

Case Name:

Muzzin v. Miniature World Day Care Inc.

Between

**Gina Muzzin, Angela Muzzin, Mark Muzzin
and Michael Muzzin, Plaintiffs, and
Miniature World Day Care Inc., Solomon
Prabhakar Francis and Lalitha Joyce
Francis, Defendants**

[2016] O.J. No. 2754

Court File No. CV-13-44674-SR

Ontario Superior Court of Justice
Hamilton, Ontario

C.D. Braid J.

Heard: January 13, 2016.

Oral judgment: January 13, 2016.

(21 paras.)

Counsel:

J. Brown, Student-at-Law, Counsel for the Plaintiffs.

W. Ekhlas Smith, Counsel for the Defendants.

RULING

1 C.D. BRAID J. (orally):-- The defendants have brought a motion seeking to compel production of the employment file of Paramount Family Centre, who is the current employer of Gina Muzzin, the primary plaintiff in this action. The defendants requested the employment file at the examination for discovery of Ms. Muzzin and the request was refused.

I - Facts

2 This action arises out of a slip and fall by the plaintiff, Gina Muzzin, on April 25, 2012. At the time of loss, Ms. Muzzin was employed as a daycare worker at Miniature World Daycare, one of the defendants. The statement of claim alleges that the accident was caused by the negligence of the defendants. Liability and damages are contested issues in this action.

3 In the statement of claim, Ms. Muzzin claims to have suffered impairments which substantially interfere with her employment; a loss of income including future loss; a loss of competitive advantage; and a decrease in her employability.

4 Ms. Muzzin was examined for discovery on February 5, 2015. Ms. Muzzin has continued to work in the same field since the incident in question, namely at daycares. Pursuant to undertakings given at the discovery, Ms. Muzzin produced employment files from three former employers, namely Umbrella Family and Children's Centres, First Class Children's Centres, and Child Ventures Early Learning Academy.

5 At the time of the discovery, Ms. Muzzin was employed by Paramount Family Centre in Stoney Creek, Ontario. Ms. Muzzin was asked at discovery to produce the employment file of Paramount Family Centre. The plaintiff's counsel refused to produce that employment file. Counsel stated that he "did not want anything to jeopardize Gina's employment at the present time as she is a part time employee". Counsel acknowledged that the records are probably relevant, but that they would not make a request at this stage for the records from her employer for fear of jeopardizing her employment.

6 In response to the defendants' motion to compel production of the file, the plaintiffs have filed an affidavit of a lawyer at the plaintiffs' law firm. The affidavit states the following:

I verily believe that Ms. Muzzin's refusal to request the employment file is on the basis of undue prejudice. Ms. Muzzin's job is a part time position where she is largely on call and which is physical in nature, and she believes she will be at risk of losing her job if her employer knows she is in litigation for ongoing personal injuries.

7 The affidavit also states the following:

I verily believe that Ms. Muzzin has advised that she has worked in daycare centres for many years and has cause to believe that her job may be at risk if her employer becomes aware of her personal injury action.

II - Analysis

8 On this motion to compel production of records, this court must keep in mind the considerations in Rule 29.2.03, which states the following:

29.2.03(1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether:

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce a document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source.

9 I have kept in mind these considerations. In particular, I have weighed the factor set out at 29.2.03(1) (c), which is whether the requirement to produce the document would cause undue prejudice to Ms. Muzzin.

10 At the discovery of Ms. Muzzin, counsel for the plaintiffs seemed to acknowledge that the employment file being sought is relevant, although it was counsel's position that it is of only marginal relevance to the matters in issue in

this action. It is notable as well that the plaintiffs have already produced the records from three other employers, which is a consideration as to relevance in that they have already acknowledged that those records are relevant.

11 On this motion before me, the plaintiffs have argued that the records are not relevant. The plaintiffs state that they have produced employment records from all former employers, as well as income tax records. The plaintiffs state that the defendants' arguments about what the employment file might reveal are highly speculative. Finally, the plaintiffs argue that, if the current employment file is relevant and probative, the prejudice of requesting such a record outweighs the probative value of the record. The plaintiffs argue that Ms. Muzzin would likely suffer undue prejudice and potential harm if production were ordered, and that these records are not necessary to enable the defendants to mount a full and complete defence.

12 In my view, the records are relevant to the issues raised by the pleadings. In particular, the statement of claim states that Ms. Muzzin has suffered impairments which substantially interfere with her employment; that she has suffered a loss of income including future loss; that she has suffered a loss of competitive advantage; and that she has suffered a decrease in her employability.

13 The plaintiffs acknowledge that Ms. Muzzin's current job is physical in nature. The records are relevant to the claim that Ms. Muzzin has suffered impairments that substantially interfere with her employment. The records are likely to contain performance reviews, and may contain information regarding limitations, modifications of duties and/or hours of work, and other information that speaks to her claim for ongoing losses and damages. The records are also relevant to the claims for loss of income, loss of competitive advantage, and decrease in employability.

14 In claiming prejudice, the plaintiffs have the onus of establishing that prejudice would be caused by the order sought. I find that the plaintiffs have not provided any evidence to establish why Ms. Muzzin believes her job would be at risk. The court has been provided with what I would deem speculative evidence of a lawyer at the plaintiff law firm, which is not firsthand information. The affiant does not say whether he spoke to Ms. Muzzin directly to formulate his beliefs. There is no factual background or basis for Ms. Muzzin's belief. Instead, it simply contains a bold statement that, given her experience in the daycare industry, she has cause to believe that her job may be at risk if her employer becomes aware of this action. Of course, Ms. Muzzin's employer is bound by the law and is not entitled to fire her if they become aware of this litigation.

15 I also note that, once this order is made compelling Ms. Muzzin to produce the records, Ms. Muzzin can request a copy of her records from her employer. She does not need to provide a reason for the request. The employer does not necessarily need to be made aware of this litigation.

16 I find that the plaintiffs have not established prejudice within the meaning of Rule 29.2.03. I further find that the records are relevant and should be produced.

III - Conclusion

17 In the result, I am ordering that the plaintiffs shall produce the employment file of Paramount Family Centre. To be more specific, this court orders that the plaintiff, Gina Muzzin, answer question 226 from her examination for discovery by requesting and producing her employment file of Paramount Family Centre. I find that 60 days is an appropriate time to put on such an order, and the records shall be produced within 60 days of this order.

18 I have endorsed the motion record with the following: Jennifer Brown, student-at-law, for the plaintiff. Waheeda Ekhlas Smith, counsel for defendants. For reasons given orally, order is granted requiring the plaintiffs to produce the records sought.

...SUBMISSIONS ON COSTS BY MS. EKHLAS SMITH

...SUBMISSIONS ON COSTS BY MS. BROWN

RULING ON COSTS

19 I have reviewed the costs outline, and I have considered the submissions of counsel. It is indeed unfortunate that this matter had to proceed to a motion in this fashion. I understand that the matter was before the court on one earlier occasion and was adjourned because of material received somewhat late, although both sides suggest that the other side filed materials late. In my view, the amount that is being sought is modest, especially given the fact that it does not include the attendance for today's date.

20 I find that a partial indemnity rate is appropriate, and I am ordering that the plaintiff shall pay costs of this motion to the defendants in the amount of \$3,200. Those costs shall be paid within 30 days.

21 I have made that endorsement, but I have also handwritten on the proposed order. In paragraph two it now reads: This court further orders that the plaintiff, Gina Muzzin, pay to the defendants the costs of the motion in the amount of \$3,200 within 30 days of this order. I've also signed one copy of that order.

...PORTION OF PROCEEDINGS NOT REQUIRED

...WHEREUPON THESE PROCEEDINGS WERE CONCLUDED