

Case Name:

York (Regional Municipality) v. Burnett

Between

**The Regional Municipality of York, Applicant, and
Gregory Burnett, Respondent**

[2012] O.J. No. 3239

Newmarket Court File No. CV-12-08460-00

Ontario Superior Court of Justice

G.P. DiTomaso J.

July 4, 2012.

(11 paras.)

Counsel:

H. Saamen for the Applicant.

N. Xynnis for the Respondent.

ENDORSEMENT

1 G.P. DiTOMASO J.:-- The Applicant makes application for an order of Mandamus with Certiorari in aid quashing an order dismissing a motion to amend and ordering His Worship H. Radtke to amend Certificate of Offence No. 4960-5552657A by changing the set fine from \$265.00 to \$400.00 and the total payable from \$325.00 to \$490.00 on the face of the Certificate of Offence.

2 The Applicant brought a motion on notice to the Respondent by service on his legal representative prior to the date of trial to amend the defect on the face of the said Certificate of Offence pursuant to s. 34(1)(c) of the Provincial Offence Act. The Justice of the Peace dismissed the motion to amend on the basis that the defect was a fatal flaw that could not be amended.

3 Counsel for the Respondent consents to the relief sought by the Applicant. However, he raises a technical objection which he asserts is dispositive of this Application and that we never get to the merits.

4 He submits that the application be dismissed as insufficient notice was given to the Respondent of the motion to amend per s. 87(1) of the Provincial Offences Act. The Respondent was never served personally or by mail per s. 87(1)(a), or a method provided by the Act 8. 87(1)(b), or in accordance with a method provided under any other Act or prescribed by rules of court 8.87(1)(c). Rather, the Respondent was served by fax to his representative X-Copper and such service does not comply with the Act The Respondent did not attend on the return date of the motion before the Justice of the Peace.

5 Counsel for the Applicant first learned of this technical argument yesterday. The technical argument was neither raised during the disclosure process, on the Motion to Amend, or prior to yesterday. The Applicant submits it is a technical argument without merit on two grounds. Firstly, s.87 only speaks to sufficient notice by personal delivery or mail but does not preclude other modes of service. Secondly, the materials disclose that X-Copper, the Respondent's legal representative, approved and directed the Applicant to serve materials by fax to a specific number which the Applicant did. There is evidence to this effect and evidence that X-Copper received the Applicant's Notice of Motion to amend (see X-Copper disclosure request dated Dec 5/11 and Notification of Distribution/fax transmission, Tab 3 application record). The Applicant submits the Respondent did receive proper notice of the Notice to Amend but chose to do nothing and should not be permitted to succeed on a technical argument without merit.

6 I disagree with the Respondent's argument for the following reasons. The lateness of the disclosure of this argument causes suspicion regarding its merit. It should have been raised on a number of previous opportunities by the Respondent but he neglected to do so. The timing of the argument is suspect to say the least. I say this without casting any aspersions upon Mr. Xynnis or his conduct. I also find the argument based on the strict interpretation of 8.87 to be without merit especially in light of the factual context of this case. Service by fax was an acceptable means of communication between the parties (see X-Copper disclosure request Notification/Fax transmission). The Respondent was served with a Motion to Amend but sat on his hands and raised no complaint or technical argument until late yesterday which is not acceptable. Rather, I find the respondent had sufficient notice of the Applicant's notice to amend through his legal representative but chose to do nothing.

7 Personal service was referenced in London (City) v. Erdesz [2009] O.J. No. 1008 at Para. 12 by Hockin J. He cited the Words of Hogg J.A. in Re: Avery [1952] O.R. 192 at p.199 where he said:

"Personal service has been said to be service made by delivering the process into the defendant's hands or by seeing him and bringing the process to his notice".

8 Hockin. J goes on to comment at paragraph 13:

"Whether there has been personal service will always be a question of fact. There is no point to giving greater definition to the phrase than the language above. A catalogue of examples of personal service is undesirable. Suffice it to say, in addition to the words of Hogg J.A., that the object of service is to give notice to the person on whom It is made so that he Is made aware of the complaint and is made aware of the opportunity to answer the complaint and resist the remedy sought against him".

9 I find as a fact the Respondent was properly served. He was served with the Notice to Amend materials through his legal representative. He was aware of the issue and was made aware of the

opportunity to answer the remedy and resist the remedy sought. Instead he did nothing and worse yet raised an unmeritorious technical argument at this late stage. I find the Respondent's technical argument regarding service fails.

10 Respondent's Counsel has agreed the should his argument fail, then he consents to the relief sought by the Applicant.

11 Accordingly, I would grant this Application.

G.P. DiTOMASO J.

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---- End of Request ----

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Time Of Request: Monday, November 19, 2012 11:46:23