawyer immediately responded to the plaintiff's lawyer and advised that the plaintiff's representative need not attend at the examination the following day and that a motion would be brought to challenge the pleading. Despite this advice, the plaintiff's representative appeared at the examination and the plaintiff's lawyer insisted that an examination of his client take place. The plaintiff's lawyer stated that if the defendant chose not to examine the plaintiff on April 1, 2014, the plaintiff would not return to be examined again.

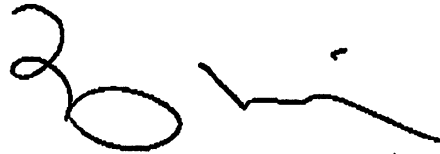
[12] The plaintiff obviously knew that the defendant was not going to conduct an examination on April 1, 2014, given its stated intention to bring this motion. There was no need to produce the plaintiff's representative on that date given the content of the defendant's lawyer's email of March 31, 2014. In my view, it was reasonable for the defendant to decline to examine the plaintiff's representative in the circumstances. Such an examination under those terms would have been a very obvious further step and would have clearly resulted in a loss of any right to object to the pleading. In my view, it is in the interest of justice that the defendant be permitted an opportunity to conduct a continued examination of the plaintiff.

[13] I therefore order as follows:

- (a) the relief sought by the defendant at paragraphs (a) and (b) of its notice of motion dated September 15, 2014 is dismissed;
- (b) the relief sought by the defendant at paragraph (c) of its notice of motion dated September 15, 2014 is dismissed without prejudice to the right of the

defendant to bring a motion to amend its amended statement of defence pursuant to Rule 26 on proper grounds and on proper evidence;

- (c) the plaintiff's representative shall attend at a continued examination for discovery on a date to be agreed to by the parties; and,
- (d) if the parties are unable to agree on the issue of costs, they may make brief submissions in writing by no later than February 20, 2015.



Master R.A. Muir

DATE: January 22, 2015