CITATION: BAYNE v. TORONTO TRANSIT COMMISSION, 2014 ONSC 733
COURT FILE NOs.: CV-08-348401 and CV-09-386390
MOTION HEARD: JANUARY 21, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Angela Bayne v. Toronto Transit Commission also known as The T.T.C. and Toronto Transit Commission Insurance Company

Angela Bayne v. TTC Insurance Company Limited

BEFORE: MASTER R.A. MUIR

COUNSEL: Jillian Van Allen, counsel to the lawyer for the plaintiff
John Rosolak for the defendants

REASONS FOR DECISION

[1] There are two motions before the court. The plaintiff brings both motions 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 dismissal orders of the registrar dated December 6, 2011 in action CV-08-348401 (the "Tort Action") and January 31, 2012 in action CV-09-386390 (the "Accident Benefits Action").

[2] The defendants oppose the relief requested on these motions.

Background

[3] The plaintiff was involved in an accident on October 30, 2007 while a passenger on a bus operated by the defendant Toronto Transit Commission ("TTC"). It appears that the plaintiff fell when the TTC vehicle suddenly applied its brakes in order to avoid a collision with another vehicle. The plaintiff was one of four passengers injured as a result of the incident. The plaintiff was also involved in a similar incident on a TTC bus on April 24, 2004. That event has also resulted in a claim by the plaintiff against the TTC (the "2006 Action"), which is still pending before this court.

[4] It appears that the TTC was put on notice of the 2004 accident a few months after it happened. A statement of claim was then issued in connection with that incident on

April 24, 2006. Production and oral discovery have taken place in connection with that claim. It has been ordered to be tried together with the two actions that form the subject matter of these motions.

[5] The plaintiff also made a claim for accident benefits from the TTC in connection with the 2004 accident. That claim was settled in October 2007.

[6] The TTC was also given early notice of the 2007 incident. The plaintiff's lawyer wrote to the lawyer for the TTC on November 8, 2007 to advise the TTC of that event.

[7] The statement of claim in the Tort Action was issued on February 5, 2008 and immediately served on the TTC. In March 2008, the plaintiff's lawyers provided various medical documents to the lawyer for the TTC.

[8] The TTC filed its statement of defence in the Tort Action on July 23, 2008.

[9] Joint discoveries in the 2006 Action and the Tort action took place on January 22, 2009. The plaintiff was examined, as was the driver of the bus in the 2007 accident.

[10] Throughout 2009, the plaintiff requested and produced extensive medical and income related reports, records and documents.

[11] An unsuccessful mediation took place on July 29, 2009.

[12] A defence medical examination of the plaintiff took place on September 22, 2009, which resulted in a report from Dr. Erin Boynton dated the same day.

[13] In September 2009 the plaintiff issued her statement of claim in the Accident Benefits Action. The TTC's statement of defence for that action was filed on October 15, 2009.

[14] The 2006 Action was set down for trial in October 2009. On January 21, 2010, I made an order on consent that all three of the plaintiff's actions be tried together.

[15] The statement of claim in the Accident Benefits action was amended in June 2010.

[16] A status notice was issued by the court in the Tort Action on July 22, 2010. That notice ultimately resulted in a consent timetable order that required the Tort Action be set down by December 1, 2011. The timetable order was made by Master Short on November 25, 2010.

[17] It appears that nothing was done in connection with any of the plaintiff's actions between November 2010 and October 2011. On October 17, 2011, the court issued a status notice in connection with the Accident Benefits Action. That notice came to the attention of the plaintiff's lawyer who gave it to an articling student to handle.

Unfortunately, the articling student was suffering from certain health issues and did not take the necessary steps to respond to the notice. It is also clear that the articling student was not being properly supervised by the plaintiff's lawyer, who was fully aware of the student's health issues.

[18] It appears that due to a combination of a lack of attention, lack of supervision and the student's health issues, the court imposed deadlines associated with these actions were overlooked and the dismissal orders were made by the registrar.

[19] Nothing was done to schedule these motions for many months after the dismissal orders were made. It appears that the articling student's health issues had resulted in many such orders and the firm's many ongoing files were not reviewed in a timely manner. It also appears that the firm was preoccupied with financial issues relating to the departure of the lawyer handling the plaintiff's claim in the summer of 2012.

[20] Eventually, a new lawyer was assigned by the firm to handle the plaintiff's claim and motion dates were requisitioned in late October 2012. Notices of motion seeking orders setting aside the dismissals were then served in December 2012.

[21] The lawyers for the plaintiff reported this matter to their insurer who retained counsel. These motions were adjourned so that they could be heard together as long motions. A return date of January 21, 2014 was agreed to by the parties.

Setting Aside a Dismissal Order

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

> **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] 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.).

• 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

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]

[23] 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."
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> **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.
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> **22** On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles.

[24] 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.

[25] 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.

[26] These are the factors and principles I have considered and applied in determining the issues on these motions. My analysis leads me to the conclusion that the orders of the registrar should be set aside.

Motion Brought Promptly

[27] Rule 37.14(1) requires that motions such as these 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.

[28] In my view, the plaintiff has not done so. Nothing was done to schedule these motions for 10 plus months after the dismissal orders came to the attention of the plaintiff's lawyers. Notices of motion were not served until more than a year after the Tort Action was dismissed and approximately 11 months after the Accident Benefits Action was dismissed. The issues with the student's health and the departure of the plaintiff's lawyer from the firm are not sufficient explanations for the delay. First, it was simply not prudent for the plaintiff's lawyer to assign these matters to the student given what he knew about the student's condition. Second, there is simply no reason why a lawyer cannot at the same time transition his practice to a new firm while attending to his client's ongoing files in a professional manner.

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

Litigation Delay

[30] I can see no unexplained delay with respect to the Tort Action before November 2010. Pleadings were exchanged. Documents were produced. A mediation session took place. Examinations for discovery were held. It is true that nothing was done between November 2010 and the dismissal of the action in December 2011. However, there really was nothing to do in respect of the Tort Action during that time period. The action was ready to be set down for trial. The matter that needed attention was the Accident Benefits Action. It needed to catch up so that all three of the plaintiff's actions could be tried together as agreed to by the parties and ordered by the court.

[31] It is true that very little was done in the nature of specific steps designed to advance the Accident Benefits Action other than an amendment to the statement of claim. However, it is my view that this lack of progress must be considered in context. All of the plaintiff's actions arise from the same two incidents and generally focus on an assessment of the plaintiff's damages. Certainly the plaintiff, as a passenger on a bus, cannot be held responsible for the accidents. In my view, the delay with the Accident Benefits Action can be adequately explained by the fact that these actions are really one claim and much work had been done to advance the Tort Action and the 2006 Action to the point where they were ready to be set down for trial.

[32] The 12 month delay between the status hearing order of November 2010 and the dismissal of the Tort Action in December 2011 has not been adequately explained. However, this period of delay cannot be described as inordinate under the circumstances.

The plaintiff's explanation for the delay need not be perfect. It simply needs to be adequate. I accept, on balance, that the litigation delay has been adequately explained.

[33] For these reasons, I am satisfied that the plaintiff has met this element of the *Reid* test.

Inadvertence

[34] In my view, the plaintiff has satisfied this factor. It was certainly not prudent for the plaintiff's lawyer to have assigned these matters to the student to handle given the circumstances involving the student's health issues. However, it is clear that the plaintiff's lawyer was doing something to address the pending dismissals. His supervision was lacking and there was certainly an absence of sufficient attention being given to the plaintiff's claims. However, there is no indication of any intention to abandon the claims. In my view, inadvertence is the only logical explanation for the failure of the plaintiff's lawyer to comply with the deadlines.

Prejudice

[35] I am also 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.

[36] 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.

[37] In my view, the plaintiff has done this. The defendants had early notice of all of the plaintiff's claims. The plaintiff's claims have been thoroughly investigated. The plaintiff and the driver of the TTC bus are available to give evidence. Both have been examined for discovery.

[38] A great deal of medical and other damages documentation has been produced by the plaintiff. She has submitted to a defence medical examination from which a report has been prepared. The defendant argues that the available OHIP summary only goes back to 2003. However, I note that 2003 is four years prior to the accident relevant to these motions. I also note that the defendants were able to resolve the plaintiff's accident benefits claim from the 2004 accident on the basis of the available medical evidence.

[39] Finally, the defendants have not provided any other specific evidence of actual prejudice.

[40] For these reasons, it is my view that this element of the *Reid* test has also been satisfied.

Conclusion

[41] When deciding motions of this nature, 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 general preference in our system of civil justice is for the determination of disputes on their merits.

[42] The plaintiff has satisfied three of the four *Reid* factors, including the key consideration of prejudice. It is not necessary for a plaintiff to rigidly satisfy all relevant factors. Any lingering concerns regarding delay can be addressed with an appropriate timetable order.

[43] In my view, it is in the interest of justice that the dismissal orders of the registrar be set aside

Order

[44] I therefore order as follows:

(a) the dismissal orders of the registrar dated December 6, 2011 and January 31, 2012 are hereby set aside;

(b) the parties shall confer and attempt to agree on a timetable for the remaining steps in these actions with the proposed timetable being provided to the court for approval by February 14, 2014;

(c) if the parties are unable to agree on a timetable, they shall provide the court with written submissions by February 14, 2014; and,

(d) if the parties are unable to resolve the issue of costs, they shall make brief submissions in writing by February 14, 2014.

Master R.A. Muir

DATE: January 30, 2014