

Document Production: If and when can productions be ordered in the Small Claims Court?

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Overview

In the Ontario Small Claims Court, there are often misconceptions surrounding a party's obligation with respect to documentary discovery. As we know, the purpose of the Small Claims Court is to provide expeditious and low-cost resolutions of monetary disputes.¹ The question becomes: when and to what extent can a non-party be compelled to produce documents?

This article will briefly outline the recent caselaw surrounding the Court's jurisdiction to order non-party productions pursuant to the *Rules of the Small Claims Court*.

Authority to Order Document Production Rests with Settlement Conference Deputy Judge

By way of overview, the caselaw is clear that only a Settlement Conference Deputy Judge can order the production of documents.

In *Petrykowski v. 553562 Ontario Ltd.* ("Petrykowski"), the Small Claims Court denied the Plaintiff's request for an Order compelling the Defendant to produce documents as well as the names and addresses of witnesses because the Court had no jurisdiction to make this order. Deputy Judge Winny held that the only exception to the absence of discovery rights is the power of a Settlement Conference Judge to make an order for the production of documents as between the parties, pursuant to Rule 13.05(2)(a)(vi).² Deputy Judge Winny opined:

The basic process in this court has three steps: pleadings, settlement conference and trial. To inject an additional step in the form of discovery of documents motions would be inappropriate. If such a step were to be considered, that would be a matter for the Civil Rules Committee.³

Further, the Court concluded that Rule 1.03(2) of the *Rules of the Small Claims Court* cannot be used to create a procedure that does not otherwise exist and thus cannot be used to justify pretrial discovery. This Rule provides as follows:

1.03(2) If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the Courts of Justice Act and the Act

¹ *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847 at para 9 [*Elguindy*]

² *Petrykowski v. 553562 Ontario Ltd.*, [2010] O.J. No. 1048 at paras 9-12 (Ont. Sm. Cl. Ct.)

³ *Ibid* at para 6

governing the action and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.⁴

The above decision is confirmed by *Norquay Developments Ltd. v. Oxford County Housing Corp.* (“*Norquay*”). Here, the Court found there to be no provisions in the *Rules of the Small Claims Court* that afforded it the power to Order the production of documents. Rather, a motion for productions is only to be entertained by a Deputy Judge conducting a Settlement Conference; as a result, the motion for productions was dismissed.⁵

In the recent 2018 decision of *Fiuza v. Creekside Real Estate Group Inc.* (“*Fiuza*”), Deputy Judge Winny again reviewed and interpreted the conflicting caselaw on this issue. Consistent with *Petrykowski* and *Norquay*, it was held that the Small Claims Court does not have the jurisdiction to entertain productions motions and that same must be made at the Settlement Conference.⁶ In this case, the motion was dismissed, and costs were awarded to the responding party.⁷

Production of Non-Party Documents

An order for the production of documents is not equitable relief; it is a procedural order, the jurisdiction for which arises out of the *Small Claims Court Rules*.⁸ Upon analysis of the Rules, the Courts have recognized that the production of non-party documents cannot be ordered, including by a Settlement Conference Deputy Judge.

In *Lemont v. State Farm Mutual Automobile Insurance Co.* (“*Lemont*”), the Small Claims Court dealt with a motion for production of non-party documents under Rule 15 of the *Rules of the Small Claims Court*. The Deputy Judge ultimately dismissed the motion for several reasons, including:

1. That Rule 30.10 of the *Rules of Civil Procedure* does not apply in the Small Claims Court;
2. That both Rule 1.02(1) of the *Rules of Civil Procedure* and Rule 1.03(2) of the *Rules of the Small Claims Court* can only be applied where the *Rules of the Small Claims Court* fail to cover a matter adequately, which cannot be said in respect of discovery in the Small Claims Court; and
3. That in the context of a Settlement Conference, Rule 13.05(2)(a)(vi) cannot be interpreted to mean that non-party production motions are a proper part of the Settlement Conference process.⁹

⁴ *Rules of the Small Claims Court*, O. Reg. 258/98, Rule 1.03(2)

⁵ *Norquay Developments Ltd. v. Oxford County Housing Corp.*, [2010] O.J. No. 274 at para 11-12, 14 (Ont. Sm. Cl. Ct.)

⁶ *Fiuza v. Creekside Real Estate Group Inc.*, 2018 CanLII 6671 at paras 9-10, 15 (Ont. Sm. Cl. Ct.)

⁷ *Ibid* at para 18

⁸ *Elguindy* Supra Note 1, at para 12

⁹ *Lemont v. State Farm Mutual Automobile Insurance Co.*, [2011] O.J. No. 4601 at paras 9-10, 20-21 (Ont. Sm. Cl. Ct.)

As a result, the Court in *Lemont* concluded that the production of documents in Small Claims Court matters is solely under the power of a Settlement Conference Judge and limited only to parties to the action. In doing so, the Court provided the following comments which are worthy of consideration:

Counsel also pointed out that to her knowledge, non-party production orders have been granted by one or more judges of this court in other cases. I have no doubt that is true, but no reasons were produced or cited and I am aware of none holding such a jurisdiction to exist...

Despite my reasons in [*Polymer Distribution Inc. v. Rasmussen*, [2011] O.J. No. 1281 (Ont. S.C.J.)]... I have considered this subject afresh with the benefit of counsel's submissions. I conclude that Justice Sharpe's observation in 1995 continues to be true today: there is no discovery in the Small Claims Court. The power of a settlement conference judge to order the production of documents is limited to production of documents between the parties. This court has no jurisdiction to make pre-trial orders for the production of documents by non-parties, whether on motion or at a settlement conference.¹⁰ (emphasis added)

In *Elguindy v. St. Joseph's Health Care London*, the Plaintiff commenced an action for damages arising from medical negligence but thereafter refused to produce records of his medical condition. A Deputy Judge of the Small Claims Court ordered non-party productions at the Settlement Conference. Specifically, the Endorsement ordered the Plaintiff to produce medical records from non-party hospitals; these records directly related to his alleged condition. The Plaintiff thereafter applied for judicial review on the basis that the Deputy Judge had no jurisdiction to make a non-party production order.¹¹

In keeping with *Lemont*, Justice Pattillo, writing on behalf of the Superior Court, held that the Deputy Judge did not have jurisdiction to order the non-party production of the Plaintiff's medical records. Justice Pattillo remarked as follows:

...I am in complete agreement with Deputy J. Whinny's reasons in *Lemont*. In the absence of discovery in the Small Claims Court, there is no gap in the SCC Rules which would permit incorporation of rule 30.10 of the Rules of Civil Procedure. Nor is there any provision in the SCC Rules for third party production orders, either on a motion or at a settlement conference. As noted, the only provision in the SCC Rules permitting an order for production of documents is SCC Rule 13.05(2)(a)(vi) which, in the context of a settlement conference, only permits an order for production by a party to the action as part of the settlement conference.¹² (emphasis added)

¹⁰ Ibid at paras 14, 22

¹¹ *Elguindy* Supra Note 1

¹² *Elguindy* Supra Note 1, at para 23

Of noteworthiness, the Defendants in this case later moved to dismiss the Plaintiff's action on the basis that it was inflammatory, a waste of time, a nuisance or an abuse of the court process, pursuant to Rule 12.02(1)(c) of the *Rules of the Small Claims Court*. The action was dismissed.

The Plaintiff subsequently appealed the decision and the Defendants moved to dismiss the appeal on the basis that it was frivolous, vexatious, otherwise an abuse of process, or devoid of merit.¹³ On hearing of the motion, the Court declined to dismiss or quash the Plaintiff's appeal but did strike parts of the Plaintiff's notice of appeal. Ultimately, however, the Court did dismiss the Plaintiff's appeal; the action remained dismissed.¹⁴

Concluding Remarks

As can be seen from the above, the Rules and caselaw can be used to shield one's own client from the excessive and unrealistic demands of an opposing party. On the other hand, the jurisprudence presents real and substantial challenges when requesting pertinent documentation from an opposing party, absent consent.

For the time being, motions such as those under Rule 12.02(1) provide relief which, to a certain extent, can be used to prevent abuse of the system. However, as the demands on our legal system become ever-increasing – and in contemplation of further increases to the Small Claims Court monetary limit – it remains to be seen what the future holds and whether the Rules surrounding documentary discovery will correspondingly be amended to reflect the most just, most expeditious and least expensive determination of every proceeding on its merits.

¹³ *Elguindy v. St. Joseph's Health Care London*, 2017 ONSC 4247

¹⁴ *Elguindy v. St. Joseph's Health Care London*, 2017 ONSC 5360