CITATION: Casey v. Ornsby and Matthews, 2017 ONSC 5314
COURT FILE NO.: CV12-720-00
DATE: 20170907

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mary Eileen Casey, Plaintiff

AND:

Ronald Albert Ornsby and Jennifer Matthews, Defendants

BEFORE: THE HONOURABLE MADAM JUSTICE S.E. HEALEY

COUNSEL: J. Van Allen, for the Plaintiff

D. Scott, for the Defendant, Jennifer Matthews

Defendant Ronald Albert Ornsby, Not Attending

HEARD: August 4, 2017

ENDORSEMENT

Nature of the Motion

[1] This is a commercial action that was commenced on June 21, 2012. As of the beginning of 2017, the only step taken under the Rules following the close of pleadings was service of the plaintiff's affidavit of documents, which occurred on March 20, 2014. Pursuant to Rule 48.14(1), an administrative dismissal would occur in the event that the plaintiff had not filed a trial record by June 21, 2017.

[2] The plaintiff brought a motion for an order extending the time to set the action down for trial by a further one-year period, and for court approval of a timetable, originally returnable on June 13, 2017. The motion was adjourned on consent to June 20, 2017.

[3] There is no authority provided under Rule 48 for the relief requested by the plaintiff in her motion record unless it such order is:

1. on consent pursuant to Rule 48.14(4); or

2. an order arising out of a status hearing under Rule 48.14(5).

[4] Where the parties do not agree to a timetable, any party can bring a motion for a status hearing before the expiration of the applicable period: Rule 48.14(5). In this case, that motion would have to be brought before June 21, 2017.

[5] The defendant Matthews argued that the above facts meant that the plaintiff's motion for the requested relief must be convened as a status hearing. The defendant Ornsby did not attend the motion.

[6] On June 20 the parties attended before me in the following endorsement was made:

> On an opposed basis, the plaintiff seeks an adjournment to file further material addressing delay as she has been caught off guard by the defendant's position that the action be dismissed and that this motion is for a status hearing. Whether she has misconstrued the Rule or not, fairness requires that, before such a severe order be made, the Court has all available evidence before it to assess the reason for the delay and prejudice. Adjourned to June 27, 2017 at 9:30 a.m. This will be a status hearing. The costs of today are reserved to the motions judge on the next day. The parties have now been here all day and it is 4:10 p.m. Plaintiff's material to be served by June 22 at 5 p.m. and defendant's material to be served by June 26 at 5 p.m., with leave for late filing.

[7] The next day, on the last day permitted under Rule 48.14(1), the plaintiff filed her trial record. Two days later she served and filed a Notice of Abandonment of her motion. In a supplementary affidavit the plaintiff now states, through her counsel, that the action is trial-ready. This is in direct opposition to the evidence filed on the original motion, in which a lawyer's affidavit states that the action is still in the production and discovery stage, a number of steps remain to be completed, and the action is not ready be set down for trial by the deadline of June 21, 2017.

[8] On the return date of June 27, Mulligan J. adjourned the motion again because LawPro had been retained by the plaintiff's counsel. Cost thrown away for the last date were fixed in the amount of $2,500 to be paid forthwith by the plaintiff. Timelines were set for the filing of further material, and the defendant was relieved of filing a further motion to address the status hearing and her request for a dismissal of the action. The motion was adjourned to August 1. On August 1 the motion judge adjourned the matter to a long motion date.

[9] The defendant argues that the plaintiff was not entitled to serve the trial record or abandon the motion in light of the endorsement from June 20. Her position is summarized in her factum as follows:

> The plaintiff should not be permitted to use the indulgence of the Court allowing her to provide more explanation for her delay to avoid having to provide any explanation at all. This would be to allow the plaintiff to use the court's indulgence for a purpose directly opposed to the reason the indulgence was granted. It would allow the plaintiff to entirely avoid a hearing which would otherwise have proceeded, simply because the Rules do not

> expressly prohibit filing a trial record during a status hearing or otherwise deal directly with that issue. In short, it would allow an abuse of process.

Issues

1. Did this Court's endorsement of June 20 prevent the plaintiff from serving her trial record, effectively pre-empting a status hearing?

2. If yes, has the plaintiff met the burden of demonstrating that there was an acceptable explanation for the litigation delay and that the defendant would suffer no non-compensable prejudice if the action is allowed to proceed?

3. If the action is not dismissed, should the defendant's request be granted to have it pre-emptively struck from the trial list, and the plaintiff prohibited from conducting any form of discovery?

Analysis

[10] There is nothing in Rule 48.14 to prohibit either of the steps taken by the plaintiff. This court has no jurisdiction to prevent a party from abandoning a motion. Subrule 37.09(1) is permissive and no limits are placed on a party's right to abandon a motion other than exposure to the cost consequences prescribed by subrule 37.09(3). The endorsement of June 20 in respect of the matter being required to proceed as a status hearing was made in the context of the motion then before the court. As the motion is no longer before the court, a status hearing would be moot. The plaintiff had until June 21 to set the matter down for trial and did so; again, a status hearing would be moot.

[11] Prior to the argument on June 20, the defendant was made aware that the plaintiff asserted a right to file a trial record the following day in the event that the timetable was not agreed to. This court's endorsement requiring the matter to proceed as a status hearing was obviously made in the context of the plaintiff not having taken that procedural step as of June 20. The defendant cannot be said to have been taken by surprise that the plaintiff did exactly what her lawyer stated would be done if counsel were unable to reach an agreement on the proposed extension and timetable.

[12] There can be no abuse of process when a party is complying with the rules. This case is distinguishable from that of *Shabbir Khan v. Sun Life*, 2011 ONSC 455, aff'd 2011 ONCA 650, relied on by the defendant, where the plaintiff passed his trial record after the Court issued a status notice and the hearing had been scheduled. As in the case before me, the plaintiff took the position that the passage of the trial record stopped the status hearing process utterly. The motion judge in Khan found that the passing of the trial record by the plaintiff was nothing more than an attempt to avoid a status hearing and the resulting onus of showing cause why his action should not be dismissed for delay. However, Khan was decided under the former Rule 48.14 regime, in which a status notice was issued once two years had passed following the filing of the first defence, without the matter being placed on a trial list. Mr. Khan served and filed his trial record

after the 2-year period had elapsed, and after the 90-day period permitted under the former rule for setting the matter down following the issuance of the status notice. By contrast, under Rule 48.14(1) the plaintiff in this case had one more day to file her trial record.

[13] Accordingly, I conclude that this Court's endorsement of June 20 did not prevent the plaintiff from serving her trial record, thereby pre-empting a status hearing.

[14] The Rules continue to apply to this action. Under Rule 48.06, the action was to be placed on the trial list by the registrar 60 days after the filing of the record. Counsel's conflicting evidence about the matter being ready for trial is disingenuous; it is clearly not ready and the defendant should not be prejudiced by the automatic operation of Rule 48.07, which deems her to be ready for trial. The defendant needs further time to complete discoveries. Rule 48.04 prohibits the plaintiff from conducting any form of examination; an order from this Court is not required. In the circumstances it is appropriate to strike this matter from the trial list, and it is so ordered.

[15] The defendant seeks costs of the plaintiff's motion. The award of costs made by Mulligan, J. on June 27 was in respect of costs "thrown away on the last date", which I interpret to mean the costs of counsel's 6 or 7 hour attendance on June 20 only. The defendant remains entitled to seek all reasonable costs over and above the amount of $2,500 for the abandoned motion, if any, up to the date that the motion was abandoned.

[16] Following that date, it is my view that the position taken by the defendant following the service of the trial record and the notice of abandonment has not been entirely reasonable. As indicated in my initial endorsement, counsel was not intending to trigger a status hearing when she filed her motion, although she was in error in her interpretation of the rule. This error can be addressed through any further award of costs that may be made by this Court as referenced in the preceding paragraph, together with the $2,500 already ordered against the plaintiff. The defence position essentially asked the Court to impose the strictures of Rule 48.14(5) on a party who has otherwise complied with Rule 48.14. In *Daniels v. Grizzell*, 2016 ONSC 7351, at para. 13, Marrocco, A.C.J.S.C. stated:

> As can be appreciated from the above, R. 48.14 exists in the interests of keeping court information current. It should be interpreted in a way which appreciates this purpose. It should not be interpreted in a way which makes it a trap for the unwary.

[17] The Rule would indeed become a trap for the unwary if the plaintiff was compelled by this Court to continue a status hearing while being stripped of her entitlement to file a trial record.

[18] The attendances on June 27 and August 1 and 4 were all triggered by the defendant's insistence that the status hearing must proceed. I believe this position was not compelled primarily by the court's endorsement from June 20, but rather from the defendant's strategic decision to try to push the plaintiff through a status hearing. In any assessment

of costs, this court would also take into account the fact that the defendant did not bring a motion for a status hearing before June 21, although entitled to do so under Rule 48.14(5). Even after the defendant was notified in May of the plaintiff's request for the extended timetable, the defendant had time to do so before June 21. Also to be taken into account is the defendant's success in having the matter struck from the trial list, and the incongruous position of plaintiff's counsel in certifying this matter as being trial-ready after bringing a motion on the basis that it was not.

[19] If the parties are unable to reach an agreement on costs of the abandoned motion and costs related to all attendances since June 20, they may file written submissions to the court limited to 3 pages in length, together with a costs outline and any authorities on which they wish to rely. The defendant shall serve and file her submissions by. September 22, the plaintiff by September 29, and any reply by October 4.

Healey J.

Date: September 7, 2017