CITATION: Bou-Younes v. Goldman 2020 ONSC 6019
COURT FILE NO.: CV-12-464230
MOTION HEARD: 20200923

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ramez Bou-Younes, Plaintiff

AND:

The Estate of Jeffrey Goldman by its Litigation Administrator Ruth Goldman and Jeffrey Goldman Professional Corporation, Defendants

BEFORE: Master Jolley

COUNSEL: Jillian Van Allen, Counsel for the Moving Party Plaintiff

Bronwyn M. Martin, Counsel for the Responding Party Defendants

HEARD: 23 September 2020

REASONS FOR DECISION

[1] The plaintiff seeks an order setting aside the registrar's order of 18 October 2017 and extending the set down date to 31 December 2020. Applying the *Reid* factors, in order to succeed, the plaintiff must (a) provide a reasonable explanation for the delay; (b) satisfy the court that the deadline was missed through inadvertence; (c) demonstrate that this motion was brought promptly; and (d) rebut the presumption of prejudice. If the presumption is rebutted, the burden then shifts to the defendants to demonstrate they would suffer actual prejudice should the dismissal order be set aside. (see *Reid v. Dow Corning Corp.* 2001 CarswellOnt 2213). The order sought is a discretionary one.

[2] In *Jadid v. Toronto Transit Commission* 2016 ONCA 936, the court stated as follows:

> It is well established that, as stated by the motion judge, none of the *Reid* factors have automatic priority over any others. The *Reid* test provides a structured approach to reconciling the principle that civil actions should be decided on their merits, with the principle that the public interest is served by enforcing procedural rules that promote the timely and efficient resolution of disputes *(1196158 Ontario Inc. v. 62474013 Canada Ltd*., 2012 ONCA 544 (CanLII), 112 O.R. (3d) 67, at para. 18). It guides the exercise of judicial discretion and thereby reduces the risk of overlooking relevant considerations. It does not set out a formula, prioritize any enumerated factors over any others, or categorically exclude the consideration of other factors not listed: *H.B. Fuller Co. v. Rogers*, 2015 ONCA 173 (CanLII), 386 D.L.R. (4th) 262, at para. 23; *Marche d'Alimentation Denis Theriault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 (CanLII), 87 O.R. (3d) 660, at para 20.

[3] The analysis is a contextual one which considers the overall dynamics of the litigation to determine what is just in the circumstances (see *Carioca's Import and Export Inc. v. Canadian Pacific Railway* 2015 ONCA 592 ("*Carioca's*") at paragraph 46 and *Scaini v. Prochnicki* 2007 ONCA 63 at paragraph 23).

Has the plaintiff provided a reasonable explanation for the delay?

[4] Considering the first *Reid* factor, I am satisfied on the evidence before me that the plaintiff has provided a reasonable, acceptable or satisfactory explanation for the delay.

[5] This action was commenced by notice of action on 25 September 2012 and a statement of claim issued 12 October 2012. The pleadings were served on 28 November 2012 and a notice of intent filed 23 January 2013. The defendants received an indulgence for the delivery of their defence, which was served on 10 May 2013.

[6] In February 2013, the parties started discussing plans to examine the defendant Jeffrey Goldman, who was unwell. That examination was set for 6 March 2013 but was adjourned because of Mr. Goldman's health situation and because the plaintiff had not served his affidavit of documents, which was the defendants' precondition for the discovery proceeding. The plaintiff served his affidavit of documents on 25 July 2013. Mr. Goldman's examination was set for 7 August 2013 but he remained too ill to attend and he died shortly thereafter, on 23 August 2013.

[7] In November 2013, examinations for discovery were set for 9 January 2014, but rescheduled at the defendants' request. In May 2014 the plaintiff obtained an order to continue and the parties set his discovery for 22 September 2014 and mediation for 15 December 2014.

[8] The plaintiff was examined as scheduled. The defendant trustee's examination was adjourned at the defendants' request from 11 December 2014 to 24 March 2015 to 23 April 2015 to 3 June 2015, when it took place.

[9] In October 2014, the defendants requested a change in mediators and production of certain briefs that the plaintiff had not yet produced. In February 2015, the plaintiff requested a new mediation date but defendants would not agree to set a date until all of the plaintiff's undertakings were answered. The plaintiff made significant efforts to obtain answers. The defendants brought a motion to deal with the undertakings, returnable 20 May 2015 but agreed to adjourn the motion, recognizing that, by the motion date, most of the undertakings had been answered.

[10] In August 2015, the parties fixed mediation for 23 December 2015 and it did proceed as scheduled. They agreed to conduct a further mediation on 20 September 2016, which also proceeded but did not result in a settlement.

[11] On or about 27 September 2016, the plaintiff served a motion record returnable 25 November 2016 to obtain answers to the defendants' undertakings and to extend the set down date from approximately 12 October 2017 to 31 December 2017. The plaintiff had prepared but did not file his trial record, as he thought that he would be precluded from

bringing his undertakings motion if he did so. The defendants answered their undertakings by 23 November 2016 and the motion proceeded only on the issue of costs. Unfortunately, plaintiff's counsel neglected to deal with his request for an extension of the set down date in the draft order.

[12] On 23 December 2016 the plaintiff advised his lawyer that he wished to take over the action. It took until July 2017 for him to serve his notice of intention to act in person. In October 2017 he had a change of heart and asked his lawyer to once again assume carriage of the action. On 31 October 2017, his lawyer requested a meeting with the defendants' counsel and learned from him on 2 November 2017 that the action had been dismissed while the plaintiff was self-represented. The plaintiff advised that he did not receive the order.

[13] The plaintiff's lawyer (although not formally back on the record) immediately advised the defendants that he intended to bring a motion to set aside the dismissal order and sought their position. The defendants were waiting on the position of LawPro and in January 2018 advised that they could likely consent. In February 2018, they confirmed that they would not oppose the motion.

[14] However, the plaintiff's lawyer delayed in bringing the motion. He wanted to have clear written instruction from the plaintiff before bringing the motion, given the plaintiff had terminated his retainer once before. The plaintiff did not provide those instructions until 28 August 2018, citing his ill health for the delay. On 15 October 2018 plaintiff's counsel served his notice of appointment.

[15] A few days later, the defendants advised there may now be prejudice because of the injury of a potential witness. On 30 October 2018 the plaintiff advised that he would book the motion, given the defendants' lack of instructions. However, he did not do so. On 4 January 2019 the defendants encouraged the plaintiff to book the motion, as their position was still unclear. Finally, the motion was served on 26 February 2019, returnable 7 March 2019. On 6 March 2019 the defendants advised they would oppose the motion. It was then adjourned for a multitude of reasons thereafter to today's date.

[16] The defendants focus their delay argument on the period after November 2016, which was the last time the plaintiff took any action in the file, other than the filing of the notice of intention to act in person. The plaintiff deposed that he was in poor health from the time he took over his own file in December 2016 to July 2017 when he met with his lawyer to ask him to re-assume carriage of the file. The defendants dispute that the plaintiff's illness interfered with his ability to manage the litigation. The record does show he suffers from Crohn's disease, has intermittent health crises and was hospitalized in October 2017, but recovered by November 2017. The defendants note that, even after the plaintiff learned in November 2017 that his action had been dismissed, he delayed providing his lawyer with any instructions until August 2018 causing another ten months of inexplicable delay.

[17] I am satisfied the plaintiff has provided a reasonable explanation for the delay, even if not perfect. The action proceeded, with all required steps having been taken, and was ready for trial, until the plaintiff terminated the services of his lawyer in December 2016. There

is evidence the plaintiff suffered from intermittent health issues while he was self-represented, sufficient to hospitalize him from time to time. I will address the delay in bringing the motion, below.

Has the plaintiff shown that the deadline was missed through inadvertence?

[18] The plaintiff must also demonstrate that the deadline was missed through inadvertence. The records support that the plaintiff always intended to pursue his action. He participated in examinations for discovery, obtained an order to continue, provided a multitude of documents in answer to his undertakings, examined the defendants, followed up on their undertakings and participated in two mediations.

[19] The plaintiff's lawyer deposed that he prepared the trial record and certificate in September 2016 but held off filing it as he believed the filing would jeopardize his ability to bring a motion to deal with the defendants' outstanding undertakings. He then intended to file the trial record by what he thought was the deadline of 31 December 2017 but his retainer was terminated in the interim. The plaintiff deposed that he did not receive the dismissal order and only learned of it from his lawyer, who, in turn, was told of the dismissal by defence counsel in early November 2017.

[20] I am satisfied that the plaintiff always intended to proceed with his action and that his lawyer would have set the action down by 31 December 2017, the date he believed, mistakenly was the set down date. When he learned of the dismissal, he advised the defendants of his client's intention to bring a motion to set the order aside.

[21] I am satisfied that the plaintiff missed the deadline through inadvertence.

Did the plaintiff bring this motion promptly after learning of the dismissal?

[22] The defendants argue that the plaintiff's delay in bringing this motion from November 2017 when he learned of the order to February 2019 when the motion was brought can hardly be considered prompt.

[23] While I agree, I also accept that there is an explanation for this delay. First, the defendants have been aware since 21 November 2017 that the plaintiff intended to bring a motion to set aside the dismissal. Second, in February 2018, the defendants advised that they would not oppose the motion. This understandably took away the sense of urgency for this motion as the plaintiff was assured it would be unopposed. If there was delay, it is not of such a nature that should cause the plaintiff to lose his right to have his case heard on the merits.

Has the plaintiff rebutted the presumption of prejudice?

[24] The plaintiff argues that there will be no prejudice as documentary and oral discovery has been completed for some time, he has answered all his undertakings and the matter is ready for trial.

[25] The defendants argue that they will suffer actual prejudice if the action is restored as three key witnesses – Mr. Fireman, Mr. Steinmetz and Mr. Goldman - are no longer able to testify. The target of the original action was Fireman Steinmetz. The plaintiff alleged they had improvidently settled his industrial accident action and failed to commence a second unrelated motor vehicle accident action. It is alleged that Mr. Fireman was the primary lawyer. Mr. Steinmetz attended the mediation at which the industrial accident action was settled. The plaintiff saw Barry Goldman in July 2012 but did not retain him as his position as the defendant's brother gave rise to a conflict.

[26] Mr. Fireman deposed that prior to his retirement in 2017 he had been in practice for over 50 years and had represented thousands of clients. Due to the passage of time, he has absolutely no recollection of the plaintiff or the file. A review of the file did not refresh his memory. Mr. Steinmetz recalled the mediation but no meaningful details. Mr. Goldman suffers from significant memory problems due to an accident in 2017.

[27] The defendants have had the complete Fireman Steinmetz file since 2016. Mr. Steinmetz can review the file to refresh his memory, something he had not done when he swore his affidavit. There is evidence in that file from the firm explaining that they did not commence an action with respect to the motor vehicle claim because the plaintiff's injuries did not meet the threshold, in their opinion. Further, when the plaintiff filed a complaint against them, Mr. Steinmetz wrote a lengthy response to LawPro and he is able to use that document, which has been produced, to refresh his memory.

[28] I am advised that Mr Fireman has been in poor health since some time in 2018. Had the matter been listed for trial in late 2017, it may well not have been reached at a time when Mr. Fireman had a substantial recollection of the matter, given his health deterioration. There is also evidence from Mr. Fireman in a letter he wrote in September 2012 that his son handled the file and not him. If so, it would be the son whose evidence would be relevant and not that of Mr. Fireman senior.

[29] Mr. Goldman is described as a "potential" witness in the affidavit material. Although he was contacted by an adjuster in 2013, it is unclear what relevant evidence he could have had or that his evidence would be "key". The only evidence before me about his involvement is that he met with the plaintiff in July 2012, told the plaintiff that his firm would not be able to represent him as there was a potential appearance of a conflict and he referred him to two other lawyers. Further, Mr. Goldman sent the plaintiff a contemporaneous letter summarizing what he had told him verbally. Had the matter been listed for trial in late 2017, sadly, Mr. Goldman would not have been in any better position to testify, as his accident occurred in September 2017.

[30] I note that if the defendants believed Mr. Goldman or any of these witnesses had key evidence, it was open to them to obtain witness statements from them back in 2016 when they were served with the trial record and the action was ready to be set down for trial. Alternatively, the defendants could have moved to secure the evidence in November 2017 when they were notified of the plaintiff's intention to bring this motion to restore the action to the trial list. Not having taken that step undermines the suggestion of prejudice now (*Carioca's, supra* at paragraph 75).

[31] I am satisfied that the plaintiff has met the onus on the issue of prejudice. Any prejudice that may have arisen cannot be said to be due to the delay in setting the action down for trial.

Conclusion

[32] On motions such as this, the court must balance the preference to have civil actions decided on their merits against the promotion of timely resolution of actions (*H.B. Fuller, supra*, at paragraph 25) and the importance of finality of litigation (*Marché d'Alimentation Denis Thériault Ltée., supra* at paragraphs 37-38). I am also guided by the provisions of Rule 1.04(1) of the Rules of Civil Procedure which provides that these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. I am satisfied that it is in the interest of justice that I exercise my discretion to set aside the dismissal order and allow this action to be determined on its merits.

[33] The motion is granted. The plaintiff shall set the action down for trial by 31 December 2020. The plaintiff did not seek costs in the event he was successful and none are ordered.

Master Jolley

Date: 5 October 2020