

CITATION: Miller v. FSD Pharma, Inc., 2020 ONSC 2253
COURT FILE NO.: CV-19-614980-00CP
DATE: 20200414

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Anne Miller, Plaintiff

AND:

FSD Pharma, Inc., Defendant

BEFORE: E.M. Morgan J.

COUNSEL: *Andrew Morganti, Albert Pelletier and Ian Literovich*, for the Plaintiff

Samuel Robinson and Carlo Di Carlo, for the Defendant

HEARD: April 14, 2020

CASE CONFERENCE ENDORSEMENT

[1] The parties in this proposed class action have been working toward a two-day hearing for a leave motion under the secondary market provisions of the *Securities Act* (Ontario). Motion records have been exchanged and cross-examinations are nearing completion. The motion dates have long been set for May 4-5, 2020.

[2] Matters have been proceeding more-or-less on schedule, but now the COVID-19 public health situation has intervened. Court operations are suspended and the courtrooms will remain physically off-limits until June 1, 2020.

[3] In the meantime, urgent civil motions have been proceeding by Zoom or other videoconference platforms. A Practice Direction recently issued by the Regional Senior Justice for Toronto has expanded the availability of Zoom motions, and has specifically indicated that pre-certification motions in proposed class actions may be heard in a virtual hearing and need not wait until the courts re-open. As case management judge for this action, that gives me the discretion to proceed by videoconference on the two previously scheduled days if I see fit.

[4] Defendants' counsel would like to go forward with the previously scheduled motion dates and hold a virtual hearing on the two days that all parties had already booked. They state that both sides have been working diligently and that the record will be complete and ready for a hearing. They also submit that they have invested substantial time and effort into preparing for the upcoming motion, and do not want to put the matter off now that the possibility of a virtual hearing has been opened up.

[5] Plaintiff's counsel are reluctant to proceed in this way. They point out that this will be a two-day hearing with a voluminous, multi-volume evidentiary record, which will create logistical difficulties for counsel. Foremost among these is that counsel will not be able to have their entire team together in the same room to provide the support required at the hearing. The leave motion can spell the end of the claim if it is not successful, and Plaintiff's counsel do not want to put their client and putative class members to that risk in what would be a rather novel format for a complex and lengthy motion with a heavily documented record.

[6] I am anxious not to delay litigation any more than needed given the present court suspension and general societal lockdown. At the same time, I would not want to hold a hearing that in its very format raises due process questions for whichever party ends up being unsuccessful. I admire Defendant's counsels' enthusiasm, and would be willing to conduct the hearing via video conference if both sides were willing to do so. However, I do not think it appropriate to compel the moving party to proceed under conditions where Plaintiffs' counsel perceive that they may not be able to present the case as effectively as they would in person.

[7] Counsel for the Plaintiff have also expressed some apprehension that the Defendant's recent annual report raises questions about its financial future. While I understand the concern, that is not something that can be addressed in a case conference or that should impact on the scheduling of the motion at this stage.

[8] Counsel on both sides have indicated that they are available for a two-day, in-court hearing on June 23-24, 2020. I am therefore re-scheduling the leave motion to be heard over those two days.

Morgan J.

Date: April 14, 2020