Finlay v. Van Paassen et al.

[Indexed as: Finlay v. Van Paassen]

101 O.R. (3d) 390

2010 ONCA 204

Court of Appeal for Ontario,
Doherty, Laskin and Lang JJ.A.
March 18, 2010

Civil procedure -- Dismissal for delay -- Setting aside -- Status notice issued by registrar in 2007 not served on plaintiff or his counsel due to mistake in registrar's office -- Action dismissed for delay -- Plaintiff's counsel obtaining copy of registrar's order several weeks later but motion to set aside order not brought for another two years -- Plaintiff moving unsuccessfully to set aside default judgment -- Plaintiff's appeal allowed -- Registrar's failure to serve status notice not depriving registrar of jurisdiction to dismiss action -- Motion judge failing to balance all material considerations and reaching unjust result.

The registrar issued a status notice stating that the plaintiff's personal injury action would be dismissed unless it was set down for trial within 90 days. Because of a mistake in the registrar's office, the status notice was not sent to the plaintiff or his counsel. Unbeknownst to them, the registrar issued a notice dismissing the action for delay. Counsel for the plaintiff obtained a copy of the registrar's order several weeks later, but a motion to set aside the order was not brought immediately. Rather, it was brought two years later. The motion was dismissed because it was not brought promptly.

The plaintiff appealed.

Held, the appeal should be allowed.

The registrar's failure to serve the status notice on the plaintiff or his counsel did not deprive the registrar of jurisdiction to dismiss the action. The failure to serve a status notice was an irregularity. However, the order should nevertheless be set aside because the motion judge did not balance all the material considerations, including the absence of prejudice to the defendants, and therefore reached an unfair result.

Cases referred to
Amardi v. Terrazzo, Tile & Marble Trade School Inc., [2009] O.J. No. 2077, 2009 CanLII 25607 (Div. Ct.), not folld
Scaini v. Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299, 2007 ONCA 63, 219 O.A.C. 317, 39 C.P.C. (6th) 1, 154 A.C.W.S. (3d) 1075, apld
Other cases referred to
Chiarelli v. Weins (2000), 46 O.R. (3d) 780, [2000] O.J. No. 296, 129 O.A.C. 129, 43 C.P.C. (4th) 19, 94 A.C.W.S. (3d) 850 (C.A.); Farrar v. McMullen, [1971] 1 O.R. 709, [1970] O.J. No. 1721 (C.A.); Gao v. De Keyser, [2008] O.J. No. 2225, 61 C.P.C. (6th) 89, 167 A.C.W.S. (3d) 995 (Div. Ct.); Kaltenback v. Frolic Industries Ltd., [1948] O.R. 116, [1948] O.J. No. 449, [1948] 1 D.L.R. 689 (C.A.); March d'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872, 2007 ONCA 695, 47 C.P.C. (6th) 233, 286 D.L.R. (4th) 487, 247 O.A.C. 22; Somerleigh v. Polhill, [2006] O.J. No. 1587, 209 O.A.C. 10, 147 A.C.W.S. (3d) 694 (C.A.)
Rules and regulations referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04(1), 2.01, 48.14 [as am.], (1) [as am.], (2) [as am.], (3) [as am.], (4) [as am.] [page391]

APPEAL from the order of Ramsay J. of the Superior Court of

Justice dated July 2, 2009 dismissing a motion to set aside an order dismissing an action for delay.

William G. Scott, for appellant.

Simon J. Adler and Stephen T. Bogden, for respondents.

The judgment of the court was delivered by

LASKIN J.A.: --

Overview

[1] The appellant, Frederick Finlay, sued the respondents for damages for personal injuries arising out of a car accident. The registrar dismissed the action for delay in setting it down for trial. The motion judge refused to set aside the registrar's dismissal order. Finlay asks us to set aside both the motion judge's order and the registrar's order and to reinstate the action.

[2] The accident occurred in October 2003; the statement of claim was issued in October 2004; pleadings and discoveries were completed by the end of September 2005. Up to this point, the matter had proceeded fairly promptly.

[3] Finlay's problems began when his counsel failed to set the action down for trial. In January 2007, the registrar issued a status notice under the Rules [Rules of Civil Procedure, R.R.O. 1990, Reg. 194] stating that the action would be dismissed unless it was set down for trial within 90 days. But a mistake occurred in the registrar's office. The status notice was not sent to Finlay or his counsel. On April 30, 2007, unbeknownst to them, the registrar issued an order dismissing the action for delay.

[4] Finlay's counsel first obtained a copy of the registrar's order in mid-May 2007. Had he then moved to set aside the order, his motion would undoubtedly have been granted. However, the motion to set aside the order was brought in May 2009. The

motion judge focused on this two-year delay in refusing to grant relief.

[5] On appeal, Finlay makes two submissions: first, he contends that the registrar's failure to serve the status notice on him or his counsel deprived the registrar of jurisdiction to dismiss the action; second, he contends that the motion judge misapplied the test for setting aside a registrar's order in that he adopted a "rigid" approach to the issue instead of a "contextual" approach that took account of all the relevant considerations. [page392]

[6] I would allow the appeal on the basis of Finlay's second submission. The motion judge's order was discretionary and was made as part of his duty to manage the trial list. It thus attracts significant deference from this court. Nonetheless, I would set aside the order because the motion judge did not balance all the material considerations, including the absence of prejudice to the respondents, and therefore reached an unjust result.

B. Analysis

(1) Was the registrar's dismissal order made without jurisdiction?

[7] Rule 48.14 deals with what occurs when -- as in the case before us -- a plaintiff has not listed an action for trial within two years after the filing [of] a statement of defence. Rule 48.14(1) provides for the delivery of a status notice: [See Note 1 below]

> 48.14(1) Where an action in which a statement of defence has been filed has not been placed on a trial list or terminated by any means within two years after the filing of a statement of defence, the registrar shall serve on the parties a status notice (Form 48C) that the action will be dismissed for delay unless it is set down for trial or terminated within ninety days after service of the notice.

[8] Rule 48.14(2) states: "A solicitor who receives a status notice shall forthwith serve a copy of the notice to his or her client." [See Note 2 below] Rule 48.14(3) stipulates that the

registrar shall dismiss the action for delay unless the action has been set down for trial within 90 days of the delivery of the status notice or unless a judge has ordered otherwise: [See Note 3 below] [page393]

> 48.14(3) The registrar shall dismiss the action for delay, with costs, ninety days after service of the status notice, unless,
>
> (a) the action has been set down for trial;
>
> (a.1) in an action under Rule 78, documents have been filed in accordance with rule 78.08;
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> (b) the action has been terminated by any means; or
>
> (c) a judge presiding at a status hearing has ordered otherwise.

[9] Finlay submits that the delivery of a status notice under rule 48.14(1) is a condition precedent to the registrar's jurisdiction to dismiss the action for delay under rule 48.14(3). As the status notice was not served on Finlay or his solicitor, the registrar had no jurisdiction to dismiss the action and his dismissal order must be set aside.

[10] This was the view of rule 48.14(1) and (3) taken by the Divisional Court in Amardi v. Terrazzo, Tile & Marble Trade School Inc., [2009] O.J. No. 2077, 2009 CanLII 25607 (Div. Ct.). In that case, too, a status notice was not sent to the solicitor for the plaintiffs. The court held that the registrar's failure to serve the status notice meant that the registrar had no jurisdiction to dismiss the action. His dismissal order was therefore set aside [at para. 10]:

> In my view, the Registrar's failure to serve the solicitor of record with the Status Notice deprived the Registrar of jurisdiction to order the dismissal of the action. As Master Linton stated in Xu v. Olde Yorke Esplanade Limited, operating as Novotel Toronto Centre (endorsement August 7, 2008):
>
> > Because a Registrar's order can be so serious it is essential that the Registrar strictly satisfy the conditions permitted him or her for an administrative order

> to issue. One requirement is how a Notice is served. There was a solicitor of record who was the person to be served. Instead the Notice was sent to the party which should not have been done. Therefore the Registrar's order must be set aside.

[11] Respectfully, I do not agree with the holding in Amardi. It seems to me that it harkens back to the distinction between nullities and irregularities that pervaded our Rules before 1985. It does not take account of our current rule 2.01, which eliminates the notion of a nullity and provides that any failure [page394] to comply with the rules is a mere irregularity that is capable of being cured:

> 2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.
>
> (2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other that the one employed.

[12] Under the pre-1985 Rules, procedural missteps characterized as nullities were incapable of being cured. To give but one example, if a sole proprietor carrying on business under a firm name started an action in the firm name, the action was a nullity. The court had no power to amend the claim to substitute the name of the sole proprietor for the name of the firm, even if the defendant was not misled: see Kaltenback v. Frolic Industries Ltd., [1948] O.R. 116, [1948] O.J. No. 449. That case, of course, would be decided entirely differently under our current Rules.

[13] By characterizing the failure to serve a status notice

as a jurisdictional error, Amardi effectively turns the registrar's dismissal order into a nullity that must be set aside. This characterization runs contrary to the curative provision in rule 2.01: see Somerleigh v. Polhill, [2006] O.J. No. 1587, 209 O.A.C. 10 (C.A.).

[14] Rule 2.01 reflects the general principle found in rule 1.04(1), which guides the interpretation of all the Rules: "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Rule 1.04(1) and rule 2.01 are intended to do away with overly "technical" arguments about the effect of the Rules and orders made under them. Instead, these provisions aim to ensure that the Rules and procedural orders are construed in a way that advances the interests of justice and ordinarily permits the parties to get to the real merits of their dispute.

[15] Looked at in this way, the registrar's failure to serve a status notice on Finlay's counsel was an irregularity. The lack of service did not mean that the registrar was without jurisdiction [page395] to dismiss the action, or -- in the words of rule 2.01 -- that the dismissal order was a nullity.

[16] The lack of service, however, would be an important consideration in deciding whether to set aside the dismissal order. So, for example, if Finlay's counsel had moved promptly after learning of the dismissal order, the interests of justice would demand that the order be set aside. Conversely, to use an extreme example, if Finlay had waited ten years after learning of the dismissal order before moving to set it aside, I highly doubt that his motion could succeed. He certainly could not claim lack of jurisdiction as a basis to set the order aside.

[17] For these reasons, I cannot accept Finlay's submission that the registrar's order must be set aside for lack of jurisdiction.

(2) Should the motion judge's order be set aside?

(a) October 2003 to April 2007: from the date of the accident to the registrar's dismissal order

[18] The car accident occurred in Port Dover, Ontario. Although the respondents dispute their liability for the accident, they acknowledge that their car collided with the car Finlay, was driving after they crossed the centre line of the road. In October 2006, after discoveries were completed, the respondents made an offer to settle, which Finlay rejected.

[19] Finlay's former wife was a passenger in his car. She has started a separate action against the respondents for her injuries. The respondents have counterclaimed against Finlay seeking contribution for any damages they must pay to Finlay's former wife. In defending the counterclaim, Finlay is represented by a different law firm.

[20] In December 2006, the two actions were ordered to be consolidated. The record before us does not indicate why Finlay's counsel did not then set the action down for trial. However, the action begun by Finlay's former wife is still outstanding.

(b) May 2007 to May 2009: from discovery of the dismissal order to the motion to set it aside

[21] This time period was critical to the motion judge's decision. Finlay's law firm did not move against the registrar's dismissal order for two years. The obvious question is why. The record discloses that motion materials to set aside the order were drafted but were never served. Then, the lawyer handling the file and the law clerk who prepared the motion materials left the firm. Apparently neither told anyone about the registrar's order or the draft motion materials. [page396]

[22] Moreover, the record suggests that no one in the law firm reviewed the departing lawyer's file. Even so, correspondence from the respondents' lawyers within the two-year period ought to have alerted Finlay's law firm that something needed to be done.

[23] On June 15, 2007, the respondents' lawyer wrote a letter to Finlay's law firm stating, in part, that "[u]nless Mr. Ferro moves to set [the registrar's] Order aside by the end of the month, I propose to treat that as the final disposition of this

matter". The letter went unanswered. On August 15, 2007, the respondents' lawyer again wrote to Finlay's law firm. That letter discussed whether the consolidation order needed to be amended, but added in the last paragraph: "The foregoing is, of course, premature in light of the Order dismissing the action of Mr. Finlay." This letter, too, went unanswered.

[24] Over a year later, on December 4, 2008, the respondents' lawyer served notice on Finlay's law firm withdrawing all previous offers to settle. This notice of withdrawal prompted the motion to set aside the registrar's order, though the motion itself was not brought for several months.

(c) Discussion

[25] In March d'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.), at para. 12, this court approved four factors to be considered on a motion to set aside an order dismissing an action for delay:

> The Master applied the four-pronged test described in Reid v. Dow Corning Corp. (2001) 11 C.P.C. (5th) 80 at para. 41 (Ont. S.C.J.), rev'd on other grounds 48 C.P.C. (5th) 93 (Ont. Div. Ct.):
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> (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.
>
> (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. [page397]

(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.

(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.

[26] In his oral reasons, the motion judge recited these four factors. However, he only addressed the first factor -- he said, "I am not sure I would have too much trouble with that" -- and the third factor, which for him was decisive:

> Here, the problem for me is what was done between the making of the dismissal order and the bringing of this motion, a delay of some two years. I do not think that there was a deliberate decision not to advance the litigation. I think it was, rather, more a passive decision to ignore it and not to review the matter properly once Mr. Morris left the office. There is no explanation why this file was not reviewed from Mr. Morris' leaving the firm until May of 2009. I take it that it was a reaction to the withdrawal of the settlement offers and not a quick reaction at that.
>
> To me, the conduct of the Plaintiff's counsel's firm was more than a lapse or inadvertent mistake and I think it would be very unfortunate if this became an acceptable way of dealing with similar circumstances.

[27] The motion judge determined that because Finlay could not satisfy the third factor his motion must fail. In effect, on the motion judge's approach, in order to set aside the registrar's order Finlay had to satisfy each of the four factors. In approaching the motion that way, the motion judge made the very error identified by Goudge J.A. in Scaini v.

Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.). There, Goudge J.A. rejected as too "rigid" the notion that to set aside a registrar's dismissal order, a moving party must satisfy each factor. Instead, he favoured a "contextual" approach in which the court weighs all relevant considerations to determine the result that is just [at paras. 21-23]:

> More importantly, I do not agree that the case law reviewed in Reid, supra, yields the proposition that an appellant must satisfy each relevant criterion in order to have the registrar's order set aside. None of the cases referred to say so expressly and several proceed on a more contextual basis. For example, in Steele v. Ottawa-Carleton (Regional Municipality), [1998] O.J. No. 3154 (Gen. Div.) Master Beaudoin, at para. 17, described the guiding principle in deciding whether to set aside a rule 48.14 dismissal by the registrar as follows:
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> > . . . Ultimately, the Court will exercise its discretion upon a consideration of the relevant factors and will attempt to balance the interests of the parties.
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> I agree with Master Beaudoin. [page398]
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> In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1)(c) and (2). The latter invites the court to make the order that is just in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.

[28] The motion judge did not engage in this weighing exercise. Indeed, he did not even consider the issue of prejudice, which invariably is a key consideration on a motion to set aside a dismissal order: see Farrar v. McMullen, [1971]

1 O.R. 709, [1970] O.J. No. 1721 (C.A.).

[29] The motion judge's failure to adopt the approach advocated by Goudge J.A. in Scaini justifies this court interfering with his order and weighing all of the relevant considerations ourselves. After performing this exercise, it is my view that the just result is to set aside the registrar's order and to reinstate the action. My conclusion is based on the following considerations, which take account of the four factors in March:

-- up to the time of the service of the status notice, the action had proceeded without any unreasonable delay;

-- at least initially, Finlay's law firm cannot be faulted for not responding to the status notice because they were not served with it;

-- as the motion judge found, and contrary to what occurred in March, Finlay's law firm did not deliberately decide not to move the litigation forward. The failure to do so was attributable to a slip-up, or at worst to sloppiness, in the law office during and after the time the lawyer in charge of the file left;

-- the two-year delay in moving against the registrar's order was obviously undesirable, especially as Finlay's law firm had been alerted to the need to take some action. However, the two-year period is not so long that by itself it warranted denying relief. Moreover, the two-year delay has to be assessed in the context of the time frame preceding it -- a time frame in which the lawsuit proceeded reasonably promptly;

-- the respondents do not point to any specific prejudice they would incur if the registrar's order was set aside. As Finlay points out, the respondents' lawyer maintained an open file on [page399] this litigation until at least December 2008, when he withdrew his offers to settle. Yet in their affidavit material, the respondents can muster only the bald assertion that it will be "extremely

difficult" to locate witnesses and that because of the delay witnesses memories will be "hampered". Without more, this assertion does not amount to a showing of prejudice. I agree with Finlay that it is likely respondents' counsel obtained witness statements immediately after the accident. Furthermore, I expect that if one of those witnesses was no longer available or the memory of that witness could not be refreshed by the witness' statement, the respondents' affidavit evidence on the motion would have said so. The absence of such evidence is telling: see Chiarelli v. Weins (2000), 46 O.R. (3d) 780, [2000] O.J. No. 296; and

-- any hardship visited on the respondents from setting aside the registrar's order is lessened because they are already defending the action brought by Finlay's former wife.

[30] Cumulatively, these considerations outweigh the two-year delay in bringing the motion and justify setting aside the registrar's order. In my view, it is in the interests of justice to do so.

[31] Finally, although not necessary to my decision, I wish to comment on two other considerations relied on by the motion judge to deny Finlay relief. The motion judge rested his decision principally on the two-year delay in moving against the registrar's order, but he also referred to the possibility of a negligence claim against Finlay's law firm and the "expiration of the limitation period". Neither consideration, in my view, is germane. The motion judge said:

I also think that the Plaintiff is not necessarily out any remedy and LPIC may, indeed, become involved, although I express no opinion, and certainly no opinion as to whose negligence would be involved as I do not know exactly what took place between Mr. Morris and Mr. Ferro.

In sum, two years of delay took place after the expiration of the limitation period. Taking that into account and also the fact that the Defendants have some entitlement to rely on the finality of the registrar's order, I think the motion cannot succeed.

[32] A judge who refuses to set aside a dismissal order will naturally be concerned that the effect of the refusal will be to deprive an innocent party of its day in court. To protect the claim of the innocent party, the judge will often raise the possibility of a negligence action against the party's own lawyer. Although [page400] perhaps understandable, I do not find this helpful. Speculation about whether a party has a lawsuit against its own lawyer, or the potential success of that lawsuit, should not inform the court's analysis of whether the registrar's dismissal order ought to be set aside.

[33] In my view, on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel. As Sharpe J.A. noted in March, at para. 28, "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." Sharpe J.A. went on to recognize that the situation may be different where the lawyer's conduct is not inadvertent but deliberate. In the case before us, however, the conduct of Finlay's law firm was not deliberate, which affords a further basis to call into question whether the motion judge's decision was just: see Chiarelli v. Weins; Gao v. De Keyser, [2008] O.J. No. 2225, 61 C.P.C. (6th) 89 (Div. Ct.), at para. 27.

[34] In refusing Finlay relief, the motion judge took into account that the two years of delay occurred after "the expiration of the limitation period". I do not see how the running of the limitation period had any relevance to the motion. The action was started well within the limitation period and would be reinstated if the registrar's order were set aside. Moreover, to be relevant, any prejudice from the "expiry" of a limitation period would have to be caused by the delay. In this case, however, to the extent that it can be said the limitation period "expired", it did so in October 2005 while the action was ongoing. The delay itself had no bearing on the running of the limitation period.

C. Conclusion

[35] I would allow the appeal. I would set aside para. 1 of

the motion judge's order and set aside the registrar's dismissal order. Finlay shall have 30 days from the release of these reasons to set the action down for trial. As suggested by Mr. Scott on behalf of Finlay, I would leave in place the costs order of the motion judge and would order that there be no costs of the appeal.

Appeal allowed.

Notes

Note 1: Rule 48.14(1) has since been amended and now reads:

48.14(1) Unless the court orders otherwise, if an action in which a defence has been filed has not been place on a trial list or terminated by any means within two years after the first defence is filed, the registrar shall serve on the parties a statared notice in Form 48C.1 that the action will be dismissed for delay unless, within 90 days after service of the notice, the action is set down for trial or terminated, or documents are filed in accordance with subrule (10).

Note 2: This provision is now rule 48.14(3).

Note 3: This provision is now rule 48.14(4) and has since been amended to read:

48.14(4) The registrar shall dismiss the action for delay, with costs, 90 days after service of the notice, unless,

(a) the action has been set down for trial or restored to a trial list, as the case may be;

(b) the action has been terminated by any means;

(c) documents have been filed in accordance with subrule (10); or

(d) the judge or case management master presiding at a

status hearing has ordered otherwise.
