CITATION: BAGUS v. TELESFORD, 2014 ONSC 3512
COURT FILE NO.: CV-08-349923
MOTION HEARD: MAY 21, 2014

2014 ONSC 3512 (CanLII)

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Rake Bagus

v.

Anderson Telesford

**BEFORE:** MASTER R.A. MUIR

**COUNSEL:** Jillian Van Allen, counsel for the lawyer for the plaintiff
Ari C. Krajden for the proposed defendant State Farm Automobile Insurance Company

## REASONS FOR DECISION

[1] The plaintiff brings a motion pursuant to Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order setting aside the order of the registrar dated April 27, 2010, dismissing this action as abandoned. This action was dismissed by the registrar due to the failure on the part of the plaintiff to comply with the requirements of Rule 48.15. An action may be dismissed by the registrar under Rule 48.15 if no defence has been filed within 180 days after the proceeding was commenced.

[2] The plaintiff also seeks an order extending the time for and validating service of the statement of claim and the motion materials on the defendant.

[3] The non-party State Farm Automobile Insurance Company ("State Farm") has also brought a motion. State Farm seeks an order that it be added as a party defendant to this action pursuant to Rule 13.01 for the purposes of responding to this motion and defending this action in the event this claim is permitted to proceed.

### Background

[4] This action arises out of a motor vehicle accident that took place on March 5, 2006. The plaintiff was a passenger in a vehicle driven by Maryam Bakos and owned by

Yousif Bakos (the "Bakos Vehicle"). The Bakos Vehicle was hit from behind while stopped at a red light. The other vehicle then left the scene of the accident. It was later identified as belonging to the defendant. The defendant's vehicle was not insured. However, the Bakos Vehicle was insured. That insurer is State Farm.

[5] The statement of claim in this action was issued on behalf of the plaintiff on February 28, 2008 by Romano Law Firm Professional Corporation ("Romano Law"). It did not name State Farm or the plaintiff's own insurer as a defendant. Anderson Telesford was the only named defendant.

[6] A process server was retained by the plaintiff's lawyers shortly after the statement of claim was issued. An attempt to serve the defendant was made on March 4, 2008 at an address on Marconi Boulevard in London, Ontario. This was the address associated with the defendant's plate number. A female person at that address advised the process server that the defendant was her "ex-boyfriend" and that she did not know where he was.

[7] On April 11, 2008, an employee of Romano Law called a telephone number associated with the Marconi Boulevard address and was advised by a female that the defendant was simply "not in at the moment". A further attempt at service was then made on April 29, 2008. This time the female person who answered the door identified herself as Ashley Owendyk and advised the process server that the defendant did not live at the address and she did not know where he was.

[8] The plaintiff made no further service attempts until after this action was dismissed. No motion for substituted service was brought. In fact, almost nothing was done to advance this action before it was dismissed. In September 2008, Romano Law wrote to the plaintiff's insurer putting it on notice of a potential uninsured claim. However, that notice letter should have gone to State Farm, as it was first in line to respond as the insurer of the Bakos Vehicle.

[9] On March 1, 2010 the court issued a notice advising that this action would be dismissed pursuant to Rule 48.15 as no defence had been filed. On March 17, 2010, the plaintiff's lawyer wrote to the plaintiff's insurer once again, advising of the pending dismissal and seeking the consent of the plaintiff's insurer to an order adding it as a defendant to this action. Perhaps understandably, the plaintiff's insurer did not respond to this letter and the plaintiff's lawyer took no steps to obtain an order extending the Rule 48.15 deadline.

[10] On April 27, 2010, the court issued an order dismissing this action as abandoned. The plaintiff's lawyer became aware of this order shortly after it was made. However, he did nothing to address the dismissal order until notice of this motion was formally provided on September 30, 2013.

[11] However, the plaintiff's lawyer was taking other steps to advance the plaintiff's claim, although not through the instrument of this proceeding. In October 2011, the plaintiff's lawyer decided that issuing a second statement of claim would be the most

2014 ONSC 3512 (CanLII)

efficient way of furthering the plaintiff's claim. The second statement of claim was issued on October 24, 2011 (the "2011 Action") and this time the defendant in this action and State Farm were both named as party defendants. The same claims made against the defendant in this action are also made in the 2011 Action, along with the addition of the uninsured motorist claims against State Farm.

[12] The 2011 Action proceeded expeditiously, at least at the outset. State Farm was served with the statement of claim in the 2011 Action shortly after it was issued. A statement of defence was filed in January 2012. Productions were exchanged and examinations for discovery were held in January 2012. Various medical and other damages documents were collected by the plaintiff and provided to State Farm. State Farm conducted a defence medical examination of the plaintiff in July 2012. An unsuccessful mediation session took place in March 2013.

[13] However, it appears that the court issued a status notice in the 2011 Action on January 20, 2014. This notice was apparently not responded to and the 2011 Action was dismissed for delay by the registrar on May 6, 2014, two weeks before this motion was argued. I was not advised of this dismissal and I do not know what, if any, steps have been taken to address that issue. Of course, that matter is not before me and I can only deal with the issues related to this action.

**Adding State Farm as a Defendant**

[14] State Farm seeks to be added as a defendant pursuant to Rule 13.01 for the purposes of opposing the plaintiff's motion and defending this action if the plaintiff is successful. Rule 13.01 provides as follows:

> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

2014 ONSC 3512 (CanLII)

[15] As can be seen from the language of Rule 13.01, one of the factors the court must consider on such a motion is the potential prejudice to the parties.

[16] Under the fact scenario present before the court on this motion, State Farm is the plaintiff's insurer. This is because section 265 of the *Insurance Act*, R.S.O. 1990, c. I.8 defines an insured person as including any person injured while an occupant of an insured vehicle. This is an action brought by the plaintiff against the alleged tortfeasor only. State Farm seeks to be added as a defendant to this tort action pursuant to Rule 13.01 against the wishes of its insured in order to take a position adverse in interest to its insured. The plaintiff argues that she would be prejudiced if State Farm were added as a defendant in such circumstances.

[17] The leading authorities dealing with situations where an insurer seeks to intervene in order to take a position adverse to its insured are *Waterloo Insurance Co. v. Zurbrigg*, [1983] O.J. No. 148 (C.A.); leave to appeal refused [1984] S.C.C.A. No. 388 and *Porretta v. Stock*, [1988] O.J. No. 2108 (H.C.J.); affirmed [1989] O.J. No. 3244 (C.A.). In both cases, the Court of Appeal determined that such an order was not appropriate given the conflict of interest that would result when an insurer must inevitably choose between its own interests and the interests of its insured. See *Waterloo* at paragraph 5, the High Court decision in *Porretta* at paragraph 37 and the Court of Appeal decision in *Porretta* at paragraph 1.

[18] In *Waterloo*, the Court of Appeal stated that such an order would place the insurer in "an impossible position" and that the "clearest mandate would be required before such a situation could be tolerated". See *Waterloo* at paragraphs 5 and 6.

[19] Counsel for State Farm argued that *Waterloo* and *Porretta* are distinguishable as both involved fully defended actions where the plaintiff's damages would be subject to a full assessment on a contested basis. I do not see this factor as being significant in the circumstances of this action. If the plaintiff obtains default judgement against the defendant and then presents that judgment to State Farm for payment, State Farm would not be bound by that decision. It will have every right to contest the plaintiff's claim. See *Johnson v. Wunderlich*, [1986] O.J. No. 1251 (C.A.) at paragraph 28. See also section 4(1) of the *Uninsured Automobile Coverage Regulation, R.R.O. 1990, Reg. 676.*

[20] State Farm also relies on the decision of J. Wright J. in *Buset v. Dominion of Canada General Insurance Company*, [2005] O.J. No. 3389 (S.C.J.), where the court suggested that the principle in *Waterloo* should be revisited and made an order consolidating the plaintiff's tort action and the plaintiff's separate action against her insurer. However, I note that the finding in *Buset* appears to be based on the principle that "no person should be condemned unheard". See *Buset* at paragraph 17. The plaintiff in *Buset* was expressly taking the position that once she had obtained judgment in the tort action, she would be entitled to payment from her insurer "without allowing her insurer to participate in the determination of that judgment". See *Buset* at paragraph 6. That is

2014 ONSC 3512 (CanLII)

not the situation before the court on these motions. In fact, the plaintiff readily concedes that State Farm will be entitled to contest the judgment if and when it is asked to pay.

[21] For the same reasons, I do not accept the concerns expressed by State Farm regarding the decision of the Court of Appeal in *Stoyka v. General Accident Assurance Company of Canada*, [2000] O.J. No. 410 (C.A.). At paragraph 24 of that decision, the Court of Appeal makes reference to a situation where the insurer chose not to be added as a party defendant and having to live with the consequences of the judgment the plaintiff obtained. Again, that is not the situation before me. The plaintiff concedes that State Farm will not be bound by any judgment in this action.

[22] I accept that there appears to be some element of uncertainty regarding the decisions of the Court of Appeal in *Waterloo* and *Porretta*. Subsequent decisions of the Superior Court and of the Court of Appeal itself appear to be at least somewhat inconsistent with the clear decisions in *Waterloo* and *Porretta*. However, despite Justice Wright's invitation to reconsider *Waterloo*, the Court of Appeal has not expressly done so. The Court of Appeal's decisions in those cases are clear and set out with forceful language. In my view, *Waterloo* and *Porretta* remain the law of Ontario and are binding on this court. I am therefore dismissing State Farm's motion.

## Setting Aside a Dismissal Order

[23] The law relating to motions seeking an order setting aside an administrative dismissal order is summarized in my decision in *744142 Ontario Ltd. v. Ticknor Estate*, 2012 ONSC 1640 (Master).[1] At paragraph 32 of that decision I set out the applicable principles as follows:[2]

> **32.** In the last five years, the law relating to setting aside registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario. Although each of those decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal in *Scaini* has been followed consistently. The principles that emerge from those decisions can be summarized as follows:

[1] Although most of the applicable authorities deal with orders dismissing actions for delay, the same considerations apply to a motion for an order setting aside an order dismissing an action as abandoned. See *Vaccaro v. Unifund*, 2011 ONSC 5318 at paragraph 34.

[2] The applicable principles are derived from seven decisions of the Court of Appeal for Ontario released over the last several years: *Scaini v. Prochnicki*, [2007] O.J. No. 299 (C.A.); *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, [2007] O.J. No. 3872 (C.A.); *Finlay v. Van Paassen*, [2010] O.J. No. 1097 (C.A.); *Wellwood v. Ontario (Provincial Police)*, [2010] O.J. No. 2225 (C.A.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, [2010] O.J. No. 5572 (C.A.); *Machacek v. Ontario Cycling Assn.*, [2011] O.J. No. 2379 (C.A.); *Aguas v. Rivard Estate*, [2011] O.J. No. 3108 (C.A.).

2014 ONSC 3512 (CanLII)

• the court must consider and weigh all relevant factors, including the four *Reid* factors which are likely to be of central importance in most cases;

• the *Reid* factors, as cited by the Court of Appeal in *Giant Tiger*, are as follows:

(1) *Explanation of 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 toward trial then the motion to set aside the dismissal will fail.

(2) *Inadvertence in Missing the Deadline*: 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.

(3) *The Motion is 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.

(4) *No Prejudice to the Defendant*: 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;

• a plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;

• the key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;

• all factors are important but prejudice is the key consideration;

• prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;

• once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;

• prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of

2014 ONSC 3512 (CanLII)

the plaintiff's delay or as a result of steps taken following the dismissal of the action;

● the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;

● in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.

[Footnotes Omitted]

[24] I am also mindful of the observations of the Court of Appeal in its decision in *Hamilton (City)*. At paragraphs 20-22 of that decision Justice Laskin notes as follows:

> **20** Two principles of our civil justice system and our *Rules of Civil Procedure* come into play. The first, reflected in rule 1.04(1), is that civil actions should be decided on their merits. As the motion judge said at para. 31 of his reasons: "the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."
>
> **21** The second principle, reflected in the various time limits mandated by our rules, and indeed, as noted by the motion judge, in the provision for a status notice and hearing, is that civil actions should be resolved within a reasonable timeframe. In *Marché*, at para. 25, my colleague Sharpe J.A. wrote about the strong public interest in promoting the timely resolution of disputes. Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it.
>
> **22** On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles.

[25] I also note that the Court of Appeal has recently emphasized the principle that these motions involve an exercise of the court's discretion. The court must weigh all relevant considerations to determine the result that is just in the circumstances. See *Habib v. Mucaj*, 2012 ONCA 880 at paragraph 6.

[26] Finally, it should be emphasized that the general preference in our system of civil justice is for disputes to be decided on their merits. See *MDM Plastics Ltd. v. Vincor International Inc.*, 2013 ONSC 710 (S.C.J.) at paragraphs 24 and 28.

[27] State Farm argued that recent decisions of this court and the Court of Appeal suggest that there is a trend toward a stricter approach on motions to set aside dismissal orders. I agree that the tests set out by the Court of Appeal in connection with status

2014 ONSC 3512 (CanLII)

hearings and motions to restore actions to the trial list appear to be more rigid than the applicable test on this motion. The test on a contested status hearing, for example, is conjunctive. It requires a plaintiff to explain her delay *and* demonstrate that the defendant will not be prejudiced. See *Faris v. Eftimovski*, 2013 ONCA 360 at paragraph 42. However, none of the half dozen or more Court of Appeal decisions dealing with administrative dismissal orders take that approach. They all require a contextual analysis where it is not necessary for a plaintiff to satisfy all factors. The court is to weigh all of the factors and make the order that is just in the circumstances. In my view, this remains the applicable test.

[28] These are the factors and principles I have considered and applied in determining the issues on the plaintiff's motion to set aside the dismissal order. My analysis leads me to the conclusion that it is in the interest of justice that the dismissal order of the registrar be set aside.

2014 ONSC 3512 (CanLII)

**Motion Brought Promptly**

[29] Rule 37.14(1) requires that motions of this nature be brought by way of a notice of motion served forthwith after the order in question comes to the attention of the person affected. The applicable authorities also require these motions to be brought promptly. In my view, the plaintiff has not done so. The explanation provided is not sufficient. There was no basis for the plaintiff's lawyer to simply assume that the dismissal order would be set aside on consent. Allowing a period of more than three years to pass cannot be an acceptable period of delay regardless of how busy a lawyer is or whether he thought the order would be set aside on consent.

[30] In my view, the plaintiff has not satisfied this element of the *Reid* test.

**Litigation Delay**

[31] I am also of the view that the plaintiff has failed to provide a satisfactory explanation for the delay encountered with this action from the attempted service of the statement of claim in April 2008 to the receipt of the notice that the action would be dismissed. In fact, it appears that the plaintiff did nothing to advance the claim during this time period other than to make two attempts at service and write a few letters. It is true that in October 2011, the plaintiff issued the 2011 Action which sought the same relief. The plaintiff has obviously pursued her claim through that action, although it also appears to have fallen through the cracks in recent months. However, the plaintiff has done nothing to advance this particular proceeding.

[32] For these reasons, I am not satisfied that the plaintiff has met this element of the *Reid* test.

2014 ONSC 3512 (CanLII)

**Inadvertence**

[33] I am not satisfied that the plaintiff has met this aspect of the *Reid* test. The plaintiff's lawyer knew about the pending dismissal but did nothing other than writing a letter to the plaintiff's insurer. There is no evidence to suggest anything other than a deliberate decision to ignore the pending dismissal. I appreciate that the plaintiff's lawyer was overwhelmed with work at the relevant times. However, that does not alter the fact that this important matter should have been attended to in a timely manner. If the plaintiff' lawyer was unable to properly attend to all of the files he was carrying, some should have been transferred to other lawyers with capacity. This factor has not been satisfied.

**Prejudice**

[34] I am, however, satisfied that the plaintiff has met the onus placed upon her to rebut the presumption of prejudice. Where a limitation period has passed, as it has here, a presumption of prejudice arises and the onus rests with the plaintiff to rebut that presumption. The strength of this presumptive prejudice increases with the passage of time. See *Wellwood* at paragraph 60.

[35] A plaintiff can overcome the presumption of prejudice by leading evidence that all relevant documents have been preserved, that key witnesses are available or that certain aspects of the claim are not in issue. See *Wellwood* at paragraph 62. I have concluded that the plaintiff has done so.

[36] First, the defendant in this action will not be prejudiced in presenting his defence at trial as he has shown no interest in defending this action in the first place. In fact, as set out below, it is my view that he has been actively avoiding this litigation.

[37] However, even if State Farm were to assume the role of defending this action, I would find that the plaintiff has met the onus of rebutting the presumption of prejudice.

[38] This was a rear-end accident and the defendant fled the scene. Liability is not in issue.

[39] It appears that most of the important medical evidence is available and has been produced. The one exception to this is the OHIP summary. It is only available from 2005, one year pre-accident. While this is a concern, it must be contrasted with the fact that almost all other medical evidence is available. State Farm has also had the benefit of its discovery of the plaintiff as part of the 2011 Action. The plaintiff has answered her undertakings and submitted to a defence medical examination. Some employment records are missing but that fact is prejudicial to the plaintiff, not the defendant or State Farm.

The plaintiff will be unable to prove her claim for lost income unless those records can be produced. It must be remembered that the test refers to "significant prejudice" and not simply to "any prejudice". See *Giant Tiger* at paragraph 12.

[40] Finally, State Farm has not provided any specific evidence of actual and significant prejudice.

[41] In my view, this element of the *Reid* test has been met.

[42] When deciding a motion to set aside an administrative dismissal order, the court is to adopt a contextual approach in which it weighs all relevant considerations to determine the result that is just in the circumstances. The court must, of course, balance the strong public and private interest in promoting the timely resolution of disputes with the entitlement of a plaintiff to have her claim decided on the merits. However, the preference in our system of civil justice is for the determination of disputes on their merits.

[43] It is true that the plaintiff has failed to satisfy three of the four *Reid* factors. However, she has been actively pursuing her claim in the context of a separate action (at least until recently). It is clear from the evidence that she always intended to pursue her claim. It was perhaps unwise to do so through the instrument of a separate action for the same relief, however, I do not view that decision as a deliberate choice to abandon her claim for compensation. Most importantly, however, she has satisfied the key consideration of prejudice.

[44] For these reasons, I have concluded that it is just in the circumstances of this action that the dismissal order of the registrar dated April 27, 2010 be set aside.

**Service of the Statement of Claim**

[45] The defendant did not respond to the attempted service of the plaintiff's motion record and did not appear at the hearing of these motions. I am satisfied from the evidence before me that the defendant has been evading service of the statement of claim and the plaintiff's motion materials.

[46] As set out above, attempts at service were made on the defendant at the Marconi Boulevard address in London, Ontario. The process server was told by a woman claiming to be the defendant's ex-girlfriend that she did not know where he could be found. However, the same person apparently told an employee of Romano Law that he was simply not home.

[47] More importantly, however, the defendant is now the owner of real property in London, Ontario. The statement of claim of claim in the 2011 Action was served on the defendant at that property on June 25, 2013 by leaving a copy with the same "ex-

2014 ONSC 3512 (CanLII)

girlfriend" who now appears to be living with the defendant at the property. No response was received from the defendant to the service of that statement of claim. Similarly, the defendant has not seen fit to respond to this motion despite the fact that the plaintiff's initial motion record was mailed to the defendant's property in January 2014 and other attempts were made to serve the balance of the motion materials at that address.

[48] For these reasons, I am prepared to grant the relief requested by the plaintiff in relation to the service of the statement of claim.

**Order**

[49] I therefore order as follows:

(a) the order of the registrar dated April 27, 2010 is hereby set aside;

(b) the time for service of the statement of claim is extended to August 29, 2014;

(c) the statement of claim shall be served on the defendant by mailing a copy of the statement of claim, together with a copy of the formal order from this motion, to the defendant at 306 Edmonton Street, London, ON, N5W 4Y2;

(d) service of the statement of claim in accordance with this order shall be effective seven days after mailing;

(e) the registrar shall not dismiss this action as abandoned before November 28, 2014;

(f) service of the motion materials on the defendant is hereby validated;

(g) State Farm's motion is dismissed; and,

(h) if the parties are unable to agree on the issue of costs, they may make brief written submissions in writing by no later than July 11, 2014.

Master R.A. Muir

**DATE:** June 9, 2014

2014 ONSC 3512 (CanLII)