SUPREME COURT OF YUKON

Citation: *Spencer v. Marshall*, 2012 YKSC 13 Date: 20120222
Registry: Whitehorse

11-A0028

Between:

LEE A. SPENCER

Plaintiff

AND:

LUCY MARSHALL and JOSEPH BINNIE
WESTMINISTER HOTEL (YUKON) LTD., dba THE BEER PARLOUR, THE SNAKE PIT,
And THE TAVERN, KLONDIKE VISITOR ASSOCIATION,
dba DIAMOND TOOTH GERTIE'S GAMBLING HALL
JANE DOES 1-8, JOHN DOES 1-8, ABC COMPANY, and XYZ COMPANY

Defendants

AND:

WESTMINISTER HOTEL (YUKON)LTD., dba THE BEER PARLOUR, THE SNAKE PIT,
And THE TAVERN, KLONDIKE VISITOR ASSOCIATION,
dba DIAMOND TOOTH GERTIE'S GAMBLING HALL
JANE DOES 1-8, JOHN DOES 1-8, ABC COMPANY, and XYZ COMPANY

Third Parties

11-A0029

Between:

LUCINDA HILL SPENCER

Plaintiff

AND:

LUCY MARSHALL and JOSEPH BINNIE
WESTMINISTER HOTEL (YUKON)LTD., dba THE BEER PARLOUR, THE SNAKE PIT,
And THE TAVERN, KLONDIKE VISITOR ASSOCIATION,
dba DIAMOND TOOTH GERTIE'S GAMBLING HALL
JANE DOES 1-8, JOHN DOES 1-8, ABC COMPANY, and XYZ COMPANY

Defendants

AND:

WESTMINISTER HOTEL (YUKON)LTD., dba THE BEER PARLOUR, THE SNAKE PIT,
And THE TAVERN, KLONDIKE VISITOR ASSOCIATION,
dba DIAMOND TOOTH GERTIE'S GAMBLING HALL
JANE DOES 1-8, JOHN DOES 1-8, ABC COMPANY, and XYZ COMPANY

Third Parties

Before: Mr. Justice R.S. Veale

Appearances:

A.C. Richard Parsons	Counsel for the Plaintiffs
Megan E. Whittle and Gaynor C Yeung	Counsel for the Klondike Visitor Association
Anthony Slemko	Counsel for Westminster Hotel (Yukon) Ltd.

REASONS FOR JUDGMENT
(Affidavit of Documents and Discovery of Dennis Dunn)

INTRODUCTION

[1] The plaintiffs bring this application against the Klondike Visitors Association ("KVA") for three remedies:

1. produce the documents and records requested in the examination for discovery of Gary Parker, a representative of the KVA;
2. produce Dennis Dunn to be examined; pursuant to Rule 27(5) on the issue of KVA practice and procedure on alcohol service; and
3. produce a sworn affidavit of documents pursuant to Rule 25(6).

[2] There are two separate actions, one for Lee Spencer and one for Lucinda Spencer. I have been case managing the matter and counsel have been cooperative in moving the case forward.

BACKGROUND

[3] The court action is for damages suffered by the plaintiffs in a motor vehicle accident on July 24, 2009, south of Dawson City, Yukon.

[4] It is a matter of record in *R. v. Marshall*, 2012 YKTC 81, that the defendant Lucy Marshall pled guilty to impaired driving causing bodily harm to the plaintiffs with a blood alcohol reading of 148 milligrams percent.

[5] Ms. Marshall had been drinking in Dawson City that evening at the Diamond Tooth Gertie's Gambling Hall operated by the KVA ending up at the Snake Pit, a tavern owned by the Westminster Hotel (Yukon) Ltd.

[6] The statement of claim explicitly includes 11 allegations which may be generally described as host liability claims relating to serving alcohol to Lucy Marshall thereby causing or contributing to the damages suffered by the plaintiffs in the motor vehicle accident.

The Affidavit of Documents

[7] I will begin with issues 1 and 3 relating to production of documents and the affidavit of documents. I understand that the KVA has recently provided the plaintiffs a sworn affidavit of documents as required in Rule 25(6). I am assuming for these reasons that it is the same form as in the Application Record. The sworn affidavit is not before me but I assume that the Lawyer's Certificate required in Rule 25(7) has been included.

[8] However, a further issue has arisen as the affidavit of documents is apparently silent on the issue of video clips that Gary Parker stated that he had seen within the last week before the examination for discovery. Specific reference is also made to the video clips still held by the contractor in Questions 132 to 145 in the transcript of the examination of Gary Parker.

[9] In the draft affidavit of documents provided in the Application Record, Schedule C referred to "Surveillance tapes taken at Diamond Tooth Gertie's" as being formerly but no longer in the possession, control or power of KVA.

[10] In Question 133, Mr. Parker said:

> I have seen short clips of video that was copied from the actual recorded material on our machines, and the only clips I've been able to see were of the … of that entranceway, yes.

[11] Mr. Parker's answers clearly indicate that KVA still has original recordings and that the surveillance contractor still has some recordings in addition to those turned over to the RCMP.

[12] In my view, these recordings are either in the possession, control or power of the KVA.

[13] I order KVA to produce the documents referred to by Gary Parker pursuant to Rule 25(14). I also point out that Rule 25(22) provides for a supplementary affidavit of documents if required.

The Examination of Dennis Dunn

[14] In the examination of Gary Parker, he stated that he had taken steps to inform himself of the practices and procedures of Diamond Tooth Gertie's (Q.6). That statement was generally the case as he worked in front line positions in the casino in the 1970's and 1980's and was the casino manager in the 1990's as well as the present day Executive Director. However, when it came to the very specific questions about whether bar shots were served (Q. 208), whether there is a manual for training bar staff (Q. 240) and what the bar staff training would specifically entail (Q. 290), Mr. Parker could not answer the questions in any detail. He candidly said that Dennis Dunn, the bar manager, would be a better person to speak as to what was specifically said. Counsel for KVA offered to have Mr. Parker go back and inform himself but would not agree to present Dennis Dunn for discovery.

[15] Rule 27(5) is the relevant rule to determine whether leave should be granted to examine Mr. Dunn. It states:

> 27(5) A party who has examined
>
> (a) for discovery any party adverse in interest shall not examine an employee or agent of that adverse party without leave of the court,
>
> (b) an employee or agent of another party shall not examine that other party without leave of the court,
>
> (c) a person referred to in subrule (4) shall not examine any other person referred to in that subrule.

[16] Counsel for the plaintiffs relies upon the statement of Hinkson J.A. in *Lord v. Royal Columbian Hospital,* [1981] B.C.J. No. 1000 (B.C.C.A.), at para. 14:

> Rather, it is for counsel applying for an additional examination to satisfy the judge in Chambers that the witness being examined for discovery on behalf of the adverse party cannot satisfactorily inform himself or herself about the subject of the examination for discovery. In those circumstances the Chambers judge has a discretion to order the discovery of an additional person. Davey, C.J. in Morrison-Knudsen Company Inc. et al. v. B.C. Hydro and Power Authority [1970] 75 W.W.R. 757 said at 760:
>
> > Cases may arise in which, rather than sending an officer of the company back to fully inform himself by inquiry from other agents or officers of the company about the subject of his examination, another officer should be examined. It would be desirable to do that, I should think, in the case of an automobile accident where a bus driver was charged with negligence and it was suggested that the managing director of the company should go back to the bus driver and get a report from the bus driver of what happened and then give that through discovery. There I think the most convenient way and practical way would be to have the bus driver examined.

[17] The *Lord v. Royal Columbian Hospital* decision was referred to as the “leading case” on Rule 27(5) in *W.R. Grace & Company v. Privest Properties Ltd.* (1992), 67 B.C.L.R. (2d) 345 (C.A.).

[18] Counsel are generally agreed on the principle to be applied by the trial judge in exercising his or her discretion. Counsel for KVA provided a number of decisions that took a somewhat narrower view of *Lord v. Royal Columbia Hospital*, cited above. In *Rogers v. Bank of Montreal*, [1986] B.C.J. No. 3108, Macdonald J. said it is for the chambers judge to be satisfied that the witness being examined cannot satisfactorily inform himself about the subject matter (para. 8). However, the chambers judge may take the following factors into consideration (para. 5):

> (a) the circumstances of the particular case;
>
> (b) the responsiveness of the witness under examination and the degree to which he has taken pains to inform himself;
>
> (c) the nature and materiality of the particular evidence sought to be canvassed with the second representative; and
>
> (d) what appears to be the most practical, convenient and expeditious alternative.

[19] Counsel for KVA also rely on a decision of Finch J., as he then was, in *Westcoast Transmission Co. v. Interprovincial Steel and Pipe Corp.*, 59 BCLR 43, at para. 23:

> It is clear from this language that a satisfactory examination may be possible in circumstances where the witness must inform himself. The examiner continues to have the right to cross-examine. But the discovery does not cease to be satisfactory because the cross-examination may be interrupted so that the witness can inform himself. It may cease to be satisfactory when the witness is unable to inform himself adequately. That, however, is not the case here.

[20] I have concluded that it is appropriate in the circumstances of this case to grant leave to counsel for the plaintiffs to examine Dennis Dunn. I order this because Rule 1(6) sets out the overriding object of the Rules of Court to be just, speedy and inexpensive. In this case, there is Vancouver and Alberta counsel as well as Georgia counsel for the plaintiffs. Discoveries have taken place in Vancouver and while Mr. Parker is not incapable of informing himself he will clearly be going back and forth to Mr. Dunn for details on all questions regarding the training of staff, the operation of the bar, and what took place that evening. It is my view that Mr. Dunn is more akin to the bus driver and it will be the most practical, convenient and expedient way to give the plaintiffs discovery on such a crucial issue.

[21] I note that counsel for KVA submitted that a Case Management order setting out the dates for examination of KVA were somehow determinative of the issue of whether Lucinda Spencer could have a separate examination of KVA. I do not find that this Case Management order should be considered to be a substantive ruling in the matter as it was more in the nature of setting the order and timing of examinations when there are four counsel plus Georgia counsel involved. It was more procedural than a substantive ruling.

[22] However, given my ruling in this application, I do not find it necessary to rule on the issue of whether Lucinda Spencer has an independent right to examine another representative of the KVA.

VEALE J.