CITATION: Ayad et al. v. Eddolls and Certas Direct Insurance Company, 2016 ONSC 1149

Court File No. CV-10-22965

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NISREEN AYAD, MICHAEL AYAD,
FAIZA FAKHORI AND NICOLA SHYOTIS

Plaintiffs

- and -

JOHN EDDOLLS and
CERTAS DIRECT INSURANCE COMPANY

Defendants

P R O C E E D I N G S A T M O T I O N
BEFORE THE HONOURABLE JUSTICE C. BRAID
on January 18, 2016 AT HAMILTON, ONTARIO

APPEARANCES:

J. Van Allen	Counsel for the Plaintiffs
A. Keesmaat	Counsel for the Defendant, John Eddolls

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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R E A S O N S F O R J U D G M E N T

BRAID J. (Orally):

INTRODUCTION

The plaintiffs sued the defendant for damages arising out of a motor vehicle accident in 2008. In 2014, the Registrar dismissed the action for delay because the plaintiffs failed to comply with a timetable that had been agreed upon by the parties. The plaintiffs now move to set aside the order dismissing the action for delay.

FACTS

The action arises out of a motor vehicle accident which took place on October 13, 2008. The Plaintiff, Nisreen Ayad, hereinafter referred to as Ms. Ayad, was the driver of the plaintiff vehicle. Her mother, Faiza Fakhori, hereinafter Ms. Fakhori, was a passenger.

The two other plaintiffs have advanced Family Law Act claims. Mr. Nicola Shyotis is the husband of Ms. Fakhori and the father of Ms. Ayad. Michael Ayad is the former spouse of Ms. Ayad.

The Statement of Claim states that the vehicle driven by John Eddolls, hereinafter referred to as Eddolls, struck the plaintiff vehicle from behind.

When he was examined for discovery, Eddolls stated that the plaintiff vehicle cut him off. Liability is not admitted. Following the accident, the drivers of both vehicles reported the accident at a collision reporting centre in Milton.

It is helpful to outline the history of the litigation:

i. October 13, 2008: The motor vehicle accident occurred.

ii. November of 2008: The plaintiffs retained counsel Ben Fortino to assist them in obtaining benefits from their insurer and to commence this litigation.

iii. October 5, 2010: A statement of claim was issued. The plaintiffs state that, at the time the statement of claim was issued, they did not know or could not recall the name of the driver of the vehicle who struck them. So the claim was commenced against John Doe and against Ms. Ayad's own insurance company, Certas Direct Company, hereinafter referred to as Certas.

iv. October 12, 2010: Certas was served with a statement of claim. Certas served a notice of intent to defend.

v. October 14, 2010: Counsel for Certas sent a letter to plaintiffs' counsel to advise that the driver of the other vehicle in the accident was John Eddolls, who is the current defendant in this action. Certas took the position that there was no unidentified vehicle involved in the collision, and asked that the claim be amended to withdraw the claim against Certas and to add Eddolls as a defendant.

vi. January 20, 2011: Certas served a statement of defence and commenced a third party claim against the defendant Eddolls.

vii. March 2011: Counsel on behalf of Eddolls filed a third party defence, statement of defence of the third party to the main action, and a jury notice.

viii. December 1, 2011: A motion was brought returnable on December 1, 2011, to substitute the defendant, John Eddolls, for the defendant, John Doe. Counsel for Eddolls wrote to the plaintiffs' counsel in late November, stating that they could not consent to the motion unless the plaintiffs limited their collective claims to Mr. Eddoll's insurance policy limits.

ix. The motion was adjourned to December 15, 2011 and then to January 19, 2012. No one appeared

on January 19, 2012, due to confusion by the plaintiffs' counsel, and the matter was adjourned sine die. In the meantime, counsel for the defendant wrote to plaintiffs' counsel on seven more occasion in addition to the letter of late November, asking for the plaintiffs' position regarding limiting the claim to the policy limits.

x. June 13, 2012: Counsel for the defendant wrote to confirm that the plaintiffs had limited the claim to the policy limits. Counsel for the defendant sent three follow-up letters asking for the motion to be scheduled.

xi. August 14, 2012: The plaintiffs were granted leave to amend the statement of claim to replace the name John Doe with John Eddolls as a defendant and granting Eddolls 45 days to file a defence. The action was also dismissed against Certas, and the third party claim was also dismissed.

xii. August 27, 2012: Eddolls served a statement of defence and jury notice.

xiii. October 2012: The parties scheduled discoveries to take place on July 29, 2013.

xiv. November 19, 2012: Plaintiffs' counsel met with Ms. Ayad, at which time she stated that she was in the process of separating from her husband and had to move in with her parents in Brooklyn, New York.

xv. November 22, 2012: The Registrar issued a status notice stating the action was not yet on the trial list.

xvi. November 28, 2012: Plaintiffs' counsel filed a requisition to obtain a status hearing and a notice was issued for a hearing to be held on January 3, 2013.

xvii. November 29, 2012: Plaintiffs' lawyer provided copies of the documents listed in their affidavit of documents.

xviii. January 3, 2013: A status hearing was held. The matter was adjourned on consent to February 7, 2013, so the parties could agree on a timetable.

xix. February 7, 2103: A status hearing was held. On consent, the following timeline was ordered:

a) Examinations for discovery of all parties to be completed by August 31, 2013;

b) Undertakings and motions to be completed by November 31, 2013;

c) Matter to be set down for trial by January 31, 2014.

Plaintiffs' counsel now states that, due to inadvertence and mistake, the dates in the timeline were not diarized by his office.

xx. Early July 2013: Plaintiffs' counsel stated that Mr. Shyotis was seriously ill and as a result, Ms. Ayad, Ms. Fakhori and Mr. Shyotis were unable to travel from New York to Hamilton for the discoveries scheduled for July 29, 2013. Plaintiffs' counsel also stated that Michael Ayad was separated from Ms. Ayad so he could not attend discoveries; however, the claim by him had not been discontinued and still exists as of today's date.

xxi. July 29, 2013: The defendant was examined for discovery. A certificate of non-attendance was obtained for the plaintiffs.

xxii. Fall of 2013: The defendant wrote to plaintiff counsel on four occasions to ask for dates to reschedule the examinations for discovery of the plaintiffs. The defendant received no reply. Counsel for the plaintiffs stated in his affidavit that he did not respond to those emails as it was around this time that Ms. Ayad moved to New York. However, it appears that

she had moved in November 2012, almost a year earlier.

xxiii. November 27, 2013: Having received no reply for new dates for examinations, the defendant unilaterally set dates for examinations of the plaintiffs on February 10 and 11, 2014. Counsel for the defendant sent a letter to plaintiffs' counsel, which contained the following paragraphs:

> As you are aware, in February 2013, we agreed to a timetable which indicated that examinations for discovery of all parties would be completed by August 31, 2013; any motions for undertakings to be brought by November 31, 2013, and that the matter would be set down for trial by January 31, 2014.
>
> Our client's discovery concluded on July 29, 2013.
>
> We have attempted to arrange Examinations for Discovery of your client on numerous occasions, without success. Consequently, we have unilaterally scheduled examinations for discovery of your client for February 10 and 11, 2014. Should your clients fail to attend examinations for discovery as scheduled,

we will proceed to obtain a certificate of non-attendance and bring a motion to compel your clients' attendance and/or dismissal for delay, and will be pursuing our client's costs for same.

xxiv. February 7, 2014: Plaintiffs' counsel stated that Ms. Ayad could not travel from Brooklyn, New York, to attend discoveries scheduled three days hence, due to her father's illness and because of financial hardship. Ms. Ayad did not attend on February 10. The defendant obtained certificates for non-attendance.

xxv. March 5, 2014: The Registrar issued an order dismissing the action for delay under Rule 48.14.

xxvi. March 24, 2014: Counsel for the plaintiffs served a notice of motion to set aside the dismissal order, but the motion did not have a return date. Plaintiffs' counsel then retained counsel from LawPRO for these proceedings.

xxvii. March 31, 2014: Counsel for the defendant wrote to state that he would oppose the motion to set aside the dismissal order.

xxviii. April 4, May 26, July 21, and September 2, 2014: Counsel for the defendant sent potential dates for the hearing of the motion on all of these dates, with no response with respect to setting a date for the motion.

xxix. June 23, 2014: Counsel for the defendant stated he would oppose a motion to overturn the order dismissing the action, but that he would take any settlement proposal to his client.

xxx. November 3, 2014: Counsel for the defendant reiterated his instructions to oppose the motion to set aside the dismissal order.

xxxi. November 12, 2014: Counsel for the defendant sent more potential dates for the motion.

xxxii. January 27, 2014: This was the first actual return date of the motion to set aside the registrar's order for dismissal. The parties agreed that the motion should thereafter be adjourned to a long motions list. Because of court scheduling difficulties, the motion could not be argued until January 15, 2016.

ANALYSIS

A. The Applicable Rules

The registrar dismissed the action pursuant to the former Rule 48.14 and 15.

This motion is brought pursuant to Rule 37.14, which states that a party may move to set aside or vary an order by notice of motion that is served forthwith after the order comes to the person's attention and names the first

available hearing date, that is at least three days after the service of a notice of motion.

B. Test on a motion to set aside a registrar's dismissal order

On a motion to set aside a registrar's order for dismissal for delay, the courts often consider four factors, which are referred to as the Reid factors. These are not an exhaustive list of all the considerations. The plaintiffs do not need to rigidly satisfy each of the four Reid factors and a contextual approach is required. While the plaintiff bears primary responsibility for the conduct of an action, the defendant's conduct in litigation is a relevant circumstance (see *HB Fuller Company v. Rogers* 20124 ONCA 173).

Civil actions should be decided on their merits. On the other hand, civil actions should be resolved in a timely and efficient manner in order to maintain public confidence in the administration of justice. On a motion to set aside a dismissal for delay, the court must balance these two conflicting policies.

Courts tend to favour deciding matters on their merits, especially where delay results from an error committed by counsel (see *H.B. Fuller*).

The four Reid factors as cited by the Court of Appeal in *Finlay v. Paasen* 2010 ONCA 204 (at p. 10-11), can be stated as four questions:

i) Is there a reasonable explanation for the litigation delay? The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial, as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken, to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation towards trial then the motion to set aside the dismissal will fail.

ii) Was the deadline missed because of inadvertence? The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice or request a status hearing but failed to do so through

inadvertence. In other words, the penultimate dismissal order was made as a result of inadvertence.

iii) Was the motion brought promptly? The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

iv) If the action were allowed to proceed, would the defendant suffer non-compensable prejudice? The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action.

The plaintiffs need not satisfy each of the four Reid factors. In conducting the analysis, prejudice to the defendant can be a key consideration. (See *MDM Plastics* and *HB Fuller*).

1) Is there a reasonable explanation for the litigation delay?

While it is true that the inadequacies and/or failure of counsel's tickler system led to counsel missing the deadline imposed by the court in setting this matter down for trial, the court must be mindful of the actions of the plaintiffs and

whether they have diligently pursued their claims. In my view, the plaintiffs have done very little to move this case forward past the pleadings stage. Despite entering into a timetable on consent and agreeing to timelines for discoveries, the plaintiffs did nothing to ensure that the deadlines were complied with. No explanation has been provided regarding the following:

i. The plaintiffs have not explained the lengthy delay in bringing the motion to amend the claim and insert the defendant's name in the place of John Doe. It is clear that they were aware of the defendant's identity by October 14, 2010, if not earlier. The order amending the claim was not obtained until August 13, 2012 on the consent of the parties. Although the defence requested that the claim be limited to policy limits, the plaintiffs failed to respond to repeated correspondence from the defendant on this issue and then failed to set a date for the hearing in a timely fashion.

ii. The plaintiffs state that Mr. Nicola Shyotis has been ill and that Ms. Ayad is unable to leave him to travel to Canada to conduct discoveries. However, there is no evidence as to the nature of his illness and how long it will last. There is no explanation as to why

someone else cannot care for him during his daughter's brief absence. His wife, Ms. Fakhori, also lives with him and may be able to care for him; or a third party healthcare provider may be retained for a short period of time to care for him while both Ms. Ayad and Ms. Fakhori attend for discoveries. None of these options are explored in the evidence before me.

iii. Michael Ayad did not attend for discovery. Counsel stated that he has separated from Ms. Ayad, but no explanation was provided for his failure to attend on discovery. At the motion before me, counsel fairly stated that Michael Ayad may no longer have a viable *Family Law Act* claim. This has never been addressed properly by the plaintiffs if he is no longer pursuing this action.

iv. The plaintiffs have not explained why they gave the defendants such short notice before cancelling the first and second discovery dates. The evidence is conflicting as to when Ms. Ayad went to New York to care for her ill father, or to live with her parents because of financial considerations, and how long the plaintiffs' counsel was aware of the fact that she would be unable to attend discoveries. The plaintiffs have also failed to explain why they did not respond to the defendant's

request to arrange a further discovery date, forcing the defendant to unilaterally choose a date, which the plaintiffs then attempted to cancel at short notice.

v. In the circumstances of Ms. Ayad's stated inability to travel for discoveries, the plaintiffs did nothing to suggest another alternative for conducting discoveries. It was not until counsel appeared before me on this motion that the plaintiffs proposed the options of conducting discovery by video link or the plaintiffs reimbursing the defendant's counsel to travel to New York to conduct discoveries there.

Because discoveries have not taken place, neither party can set the matter down for trial. Without discoveries, the defendant does not know the plaintiffs' evidence regarding the accident in 2008, whether there are independent witnesses or medical witnesses other than the ones that have already been disclosed, and the defendant is unable to identify what documents may need to be requested from the plaintiffs or third parties, apart from those that have already been disclosed. Without the discoveries of the plaintiffs, the action is at a standstill.

2) Was the deadline missed because of inadvertence?

The plaintiffs state that there was inadvertence in missing the date set by the timeline. However, the timeline was agreed to on consent. As noted previously, defence counsel wrote to the plaintiff's counsel in November, before the expiry of the timeline to remind him of the timelines.

The plaintiffs agreed to deadlines for discovery and then missed deadlines for discovery, making no effort to reschedule. They did not begin any discussion about conducting discovery by video or paying counsel's travel costs to conduct discovery in New York until this motion was argued. The defendants have made efforts to move this case along by sending reminders and attempting to set dates for motions. Much of that correspondence was ignored by counsel for the plaintiffs. Although the missing of the ultimate deadline that resulted in the dismissal appears to be inadvertent, much of the other delays were not.

3) Was the motion brought promptly?

The plaintiffs argue that the motion to set aside the dismissal order was brought promptly. Since the Notice of Motion was served on March 24, 2014, the plaintiffs argue that time stops when the Notice of Motion was served even if it does not have a return date. The plaintiffs rely on *Vaccaro v. Unifund* 2011 ONSC 5318 Ontario Superior Court of

Justice. However, in my view, this contemplates date. Although *Vaccaro* does provide flexibility for counsel to serve the motion and then canvass return dates, it cannot stand for the proposition that one can simply serve a motion without a return date and then do nothing for months to bring it to a hearing, resulting in a further delay of the case.

Defence counsel sent numerous letters with his availability requesting that the motion date be set, which letters were largely ignored by plaintiffs' counsel. The dismissal order was made on March 4th, 2014, and the first return date for the motion was January 17, 2015, a delay of 10 months. In my view, given the efforts of defence counsel to set this matter down, this motion was not brought promptly.

4) If the action were allowed to proceed, would the defendant suffer non-compensable prejudice?

Any action may be dismissed even in the absence of prejudice. However, in most cases, the issue of prejudice is a key consideration in a motion to set aside a dismissal order (see *1196158 Ontario Inc. v. 6274013 Canada Inc.*, 2012 ONCA 544 and *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28). The court should consider prejudice as a question of fact in the particular circumstances of

the case, together with the presumption of prejudice based on the passage of time.

The prejudice that the motion judge must consider is the defendant's ability to defend the action that would result from restoration of the action. The court must balance this prejudice to the defendant against the prejudice of the plaintiff from having the case dismissed. The principle of finality is also relevant to this factor (see *MDM Plastics, supra)*.

There is a presumption of prejudice which arises from the passage of time and the expiry of a limitation period. In evaluating the strength of the presumption of prejudice, the court must consider all the circumstances, including the defendant's conduct in the litigation. The plaintiff bears the primary responsibility for the progress of an action (see *MDM Plastics v. Vincor International* 2015 ONCA 28).

In this case, the defendant did not simply wait for the plaintiff to move the case forward. Instead, the defendant's counsel sent letters and proactively attempted to obtain dates to schedule motions and discoveries.

I find that the defendant's actions demonstrated that they intended for the matter to move forward. This is not a case where the defendant remained

passive. When the case was dismissed, counsel for the defendant sent letters attempting to schedule an early date for the motion to set aside the dismissal order, to which the plaintiffs did not set a date until January, approximately 10 months after the action was dismissed for delay.

The plaintiffs argue that the defendants expressed a willingness to discuss settlement after the dismissal order was made, and that the defendant's willingness to discuss settlement is, absent further explanation, inconsistent with a presumption of prejudice arising from delay (see *MDM Plastics, supra*).Although the defendant did have some settlement discussions in 2014 after the action was dismissed, the defendant made it clear that he would oppose the motion to reinstate the action. In my view, this is not inconsistent with the presumption of prejudice.

This case involves a claim for damages for personal injury arising out of a motor vehicle accident in 2008. The defendant has yet to hear about what evidence the plaintiffs will offer in support of liability arising from the accident. The defendant has yet to learn the names of all treating physicians and determine the extent of the alleged injuries. The defendant has some medical records and some income tax documentation but does not yet know the extent to which the plaintiffs' employment

and day to day activities are restricted by injury and whether those injuries may have existed before the accident.

This is not a commercial case in which documents would be important. This case relies on a mixture of memories of witnesses and documentation, including medical records.

Not only did the plaintiffs fail to prosecute this action in a timely way, the plaintiffs failed to comply with timelines provided for in a consent timetable approved at a status hearing (see *1196158 Ontario Inc., supra*).

Given that discovery of the plaintiffs has not taken place, in my view, the plaintiffs should have provided evidence on this motion to identify important witnesses and indicate whether or not they remain available to testify or whether their evidence has otherwise been preserved. In addition they ought to have provided a list of important documentary and physical evidence and whether it has been preserved. Although there is quite a bit of evidence about records that are available for Ms. Ayad, it is not clear what documents may be missing.

On the issue of prejudice, counsel for the plaintiffs argue that Rule 48 has significantly

changed since this action was dismissed. As of January 1, 2015, the new Rule 48 has taken effect. Registrars will now dismiss five-year-old actions that have not been set for trial and will not give notice to counsel. Older actions which were commenced before January 1, 2012 and were not set down for trial by January 1, 2017, will be dismissed without notice.

The plaintiffs essentially argue that this new five year time limitation means that this is a more reasonable time for a matter to be set down for trial. In effect, the plaintiff argues this will affect the analysis of whether the defendant suffered any prejudice and whether the two-year time limitation imposed was reasonable.

I agree that this change to the Rules is a consideration when conducting the contextual analysis on this motion. However, in my view, the Rule change is not significantly relevant. The parties were subject to the old Rules and were bound to follow them. When the two-year deadline loomed, the parties agreed to a timetable which was endorsed by the court. The plaintiffs consented to that timetable, thereby extending the deadlines and providing a "lifeline" to the case. The failure to comply with deadlines to conduct discoveries and/or to suggest a reasonable alternative reflect a

failure to move the case forward in any meaningful way.

C. Should the Registrar's Dismissal Order be set aside?

On a motion to set aside a registrar's dismissal order, the court must consider and weigh all relevant factors to determine the result that is just in the particular circumstances of the case (see *HB Fuller*, supra).

Having considered all of the factors, I find that the plaintiffs have not demonstrated that the order of dismissal should be set aside.

While it is true that plaintiffs' counsel missed the deadline for setting the matter down for trial, this is not the only delay in this case. The plaintiffs have failed to attend for examinations for discovery despite repeated efforts by the defendant to schedule those examinations. The plaintiffs have not, until arguing this motion, suggested any alternatives to permit the examinations to proceed. While the illness of Mr. Shyotis evokes the court's sympathy, the plaintiffs have failed to provide any evidence regarding the nature of the illness and why it would prevent the plaintiffs from travelling back to Canada where the lawsuit was commenced.

In my view, the defendant's counsel have been diligent in their efforts to move this case forwards. When plaintiff examinations were cancelled, the defendant's counsel sent correspondence attempting to set new examinations and reminding the plaintiffs of the timetables that had been agreed upon and ordered by the court. When the plaintiffs brought a motion to set aside the dismissal order, the defendants sent numerous correspondence with available dates seeking to have the motion heard. It cannot be said that they misled the plaintiffs.

It is almost impossible to assess any prejudice to the defendant, given the fact the plaintiffs have not advanced the litigation forward. Since examinations for discovery have not taken place, the defendant does not even know what the plaintiffs' evidence will be regarding the circumstances of the accident relevant to liability. The defendant does not know the identities of any independent or medical witnesses, and whether those witnesses are still available or have a recollection of their evidence. With respect to Ms. Fakhori, it has been established that a significant number of important medical documents are no longer available.

Given the nature of this personal injury case, the mere passage of time is a significant consideration

regarding prejudice. In my view, given the fact that discoveries have not taken place and the court is not able to assess prejudice in any meaningful manner, the other factors weigh heavily in my analysis. In my view the plaintiffs, Ms. Ayad, Ms. Fakhori and Mr. Shyotis, left the country and subsequently failed to take steps to move this action forward. The plaintiffs have not diligently pursued this litigation and I am not satisfied that the action should proceed.

CONCLUSION

For all of these reasons, the motion is dismissed.

...COURT ADJOURNED

FORM 2

Certificate of Transcript

***Evidence Act*, Subsection 5(2)**

I, Antoinette Dias, certify that this document is a true and accurate transcript of the recording of Ayad v. Eddolls in the Superior Court of Justice held at 45 Main Street East, Hamilton, Ontario, taken from Recording No. 4799_606_20160118_094910__10_BRAIDC and 4799_606_20160118_162629__10_BRAIDC which has been certified in Form 1.

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