

CITATION: Dhillon v. Benavides, 2012 ONSC 4350
COURT FILE NO.: CV-07-796-00
DATE: 20120815

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jasvir Dhillon and Ajit Pal Dhillon (Plaintiffs)
v.
Raquel Benavides and Her Majesty the Queen in right of Ontario as
represented by The Minister of Finance (Respondent)

BEFORE: Daley J.

COUNSEL: **J. Van Allen**, for the Plaintiffs

No one appearing, for the Defendant, Raquel Benavides

J. Friendly, for the Defendant, Her Majesty the Queen in right of
Ontario as represented by The Minister of Finance

HEARD: July 4, 2012

ENDORSEMENT

Daley J.

[1] The plaintiffs brought this motion to set aside an order of the Registrar dated October 16, 2009, which dismissed this action for delay pursuant to Rule 48.14 of the *Rules of Civil Procedure*, R.S.O. 1990, O.Reg. 194.

[2] This action arises from a motor vehicle accident which occurred on February 2, 2006 at which time the plaintiff, Jasvir Dhillon alleges that she was

struck, while a pedestrian, by a motor vehicle owned and operated by the defendant Raquel Benavides ("Benavides").

[3] This action was initiated by a statement of claim issued on March 9, 2007. Initially as the driver of the vehicle was unknown and as such the Minister of Finance was advised of the accident by letter of January 22, 2007 as the plaintiff's claim may have resulted in a claim to the Motor Vehicle Accident Claims Fund.

[4] In this letter to the Minister of Finance, which was sent by the plaintiffs' solicitor to the Motor Vehicle Accident Claims Fund, he advised that a claim was being made on behalf of the plaintiffs with respect to injuries suffered in a motor vehicle accident and that the plaintiff, Jasvir Dhillon, had submitted a claim for statutory accident benefits to the Motor Vehicle Accident Claims Fund.

[5] Following service of the statement of claim, a statement of defence was delivered on behalf of the defendant, Benavides, on June 21, 2007. Examinations for discovery of the plaintiffs and the defendant were arranged to proceed in August of 2007; however, the examinations were not conducted as the plaintiffs wished to add Her Majesty the Queen, in right of Ontario as represented by the Minister of Finance ("Minister") as a defendant with respect to the plaintiffs' accident benefit claims.

[6] Before proceeding to add the Minister as a new defendant, it was necessary to conduct a mediation of the statutory accident benefit claims before the Financial Services Commission of Ontario ("FSCO").

[7] The plaintiff delivered a sworn affidavit of documents on September 14, 2007 and the mediation proceeded on October 18, 2007 before the FSCO with respect to the plaintiffs' claims for statutory accident benefits.

[8] Following the mediation, a motion was brought on behalf of the plaintiffs to add the Minister as a defendant on January 18, 2008. The Minister consented to being added as a defendant on January 29, 2008. An order was made granting leave to the plaintiffs to amend the statement of claim on February 14, 2008.

[9] The amended statement of claim was served on the Minister on February 15, 2008; however, it took approximately two months for counsel to be appointed on behalf of the added defendant.

[10] Counsel on behalf of the Minister wrote to the plaintiffs' solicitor on April 18, 2008 and advised that he had been instructed to represent the Minister and that he would be delivering a statement of defence.

[11] The statement of defence, on behalf of the Minister, was served on October 20, 2008.

[12] It is conceded by the plaintiffs' solicitor that in the period from October, 2008 through April 2009 he did not do anything to advance the action. It is the plaintiff's solicitors' evidence that he was not working on a full-time basis in this period due to medical issues.

[13] In his affidavit, the solicitor states that he submitted a further application for mediation to the FSCO on May 24, 2009.

[14] A Status Notice was received by the plaintiffs' solicitor on June 29, 2009. On July 3, 2009, he directed his office staff to make inquiries with the court at Brampton as to how he could arrange a Status Hearing in this matter. Then, he left on holiday for approximately one-month.

[15] In his affidavit on this motion, the plaintiffs' solicitor states that there was staff turnover in his law firm while he was away on holiday in July 2009 and specifically the lawyer who had been assigned to attend to this matter left the firm.

[16] The Status Notice was not diarized for follow-up in accordance with the solicitor's usual practice.

[17] In November, 2009, the plaintiffs' solicitor moved his office and he explained in his affidavit that this resulted in further delay in reviewing the status

of the file relating to this matter. Although the solicitor had an articling student assist him in file reviews at the time of this move and although he met with his law clerks to discuss files that required review, the order of October 16, 2009 dismissing this action did not come to his attention.

[18] A further mediation of the plaintiffs' statutory accident benefit claim made against the Motor Vehicle Accident Claims Fund was conducted before the FSCO on November 26, 2009.

[19] It was not until January, 2010 that the Status Notice dated June 29, 2009 next came to the plaintiffs' solicitor's attention and at this time he also learned of the order dismissing the action for delay which was made on October 16, 2009. According to the solicitor's affidavit, the order was received by his office but filed by a member of his staff and had not been brought to his attention.

[20] The solicitor was ill in February, 2010 and was hospitalized for a period for various reasons which had initially arisen in 2008 - 2009.

[21] The solicitor did not attend to his practice in February of 2010, and although he had instructed an articling student to attend to some matters, no other lawyer was hired or assigned to assist with files while he was away and no steps were taken with respect to the dismissal order in this matter.

[22] Although the solicitor returned to his practice in March and April 2010, it is his evidence that he was overwhelmed and working contrary to his doctor's recommendations that he lessen his workload. He states that through inadvertence he did not turn his attention to the order dismissing this action, although he did write to the plaintiffs' physicians seeking certain medical records relating to this matter.

[23] On May 31, 2010 a flood occurred in the plaintiffs' solicitor's office and as a result, his office was not fully operational following the flood until the end of August 2010.

[24] It was not until November 2, 2010 that the solicitor reported the dismissal order to his errors and omissions insurer. The plaintiffs' solicitor sought the consent of the defendants to the setting aside of the dismissal order. Counsel for the Minister advised that his client would not provide such consent. No response was received regarding this request from counsel for the defendant Benavides.

[25] Counsel for the plaintiffs served the motion to set aside the order dismissing this action upon the defendants' solicitors on February 1, and filed the motion with the court on February 2, 2011.

[26] Although the defendant Benavides did not appear on the hearing of this motion either in person or by counsel, an affidavit was submitted by her in the responding motion materials filed by counsel for the Minister.

[27] In her affidavit this defendant sets out evidence with respect to her personal circumstances and finances. She states that after learning from her solicitor of record in 2009 that the action had been dismissed, she used the money she had saved and which she had intended to use to defend the outstanding claim to purchase a home in Barrie.

[28] She further states that upon consulting with her previous solicitor, she determined that she could not financially afford to oppose the motion seeking to set aside the dismissal order and that in the event the order is set aside she states that she will be required to sell her home in order to raise funds to defend the outstanding claim.

[29] Counsel for the Minister is representing that defendant, Minister, with respect to the statutory accident benefit claim made by the plaintiff, Jasvir Dhillon. Counsel does not presently represent the defendant Benavides in the claim brought within the statement of claim; however, should the defendant, Benavides, default in defending the claim made against her, and the Minister may take over the defence in her name and on her behalf, and the Minister may

settle a claim with the plaintiffs without Benavides' consent and may thereafter enforce any consent judgment obtained against the defendant to recover monies paid on her behalf as an uninsured driver.

Analysis:

[30] The plaintiffs moved pursuant to Rule 37.14, of the *Rules of Civil Procedure*, to set aside the order dismissing this action.

[31] A contextual approach must be applied in determining whether or not an indulgence should be granted to a plaintiff to set aside a dismissal order and to allow an action to proceed. In considering a motion of this kind the court must examine the four factors in *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365; See also: *Sciani v. Prochnicki*, (2007) 85 O.R. (3d) 179; *Marché D'Alimentation Denis Theriault Ltée et al. v. Giant Tiger Stores Ltd.*, [2007] O.J. No. 3872.

[32] The plaintiff need not rigidly satisfy each of the four *Reid* factors and these factors must be examined contextually so as to achieve a result that is just in all the circumstances.

[33] The four factors to be considered in the overall context of the circumstances of the case are as follows:

- (1) explanation of the litigation delay;
- (2) inadvertence in missing the deadline;
- (3) the motion is brought promptly: and
- (4) no prejudice to the defendant.

[34] Examination of these four factors also involves consideration as to whether the plaintiffs' lawyer's conduct in the handling of the case was inadvertent or negligent.

[35] The examination also commences with a presumption of prejudice to the defendant which may be overcome by the plaintiff offering adequate evidence to demonstrate that *prima facie* the defendant has suffered no prejudice as a result of the delay.

Litigation Delay

[36] The type of delay to be examined relates to delay in the progress of the litigation following the commencement of the action.

[37] Following the issuance of the statement of claim in March 2007, the defendant Benavides filed a statement of defence in June of that year.

[38] As the plaintiffs' action, as initially constituted, only involved the tort claim against the defendant driver, and as the plaintiffs wished to proceed with claims relating to statutory accident benefits, involving an uninsured vehicle, it

was necessary to first proceed with mandatory mediation of that claim before commencing or amending the outstanding action to include the Minister as a party defendant as to the plaintiff's claims for accident benefits.

[39] A mediation of the accident benefit claim was conducted in October of 2007 and following that the plaintiffs' solicitor obtained an order amending the statement of claim to include the Minister as a defendant. The amended claim was served in February 2008 upon the Minister.

[40] Although counsel advised in April, 2008 that he would be defending the action against the Minister, the statement of defence was not delivered until October, 2008.

[41] The plaintiffs' solicitor has acknowledged that action was not dealt with in the period from October, 2008 to April, 2009. Thus, it is conceded that approximately six months of delay resulted from the plaintiffs' solicitor's inaction.

[42] In my view, while this action was not being vigorously prosecuted, reasonable steps were taken to move the action forward prior to the delivery of the Status Notice in June, 2009. The statement of claim had been served on the defendant Benavides, a motion brought to amend the pleading to add the

Minister as a defendant and a sworn affidavit document was served on behalf of the plaintiffs.

[43] There is no evidence of any intentional delay or abandonment of the action by the plaintiffs' lawyer.

[44] I am satisfied that an adequate explanation has been offered for the litigation delay, which, in part, was attributable to the plaintiffs' lawyer, the delay in the statement of defence being filed on behalf of the defendant Minister and as well resulting from the statutory requirement that the plaintiffs mediate their claims with respect to statutory accident benefits before the FSCO prior to the institution of any action against the Minister.

[45] As such, I conclude that the plaintiffs have met the first *Reid* factor.

Inadvertence in Missing the Deadline

[46] Although the solicitor states that he instructed his office staff to determine how to arrange a Status Hearing with the court, the deadline provided for was not recorded in the solicitor's diary system.

[47] It was the solicitor's intention to arrange a status hearing, however, while away on holidays in July 2009, the lawyer assigned to deal with this matter left the solicitor's law firm and no steps were taken to arrange a Status Hearing.

[48] The plaintiffs' solicitor did not discontinue working on the plaintiffs' claims. Although not part of the court proceeding, he attended upon a mediation of the plaintiffs' statutory accident benefit claims against the Minister on November 26, 2009.

[49] In my view, the ultimate dismissal of the action was as a result of the failure to diary the Status Notice and this error was exacerbated by staff turnover at the solicitor's office.

[50] The dismissal of the action was, in my view as result of inadvertence. As such, I conclude that the second *Reid* factor has been satisfied.

Motion To Set Aside Order brought Promptly

[51] Counsel for the Minister acknowledged that the status notice may have been inadvertently filed away by the solicitor's office staff in June of 2009 and that he did not become aware of the order until January, 2010, however, it was urged on behalf of the defendant Minister that, as the solicitor dealt with the file on a few occasions between October 2009 and January, 2010, the existence of the dismissal order should have come to his attention prior to January of 2010.

[52] Although the plaintiffs' solicitor was away from his office in February 2010, after learning of the existence of the dismissal order, and he returned to

work in March and April, he took no steps to deal with the dismissal order in any way. He did, however, seek updated medical reports regarding the plaintiffs' condition.

[53] Upon subsequent review of the file in September or October of 2010, the dismissal order again came to the attention of the solicitor, however, the solicitor did not report the matter to his insurer until November 2, 2010 whereupon counsel were retained on his behalf to prepare the motion brought.

[54] The motion was served on the defendants' solicitors and filed with the court on February 2, 2011. While counsel engaged on behalf of the plaintiffs' solicitor to bring this motion, did move promptly, the solicitor failed to do so himself. The plaintiffs' solicitor having learned that the dismissal order had been granted in January 2010, and with a time gap of approximately 12 months to the date the motion was served, does not constitute moving promptly and as such, the third *Reid* factor has not been satisfied.

No Prejudice to the Defendant

[55] The claims advanced by the plaintiffs against the Minister relate to statutory accident benefits. As noted, apart from the litigation, there have been mediations between these parties before FSCO.

[56] The witness, Devyn Pawley, who swore an affidavit on behalf of the Minister which was filed in opposition to the plaintiffs' motion, acknowledged in cross-examination on her affidavit that she did not believe that there was "a great amount of prejudice *per se* for the accident benefit claim specifically."

[57] In response to an undertaking to provide particulars as to what prejudice arose with respect to the defendant Minister, counsel simply advised that the prejudice was in the amount of "\$665,000 exclusive of potential damages award for future health care costs, interest, and costs." No further explanation nor particulars were offered with respect to the alleged prejudice.

[58] As noted, there is a presumption of prejudice to the defendant in these circumstances. While liability for the motor vehicle accident is in dispute, the motor vehicle accident report indicates that this was a pedestrian - motor vehicle accident and as such, the onus would rest with the defendant driver to demonstrate that she was not negligent.

[59] The motor vehicle accident report does not indicate any witnesses to the accident. The plaintiffs delivered a sworn affidavit of documents along with copies of the schedule "A" productions. OHIP records, clinical records of the plaintiffs' healthcare providers and accident benefit file materials are available.

[60] There is a presumption of prejudice to the defendant driver given the passage of the applicable limitation. Although the defendant Benavides did not participate in this motion, she offered evidence by way of affidavit filed by counsel for the Minister, who having no standing to make submissions on behalf of the defendant Benavides, argued that the passage of a limitation period gave rise to actual prejudice to the defendant Benavides and potentially to the Minister in the event the Minister takes over the conduct of the defence of that defendant.

[61] The passage of the limitation period is only one facet of prejudice. In my view, the plaintiffs have provided sufficient evidence in this record to demonstrate *prima facie* that in spite of the passage of limitation period no prejudice has accrued. Evidence as to liability for the accident and documentary evidence as to the plaintiff's claims for damages is available.

[62] Further, as to the accident benefit claims being made against the Minister, that claim has been submitted and the basis of that claim has been mediated at FSCO on two occasions.

[63] On the whole, I conclude that the plaintiffs have established *prima facie* that the defendants have suffered no prejudice as result of the passage of a limitation period or as a result of any delay in this action. The onus shifts to the defendants to offer evidence of actual prejudice.

[64] The defendant Benavides asserts that she has been prejudiced by the delay in this action proceeding and will be further prejudiced if the action is revived as a result of the costs of defending the action. In my view, costs that may be incurred by an uninsured driver in the defence of a civil action cannot properly form a basis for asserting prejudice in these circumstances.

[65] While the Minister asserts prejudice, no evidence of actual prejudice has been offered on behalf of this defendant.

[66] Thus, I conclude that the plaintiffs have satisfied the fourth *Reid* factor.

[67] Having considered the *Reid* factors, the circumstances of this case must be examined contextually. The failure of the plaintiffs' solicitor to properly advance this action and to respond to the Status Notice and ultimately to move promptly to set aside the dismissal order are all examples of the lawyers neglect.

[68] Although the present motion was served in February, 2011, it was not heard until July 2012. Counsel for the defendant, Minister, did not assert that there was ongoing delay and accruing prejudice resulting from the passage of time between the date of the service of this motion and its hearing.

[69] Although in circumstances where a defendant is not unduly prejudiced, generally, an indulgence is granted and an order dismissing an action will be set aside, however, the overall passage of time and finality in the litigation must also be considered.

[70] Apart from the absence of undue prejudice to the defendants, there are several unusual features to this case including the plaintiffs' solicitor's illness, staff turnover within his firm as well as a flood in his office, all of which are circumstances that overall favour the setting aside of the dismissal order.

[71] In my view, the public confidence in the administration of justice would not be undermined by the granting of such an order. Also, while finality in litigation is critical to maintaining public confidence in the administration justice, the passage of time overall and the delay incurred in this action is not so great that the court should not grant an order setting aside the dismissal of this action.

[72] In the result, I conclude that it is just to grant the plaintiffs' motion and as such the order of the registrar dismissing the action is hereby set aside.

[73] As to costs, counsel shall file submissions on costs within 30 days from the date of release of these reasons. The submissions shall be no longer than two pages plus a costs outline.

Daley J.

Released: August 15, 2012

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B E T W E E N:

Jasvir Dhillon and Ajit Pal Dhillon

Plaintiffs

- and -

Raquel Benavides and Her Majesty the
Queen in right of Ontario as represented by
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Defendants

ENDORSEMENT

Daley J.

Released: August 15, 2012