CITATION: Arvanitopoulos v. Florentino, 2015 ONSC
DIVISIONAL COURT FILE NO.: DC354/14
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SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: GEORGE ARVANITOPOULOS, Plaintiff/Appellant

AND:

ALVARADO-ALVAREZ FLORENTINO AND DAVID CONTSTRUCTION INC., Defendants/Respondents

BEFORE: J. Wilson J.

COUNSEL: *William Scott*, for the Plaintiff/Appellant

Karim N. Hirani, for the Defendants/Respondents

HEARD at Toronto: March 9, 2015

ENDORSEMENT

THE APPEAL

[1] The plaintiff appeals an order of Master Brott dated July 9, 2014. The Master dismissed the plaintiff's motion to set aside the Registrar's Dismissal Order dated December 5, 2013. She concluded that the plaintiff had failed to provide adequate evidence to explain the litigation delay, or to support either the solicitor's claim of inadvertently missing the deadline or the plaintiff's claim that the defendant suffered no prejudice from the delay.

[2] The question on this appeal is whether the Master properly applied the test for setting aside a dismissal for delay.

THE STANDARD OF REVIEW

[3] The decision of the Master dismissing the action for delay is discretionary and is entitled to deference. The decision may be set aside if made on an erroneous legal principle or if infected by a palpable and overriding error of fact: 119618 *Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at para. 16; *Cascadia Fine Art Limited Partnership v. Gardiner Roberts LLP*, 2014 ONSC 6602 at para. 50, [2014] O.J. No. 5424 (Div. Ct.).

[4] The reviewing court is not to conduct a rehearing of the matter. "An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a

different view of the evidence from that of the master": *Wellwood v. Ontario (Provincial Police)*, 2010 ONCA 386 at para. 28, [2010] O.J. No. 2225 [Wellwood].

[5] Failure to take a contextual approach and weigh all the relevant factors has been found to be an error in principle justifying appellate intervention: *Scaini v. Prochnicki*, 2007 ONCA 63 at para. 26, [2007] O.J. No. 299 [Scaini]; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 at paras. 20-21, [2007] O.J. No. 3872 [Giant Tiger]; *Finlay v. Van Paassen*, 2010 ONCA 204 at para. 29, [2010] O.J. No. 1097 [Finlay].

THE LAW

[6] In *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (S.C.) at para. 41, Master Dash enunciated the four well known factors to be considered when deciding whether a Registrar's dismissal order should be set aside. These are: (1) an explanation for the delay in pursuing the litigation; (2) whether a deadline was missed through inadvertence; (3) whether the motion to set aside was brought promptly; and (4) whether reviving the action would prejudice the defendant.

[7] Subsequent case law has confirmed that the Reid factors are not to be applied in a mechanical or formalistic fashion. Failure to satisfy any one of the Reid factors is not enough to demonstrate that a dismissal order by a Registrar is to be upheld: *Scaini* at paras. 23-26; *Finlay* at paras. 27-29.

[8] On motions dealing with the dismissal of an action for delay, the court is required to take a contextual approach by considering all of the circumstances surrounding the conduct of the action and by balancing the need for a timely efficient justice system against the importance of hearing cases on their merits: *Scaini* at paras. 23-25; *Giant Tiger* at paras. 20-21; *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 at para. 12, [2015] O.J. No. 265 [MDM Plastics].

[9] In *Habib v. Mucaj*, 2012 ONCA 880, [2012] O.J. No. 5946, the Court of Appeal considered the appropriate approach. The panel's summary of the law (at paras. 6-7) is instructive:

[10] No one factor is necessarily decisive of the issue. Rather, a "contextual" approach is required where the court weighs all relevant considerations to determine the result that is just. [...] Furthermore, on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel. However, where the lawyer's conduct is not inadvertent but deliberate, this may be different: (citations omitted)

THE PLAINTIFF'S ARGUMENTS

[11] The plaintiff argues that the Master referred to the appropriate case law, but that she failed to accurately assess the evidence before reaching her conclusions as to the Reid factors. He submits that this constitutes a palpable and overriding error.

[12] He also argues that the Master failed to apply a contextual approach tailored to the circumstances of the case, and did not balance the competing interests of timely and efficient

justice with the importance of having the matter decided on its merits. As noted above, this is an error in principle justifying appellate intervention.

THE FACTS

[13] Before reviewing the conclusions of the Master, I outline the undisputed factual chronology.

[14] On March 9, 2008, the plaintiff was hit by the motor vehicle driven by the defendant, Florentino. The plaintiff was removing snow from his car prior to getting into his car. The plaintiff alleges that he was seriously injured.

[15] The plaintiff initiated this lawsuit on March 5, 2010. Mr. Rooz had carriage of the matter.

[16] The defendants served their statement of defence on November 4, 2010.

[17] Discoveries took place and were completed by July 2011.

[18] Undertakings arising from the discoveries have been fulfilled, or are largely fulfilled.

[19] The plaintiff's counsel received a notice of a status hearing on September 24, 2012.

[20] In January 2013, Mazin & Associates assumed carriage of the file from the former lawyers for the plaintiff, Mazin, Rooz Mazin. The plaintiff changed counsel when the file was transferred, and Mr. Mazin assumed responsibility for the plaintiff's file.

[21] The counsel for both parties attended a status hearing on April 2, 2013, and agreed to a schedule for the balance of the action. In accordance with this consent schedule, mediation was to take place by June 30, 2013, and the action was to be set down for trial by November 30, 2013.

[22] Mediation was originally scheduled for June 2013, but was adjourned at the request of the plaintiff's new counsel, Mr. Mazin, to allow the plaintiff to obtain updated medical reports. The counsel for the parties consented to the adjournment of the mediation to February 11, 2014, so long as the plaintiff's counsel paid the mediation cancellation fee.

[23] The action was dismissed by the Order of the Registrar dated December 5, 2013, because through solicitor inadvertence the action had not been set down for trial by November 30, 2013. The plaintiff's counsel took immediate action. By letter dated December 11, 2013, the plaintiff's law firm asked the defendants to consent to the setting aside of the dismissal order. The counsel for the defendants refused and the plaintiff prepared motion materials to set aside the dismissal on December 11, 2013.

[24] There was some difficulty in securing a motion date, and there was a disagreement about how long the motion should take. The plaintiff set the matter down for 20 minutes on February 14, 2014. The defendants sought a two-hour time slot that would cause significant delay. Counsel suggested that the motion proceed in July 2014.

[25] Meanwhile, the parties had consented to participate in mediation on February 11, 2014.

[26] The defendants' counsel cancelled the mediation because they opposed the motion to set aside the Registrar's order.

[27] When the matter came before Master Graham for the 20-minute hearing on February 14, 2014, at the defendants' request, the matter was adjourned to June 27, 2014, for 90 minutes. The plaintiff's law firm, through the law clerk, had filed 4 affidavits in support of the motion.

[28] Meanwhile, in preparation for the anticipated mediation, the plaintiff underwent examinations with an orthopedic expert. When the final affidavit was filed by the law clerk from the plaintiff's law firm, she confirmed that the expert examination had taken place and receipt of the report was pending.

ORDER LIMITING FURTHER EVIDENCE TO BE FILED

[29] Master Graham made an order on February 14, 2014, at the request of the defendants, precluding the plaintiff from filing any additional affidavits, apart from an affidavit dealing with the issue of prejudice from the original motion date on February 14, 2014, to the return date in June. No further affidavit material was filed.

[30] The defendants dispute the scope of the limiting order that was made at their request. I conclude that the order of Master Graham was clear that no further material could be filed:

> As the plaintiff has filed four Affidavits to date, he shall not file any further Affidavits other than with respect to materials relevant to the issue of prejudice received between today and the new return date.

[31] With respect, the appropriateness of such an order is questionable, given the importance of the motion and the onus on the plaintiff to provide evidence to satisfy the Reid factors.

[32] On the date of the motion before Master Brott on June 27, 2014, plaintiff's counsel had the updated medical reports in hand. He sought to file them in reply, but the Master refused.

[33] During argument before me, defendants' counsel confirmed that the expert medical evidence had been received by them before the motion was argued.

[34] The Master confirmed in her reasons: "In oral argument plaintiff's counsel noted the adjournment of the scheduled mediation in June 2103 in order that he could obtain expert's reports and other medical documentation but there was no evidence before the Court. He even attempted to file the stack of medical information during his Reply but the reports were not permitted to be filed". [Emphasis added]

[35] I conclude that the updated medical reports were relevant to delay, prejudice, the plaintiff's desire to proceed with the litigation, and a contextual analysis of the situation.

THE CONCLUSIONS OF THE MASTER ON THE REID FACTORS

[36] The Master confirmed that the plaintiff had initiated the motion in a timely manner. She found that the other relevant Reid factors had not been adequately addressed by the evidence before her.

1. Explanation of the litigation delay

[37] The Master found that the periods from July 2011, when the discovery was completed, to December 2013, constituted unreasonable delay, and that "in terms of the complexity of this action, I further held that no adequate explanation had been provided by the moving party as to why no steps were taken to advance the litigation."

[38] This conclusion cannot be supported by the evidence. A review of the affidavits filed by the law clerk confirms that during this period, undertakings were being prepared and that the matter had been set for mediation. Further, there was a change in counsel and changes in the organization of the law firm, with many staff changes. The mediation was adjourned by the new counsel to have the plaintiff examined and obtain up-to-date medical reports. The law clerk testified that this matter was moving along at a reasonable pace, and that the delay was caused by the refusal of the defendants to consent to setting aside the Registrar's order.

[39] With respect to the question of litigation delay, the Master inappropriately concluded that there was no clear evidence of the plaintiff's intention and desire to proceed with the action. The plaintiff had recently attended examinations with medical experts and the Master did not consider this evidence, and refused the late request to file the up to date medical reports.

[40] The Master considered, as part of the argument for delay, the absence of an affidavit by the plaintiff. The decision in Reid suggests, at para. 49, that it is essential to file the plaintiff's affidavit in all cases to confirm their wish to proceed. The Master accepted this argument, which was reiterated by the defendants' counsel before me.

[41] I disagree. I prefer the approach of Marrocco A.C.J.S.C. in *Dang v. Nguyen*, 2014 ONSC 7150 at paras. 14 and 21, [2014] O.J. No. 5880 (Div. Ct.). Marrocco, J. confirms that the requirement for an affidavit is contextual, and is not required in all cases.

[42] It was perhaps as a result of Master Graham's limiting order that Master Brott refused to consider the medical reports as evidence confirming the plaintiff's clear desire to proceed with this litigation. The updated medical expert examination speaks volumes as to the plaintiff's intention to pursue his case.

[43] In the context of this case, the plaintiff's intention to proceed is clear from the chronology, his attendance at medical examinations and from the law clerk's affidavits. In this case a separate affidavit from the plaintiff was not necessary as the only reasonable inference from the undisputed facts was that he wished to proceed with the lawsuit.

2. Inadvertence in missing the deadline

[44] It is clear that this matter was not set down for trial in time due to inadvertence of counsel.

[45] The Master concluded that a bold assertion of inadvertence is insufficient to satisfy this factor, and the onus is on the plaintiff to show that the set-down date was not simply ignored. She concluded that the plaintiff failed to provide such evidence.

[46] With respect, the Master did not consider all of the evidence filed by the plaintiff.

[47] The affidavit of the law clerk responding to the defence affidavit explains the inadvertence. She confirmed that the law firm had been restructured in January 2013. She confirmed that from August 2013 to October 2013 there was considerable confusion in the plaintiff's lawyer's office due to a changeover of staff members. She confirmed that this confusion caused the inadvertent failure to set the action down for trial within the prescribed time (i.e., by November 30, 2013). When she considered litigation delay, the Master suggested that problems occurring between August and October do not explain why counsel missed the November set-down deadline. Respectfully, this is an overly restrictive approach.

[48] I find that the Master did not adequately consider the cogent evidence in the law clerk's affidavit explaining why the action was inadvertently not set down for trial due to staff changes.

3. Prejudice

[49] "On motions to set aside orders dismissing an action for delay, the question whether a defendant has been prejudiced by the delay is invariably a key, if not the key, consideration": *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887 at para. 33, [2010] O.J. No. 5572 [Hamilton (City)]; MDM Plastics at para. 24.

[50] In her decision, the Master confirms that when a limitation period has expired, as in this case, there is a presumption of prejudice which the plaintiff must rebut. Once the presumption is rebutted, the onus is on the defendant to prove actual prejudice: *Wellwood* at para. 60.

[51] The affidavit of the law clerk states that the defendants will suffer no prejudice that cannot be compensated for by costs. This is admissible evidence on this issue: Dang at paras. 14 and 21. She was not cross-examined on this evidence, and the defendants did not call any evidence to rebut this assertion. This assertion must be considered in the context of the facts of the case.

[52] In assessing the question of prejudice, the Master did not consider the context of this case, or the behaviour of the defendants.

[53] In this case, examinations for discovery are complete and undertakings have been complied with. An up-to-date expert report of the plaintiff's condition has been prepared. The parties are ready for mediation. This is a case of a driver hitting a pedestrian about to enter his car, and there is no suggestion that potential evidence has not been preserved. There is no question of the quality of proof or of documents being lost. At no time were the defendants lulled

into a false sense of believing that the matter was not proceeding, as is present in some of the cases.

[54] The up-to-date report or reports were provided to the defendants and were available at the date of the motion before the Master, but were not permitted to be filed.

[55] The plaintiff's counsel has not been exemplary in moving this action along, nor has he been particularly delinquent. The responsibility for moving files forward to completion is not solely that of the plaintiff's counsel.

[56] Both parties are responsible for the pace of litigation: 1196158 Ontario Inc. at paras. 28-29; Hamilton (City) at para. 27; *Bolohan v. Hull*, 2012 ONCA 121 at para. 17, [2012] O.J. No. 749. The defendants in this case have not been proactive in moving matters along, and have contributed to the somewhat leisurely pace in this case. For example, they failed to file their statement of defence for 8 months. When counsel for the plaintiff requested an adjournment of the mediation to obtain medical reports, they did not object to the 8 month postponement. Their position on this motion resulted in the cancellation of the mediation scheduled for February 14, 2014.

[57] The Master concluded that the plaintiff did not provide proper evidence on the issue of prejudice as she considered only the statement in the affidavit. Her conclusion is not supported by the evidence before her.

CONCLUSIONS ON THE REID FACTORS

[58] The affidavits filed by the plaintiff's law clerk were not as comprehensive, organized or detailed as they could have been. However, when considered as a whole, along with the chronology of the undisputed facts and the pleadings, I find for the reasons that I have outlined that the Reid factors were adequately addressed by the plaintiff. The Master's conclusions on all three issues – delay, inadvertence and prejudice – cannot stand.

[59] The standard is not perfection, but undisputed evidence cannot be ignored.

[60] The failure to fairly and accurately assess the evidence before her in considering the Reid factors is a palpable and overriding error requiring the Master's order to be set aside.

FAILURE TO APPLY A CONTEXTUAL APPROACH

[61] I thank counsel for their supplementary written submissions that I requested on this issue.

[62] The application of the Reid factors is not to be reduced to be a mechanical checklist, but rather the criteria provide guidelines to inform a just result, taking into account the need for an efficient judicial system with timelines to be respected, balanced with the importance of hearing matters on its merits.

[63] I am of the view that the Master also failed to approach the issues contextually as required by *Scaini*.

[64] The Master concluded that "[g]enerally, the policy decision on these motions is an evaluation of the merits versus timely litigation. With proper evidence the Courts have tended to err on the side of the merits. When there is a paucity of evidence, which is in this case, a reflection of the lack of understanding and preparation for the motion, the Court must be bound by the evidence before it."

[65] She did not consider the big picture and the undisputed facts in the chronology in assessing what order would be just in the circumstances. She did not take into account that the case was mature and ready for a meaningful mediation and a trial.

[66] The failure to balance the interests of efficiency with the importance of hearing matters on the merits in order to produce a just result is an error of law. This is an alternative reason why the decision of the Master cannot stand.

[67] For these reasons, both the order of Master Brott dated July 9, 2014, and the Order of the Registrar dated December 5, 2013, shall be set aside.

[68] The plaintiff shall set this matter down for trial within 30 days of these reasons. The parties shall schedule mediation at a mutually convenient date as soon as possible.

COSTS

[69] Counsel for the plaintiff was not seeking costs if successful, as the solicitor's inadvertence precipitated the problem missing the deadline setting this matter down for trial.

[70] The defendants sought their costs regardless of the outcome in the amount of $5000. In my view and on the facts of this case, it was unreasonable to have refused consent to the setting aside of the dismissal order of the Registrar in the first place. The case was ready for mediation and to be set down for trial. Through inadvertence, the matter was not set down on time. In these circumstances, I conclude that it would not be appropriate to award costs to the defendants who were unsuccessful on this motion.

[71] Had the defendants consented as requested by the plaintiffs to set this matter down for trial in December 2013, when the error took place, this matter, including mediation and a trial could well have been completed by now.

J. Wilson J.

Date: March 25, 2015