CITATION: Cousins v Roesler, 2014 ONSC 4530
COURT FILE NO.: 08-CV-348406 PD2
DATE: 20140801

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Deniese Angela Cousins (also known as Deniese A. Johnson), Plaintiff/Respondent

– AND –

Edith Roesler, Reinhard Roesler and John/Jane Doe/Corporation, Defendants/Appellants

BEFORE: Justice E.M. Morgan

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

Derek Abreu, for the Defendants/Appellants

HEARD: July 30, 2014

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ENDORSEMENT

[1] The Defendants/Appellants ("Appellants") appeal the Order of Master Graham reinstating the action after it was dismissed by the registrar for the second time.

[2] On March 26, 2014, the Master issued his ruling which accepted that through inadvertence the then solicitor for the Plaintiff/Respondent ("Respondent") had missed the deadline for setting the matter down for trial. More specifically, the Master found:

> Inadvertent means unintentional, and Mr. Rubin's evidence, in paragraph 65 of his affidavit, is that he did intend to meet the deadline but failed to do so through inadvertence. This evidence was unchallenged and I accept that it is sufficient to meet this factor.

[3] The Master reached this conclusion as part of the contextual analysis that he applied in accordance with *Scaini v Prochnicki* (2007), 85 OR (3d) 179 (Ont CA). That analysis, which has been repeatedly approved by the Court of Appeal, entails a consideration of four factors. These were set out most succinctly in *Marché d'Alimentation Denis Thériault Ltée. v Giant Tiger Stores Ltd*. (2007), 87 OR (3d) 660 (Ont CA), at para. 12, 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.
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> (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.
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> (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.
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> (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.

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[4] The Master found that the litigation delay, although not explained in its entirety, was explained enough that it met the test of adequacy required by the Court of Appeal. He also found that the motion was brought promptly, and that the delay had not prejudiced the Appellants. The central controversy in the appeal was over the question of the Respondent's former counsel's inadvertence in missing the deadline resulting in the administrative dismissal of the action.

[5] In assessing inadvertence, the Master refused to follow the ruling of another Master in *Murphy v Barron*, [2008] OJ No 4976, where the test for reinstatement of an action after a second administrative dismissal by the registrar was said to be more stringent than for a first reinstatement. In *Murphy*, Master Birnbaum observed, at para 6: "I believe the test is higher when there has been a breach of a second set-down date order; what might have been inadvertence the first time could be negligence the second time without adequate explanation."

[6] Mr. Abreu, for the Appellants, submits that the *Murphy* test requires something more than an acknowledgement that the deadline was missed inadvertently; he states that where a plaintiff is seeking a "second kick at the can", as Master Dash put it in *Wetzel v Ontario Realty Corp.*, 2009 Carswell 7482, at para 44, there must be a cogent explanation. In *Murphy*, the solicitor had apparently stated that the deadline was missed due to inadvertence, but then failed to explain what was the nature or cause of the inadvertent error. That, Mr. Abreu submits, might have sufficed the first time around, but it is insufficient as an explanation for the second administrative dismissal.

[7] A review of the cases in which an action is reinstated for a second time reveals that one can expect *some* explanation, and not simply a bald claim of inadvertence by the solicitor that

missed the deadline. Thus, for example, in *Araujo v Jews for Jesus*, 2010 ONSC 404, para 20-21, there was a typographical error in the Status Notice issued by the court that misled the lawyer as to the date for setting the matter down; in *Grzenda v Scott*, 20112 ONSC 4314, at para 9, the solicitor was confused between two actions which he thought were consolidated (instead of just being tried together) and so assumed that the other counsel would be pushing the action forward; in *Brock University v Gespro Ontario Inc.*, 2013 ONSC 2900, at para 10, counsel himself was involved in a contentious and distracting matrimonial dispute; and in *Roch v Deutschmann ConstructionLimited*, 2012 ONSC 3102, at para 36, counsel explained that he was struggling with a shortage of staff in his office.

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[8] Mr. Abreu argues that in all of these instances, the moving party was put through the more rigorous type of analysis demanded by the *Murphy* case, and that the actions were only reinstated because they passed that higher test. He points out that this approach also conforms with Master Muir's statement in *Grzenda*, at para 14, that, "[w]here the court is dealing with multiple dismissal orders, greater scrutiny must be applied to a plaintiff's conduct of the litigation."

[9] Ms. Van Allen, for the Respondent, submits that Master Graham was correct in stating, at p. 3 of his reasons, that "*Murphy v. Barron* is not binding on me, and I do not accept that it changes the law or changes the test as set out in *Scaini v. Prochnicki* and other cases following it." She would put the test no higher than Master Dash did in *Wetzel*, at para 15, where he stated that the contextual analysis embraced by the Court of Appeal in *Scaini* still applies, but that "the court, while still considering all factors to arrive at the result that is just in all the circumstances should examine most carefully and in some detail the cause of the additional delay and why the second deadline was missed."

[10] I agree with Ms. Van Allen that *Murphy* did not revise the law in any way; at the most a Master's ruling can interpret the Court of Appeal, not change its pronouncements. Master Graham was of course right in saying that *Murphy* could not have revised the approach that the Court of Appeal endorsed in *Scaini*.

[11] In any case, all that *Murphy* really adds is the logical, if relatively banal observation that a court should at least see an articulated reason for the inadvertence on the part of a plaintiff's lawyer missing a second deadline. In the present case, the Master referenced paragraph 65 of the affidavit filed by the then solicitor for the Respondent, which does provide some explanation as to why the deadline was missed. It is not a very impressive explanation – essentially, the lawyer blamed it on a miscommunication with his assistant – but it is not *no* explanation as was apparently the case in *Murphy* itself.

[12] This situation closely parallels *Habib v Mucaj*, [2012] OJ No 5946, at para 7, where the Court of Appeal pointed out that "[s]imply because the…appeal judge's view is that the conduct was 'negligent' or 'bordering on negligent', does not mean the Master was not entitled to find the conduct not to be deliberate or not intentional." Master Graham determined that the solicitor's evidence was at least sufficient to satisfy the *Scaini* standard given the overall context of the litigation at hand. As Ms Van Allen points out in her factum, the decision to set aside a

registrar's dismissal of an action is discretionary and is entitled to deference: *Zeitoun v Economical Insurance Group*, 2009 ONCA 415, at paras 26, 40. The Master's finding of inadvertence should therefore not be disturbed unless there is a compelling reason to do so.

[13] Mr. Abreu submits that the compelling reason to overturn the Master's finding is that there is a systemic problem of delay in the courts, and that we must set a strict standard when a lawyer has missed a deadline for a second time. Weighed against that, however, is the observation by Laskin J.A. in *Finlay v Van Paassen* (2010), 101 OR (3d) 390, at para 33 that, "on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not the conduct of their counsel." This applies unless, as in *Giant Tiger*, at para 28, the conduct is not inadvertent but deliberate. That, however, is not the case here.

[14] Master Graham applied the contextual analysis and the four-factor test that the Court of Appeal has mandated. He determined that, under the circumstances, the explanation for the inadvertent error was sufficient; the solicitor did not simply shrug as in *Murphy*'s law.

[15] I may or may not have decided the matter differently had this come before me at first instance; but there is no compelling reason on appeal to reverse the Master's decision. He had the rights of the parties in mind, as the Court of Appeal says that he should, and was accordingly willing to accept what the solicitor stated in his affidavit.

[16] The appeal is dismissed.

[17] Counsel have advised me that they agree that a reasonable amount of costs for this appeal would be $4,000.

[18] Mr. Abreu sumits that the Respondent is effectively requesting an indulgence from the court by seeking reinstatement of the action after the registrar dismissed it. He states, therefore, that the Respondent should not be awarded costs even if successful in the appeal. Ms. Van Allen responds by pointing out that the appeal is a separate matter from the Master's motion below, and that a successful Respondent is entitled to costs in the ordinary course.

[19] While the nature of the motion below may have necessitated that the moving party request an indulgence from the court, in my view the appeal is a different matter. It has been well argued by counsel for both parties, who have presented the matter as a point of law. I see no reason here to deviate from the costs-to-the-successful-party norm.

[20] The Appellants shall pay the Respondent costs in the all-inclusive amount of $4,000.

Morgan J.

Date: August 1, 2014

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