CITATION: BELLOUCIF v. TORONTO TRANSIT COMMISSION, 2015 ONSC 5153
COURT FILE NO.: CV-08-351768
MOTION HEARD: AUGUST 13, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Aissa Belloucif

v.

Toronto Transit Commission

BEFORE: MASTER R.A. MUIR

COUNSEL: Jillian Van Allen, counsel to the lawyers for the plaintiff
Madeline Ferreira for the defendant

REASONS FOR DECISION

[1] The plaintiff brings this 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 8, 2011, dismissing this action for delay.

[2] This action was dismissed by the registrar pursuant to former Rule 48.14 due to the failure on the part of the plaintiff to set this action down for trial within two years from the date of the delivery of the defendant's statement of defence.

[3] The defendant is opposed to the relief sought by the plaintiff.

BACKGROUND

[4] This action arises from an alleged slip and fall at the Bloor-Yonge subway station on April 15, 2006. The plaintiff initially retained Robert Besunder to act on his behalf and to make a claim against the defendant. Mr. Besunder put the defendant on notice of this potential claim by way of a letter dated September 6, 2006. At the same time, Mr. Besunder began to request and assemble various medical documents in support of the plaintiff's claim.

[5] A meeting between the plaintiff and defendant's claims adjuster took place on December 6, 2006 at which time the plaintiff gave the defendant a statement setting out his recollection of the events giving rise to this claim.

[6] It appears that in early 2007, the plaintiff's lawyer provided the defendant with various medical documents the defendant had requested and made some effort to settle the plaintiff's claim. The defendant rejected the plaintiff's settlement efforts and took the position that there was no liability on the part of the defendant.

[7] It appears that little was done to advance the claim for the next 12 months until the statement of claim was issued by the plaintiff on March 31, 2008. The defendant delivered its statement of defence and jury notice on December 18, 2008.

[8] At the same time, the plaintiff left Canada, off and on, for an extended period of time. Mr. Besunder wrote to the defendant on January 7, 2009 and advised the defendant of the plaintiff's extended absence and suggested that this matter be held in abeyance until the plaintiff's return. Unfortunately, the defendant did not receive this letter (and several other subsequent letters sent by Mr. Besunder). Around the same time, the defendant sent various letters to Mr. Besunder which he has no record of receiving.

[9] In the fall of 2010, Mr. Besunder's father became seriously ill and passed away on November 15, 2010. At the same time, Mr. Besunder was dealing with serious health issues of his own which were not diagnosed until June 2013.

[10] It appears that the plaintiff returned to Canada for an extended period of time in or around December 2010. Mr. Besunder wrote to the defendant on December 22, 2010 suggesting that discoveries be arranged. Mr. Besunder also raised the issue of a litigation timetable as the court had previously issued a status notice. Again, it is the defendant's position that this letter was not received.

[11] Mr. Besunder sent several follow up letters to the defendant in January and March 2011. Those letters were not received by the defendant.

[12] Despite a lack of response from the defendant, Mr. Besunder did not requisition a status hearing. As a result, this action was dismissed by the registrar for delay on April 8, 2011. Mr. Besunder's evidence is that he did not receive a copy of the dismissal order at that time.

[13] Mr. Besunder wrote to the defendant again on July 28, 2011 seeking the defendant's agreement on a timetable. Once again, it appears that the defendant did not receive this letter. A further letter is sent by Mr. Besunder on March 22, 2012 purporting to enclose the plaintiff's sworn affidavit of documents and advising of his intention to bring a motion to set aside the dismissal order. He also sends a follow up letter on July 31, 2012. Neither of these letters was received by the defendant.

[14] The plaintiff retained Howie, Sacks & Henry LLP ("Howie Sacks") in August 2012. It took several months for Mr. Besunder to provide his file to Howie Sacks. A notice of

change of lawyers was served in January 2013. Howie Sacks then began requesting and assembling additional medical documents but failed to contact the defendant (other than service of a notice of change of lawyers) until May 2014. In June 2014, Howie Sacks learned of the dismissal order. They then reported this matter to their insurer, as did Mr. Besunder. A notice of motion seeking an order setting aside the dismissal was served on November 13, 2014. This motion was ultimately scheduled to be heard by me on August 13, 2015.

ANALYSIS

[15] The parties agree on the test to be applied by the court when deciding a motion of this nature. The court must apply a contextual analysis and consider all relevant factors. However, four factors are of central importance, generally referred to as the *Reid*[1] factors. The court must consider the adequacy of the explanation for the delay, whether the deadline was missed due to inadvertence, any delay in bringing the motion to set aside the dismissal order and prejudice to the defendant. Of these factors, prejudice is the key consideration.

[16] In recent months, the Court of Appeal has released two decisions which appear to add some refinement to this test. The court has held that in most cases, the issue of prejudice figures largely in determining whether to set aside a dismissal for delay. See *MDM Plastics Limited v. Vincor International Inc.*, 2015 ONCA 28 at paragraph 24.

[17] In addition, the Court of Appeal has emphasized that judges and masters should be mindful of the preference in our system of civil justice for the determination of disputes on the merits. This preference is more pronounced where the delay results from errors committed by counsel and not the parties themselves. See *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 at paragraphs 26 and 27. Ultimately, the court must consider all of the circumstances of each particular case and make the order that is just. See *Fuller* at paragraphs 21 to 23.

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

[19] The progress of this action has obviously been less than satisfactory. The statement of claim was issued more than seven years ago and this action has not progressed any further than the documentary discovery stage. However, I accept that the delay has, for the most part, been adequately explained. Some of the early delay is attributable to the plaintiff's absence from Canada and Mr. Besunder's health issues. The delay can also be explained, in part, by the remarkable communication problems encountered by the parties. It appears that more letters went missing than were actually received. The amount of missing correspondence is certainly

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[1] *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (S.C.J. – Master), reversed on other grounds [2002] O.J. No. 3414 (Div. Ct.).

unusual but I accept for the purposes of this motion that Mr. Besunder's missing letters are what they purport to be and that they were sent on or about the dates set out on the letters.

[20] However, the shorter period of delay after the retainer of Howie Sacks has not been adequately explained. Despite being retained in the summer of 2012, Howie Sacks did not have any substantive contact with the defendant until May 2014. I accept that it takes time for a new lawyer familiarize herself with a file but 20 months seems far more than would be necessary for a file of this nature.

[21] Despite this gap in the evidence, I am nevertheless satisfied that the plaintiff has, on balance, met this element of the test. The plaintiff and his lawyers were taking at least some steps to move this matter forward throughout the course of this proceeding. Medical and other evidence was collected. Several attempts were made to communicate with the defendant in order to establish a timetable and schedule examinations for discovery. This is not a situation where a matter has been moved to the back of a filing cabinet and forgotten about for extended periods of time. Certainly, the plaintiff's lawyers could have been more diligent. Communications could have been better. However, as I have stated in several previous decisions, the plaintiff's explanation for the delay does not need to be perfect. It simply needs to be adequate.

[22] I am also satisfied that the failure to meet the set down deadline was inadvertent. It is clear from Mr. Besunder's correspondence that he was aware of the pending dismissal and the need to agree on a new timetable. He made several requests of the defendant in this respect. Mr. Besunder continued to follow up with the defendant, even after this action was dismissed and up to the date of the Howie Sacks retainer. Of course, the evidence shows that the defendant did not receive those letters but that does not alter the obvious fact that the plaintiff's lawyer was making at least some effort to advance this action before and after it was dismissed by the registrar. The plaintiff's decision to retain a new lawyer in the summer of 2012 is clear evidence of his ongoing intention to pursue this claim. In my view, the evidence shows a continuing intention to advance this action. The failure to meet the set down deadline or obtain an extension order must have been inadvertent. No other explanation makes sense.

[23] In my view, this motion was not brought in a timely manner. Mr. Besunder was aware of the dismissal order as early as March 2012. Howie Sacks was aware of the dismissal order by June 2014. However, the plaintiff's notice of motion was not served until November 2014. In my view, this time period cannot be described as prompt. This element of the test has not been met.

[24] It is my view that the plaintiff has satisfied his onus with respect to prejudice. It appears from the evidence on this motion that a great deal of medical and other evidence has been preserved and produced. The defendant had early notice of the plaintiff's claim and an opportunity to thoroughly investigate the plaintiff's allegations. The defendant met with the plaintiff in December 2006 at which time the plaintiff provided the defendant with a statement. The plaintiff is available to be examined for discovery and to attend at a defence medical examination. The defendant argued that it may be potentially prejudiced by the lack of pre-accident medical evidence. However, the plaintiff has produced medical evidence for one year

prior to the incident. There is no suggestion in the evidence of a relevant pre-existing condition that would require a longer period of pre-accident production. Finally, the defendant has not provided any evidence of actual prejudice or detrimental reliance on the finality of the dismissal order.

CONCLUSION

[25] When determining motions of this nature, the court must weigh all relevant factors and make the order that is just in the circumstances. The plaintiff has satisfied three of the four *Reid* factors, including the key consideration of prejudice. The defendant has not suggested it will suffer any actual prejudice in term of its ability to defend itself at trial. The preference in our system of civil justice is for a determination of disputes on the merits. This preference is particularly germane when the delay is a result of errors by counsel. For the reasons set out above, I have concluded that it is just in the circumstances of this action that the dismissal order of the registrar be set aside.

ORDER

[26] I therefore order as follows:

(a) the order of the registrar dated April 8, 2011 is hereby set aside;

(b) the parties shall confer and attempt to agree on an appropriate timetable order for the completion of the remaining steps in this action;

(c) any such consent timetable shall be provided to the court for its consideration and approval by no later than September 14, 2015;

(d) if the parties are unable to agree on such a timetable, the parties shall provide the court with written submissions by no later than September 14, 2015; and,

(e) if the parties are unable to agree on the issue of costs they shall provide the court with brief written submissions, also by September 14, 2015.

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Master R.A. Muir

DATE: August 14, 2015