CITATION: ELKHOULI v. SENATHIRAJAH et al, ,2014 ONSC 6140
COURT FILE No. CV-09-393546
HEARD: 20141016
ENDORSEMENT RELEASED: 20141027

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MOHAMED ELKHOULI

Plaintiff

- and-

KAVITHA SENATHIRAJAH, SIVATHASHAN KARUNANANTHAN and PATRICK FORAN.

Defendants

BEFORE: Master D. E. Short

COUNSEL:

William G. Scott -for the plaintiffs	Fax: (416) 869-0271
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HEARD: October 16, 2014

REASONS FOR DECISION

Diligence

"careful and persistent work or effort"

Concise Oxford English Dictionary, 11th edition

Due Diligence

"The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."

-*Black's Law Dictionary*, 9th edition

I. Motion

[1] This is a motion argued on behalf of the plaintiff by counsel retained for this motion to set aside a Registrar's Order dismissing his action as abandoned pursuant to Rule 48.15. As well, relief is sought with respect to the manner and timing of service of the Statement of Claim. As

the sequence of events is of some relevance to my decision I have underlined various dates throughout these reasons, to highlight my concerns.

[2] This action arises out of a motor vehicle accident which occurred on August 9, 2007. The plaintiff was a passenger on a Toronto Transit Commission ("TTC") bus which was involved in an accident on that date as were two other cars.

[3] Counsel for the driver Patrick Foran, and counsel for the insurers of Kavitha Senathirajah and Sivathashan Karunananthan opposes the granting of the order sought.

[4] The lawyers for the plaintiff commenced a previous action against the TTC and "John Doe 1 and John Doe 2" on August 10, 2009.

[5] This would appear to be one day beyond the normal two year limitation period.

[6] It appears that following service of the original claim, counsel for the plaintiff was provided by the TTC with the police report relating to the accident. Shortly thereafter the action involving the TTC was discontinued. No explanation or evidence of due diligence was provided before me as to why no the police report was not obtained prior to the 2 year limitation period expiring or the action being commenced.

[7] Rather than amending the existing pleading a new action was commenced by way of a new Statement of Claim issued December 16, 2009.

[8] The content of the pleading in the second action largely mirrors that of the first action. Significantly, however, an additional paragraph is added reading:

> "18. The plaintiff pleads that this claim is being commenced within two years from the date that Mr. Elkhouli could have reasonably discovered that he had permanent serious impairment of any important functions arising from the collisions, as defined in the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, and the regulations thereunder."
>
> The plaintiff has now brought on for a hearing in October of 2014, a motion to set aside an administrative dismissal of his December 16, 2009 action. The dismissal occurred on February 10, 2012, pursuant to subrule 48.15 (1) of the *Rules of Civil Procedure*.

[9] I expect that at some point in time, the question of whether or not due diligence was exercised by the plaintiff and his counsel were exercised may become an issue in this litigation. However, that question is not to be ultimately decided at this stage.

II. Case History to Date

[10] The affidavit filed on behalf of the plaintiff by his counsel, outlines a series of misadventures, failures to perform on a timely basis, and other omissions.

[11] It would seem that following the issuance of the Statement of Claim in December 2009, the plaintiff's counsel unsuccessfully attempted service on the defendants Senathirajah and Karunananthan . While there is apparently no sworn affidavit even of that attempted service, I was provided with a copy of a bill from a process server indicating that an attempt was made in February 2010. There was no evidence before me of any further attempts to serve the claim until the summer of that year.

[12] It seems that virtually nothing was done to move the action forward for about a year and a half. When the file was transferred in July 2010 to another lawyer within the firm representing the plaintiff, that new lawyer made an attempt to find the two defendants.

[13] Ultimately in August 2011, plaintiff's counsel received a positive search report with an address for one of the two defendants Senathirajah. Notwithstanding that development there is no indication that the plaintiff's counsel made any arrangements for attempted service of the statement of claim at that time.

[14] On December 19, 2011, the court issued a notice that the action would be dismissed as abandoned under rule 48.15.

[15] There is no explanation why it took a full year for this 45 day notice to be issued. For whatever reason, the plaintiff was able to avoid having his action dismissed administratively for a number of extra months.

[16] Rule 14.08(1) provides that where an action is commenced by Statement of Claim, the statement of claim shall be served within six months after it is issued. Here the six-month period for service of the statement of claim had long since expired by the time the Registrar issued the Notice of Pending Dismissal for Abandonment. Any attempted service at this point in time, would not have been valid without obtaining leave from the court for the late service. Till this motion was brought no such leave was sought.

[17] Regardless of the situation, it seems that counsel did make an unsuccessful attempt to serve the defendant Karunananthan on January 20, 2012 within the 45 day period provided for in the notice.

[18] On January 21, 2012, the defendant Senathirajah was apparently served the Statement of Claim.

[19] Then on January 24, 2012, apparently, for the first time, plaintiff's counsel wrote to the insurer of that individual to advise them of the tort claim. As well his letter referred to the notice of action that the act matter would be dismissed if a Statement of Defence was not delivered within 45 days of the December 19, 2011 notice.

[20] There is no indication the plaintiff's counsel took any steps to note the defendants in default 20 days from January 21, 2012, which I calculate as February 10, 2012. No defence has yet been filed by any of the defendants

[21] Apparently purely by coincidence, February 10, 2012 is the day the court issued the Order Dismissing the Action as Abandoned. Since no defences had been filed no copy of that notice was sent to any of the defendants lawyers. The affidavit of an associate in the law firm representing the insurers of Senathirajah and Karunananthan observes:

> "22. …at some unspecified time, after receiving the Order Dismissing Action as Abandoned, Plaintiff's counsel reported the matter to his insurer, who retained counsel to assist in this Motion.
>
> 23. Aviva Insurance Company was served with a copy of the Motion Record on July 26, 2013….
>
> 24. The defendants Senathirajah was served with the motion record on October 1, 2013

[22] Typical of the way that the plaintiff's file seems to been treated is the terse affidavit of the plaintiff filed in support of the motion before me which was sworn September 10, 2013 (i.e. 19 months after the Registrar made the order dismissing the action as abandoned).

[23] The paragraphs of the affidavit in their entirety (with my emphasis) reads as follows;

> 1. I am the Plaintiff in this action and as such have knowledge of the matters to which I hereinafter depose.
> 2. On August 9, 2007, I was involved in a motor vehicle accident which is the subject of these proceedings.
> 3. It has always been my intention to proceed with this action.
> 4. After retaining Romano Law Finn, I left my claim in their hands and did not see the need to follow up with them on a regular basis to inquire about the status of my action. However, from time to time I was in contact with the Romano Law Firm and understood that my action was proceeding in the normal course.
> 5. ***Today, I have been provided*** with a copy of the Order Dismissing Action as Abandoned ("Order") dated February 10, 2012.
> 6. I have instructed my lawyers to proceed with a Motion to set the Order aside.

[24] It is to be noted that while the matters addressed in his counsel's later affidavit, there is nothing contained in the client's affidavit addressing the issue of prejudice.

III. Applicable law

[25] The consequences of the 180 day deadline for having an action dismissed as abandoned and the two year trial set down requirement have fluctuated over the history of these relatively recent provisions.

[26] The Masters of the Court and its Judges have each brought their own approaches to the so-called "Reid factors" established by my colleague Master Dash. Appellate courts have provided us with guidance, which has ultimately allowed a fair amount of discretion, to be placed in the hands of those dealing with Registrar's Dismissals at first instance.

[27] My colleague Master Muir delivered a decision in June of this year, in *Bagus v. Telesford*, 2014 ONSC 3512 , which was very helpful in my coming to a conclusion in this case. I adopt his analysis of the appropriate tests as set out in *Bagus*.

[28] There he was (i) not satisfied that there was an appropriate explanation of the litigation delay. Further, he was (ii) not satisfied as to the explanation of inadvertence in missing the deadline and lastly (iii). He determined the motion was not brought promptly. Normally, three strikes and you are out. But under the *Reid* factors. There is a fourth, namely "no prejudice to the defendant".

[29] As well, the Court of Appeal in the cases that guide my approach has made it clear that a plaintiff need not satisfy all four of the Reid factors, but rather a contextual approach is required. The key point is that the court is to consider and weigh all relevant factors to determine the order that is "just" in the circumstances of each particular case.

[30] In this case, the plaintiff's affidavits were not cross-examined upon, and there is at least some assertion from the plaintiff's side directed towards rebutting the presumption of prejudice, now that the limitation period (which may have expired before the action even commenced) has clearly expired.

[31] Prejudice to a defendant is not prejudice inherent in facing an action the first place but prejudice in reviving the action after it is been dismissed as a result of the plaintiff's delay or as a

result of steps taken following the dismissal, the action. Here I was not satisfied that any such prejudice was demonstrated by any of the defendants.

[32] The accident in question in this action arose from a left hand turning vehicle being hit by a vehicle going through the intersection. Such accidents often result in an apportionment of liability as it is difficult to establish with certainty the degree of fault.

[33] To date in this case the defendant Patrick Foran seems to have been regarded by all as being without fault, and I believe there have been discussions of possibly discontinuing the action against him.

[34] It seemed to me at first blush it would make sense to only allow the action to be restored against the other defendants. However, I have no doubt that they will seriously consider and probably take steps to bring Mr. Foran back in the action as a third party.

I am striving to get this action resolved one way or another. Adding extra roadblocks to getting the matter to trial serves no one. As a consequence, I determined my decision ought to be the same for all defendants with respect to the relief sought.

IV. Contextual considerations

[35] I note from reading, *Bagus* that the plaintiff law firm in that case was the same firm as was retained by the plaintiff in the case before me.

[36] A consumer of litigation services is entitled to expect that his action will be conducted professionally, expeditiously and in compliance with the appropriate rules of civil litigation.

[37] In my view such a consumer ought not to be forced to seek new counsel to pursue possible recovery by way of an indemnity claim against his counsel. Such an action will first require the proof of the likely liability of the defendants in the original action without having the normal rights of discovery and production, from the others involved in the accident. In addition, more costs and court time will be consumed in addressing the questions of whether or not the lawyers ought to be responsible for the losses suffered as a result of the apparent deleterious conduct of that action.

[38] While there is case law that supports the view that an order setting aside a registrar's dismissal ought not to be made where the cause of action against the plaintiff's counsel might be available; I do not interpret the guidance of the various members of the Court of Appeal as *requiring* that a plaintiff in a case such as this should be required to only look to recovery based upon the potential liability of their counsel.

V. A Changing Environment

[39] Since, Master Muir delivered his reasons in *Bagus* the Rules Committee has turned its attention to the problems inherent with the existing deadlines with respect to the conducting of civil litigation. It is a rare Master's Regular Motions that does not have at least one motion relating to setting aside a registrar's dismissal. Large amounts of lawyers' time, clients' fees and available court time were consumed. Ultimately reams of paper in motion records often resulted in a consent order. It was recognized that something had to be done to remedy this situation.

[40] I now come to decide this decision in the shadow of a complete reworking of the provisions of the rules in this area.

VI. Pending Rule Changes

[41] Rule 1.04 provides overall guidance in dealing with the application of the *Rules*:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> *Proportionality*
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.
> *Matters Not Provided For*
> (2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[42] I have looked to these provisions as informing an appropriate approach to the issues before me.

[43] Currently Rule 48.15 provides for dismissal of actions that have not been defended within 6 months of commencement. Rule 48.14 provides that a status notice will be issued for defended actions that have not been set down for trial within two years.

[44] As of January 1st, 2015, Rule 48.15 is repealed entirely. Thus within 90 days there will no longer be a deemed abandonment in the first five years of action

[45] Rule 48.14 is also repealed and replaced with a simpler rule with longer time frames. Under the new Rule each Statement of Claim in the boilerplate portion at the outset of that document, will contain a notice that the action will be dismissed 5 years after it is commenced unless it has been set down for trial or otherwise disposed of or there is an order extending the time. The dismissal will be automatic with no further notice.

[46] This action was commenced on December 16th 2009. If the new rule had applied throughout its existence, the action would be subject to being dismissed on December 16, 2014, being the end of the five year period now contemplated by the amended rule.

[47] I appreciate that there are transition provisions with respect to actions commenced under the previous timeframe. Nevertheless an action that would have been subject to dismissal on January 2, 2015 for failure to set the action down for trial under the old rule, now has a further three years before anything happens.

[48] In my view proportionality dictates that this factor be taken into account as part of my contextual approach in determining the appropriate disposition of motions such as the one presently before me.

[49] Given that there is nothing before me that indicates the delay was in any way occasioned by the conduct of the plaintiff personally, and nothing before me to contradict his evidence that he left his claim in his counsel's "hands and did not see the need to follow up with them on a regular basis to inquire about the status of my action".

[50] His uncontradicted evidence asserts:

> "However, from time to time I was in contact with the Romano Law Firm and understood that my action was proceeding in the normal course."

[51] In all the circumstances, I am satisfied that the registrar's dismissal ought to be set aside at this point in time. I come to this conclusion notwithstanding that it appears that the client had much to complain about if he had known what to expect in a properly run personal injury action in Ontario.

[52] Both defendant sought costs of this motion. Notwithstanding that they have been unsuccessful in preserving the Registrar's Dismissal. I am satisfied that this is a case where they ought to receive their partial indemnity costs as sought.

[53] I expect that the plaintiff's lawyers (as distinct from the Council who appeared on his behalf on this motion) will appropriately address the manner in which the costs awards are to be paid.

VII. Disposition:

[54] In the result an Order will go

a) setting aside the Registrar's Order dismissing this action as abandoned dated February 10, 2012;
b) extending the time for service of the statement of claim on the defendant, Patrick Foran, to January 19, 2012, *nunc pro tunc* ;
c) extending the time for service of the statement of claim on the defendant Visa sent a third job to January 21, 2012, *nunc pro tunc*;
d) Granting substitutional service of the Statement of Claim on the defendant Sivathashan Karunananthan by way of service upon counsel appearing on his behalf on this motion;\
e) extending the time for delivery of defense is by all defendants, 230 days from the date of these reasons;
f) awarding costs of this motion to the defendants as outlined below; and
g) extending the set down date for trial as outlined below.

VIII. Transition

[55] There is also a transition rule for existing cases under the new rules that take effect after December 31st.The transition rule applies to any current action that would have been subject to the existing Rule 48 and *has not already been dismissed or in which a status hearing has not already been scheduled*. In those cases, the action will be dismissed on the ***later*** of the fifth anniversary of the commencement of the action or January 1, 2017.

[56] To avoid dismissal under the new rules a party may either: a) file a consent timetable at least 30 days prior to the expiry of the five years extending *the time for up to 2 years* OR b) may "bring a motion for a status hearing" on the return of which the plaintiff must show cause why the action should not be dismissed.

[57] I am reluctant to force the defendants to endure what could possibly be no further activity for another two years. Applying proportionality and attempting to balance the needs and interests of all the parties, Subject to any further status hearing held under the new rule I am directing that

this action be set down for trial on or before December 31, 2015, failing which the action shall again be dismissed.

IX. Costs

[58] I received costs outlines from the both defendants.

[59] The amount for partial indemnity basis costs sought by them were somewhat different. The motion was clearly important to both of their clients and I am therefore awarding the sum of $6000, all in, to the defendant, Patrick Foran and $2500 plus HST to the to this, to me defendants Kavitha Senathirajah and Karunananthan. Costs to be payable within 60 days.

[60] I am obliged to all counsel for their oral and written submissions on this matter.

Master D. E. Short

DATE: October 27, 2014
DS/ R.78