

CITATION: Bargain Club Inc. v. Co-Operators General Insurance Company,
2018 ONSC 3402
COURT FILE NO.: CV-16-2667-SR
DATE: 2018 07 05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bargain Club Inc., Plaintiff/Moving Party

AND:

Co-Operators General Insurance Company, Defendant/Responding
Party

BEFORE: Trimble, J.

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

Robert W. Dowhan and Danielle Marks, Counsel for the
Defendant/Responding Party

HEARD: May 30, 2018

ENDORSEMENT

Nature of the Motion

[1] The Plaintiff brings a motion for an order extending the time for service of the Notice of Action and Statement of Claim *nunc pro tunc* to February 14, 2017.

Issue

[2] Should the time for service of the Statement of Claim be extended?

Result:

[3] The motion is allowed with costs to be determined as directed in this Endorsement.

Facts:

[4] On June 12, 2015, the Plaintiff's store suffered water damage. The Plaintiff notified its insurer, the Defendant, of the loss, immediately. For the purposes of this motion, the other important dates are as follows:

2015	
June 15	Co-Operators attended the premises to assess the loss and discuss the claim, and requests documents from the Plaintiff
June 16	Co-Operators advises Plaintiff of the one year limitation date under policy
June 18	National Fire Adjustment Co. (NFA) wrote to Co-Operators on behalf of the Plaintiff to advise that NFA had been retained and providing notice with respect to pre-judgment interest
June to October	NFA provides various documents to Co-Operators
October 14	Co-Operators provides a proof of loss with respect to stock and stock relocation
October 21	Co-Operators writes to the Plaintiff advising of proscription date under the policy
November	Stocking inventory claim resolved, leaving equipment loss and business interruption claims outstanding
2016	
March 29	Co-Operators writes to Plaintiff to confirm proscription date
June 10	Plaintiff issues Notice of Action
June 12	Proscription expires under policy
June 15	NFA sends Notice of Action to Co-Operators
July 8	The Statement of Claim is filed
December 10	Time for serving the Notice of Action and Statement of Claim expires.
2017	
February 14	Notice of Action and Statement of Claim are served
May 11	Motion record served to extend time for service, returnable June 16, 2017
July 15	Adjourned on consent to July 21
July 13	Supplementary motion record served within time for service returnable
July 21	Adjourned on consent to September 14
September 19	Adjourned on consent to May 30, 2018

The Positions of the Parties

Plaintiff/Moving Party's Position:

[5] The Plaintiff has the onus to prove that extending the time for service will not prejudice the Defendant (see: *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780 (C.A.)). Further, while the Plaintiff may use evidence as to the reason for the delay in serving the Notice of Action and Statement of Claim within the required time frame, it does so only as part of the overall narrative. There is no obligation on the Plaintiff to adduce evidence as to why the Notice of Action and Statement of Claim were not served within the appropriate time frames under the Rules.

[6] The relevant time period in assessing the prejudice is a two-month period from December 10, 2016 to February 14, 2017.

[7] The Defendant will not be prejudiced because it had notice of the Plaintiff's claim since at least June 15, 2015, had the opportunity to assess and investigate the Plaintiff's losses, and had the opportunity to obtain evidence. The Defendant cannot create its own prejudice by its failure to do something that it could or ought to have done as a prudent insurer presented with a claim under its policy.

Defendant/Responding Party's Position:

[8] The Defendant agrees that under *Chiarelli*, the central focus is on the conduct of the parties and the merits of the case, and that the time for service should be extended or service validated unless there is prejudice to the

Defendant. The Defendant also says that the Plaintiff must give a reasonable explanation for its failure to comply with the rules regarding service.

[9] By the time the Notice of Action and Statement of Claim were served, over one year had lapsed since the loss. The insurance policy between the parties contains a strictly-worded 1-year limitation period. Despite offers of assistance, three reminders of the proscription date, and 18 letters concerning information requests, the Plaintiff refused to provide proof of loss forms, information, and documents that the Defendant needed to properly assess the claim prior to the expiry of the limitation period.

[10] The passage of the limitation period, itself, gives rise to a rebuttable presumption of prejudice which the Plaintiff has not displaced. In any event, the insurer says that it is prejudiced, in fact, in its ability to adjust the loss within the applicable 1-year limitation.

[11] The Plaintiff's explanation for its failure to serve the Notice of Action and Statement of Claim within the required time frame is no explanation at all. It is not mere inadvertence. The Plaintiff's representative says that they intentionally did not serve the Notice of Action and Statement of Claim for fear of upsetting negotiations for settlement. He adds that he forgot to diarize the date for service.

Discussion

a) What Is Required To Succeed On A Motion To Extend Time For Service Under Rules 3.02 And 14.08?

[12] The Plaintiff must show some explanation for failure to serve within the required time frame.

[13] The Court of Appeal in *Chiarelli* did not set this as one of the legal requirements or make it part of the test. The requirement for the Plaintiff to give a reasonable explanation for its failure to follow the Rules regarding service comes from the Court of Appeal's decision in *Nugent v. Crooke* (1969), 40 O. R. (2d) 110 (Ont. C.A.), paragraph 111. In that case, the Court of Appeal said that under former Rule 8, while the court had the discretion in proper cases to grant an order of renewal of a writ of summons after the expiry of the writ, the jurisprudence under that rule indicated that the discretion should be exercised only when a number of circumstances are made apparent. One of these was the reason why the writ was not renewed in time. The Court of Appeal commented that there are both intentional and unintentional reasons why the writ might not be renewed. Therefore, it looked for a reasonable explanation for the delay. In that case, the lapse of time was over seven years between the issuance of the writ and the request to renew it. The court held that this was no mere slip of a solicitor. Rather, "... *The material does make it clear that instead of a mere slip in the failure of service, there was a continuous if not studied neglect of the*

provisions of the rules of practice respecting service of the writ and the effect of the statute concerning intervention of limitation of the action....”

[14] In *Chiarelli*, the Court of Appeal, it is assumed, was aware of its earlier decisions. The Court of Appeal did not overrule *Nugent*. *Chiarelli* did not refer to *Nugent*. Accordingly, I disagree with the Plaintiff’s argument that there is no need for the Plaintiff to explain why it failed to serve in accordance with the rules.

b) Was An Appropriate Explanation Given?

[15] In the Plaintiff’s supplementary affidavit, sworn after it received responding material, the Plaintiff’s representative provided an explanation for the failure to serve; namely, the desire not to upset settlement negotiations, and the failure to diarize or enter into the tickler system the dates by which service had to be carried out. While the Plaintiff’s representative did not use the word “inadvertence”, it is clear that the inadvertence in this matter was the failure to put the matter into the tickler system. As to the Plaintiff’s desire to withhold service to not upset settlement discussions, there is no evidence of an intention to not serve before the expiry of the time within the Rules. Accordingly, I reject the Defendant’s argument with respect to the lack of explanation.

c) Is There Presumed Prejudice To The Defence?

[16] The parties agree that in a motion to extend the time for service of the Statement of Claim and/or Notice of Action, the only relevant prejudice is that

which arises, or is presumed to arise from the failure to serve the Notice of Action and/or Statement of Claim. In this case, that means that the Plaintiff must rebut the presumption of prejudice arising from the two month delay in service.

[17] I find that the Plaintiff has rebutted the presumed prejudice. The delay in service was only two months beyond the service requirement. The insurer was given access to the property and resolved the contents claim. The equipment and business interruption claims are founded largely (the latter almost exclusively) in documents. These documents still exist.

d) Is there Actual Prejudice to the Defendant?

[18] Co-Operators alleges that it has suffered actual prejudice because it was unable to adequately investigate and adjust the loss within the limitation period. Co-Operators, in its argument, stressed that the expiry of the limitation, itself, creates the prejudice, relying on *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469. Implicitly, Co-Operators saying that it has no obligation to adjust the loss within the limitation period so long as there is a possibility that the Statement of Claim is not served within the appropriate time period after the Notice of Action. I do not think this is a correct statement of its obligation.

[19] The question I raised at the hearing, however, is whether the limitation clock stopped running once the Notice of Action was issued, and therefore, there was no prejudice by the expiry of the limitation arising from the failure to serve

the Notice of Action? Implicitly, the defence argument is that the prejudice (presumed or actual) caused by the expiry of the limitation does not stop until the Notice of Action is issued, the Statement of Claim is filed and both are served. I was offered no authority for this proposition. All of the cases the insurer put before me, dealt with the extension of time to serve a Statement of Claim. None dealt with the situation where the action was commenced by Notice of Action.

[20] By Endorsement dated June 4, I invited counsel to consider and comment on the applicability, if any, of *Mosregion Inv'ts Corporation v. Ukraine Intern'l Airlines*, 2010 ONCA 715, and in *Ananthamyl v. Szabo*, 2015 ONSC 5824.

[21] In *Mosregion*, the *Warsaw Convention* specified a limitation period of two years. The plaintiffs issued the Notice of Action against the airline within the limitation but did not serve the Statement of Claim within the 6 month period provided for in the *Rules*. The plaintiffs in that case, as here, brought a motion for an order *nunc pro tunc* to extend time for serve, which was granted by the Master.

[22] The Court of Appeal held that once the claim was issued within the limitation, article 29 of the *Warsaw Convention* (which specified the two year limitation period) had been satisfied and the claim fell to be governed by the procedure in the jurisdiction where the claim had been issued. The Court held at para. 11:

Pursuant to those Rules and the jurisprudence governing them, the *nunc pro tunc* extension to the time for service did not amount to the bringing of a new claim; the claim had already been "intentée" and the time for service of the existing claim was extended in accordance with Ontario procedure. Accordingly, we see no error in the master's application of the Ontario Rules, as interpreted by decisions of this court.

[23] In *Ananthamyl v. Szabo*, 2015 ONSC 5824, para. 41 and 42, which had similar facts to this case, Master Haberman stated:

40 ... In his view, one which I share, the action has been started on time once the Notice of Action has been issued [within the limitation]. I expand on his reasons to note that a Notice of Action is generally used where a party is missing some salient fact to enable them to issue a Statement of Claim very near the expiry of a limitation period.

41 As a result, the limitation period will have expired in most of these cases before the Statement of Claim has been served. It is the Notice of Action that saves the day. It makes no sense to apply the presumption of prejudice in these cases as doing so effectively impedes a plaintiff's ability to use a Notice of Action to extend the limitation period and renders it little utility.

[24] The Defendant says that these two cases fly in the face of clear appellate authority such as *Deaville v. Boegeman*, [1984] O.J. No. 3403 (CA) which says how the Court should address that to do when the limitation expires between two procedural steps. *Deaville* addresses the extension of time for commencing derivative claims under the *Family Law Act*, and is irrelevant to the situation now before the Court.

[25] The Defendant also relies on *Malatesta v. 2088675 Ont. Inc.*, 2014 ONSC 1793 (SCJ). In that case, the court held that in the case of the Claim being issued within time, but not served within the time for service, there is still a presumption of prejudice.

[26] All of the things that Co-Operators raised as instances of actual prejudice either are not prejudice, or do not arise from the delay in service of the Notice of Action and/or Statement of Claim.

[27] Co-Operators had access to the property. Its bald statement that this access was insufficient for the purposes adjusting the loss is not sufficient to establish prejudice. The insurer, because it adjusted then resolved with the Plaintiff the inventory and stock claims, had sufficient access to adjust the property losses.

[28] There is no evidence that the failure to have access to the premises prejudiced the defence in any way with respect to adjusting the outstanding equipment loss.

[29] The outstanding business interruption claim is based on records to which formulae in the business of interruption coverage are applied. Those documents still exist, according to the evidence before me. The fact that the Plaintiff finds it inconvenient to produce those documents to its own insurer is a question for an interlocutory motion in the action regarding the Plaintiff's obligation to produce, or

may form the basis of a defence of non-cooperation. It does not indicate prejudice arising from the late service of the Notice of Action and Statement of Claim.

Order

[30] For the foregoing reasons, I order:

- a. Service of the Notice of Action and Statement of Claim are validated as of February 14, 2017.
- b. Co-operators shall serve and file its Statement of Defence by 4:00 p.m., July 31, 2018.

Costs

[31] If the parties are not able to resolve costs, I will decide the issue on written submissions. Submissions are limited to three double-spaced pages exclusive of case law, bills of costs, or other necessary supplementary information. The Plaintiff's submissions will be served and filed by 4:00 p.m., 20 July, 2018, and the Defendants by 4:00 p.m. 31 July, 2018.

Trimble, J.

Date: July 5, 2018

CITATION: Bargain Club Inc. v. Co-Operators General Insurance Company,
2018 ONSC 3402
COURT FILE NO.: CV-16-2667-SR
DATE: 2018 07 05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

RE: Bargain Club Inc., Plaintiff/Moving
Party

AND:

Co-Operators General Insurance
Company, Defendant/Responding
Party

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

Robert W. Dowhan and Daniel
Marks, Counsel for the
Defendant/Responding Party

ENDORSEMENT

Trimble, J.

Released: July 5, 2018