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Court House 393 University Avenue 6th Floor Toronto, ON M5G 1E6	Superior Court of Ontario Toronto Region Masters' Chambers	Chambres des Protonotaires Cour supérieure de Justice Région de Toronto

DATE: June 8/15

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TO: FAX:

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NUMBER OF PAGES INCLUDING COVER SHEET: 7

PROCEEDING(S) AT ISSUE: BALOTIC v. SUN LIFE

COMMENT:

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Balotic v. *Sun Life*

Court File No.: 09-CV-377346

Motion Heard: March 17/15

In attendance: J. Van Allen, counsel to the lawyer for the plaintiff 416-869-0271 (f.)

C. McGhee, lawyer for the defendant 519-888-3722 (f.)

By the court:

[1] The plaintiff moves for an Order setting aside an April 10/14 registrar's Order dismissing this action for delay. The claim arises from the defendant's denial of long term care insurance benefits to the plaintiff.

[2] The plaintiff submitted a claim for long term care insurance benefits, alleging that he became physically dependant, as of April 26/07, in that he was diagnosed with Alzheimer's disease, loss of short-term memory, shoulder pain and back pain. Benefits were denied him (with the denial having been unsuccessfully appealed) on the basis of an assessment by the defendant that the plaintiff had failed to meet the test for benefits set out in the long term care insurance policy. The test applied was: Was the plaintiff physically dependent by way of a deteriorated mental ability or did he require substantial stand-by assistance from another person in order to safely and completely perform two or more of his activities of daily living?

[3] The plaintiff commenced a claim which he served in June/09. By August/09, the claim had been defended. In September/09, the plaintiff provided the defendant with an unsworn affidavit of documents and copies of Schedule "A" documents, with the documents being current to April/09 only. Further documentation had been requested by the defendant and was being sought by the plaintiff, with a promise the documentation would be forwarded upon receipt. In July/10, the defendant served a sworn affidavit of documents.

[4] Examinations for discovery were scheduled in March/10—to be conducted in September/10. The plaintiff was not examined for discovery, as planned, given that plaintiff's counsel expressed concern to defendant's counsel about his client's capacity. On consent, discoveries were deferred, to permit time for the conduct of a capacity assessment for the plaintiff.

[5] Mediation was scheduled to take place in December/10. Counsel for the plaintiff agreed to provide the defendant with the above-referenced capacity assessment and the records of Dr. Fornazzari from the Toronto Memory Program, before mediation.

[6] Approximately one week before the date scheduled for mediation, counsel for the plaintiff advised counsel for the defendant that he did not yet have a capacity assessment and that his client had not been treated by Dr. Fornazzari since February/09. Mediation was cancelled.

[7] Between December/10 and September 6/11, counsel for the plaintiff failed to communicate with counsel for the defendant. A letter was sent on behalf of the defendant, on September 7/11, requesting documentation that the defendant did not have but required from the plaintiff. The plaintiff responded by proffering an August/11 letter from Dr. Fornazzari as to the plaintiff's competence until December/07 and suggesting that mediation be rescheduled. No opinion was rendered as to the plaintiff's condition/capacity after December/07. The defendant followed up by requesting an updated capacity assessment and reiterating its request for production of further documents.

[8] In an effort to move the matter forward and, notwithstanding its continued requests for further documentary disclosure, the defendant agreed to proceed to mediation on March 6/12.

[9] The plaintiff delivered a trial record and the parties proceeded to mediation, without success. The action did not settle.

[10] The plaintiff then changed lawyers.

[11] The plaintiff's new counsel suggested that settlement discussions be reprised. On January 31/13, counsel for the defendant advised that in order that this to occur, the defendant required updated medical documentation and a Neurology Psychiatric evaluation of the plaintiff.

There was no response to the request for an evaluation/updated medical records, until after a status notice was issued by the Registrar in June/13.

[12] In August/13, counsel for the plaintiff suggested a litigation timetable that would have discoveries completed by the end of December/13 and the action set down afresh (with the original trial record missing from the court file), by mid-August/14. While the defendant continued to require further documentation, it *consented to* the timelines proposed, save that it indicated a preference for a March 31/14 set down deadline. A consent Order was made by Master Graham on September 30/13.

[13] Counsel for the plaintiff attempted to schedule examinations for discovery herein for the Winter of 2014. On October 4/13, counsel for the defendant indicated that, since the plaintiff had passed his trial record and the action was struck from the trial list, he was precluded from continuing any form of discovery save with leave. A discussion ensued between counsel for the plaintiff and counsel for the defendant. Counsel for the plaintiff indicated that he had sought and was awaiting updated medical documentation and that he would follow up with counsel for the defendant on October 25/13.

[14] No follow-up was made on behalf of the plaintiff until May 20/14, by which time new counsel had come on the record for the plaintiff and the action had been dismissed. The action was dismissed on April 10/14.

[15] New counsel contacted the defendant's lawyer on May 20/14 asking about the possibility of settlement and about next steps. This time, consent to setting aside the dismissal Order was not forthcoming.

[16] Less than one month later, counsel appointed by LawPro delivered a notice of motion for a motion returnable in October/14. The motion was adjourned (as it was a long motion) and was heard by me on March 17/14.

17] The defendant points out that the plaintiff has more work to do, even as at now. There are gaps in the plaintiff's documentary disclosure. No sworn affidavit of documents has been delivered; the plaintiff's decoded OHIP summary has not been updated since 2009; prescription summaries have yet to be produced; driving records from the Ministry of Transportation have

not been produced; no Neurology Psychiatric evaluation of the plaintiff has been conducted; certain clinical notes and records are outstanding; and examinations for discovery have yet to be conducted.

[18] To this, Ms. Van Allen (on behalf of the plaintiff) says that further requests for clinical notes and records have been made; and, there is no reason to believe--given legislation-imposed record retention obligations (including s. 18 of O. Reg. 114/94 under the *Medicine Act, 1991* and s. 19 of O. 1990 Reg. 965 under the *Public Hospitals Act*)--that missing documents cannot be obtained (with prescription summaries and driving records only recently having been sought by the defendant and *not* at the time the denial on which this action is founded was made); the OHIP summary can be updated (with the critical earlier years already having been addressed by the plaintiff); and, updates have been requested from Dr. Fornazzari.

[19] In all of the circumstances, ought I to set aside the dismissal Order? In this regard, and as a starting point, I must consider how the plaintiff has addressed the *Reid* factors.

[20] While it is true that there have been periods of delay herein, the plaintiff himself says that he had left the action to his lawyers and assumed that it was proceeding in the normal course. He says that he followed up from time to time. The defendant posits that the plaintiff did not act with appropriate dispatch and knew or should have known that there were "lengthy periods of inaction on his counsel's part" (defendant's factum, at para. 58). There was delay and, the litigation proceeded in fits and starts; but, I cannot say that the delay was inordinate or that the plaintiff ought to have known that his counsel was moving too slowly and, as such, taken action. The manner in which the litigation proceeded reflected, in part, a concern on the part of plaintiff's counsel as to the plaintiff's capacity to proceed with the litigation. Deferral of discovery and mediation was done by agreement. And, while the plaintiff's lawyers may not have been as responsive as the defendant wished them to be, there were efforts made to improve documentary disclosure during some of the periods of silence. With lawyer turnover (three lawyers) and the steps that were taken (with no opposition from the defendant, even if with grudging agreement), I say that there has been a sufficient explanation for the delay.

[21] As for inadvertence in missing the set down deadline fixed by Master Graham, the evidence of the plaintiff's current lawyer is that she relied on a memorandum written by an

associate in her office, in determining next steps, when she assumed carriage of the file. The memorandum made no reference to the March 31/14 deadline. She says that the memorandum did not alert her to the fact that there was urgency in addressing the file when she started working on it in January/14 and, in any event, she was doing some behind-the-scenes work communicating with the plaintiff and gathering documents. I accept, even if reliance on junior counsel was less than optimal and junior counsel was less than thorough, that there was inadvertence. Then too, there is no evidence before me to suggest intention on the part of the plaintiff or his counsel to allow the set down deadline to elapse (this is particularly so, given that the action had already been set down once before).

[22] Was the motion brought promptly? I think that it was. With counsel saying that the Order dismissing this action did not come to her attention until May/14 and with this motion having been brought before the end of June/14 by LawPro counsel, the delay is minimal and of no moment.

[23] In all, the key factor for my consideration is that of prejudice. The defendant says that certain documents are missing. And while this is true, efforts have been made to obtain them and, as addressed above, there is nothing to suggest that they will not be able to be produced in short order (and, in any event, at least two of the doctors from whom notes/records are requested are not listed in the OHIP summary and, so, may have been identified by the defendant in error).

[24] The defendant also says that the plaintiff's mental and/or physical condition may have deteriorated such that his present status may not accurately reflect his status at the time of denial of benefits. To this, Ms. Van Allen says, fairly, that his present status is not material to the allegations made by the plaintiff that his benefits claim ought not to have been denied by Sun Life (i.e. denied *before* this action was commenced). In her words, words with which I agree, the plaintiff's claim is "front-loaded": What is relevant is whether the plaintiff met the eligibility requirements for the benefits he was seeking, as at the time of denial; whether the plaintiff misled the defendant as to his actual medical conditions, as at the time of denial; whether the plaintiff made false statements to induce the defendant into issuing a policy of insurance that it otherwise ought not to have issued; whether the plaintiff's claim for benefits was made too late; and whether the defendant acted with good faith in addressing the plaintiff's claims for benefits. All of these questions were addressed in the statement of defence. The plaintiff's insurance file

has been preserved by the defendant; and, all documents relative to the denial of benefits/appeals from the denial (and from years prior to and immediately after the denial of benefits) have been produced and preserved by the plaintiff. And *if* a Neurological Psychological evaluation is key, why was it not requested of the plaintiff before the claim for benefits was finally denied by the defendant, and why did the defendant agree to the first reinstatement of the action without it?

[25] When I consider the *Reid* factors in the context of the whole of the action (see: *Scaini* v. *Prochnicki*, [2007] ONCA 63) as well as the two-part test enunciated in *Kara* v. *Arnold* (2014 ONCA 871), and when I consider that (a) the action is front-ended, (b) the failings now identified notwithstanding, the defendant once before was prepared to proceed to trial (such that it cannot be said that a fair trial cannot be had even with those failings), and (c) the prejudice now complained of does not arise from steps taken following dismissal and/or would not result from restoration of the action following dismissal (see: *MDM Plastics Ltd.* v. *Vincar International Inc.*, 2015 ONCA 28, at para. 25), and when I balance the defendant's right to finality and the preference of the courts to have actions decided on their merits, the balance tips in favour of the plaintiff and his request for reinstatement of the action.

[26] The plaintiff's motion is granted, with a new set down deadline of August 31/15 now imposed by the court. Failing agreement as to the costs of the motion, I may be spoken to.

June 8/15

Master Abrams