

Wills v. Pentagram Inc. et. al.
Court File No. CV-09-389243

ENDORSEMENT

Deanna S. Gilbert for the plaintiff

Jordan M. Cutler for the defendant Pentagram Inc.

Graham J. MacLeod for the defendant 1676547 Ontario Ltd. c.o.b. as Sunshine Restaurant

1. This action involves a slip and fall that took place on November 1, 2007. It appears that from the evening of October 31, 2007 to the early morning hours of November 1, 2007, the plaintiff Frank Wills ("Mr. Wills") had been drinking heavily at several different bars and restaurants located on Danforth Avenue in the City of Toronto. The last of the establishments visited by Mr. Wills that night was operated by the defendant Pentagram Inc. ("Pentagram"). It was at Pentagram that Wills fell while descending a staircase on his way to use the washroom.
2. As a result of that fall, Mr. Wills suffered very serious injuries. He is now a quadriplegic living in an assisted living facility operated by the March of Dimes. He requires constant care and assistance.
3. Mr. Wills alleges that the defendants were negligent. He states that all of the defendants served him excessive amounts of alcohol. He also states that certain of the defendants were negligent for allowing their patrons to use an unsafe and dangerous staircase.
4. Mr. Wills brings this motion pursuant to Rule 48.09 seeking an order that this action be placed on a separate speedy trial list. He argues that such an order is appropriate for two reasons. First, Mr. Wills is seventy years old. The medical evidence before the court on this motion demonstrates that he has a reduced life expectancy of approximately 7.4 years at best. This estimated life expectancy may be further reduced as a result of the nature of the care Mr. Wills is receiving at the March of Dimes facility. The evidence demonstrates that Mr. Wills is not receiving the kind of care he needs. This has resulted

in various health problems and numerous hospital admissions. The medical evidence suggests that this will further shorten Mr. Wills' life expectancy. However, he has no choice but to continue to reside in the March of Dimes facility, at least until this action has been concluded.


5. Second, Mr. Wills argues that this action is largely ready for trial. He is prepared to immediately set this action down for trial. Discoveries are largely complete except for further discovery of Mr. Wills on the issue of damages and a further examination of the defendant 1676547 Ontario Ltd. c.o.b. as Sunshine Restaurant ("Sunshine"). The defendant 1541738 Ontario Inc. c.o.b. as Bluline Sports Bar & Restaurant ("Bluline") has been noted in default and has not participated in this action. It is unclear whether any representative of Bluline will ever be located to be examined for discovery. Sunshine's representative at discovery was the person who served alcohol to Mr. Wills on the evening in question, but he was not permitted to provide answers that were binding on Sunshine. It is similarly unclear whether any further representative of Sunshine will ever be located to be examined for discovery. Finally, Mr. Wills has served his expert reports.
6. Pentagram argues that this motion is premature. Pentagram has not filed any evidence on this motion to dispute the medical evidence filed by Mr. Wills. Instead, Pentagram takes the position that it will be prejudiced by being forced onto a speedy trial list at this stage. It argues that all discovery needs to be completed. It may wish to schedule a medical examination of Mr. Wills but cannot determine whether to do so until all of Mr. Wills' undertakings have been answered, especially those dealing with his pre-accident medical history. Pentagram may also wish to commence a third party action against the landlord of the premises where Mr. Wills fell. Pentagram argues that the potential need for such a claim only became clear following the service of an expert report by Mr. Wills' counsel on July 13, 2011.
7. In my view, it is appropriate that this matter be placed on a separate speedy trial list. I am satisfied on the evidence before me that Mr. Wills' medical condition is extremely serious and deteriorating by the day. In my view, this matter needs to get to trial as soon as possible so that Mr. Wills can receive the kind of care he needs, assuming, of course, a finding of liability on the part of one or more of the defendants. Mr. Wills' undisputed and very serious medical condition is the most important factor on this motion.
8. It is true, as Pentagram argues, that discovery is not entirely complete and that Mr. Wills has not answered all of his undertakings. However, the simple act of placing this action

on a separate speedy trial list does not mean that this action will be scheduled for trial immediately. The judges presiding over the speedy trial list and the long trial list retain a discretion to schedule pre-trial and trial dates as circumstances require, having regard to the parties' readiness for trial and other relevant factors. I am sure that any potential prejudice to the defendants will be fairly considered as part of that process. As far as the potential third party action is concerned, I note that the statement of claim includes very detailed allegations with respect to alleged deficiencies with the stairway in question. Mr. Wills' position in this regard should have been clear to Pentagram long before the expert report was served in July.

9. For all of these reasons, I am granting the relief Mr. Wills has requested.

10. Mr. Wills seeks his costs of this motion in the amount of \$3,500.00. His costs outline sets out partial indemnity costs of \$4,389.19 but Ms. Gilbert conceded that a portion of those fees would have been necessary regardless of whether any of the defendants opposed this motion. Pentagram argued that in the event that Mr. Wills was successful, there should be no order as to the costs of this motion. Mr. Cutler argued that it was necessary for his client to file responding materials due to deficiencies with Mr. Wills' materials. I do not see this as a basis for a reduced costs order in the circumstances of this motion. Pentagram chose to oppose this motion and it has not been successful. I see no reason that the usual practice of awarding costs to the successful party should not prevail. I have reviewed Mr. Wills' costs outline and considered the factors and principles set out in Rule 57.01(1). Although the issues on this motion were not complex, it was extremely important to Mr. Wills. This factor justifies the time spent by his counsel. In my view, the amount requested by Mr. Wills is fair and reasonable in the circumstances.

11. I therefore order that this matter be placed on a separate speedy trial list. Pentagram shall pay to Mr. Wills his costs of this motion fixed in the amount of \$3,500.00, inclusive of HST and disbursements, payable within 30 days. Although Mr. MacLeod appeared on behalf of Sunshine on this motion, he did not file any responding material or make any submissions. There will be no costs order against Sunshine.



Master R.A. Muir

August 10, 2011

FRANK WILLS - and - PENTAGRAM BAR & GRILL

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August 10, 2011. D. Hilbert for the
Plaintiff. J. Cutler for Pentagram.
H. Malwood for Sunshine. Order
to op in form of typewriter endorsement
dated August 10, 2011.

[Handwritten Signature]

MASTER ROBERT MUIH

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

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MOTION RECORD

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