CITATION: Deptuck v. Valencia, 2015 ONSC 6028
COURT FILE: CV-11-430655
MOTION HEARD: 201500827
Typed REASONS RELEASED: 20150929

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JENNIFER LYN DEPTUCK	)	*Jillian Van Allen*, for the Plaintiff
Plaintiff	)	
-and-	)	
JULIO VALENCIA	)	*Kieran C. Dickson*, for the Defendant
Defendant	)	
	)	**HEARD AT TORONTO:** August 27, 2015

Endorsement Delivered at End of Argument

MASTER SHORT:

[1] Riding a bicycle in downtown Toronto can be a challenging and uncertain endeavour. So is the task placed before me arising from a Registrar's dismissal of this action on the basis of abandonment under then Rule 48.15.

[2] On July 20, 2009 the Plaintiff was riding her bicycle when the defendant driver opened his car door, with which the Plaintiff then collided. She was injured as a result.

[3] The Plaintiff had no personal automobile insurance that would respond. As a consequence she was entitled to S.A.B. benefits from the Defendant's insurer. The fact that the same insurer was dealing on a contemporaneous basis with the Plaintiff as a S.A.B. insured and a tort claimant against their insured forms part of my assessment of the "context" in this case.

[4] The Plaintiff's action was dismissed as abandoned under former Rule 48.15. The counsel she retained for both claims issued a Statement of Claim on July 13, 2011. However the Claim was never served on the Defendant.

[5] Just over a month after the accident the Plaintiff's counsel sent a letter asserting a claim to the Defendant, on August 27, 2009. The Defendant's insurer acknowledged receipt of the notice of intention to commence action on September 22, 2009. A Statement of Claim for tort damages was issued on July 13, 2011. On July 19, 2011 a process server attempted service of the Claim. At that point the tort case appears to have fallen into a black hole.

[6] However the same insurer dealt with S.A.B. claim and on September 13, 2013 wrote to Plaintiff's counsel to confirm a settlement of the accident benefits claim for $12,500. That event does not seem to have resulted in any attention being turned to the tort claim by Plaintiff's counsel. Over the next year phone follow-up attempts by an adjuster seem to have been left unattended or misplaced.

[7] In the interim, the Defendant seems to have dropped off the face of the earth. Neither side can find him and the Statement of Claim still has not been served. In opposing the motion to reinstate, the Defendant's insurer says delay has prejudiced them as there is no witness for discovery. However they do have a relatively contemporaneous written statement from the Defendant. The Defendant was convicted of a traffic infraction due to this accident.

[8] On such motions the Court is to consider the "Reid Factors" and ought to take a "contextual approach". At issue is whether the Defendant can defend based on these facts.

[9] I have considered the Court of Appeal decision in *MDM Plastics Limited v. Vincor*, 2015 ONCA 28, and *H.B. Fuller Company v. Rogers*, 2015 ONCA 173. I see these cases as evidencing a swing of the pendulum to lean towards restoration of actions.

[10] I accept that now there is no longer a positive obligation on a plaintiff to prove "no prejudice". The extracts from *H.B. Fuller* are instructive. At paragraph 27 of *H.B. Fuller*, the Court comments on *Marche D'Allmentation Denis Theriault Ltee v. Giant Tiger Stores*, (2007) 87 O.R. (3d) 660 (ONCA) and notes "the law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor."

[11] At some point the number of inadvertent failures and the lack of any apparent "tickler" or follow-up system may lead to a tipping point. This case

comes very close to that line but I see no reason to punish the Plaintiff, who retained a licenced lawyer, and was entitled to expect proper handling of the file.

[12] Here the same insurer was on for accident benefits, as the bike rider had no insurance that would respond. The insurer conducted surveillance to address accident benefits claims and ultimately settled them for a relatively modest amount.

[13] Here the Plaintiff's lawyer's firm's actions were less than appropriate. They seem to have made a number of errors, failures to diarize and I suspect the possibility of an internal mail system that failed to bring both of the Court notices to Mr. Lam's attention. The inadvertence and misplaced assumptions that a defence would be filed ought not to be placed at the feet of the individual Plaintiff.

Motion Delay

[14] The Reid test says that a plaintiff has to move forthwith as soon as the dismissal came to his attention. Here that date is June 19, 2014. Here by October 8, 2014 the insurer had been served with motion to restore. I am not satisfied this motion was not brought promptly.

[15] In August 2012 steps were being taken to complete medical evidence. This was not a case of intentional abandonment. Staff failed apparently to follow up until the problem was discovered on file review on June 16, 2014.

[16] In *Finlay v. Van Paassen*, 2010 ONCA 204, two years was granted relief. In *Belloucif v. TTC,* 2015 ONSC 5153, Master Muir relieved from two years and eight months following discovery of the dismissal (and 3 years and 8 months from the dismissal). I find four months an acceptable period of delay to bring motion from the recognition of the dismissal as sufficiently explained.

[17] Early notice was provided to the insurer on August 27, 2009, just over one month after the accident of July 20, 2007. The insurer had an early ability to consider its defence on both AB and tort claims. Medical records were retained and OHIP records ought to still be available at least back to the date of the accident and in fact the Medical Brief Index has records back to 2002.

[18] In *Elkhouli v. Senathirajah*, 2014 ONSC 6140, I found that the changes in the Rules ought to be considered in "abandonment" dismissals. Justice Wilson agreed with this position in *Klaczkowski v. Blackmont Capital*, 2015 ONSC 1650.

[19] In my view the Plaintiff has provided appropriate justification for setting aside the Registrar's dismissal in this case and I so order, but on terms. In this case the Defendant may not be found in time to participate in the tort trial. If that is the case, I have determined that it would be reasonable, subject to the discretion of the trial judge, to treat the written statement of the defendant as "evidence of the witness."

[20] Rule 1.05 provides:

> "When making an order under these rules the Court may impose such terms and give such directions as are just."

[21] Rule 36 deal with "Taking Evidence before Trial." Rule 36.04 (4), (5), and (6) provides:

> (4) With leave of the trial judge or the consent of the parties, a party may use at trial the transcript and a videotape or other recording of an examination under rule 36.01 of a witness who is a party as the evidence of the witness.
>
> (5) In exercising its discretion under subrule (4), the court shall take into account,
>
> (a) whether the party is unavailable to testify by reason of death, infirmity or sickness;
>
> (b) whether the party ought to give evidence in person at the trial; and
>
> (c) any other relevant consideration.
>
> (6) Use of evidence taken under rule 36.01 or 36.03 is subject to any ruling by the trial judge respecting its admissibility.

[22] As contemplated by Rule 36.04, the condition I am establishing is that the statement may be admitted as evidence at trial and treated as if obtained under Rule 36.04.

Service of Claim

[23] In *Chiarelli v. Weins*, [2000] O.J. No. 296 (ONCA), a 1990 claim relating to a 1988 accident served in 1997 was validated. Here, early notice of the claim was provided at least as of the notice letter of August 27, 2009.

[24] I see no prejudice to the Defendant's insurer that will flow from permitting service of the claim upon the insurer to constitute service on the Defendant. However, in light of the prejudice asserted by the Defendant's insurer due to the inability to now locate the Defendant, the Plaintiff will as well be required to serve the Defendant by publication of a notice of this claim on one occasion in the Toronto Sun. Service shall be effective 30 days after the later of the publication of the notice and service on the insurer.

Costs

[25] The Plaintiff is obtaining a significant indulgence. While successful on the motion, counsel on the motion (who is not affiliated with the Plaintiff's firm) sought no order as to costs.

[26] I feel costs fixed at $7,500 on an all in basis ought to be paid for the Defendant's costs. This amount (which I would not anticipate coming from the Plaintiff personally) shall be payable within 60 days.

[27] I am obliged to both counsel for the quality of their advocacy before me.

Master Short

E.117/DS

Typed Version Released: September 29, 2015

JENNIFER LYN DEPTUCK
Plaintiff

-and-

JULIO VALENCIA
Defendant

Court File No. CV-11-430655

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

REASONS FOR JUDGMENT