CITATION: Aghili v. Hafeez, 2025 ONSC728
COURT FILE NO.: CV-13-487690
RELEASED: January 29, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mehdi Aghili v. Muhammad Hafeez and Amir Hamza;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Jillian Van Allen for the lawyers for the plaintiff;
Serena Gohal for the defendants.

HEARD: January 29, 2025.

REASONS FOR DECISION

[1] On January 29, 2025 I heard two motions: a motion by the plaintiff for leave to have this action restored to the trial list; and a motion by the defendants for an order dismissing this action for delay. Having read the motion material and heard argument, I ruled orally on January 29, 2025 accepting the plaintiff's motion and dismissing the defendants' motion. I gave oral reasons. As promised, I now issue these written reasons to support and supplement those oral reasons.

[2] The tests for these motions were very much the same:

- On the motion to restore an action to the trial list, as the action is at risk of dismissal, the plaintiff had to show, on a balance of probabilities, that there is a reasonable explanation for the delay and that the defendant would suffer no non-compensable prejudice if the action were allowed to proceed; see *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited,* 2015 ONCA 592 (CanLII) at para. 3.

- On the motion to have the action dismissed for delay, all agreed that the applicable test required that the defendants had to show that the delay was inordinate, inexcusable and prejudicial to the defendants in that it gives rise to a substantial risk that a fair trial of the issues will not be possible; see *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 (CanLII) at para. 12.

Background

[3] The following facts were not disputed. The action concerns an accident between a motor vehicle and a bicycle on September 22, 2011. The statement of claim was issued on October 24, 2013. Pleadings closed. The parties served affidavits of documents, and were discovered between late December, 2014 and late February, 2015. The plaintiff answered undertakings between August 11, 2015 and October 18, 2016. The mandatory mediation took place on June 22, 2016. The plaintiff served three expert reports on the eve of the mediation. The accident benefits claim was resolved at

the mediation, but not the tort claim. The plaintiff set the action down for trial on December 14, 2017.

[4] The Certification Form was sent to the plaintiff's lawyer on February 8, 2018. Nothing was done about it. On December 21, 2018, the action was struck from the trial list. Unaware of this, the plaintiff's lawyer began taking steps to fill out and file the form in April, 2019.

[5] The defendants' lawyer in the meantime through her own investigation discovered the trial list striking in April, 2019, but did not inform the plaintiff's lawyer. The court in turn gave inaccurate information to the plaintiff's lawyer about the trial list striking. As a result, the plaintiff's lawyer continued to try to arrange a pretrial conference believing that was possible, all without success. 2020 saw the onset of the pandemic and matters continued in this state. On June 25, 2021, in response to inquiries from the plaintiff's lawyer, the defendants' lawyer disclosed that the action was struck from the trial list.

[6] The plaintiff's lawyer took immediate steps to schedule the restore motion. A motion record was prepared and served on November 24, 2021 without a return date. The defendants' lawyer equivocated as to whether the motion would be opposed. In March, 2022, without a clear response, the plaintiff's lawyer took steps to schedule the motion as an opposed one. On March 28, 2022 the defendants served their responding motion record describing their position as "unopposed." The motion was scheduled in late April, 2022 with a return date of July 29, 2022, the earliest available time. There were then filing issues with the court. At one point the court lost a physical copy of the motion material that was filed. As a result of these issues, the court vacated the motion date.

[7] The plaintiff's lawyer then worked to reschedule the restore motion. After receiving delayed responses from the defendants' lawyer, the plaintiff's lawyer in April, 2023 scheduled the motion as a 20 minute appointment on July 21, 2023, the earliest available time. The 20 minutes was based on the expectation that the motion remained "unopposed."

[8] However, on June 14, 2023, five weeks before the return date, the defendants' lawyer emailed the plaintiff's lawyer advising that "due in part to the additional delay of a year in moving this matter forward," the defendants now opposed the restore motion and planned to bring a motion to dismiss the action for delay. The booked time was insufficient to argue a contested restore motion, and the restore motion appointment was vacated, again.

[9] At this time, mid-2023, the motions scheduling process was quite slow. The court began transitioning away from emails to the Calendly scheduling system. On September 12, 2023 the defendants succeeded in scheduling their dismissal motion for August 29, 2024 for 75 minutes, the earliest available time. The plaintiff's lawyer wrongly assumed that this time was booked for both motions and took no steps to re-schedule and re-serve the restore motion.

[10] The dismissal motion came before me on August 29, 2024. I learned about the restore motion. Because of the inadequacy of the booked time for the argument on the dismissal motion and the close relationship between both motions, I adjourned both motions to be argued before me on January 29, 2025 as long motions. At a case conference on October 3, 2025 I set a schedule for further motion material.

Length of delay

[11] For the purpose of the dismissal motion it is important to determine whether there has been inordinate delay. Whether a delay is inordinate is measured up front by the time between the beginning of the action and the motion to dismiss; see *Tsivaras v The Cadillac Fairview Corporation*, 2023 ONSC 3973 (CanLII) at para. 8. In this case, those dates are October 24, 2013, the date the statement of claim was issued, and September 12, 2023, the scheduling of the motion to dismiss. That is a period of almost 10 years.

[12] Without further review, this 10 year period would seem to be inordinately long. But it was undisputed that this action was not delayed prior to the setting of the action down for trial on December 14, 2017 and receipt of the Confirmation Form on February 8, 2018. Pleadings, productions, discovery, undertakings, mediation and the setting down for trial all took place at the usual and reasonable pace. The setting down for trial was also genuine and not an attempt to avoid disclosure obligations. The real delay took place after the plaintiff's receipt of the Certification Form on February 8, 2018. The period from February 8, 2018 to September 12, 2023 is 5 years and 7 months or 67 months. This period is not inordinately long but does require an explanation.

Excuse for delay

[13] The plaintiff had no excuse for doing nothing for 14 months or 1.16 years, after receiving the Certification Form in February, 2018. Ms. Van Allen candidly admitted that the plaintiff's lawyer "sat on his hands" during this time. This led directly to the court striking the action from the trial list on December 21, 2018.

[14] However, the evidence showed that the next period of delay - the 26 months or 2.16 years from April, 2019, when the plaintiff finally began doing something about submitting the Certification Form to June 25, 2021, the date the defendants' lawyer finally disclosed to the plaintiff's lawyer the knowledge the defendants' lawyer had since April, 2019 about the action being struck from the trial list - I blame on both the court and the defendants. The court consistently gave the plaintiff's lawyer inaccurate information leading the plaintiff's lawyer to believe reasonably that the action had not been struck from the trial list. The defendants in turn knew probably since April, 2019 and certainly since October, 2019, when the plaintiff's lawyer starting emailing the defendants' lawyer about completing and filing the Form, that the plaintiff was laboring under this misconception and did nothing about it for 20 months. The defendants now wish to take advantage of this delay, an unfair advantage.

[15] The evidence also showed that the next period of delay - the 13 months or 1.08 years between June 25, 2021 and the first aborted motion appointment dated July 29, 2022 - was also the fault of the court and the defendants. The defendants equivocated in taking a position, finally taking a formal position in their responding motion record of "unopposed" no sooner than in March, 2022. This delayed the plaintiff's lawyer in scheduling the restore motion. Then it was the court that caused that motion to be aborted by mishandling the filed material.

[16] The evidence showed that the next period of delay - the 12 months or 1 year from July 29, 2022 to the aborted motion appointment on July 21, 2023 - was primarily the fault of the defendants. Again, the defendants' lawyer delayed in corresponding with the plaintiff's lawyer about

scheduling the motion. Furthermore, the defendants' lawyer also allowed the plaintiff's lawyer to schedule the motion as if it was unopposed. Then on June 14, 2023, five weeks before the return date, the defendants changed their position to oppose the motion claiming that this change was due to the "additional delay of a year," a delay that was not the plaintiff's fault. They also launched their dismissal motion. The scheduled time did not allow for an opposed restore motion, and the motion appointment had to be vacated, again.

[17] This review indicates to me that it was the defendants and the court who were responsible for about 75% of the relevant delay after February 8, 2018. Those two indeed were responsible for 100% of the delay after April, 2019. Had the defendants informed the plaintiff's lawyer of the trial list striking in April, 2019 (or even in October, 2019), as they should have, there would probably have been an unopposed motion in 2019 restoring the action to the trial list, namely before the confusion of the pandemic. That did not happen. The subsequent conduct of the defendants and the court more than offset any concern I otherwise had about the plaintiff's failure to act in 2018 and provided the plaintiff with an acceptable explanation for the delay.

Prejudice

[18] The defendants claimed they will suffer non-compensable prejudice from the delay. Counsel agreed that, given the delay, the plaintiff must overcome a rebuttable presumption of defendants' prejudice in this case. In the end, I find that the plaintiff has done so for these reasons:

a) The defendants cannot create prejudice by failing to do something they reasonably ought to have done. This was the principle outlined by the Court of Appeal in *Chiarelli v. Weins*, 2000 CanLII 3904 (ONCA) in paragraph 15 in a motion to extend the time for service of the statement of claim. I believe the principle applies here. As described above, the defendants here were major contributors to the delay that they are now claiming prejudiced them. Indeed, any prejudice they may have suffered, they were prepared to overlook prior to changing their position on the restore motion on June 14, 2023. This is the most telling factor for me concerning prejudice.

b) During the course of this motion the plaintiff worked hard to update medical and employment related productions. While this should have been done sooner, this production undermines the defendants' argument that key documents have been lost due to the delay. Ms. Van Allen also pointed out that most medical facilities have a 10-year document retention policy thereby making relevant documents not already produced capable of being obtained. This point was not disputed.

c) The defendants complained that they did not have a chance to get timely defence medical examinations due to the delay. Ms. Van Allen gave an excellent response. Most defence medical assessments in tort personal injury actions where the threshold is an issue, such as in this case, are obtained in any event on the eve of trial to give the court a current picture of the plaintiff's medical condition. She also pointed out that the defendants made no effort to get a defence medical examination to this point, which is another oversight on their part that they are now trying to exploit.

d) Liability apparently is an issue in the case. I was advised that there were no witnesses to the subject accident other than the parties. The parties will be able to refresh their memories by reviewing their discovery evidence given in late 2014 and early 2015, namely ten years ago.

e) Ms. Gohal complained that the defendants' lawyer have lost touch with Mr. Hafeez. In argument, she admitted that a search had not been mounted for this party. Therefore, it was unclear whether he was in fact lost. Furthermore, if he was lost, this was surely the fault of the defendants' lawyers for failing to keep in touch with their own clients.

f) In his affidavit on this motion, Mr. Wakelin, the lead lawyer for the plaintiff, stated that the plaintiff, the investigating police officer, the doctors and other treatment providers whose records were produced, and the experts who provided reports, are all available to give evidence. While he did not provide the basis for this statement, he was also not cross-examined on it. Hence it is unchallenged evidence on the record. Indeed, the plaintiff submitted an affidavit in support of the restore motion.

g) I understand that memories of witnesses fade over time. But I also am of the view that most trial witnesses, certainly the damages witnesses, will refresh their memories by reviewing records. Therefore, if the productions are complete and up-to-date, which appears now to be case, any fading memories should be mitigated.

[19] For these reasons, I found that the defendants had not suffered non-compensable prejudice from the delay, and that a fair trial can still take place.

Conclusion

[20] I, therefore, granted the plaintiff's motion to restore this action to the trial list, and dismissed the defendants' motion to dismiss for delay.

[21] Concerning costs, the plaintiff claimed costs given the result. The amount claimed for both motions was a total of $19,449.63 in partial indemnity costs, which appeared in the plaintiff's costs outlines. The costs outlines for the defendants showed a total of $13,452.

[22] I granted the plaintiff partial indemnity costs of $8,000 to be paid by the defendants in sixty (60) days. I found that the plaintiff deserved costs, particularly in light of the defendants' conduct. However, I discounted the award because the plaintiff caused this problem by its dilatory conduct in 2018, and because of the many documents the plaintiff served and filed in this motion in contravention of my October 3, 2024 timetable order.

DATE: February 2, 2025

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ASSOCIATE JUSTICE C. WIEBE