

**CITATION:** Brown v. Montiel, 2013 ONSC 2503  
**COURT FILE NO.:** CV-10-430-00  
**DATE:** 20130426

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** NORMA BROWN - and - CARLOS MONTIEL

**BEFORE:** Justice D.L. Edwards

**COUNSEL:** Jillian Van Allen, for the Plaintiff

Alan L. Rachlin, for the Defendant

**HEARD:** April 24, 2013

**ENDORSEMENT**

[1] This is a motion for an order setting aside the Order Dismissing Action as Abandoned dated March 18, 2011.

[2] The parties agree upon certain facts. The action arose as a result of a motor vehicle accident that occurred on February 5, 2008. Andrew Mantella was retained as the plaintiff's counsel in and around February 2008. The defendant was given notice by letter dated April 24, 2008.

[3] The Statement of Claim was issued on February 2, 2010. The defendant was served with the Statement of Claim on or about May 18, 2010.

[4] On August 23, 2010 the court issued a Notice that Action will be dismissed. In his affidavit Andrew Mantella states that such notice was received by his office on August 25, 2010, but did not come to his attention until in or around September or October 2010.

[5] On October 7, 2010 Mr. Mantella wrote to the defendant's adjuster. In that letter he drew attention to the Notice of Dismissal and requested that the defendant file a statement of defence within the next business day or Mr. Mantella would "have no other option but to note you in default". He also requested confirmation that the defendant would consent to reinstating the matter on a no cost basis.

[6] On October 15, 2010 Mr. Mantella and the defendant's adjuster, Kim Honsinger, spoke. This conversation was confirmed by a letter of the same date to Mr. Mantella. In that letter she requested certain productions, as well as a copy of the Statement of Claim and Affidavit of Service.

[7] Mr. Mantella deposed that he had no contact with the insurer between October 15, 2010 and January 2011.

[8] The defendant produced a letter dated December 29, 2010, together with a fax confirmation. That letter was addressed to Mr. Mantella and it stated that the insurer was still waiting confirmation that the Statement of Claim had been serviced. It also requested a copy of the Affidavit of Service. The insurer asked whether a statement of defence was still required, and noted that the insurer was waiting for outstanding productions. An update on the status of the matter was requested.

[9] By fax dated February 3, 2011, a copy of the Affidavit of Service was forwarded by Mr. Mantella's office to the insurer without any further information.

[10] By letter dated August 22, 2011 the lawyer acting for the defendant asked Mr. Mantella whether the matter had been dismissed for delay. On September 23, 2011 the defendant's lawyer forwarded a copy of the August 22, 2011 letter, requesting a response to it.

[11] Finally, on October 11, 2011 the defendant's lawyer wrote to Mr. Mantella, enclosing a copy of the Dismissal Order, stating that if he did not hear from Mr. Mantella within 30 days, he would assume that the client had abandoned the action.

[12] In his affidavit Mr. Mantella states that beginning in the spring of 2011 he suffered from serious physical personal health issues, including gastrointestinal

issues and serious mental health issues, including depression. During that time he indicated that he was unable to devote his full attention to all of the files. Further the Dismissal Order did not come to his attention until November 2011.

[13] He further stated that in November 2011 he spoke to counsel for the defendant and requested consent to setting aside the Registrar's Dismissal Order. Such consent was refused.

[14] He further indicated that due to his health issues he could not report the matter to his insurer until February 23, 2012. As well, there was delay in locating his file, as it had been mislabeled.

[15] The motion record was served July 6, 2012.

### **THE LAW**

[16] The parties agreed upon the applicable law to be considered in a motion to set aside a Registrar's Dismissal Order. It is a contextual approach and the order must be one that is just in the circumstances of the case. *Scaini v. Prochnicki* (2007), 85 O.R. (3d) 179 (C.A.)

[17] The relevant factors to consider in the contextual approach are:

- a) explanation of litigation delay
- b) inadvertence in missing the deadline
- c) the motion is brought promptly
- d) no prejudice to the defendant

[18] The burden of proof lies with the plaintiff.

[19] For the reasons set forth below the motion is dismissed.

## **ANALYSIS**

### 1. Explanation of litigation delay

[20] The plaintiff has not provided a satisfactory explanation for the many delays in prosecuting this litigation. There are a number of instances of delay for which there is no satisfactory explanation.

[21] For example, the Registrar's Notice of Pending Dismissal was dated August 23, 2010. It is clear that this was received by the plaintiff's lawyer's office on August 25, 2010. The lawyer, however, states that it did not come to his attention until September or October 2010. No explanation for this delay is provided.

[22] On October 15, 2010 the adjuster for the insurer wrote to the plaintiff's lawyer asking for a copy of the Statement of Claim and Affidavit of Service. This is seven days after the deadline for filing a defence that the plaintiff's lawyer established in letter dated October 7, 2010. It is unrealistic and unreasonable for the plaintiff's lawyer to assume that a defence would be filed when the defendant had not yet received a copy of the Statement of Claim and Affidavit of Service.

[23] The plaintiff's lawyer states in his affidavit that he did not hear from the defendant during the period from October 15, 2010 until January 2011. However, part of the record includes a letter from the insurer dated December 29, 2010 in which the insurer indicates that it is still waiting for a copy of the Statement of Claim and Affidavit of Service, as well as production of requested items.

[24] The plaintiff has failed to explain this inconsistency.

[25] On February 3, 2011 the plaintiff's lawyer sent a copy of the Statement of Claim to the insurer. At that point the lawyer should have turned his mind to the status of this matter and realized that a defence would not be filed before the defendant had a copy of the Statement of Claim. The lawyer knew or should have known at that point that the action could be dismissed any day. There is no evidence that he followed up with the insurer or attempted to note the defendant in default.

[26] The action was dismissed on March 18, 2011. By letters dated August 22, 2011 and September 28, 2011 the insurer asked the plaintiff's lawyer for a status report. No response was given.

[27] On October 11, 2011 the insurer wrote to the plaintiff's lawyer and enclosed a copy of the dismissal order. The only action taken by the plaintiff's lawyer in response to this occurred more than one month later on November 21,

2011 when Mr. Mantella requested that the defendant consent to an order setting aside the dismissal order, which request was denied.

[28] As of October 11, 2011 the plaintiff's lawyer had a copy of the dismissal order. By Mr. Mantella's own evidence he was aware of this order as of the 21st day of November 2011. However, it was not until July 2012 that the motion materials were served.

[29] The plaintiff's explanation is that the lawyer had health issues in the spring of 2011. However, the problems with delay clearly predated any health issues.

[30] There was a delay of approximately 3 months in reporting the matter to LawPro, as the report was not made until February 3, 2012. There is no satisfactory explanation for this. Mr. Mantella states that the file was in storage and had been mislabeled. However, in November 2011 he had the file and was dealing with it.

[31] There is no explanation for the delay in serving this motion material for the period from February 3, 2012 until July 2012.

## 2. Inadvertence in Missing the Deadline

[32] A second factor to consider is inadvertence in missing the deadline. There is no satisfactory explanation for a missing the deadline.

[33] The lawyer for the plaintiff was aware of the approaching deadline at least by September or October 2010. He made certain requests of the defendant's insurer. It is argued that the failure of the defendant to file a defence is part of the reason for the delay. I do not accept this position.

[34] The defendant's insurer requested a copy of the Statement of Claim, Affidavit of Service and certain productions as early as October 15, 2010. There was considerable delay on the plaintiff lawyer's part in providing the Statement of Claim and Affidavit of Service. From the record it would appear that most of the productions requested have not been delivered.

[35] As Master Haberman noted in *Kahn v. Mander* [2011] O.J. No. 4072 at paragraph 127, "I therefore conclude that when a solicitor's conduct has been so egregious as to be negligent rather than mere advertence, the court should not rely on the fact as the primary focus of the analysis. However, the fact that when the plaintiff can turn around and sue her counsel if her motion to set aside the dismissal order is not successful in such circumstances is a factor the court may weigh in the balance".

3. The motion being promptly brought



[36] Whether this motion was brought promptly is another factor to consider. The order dismissing the action as abandoned was issued on March 18, 2011. The plaintiff's motion record was served on July 26, 2012.

[37] I have referred to a number of the elements of delay in bringing the motion under the heading Explanation of Litigation Delay and I will not repeat them. However, in my view, based upon the facts of this matter, this motion was not promptly brought. The plaintiff's explanations for the delay are:

- (a) the dismissal order did not come to Mr. Mantella's attention until November 2011, even though it was received by his office during April 2011;
- (b) Mr. Mantella had serious health conditions during the spring of 2011 and could not report this matter to his insured until February 3, 2012;
- (c) his file was in storage and mislabeled which delayed the lawyer's counsel in preparing the motion record served July 2012.

[38] It is incredible to believe that the file that Mr. Mantella utilized in October and November 2011, and which the lawyer knew was an active file and in serious jeopardy, would have been placed in storage sometime during December 2011 and January 2012, only to be found by February 3, 2012.

[39] The health issues allegedly occurred in the spring of 2011. The motion materials were not served until July 26, 2012, more than one year after the spring of 2011.

[40] Finally, Mr. Mantella did not require the entire file in order to commence this motion. By his own evidence Mr. Mantella was aware of the necessity of this motion as of November 2011. There was no satisfactory reason given for delaying the service of this motion until July 26, 2012.

#### 4. Prejudice to the Defendant

[41] Prejudice is a fourth factor to consider. In a file such as this, there is a presumption of prejudice to the defendant that the plaintiff must rebut. The defendant need not demonstrate actual prejudice.

[42] In my view the plaintiff has failed to rebut the presumption.

[43] The motor vehicle accident occurred on February 5, 2008, more than five years ago. On October 15, 2010 the defendant's insurer requested production of various materials. Very little of that material has been provided, and most of what has been produced was provided with the motion materials.

[44] There is no evidence before me to prove that all appropriate disclosures including medical evidence will be available, notwithstanding the fact that certain statutes require medical providers to maintain records.

#### **CONCLUSION**

[45] Having considered all of the factors in the context of the facts of this case, it would not be just in the circumstances to allow this motion. I find that there is a lack of credible explanations for the many delays. This makes the delay factor more significant. There is a presumed prejudice to the defendant that has not been satisfactorily rebutted by the plaintiff. Finally, this motion was not brought promptly. The motion is dismissed with costs.

[46] The defendant may make written submissions on the quantum of costs by May 10, 2013. The submissions are limited to three pages. The defendant may attach any costs outline and authorities to their submissions.

[47] The plaintiff shall have until May 17, 2013 to provide responding submissions, which are limited to three pages with any authorities attached.

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D. Edwards J.

**Released:** April 26, 2013

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D.L. Edwards, J.

**Released:** April 26, 2013