Graham v. Vandersloot et al.

[Indexed as: Graham v. Vandersloot]

108 O.R. (3d) 641

2012 ONCA 60

Court of Appeal for Ontario,
Cronk, Blair JJ.A. and Strathy J. (ad hoc)
January 31, 2012

Civil procedure -- Trial -- Adjournment -- Plaintiff seeking six-month adjournment of trial in personal injury action because she did not have up-to-date medical reports -- Motion judge denying request -- Motion judge failing to take into account fact that liability was admitted -- Defendants not suffering any non-compensable prejudice as result of six-month adjournment -- Overall interests of justice calling for decision on merits despite lengthy delays.

Liability was admitted in a personal injury action. The plaintiff sought a six-month adjournment of the trial because she did not have up-to-date medical reports to prove her claim for damages. The motion judge, noting the delays in the case and the fact that the trial had already been adjourned once, and finding that memories would fade with the passage of time, denied the request. The trial proceeded. The plaintiff called no evidence and the action was dismissed. The plaintiff appealed.

Held, the appeal should be allowed.

The motion judge failed to take into account two factors which brought this case into the category of cases where the overall interests of justice call for a decision of the real matter in dispute on the merits. First, liability was admitted. Fading memories over time are less of an issue where determination of the quantum of damages will depend primarily on expert evidence. Second, there was nothing to suggest that the defendants would suffer any non-compensable prejudice if the trial were adjourned for six months. Moreover, while the motion judge was justified in observing that the medical assessments should have been arranged earlier, she gave undue weight to the plaintiff's lawyer's failure to do so. The principle that the sins of the lawyer should not be visited upon the client applied in this case.

Cases referred to

Ariston Realty Corp. v. Elcarim Inc., [2007] O.J. No. 1497, 51 C.P.C. (6th) 326, 156 A.C.W.S. (3d) 1029 (S.C.J.); Graham v. Vandersoot, [2011] O.J. No. 495, 2011 ONSC 377, 95 C.C.L.I. (4th) 163; Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd., [1985] O.J. No. 101, [1985] O.C.P. No. 133, 8 O.A.C. 369, 1 C.P.C. (2d) 24 (C.A.); Khimji v. Dhanani (2004), 69 O.R. (3d) 790, [2004] O.J. No. 320, 182 O.A.C. 142, 44 C.P.C. (5th) 56, 128 A.C.W.S. (3d) 904 (C.A.)

APPEAL from the orders of Milanetti J. dated September 7, 2010 denying a request for adjournment and Ramsay J. dated September 13, 2010 dismissing the action.

William G. Scott, for appellant.

Grant E. Black, for respondents. [page642]

The judgment of the court was delivered by

BLAIR J.A.: --

Overview

[1] The appellant seeks to set aside two orders of the Superior Court of Justice: (i) the order of Milanetti J. dated September 7, 2010, denying the appellant's request for an adjournment of the trial of this action; and (ii) the order of Ramsay J. dated September 13, 2010, dismissing the action.

[2] Liability was admitted in the action, and the adjournment request stemmed from the fact that the appellant did not have up-to-date medical reports ready for the commencement of trial on September 13 in order to prove her claim for damages. When the adjournment was refused and the matter came on for trial on that date, the appellant called no evidence and the action was dismissed. For practical purposes, then, the appeal turns on whether the order of Milanetti J. refusing the adjournment stands or falls.

Background

[3] The appellant was injured on February 20, 2005 when she was a passenger in a vehicle struck by another vehicle driven by the respondent Vandersloot. On December 1, 2005, she issued a statement of claim asking for $2 million in damages for injuries and losses arising out of the accident. Pleadings were delivered and examinations for discovery were completed by the end of October 2006. In January 2007, the appellant and her family moved to Prince Edward Island and, thereafter, the evolution of the proceedings had a checkered history. The following is a brief chronology of events:

January 23, 2008: Appellant attends a defence medical examination by Dr. Arthur Port in Hamilton, Ontario.

June 6, 2008: Respondents serve the trial record.

September 12, 2008: Parties consent to the action being struck from the trial list (appellant's lawyer advises that the appellant had been involved in another car accident and the action arising from that accident should be tried with this action).

March 2009: Appellant returns to Hamilton from Prince Edward Island. [page643]

May 5, 2009: Action restored to the trial list on consent (appellant's lawyer learned that the appellant had not been involved in a subsequent accident).

July 17, 2009: At assignment court, parties consent to a trial

date of September 13, 2010.
May 2010: The appellant is psychologically assessed by Dr. Armenia for the purpose of this litigation. She was also scheduled to have a neurological assessment but she was late for the appointment (having worked the night before and slept in) and the assessment does not proceed.
May 2010: Appellant obtains employment as a bartender in Hamilton but stops work in August because of her ongoing injuries.
July 27, 2010: Appellant's lawyer serves a housekeeping assessment report dated July 22, 2010 on the respondents' lawyer.
September 7, 2010: Appellant requests that the action be removed from the trial list or, alternatively, that it be adjourned until the spring of 2011 -- Milanetti J. dismisses the motion.
September 13, 2010: The appellant calls no evidence when the trial is called and the action is dismissed by Ramsay J.
January 18, 2011: Hambly J. grants the appellant leave to appeal the order of Milanetti J. to the Divisional Court [[2011] O.J. No. 495, 2011 ONSC 377].
March 25, 2011: Rosenberg J.A. orders that the appeal from the order of Milanetti J. and the appeal from the order of Ramsay J. be combined into one appeal in this court.
The Motion Judge's Decision

[4] In denying the request for an adjournment, Milanetti J. said:

> Plaintiff seeks to adjourn the trial of this matter set for September 13, 2010. The Defendant opposes it. That trial date was chosen by both counsel at Assignment Court on July 17, 2009.
>
> The matter has been set down for trial originally in June 2008 with an earlier trial date of September 12, 2008, once again agreed on by both counsel. This date was evidently struck on consent based on a misapprehension that the Plaintiff had been involved in another accident. This was not in fact the case.

. . . . . [page644]

> This is a February 2005 accident. The passage of time cannot but mean that memories will fade. I do not agree that there is no prejudice. This request today stems from the Plaintiff's inability to have new medical reports. Evidently medicals were arranged for May 2010 but the Plaintiff came to her appointment late and the Doctor refused to conduct the exams. No alternate date has been proposed.
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> . . . . .
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> This matter was restored to the trial list on consent on May 5 some 16 months ago. I had no explanation as to why medicals were not scheduled until May 2010.
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> . . . . .
>
> The Plaintiff has an obligation to move her litigation along. The lapses in doing so here are most significant. I will not agree to adjourn this trial date yet again. The parties agreed they were ready for trial in June 2008 and reiterated that readiness in May 2009. To adjourn the matter yet again would, in my view, bring the administration of justice into disrepute. Motion is dismissed.

(Emphasis in original)

The Applicable Legal Principles

[5] Adjournment decisions are highly discretionary and appellate courts are rightly reluctant to interfere with them. Laskin J.A. succinctly summarized the operative legal principles in Khimji v. Dhanani (2004), 69 O.R. (3d) 790, [2004] O.J. No. 320 (C.A.). Although he was in dissent, the majority accepted his articulation of the statement of principles. At paras. 14 and 18, he said:

> A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any

> particular case several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may exercise his or her discretion unreasonably and if, as a result, the decision is contrary to the interests of justice, an appellate court is justified in intervening. In my opinion, that is the case here.
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> . . . . .
>
> I begin with the overriding goal of our modern Rules of Civil Procedure: to ensure as far as possible that cases are resolved on their merits. This goal is expressly set out in Rule 2.01(1)(a), which gives a judge power to grant any relief necessary "to secure the just determination of the real matters in dispute". Courts should not be too quick to deprive litigants of a decision on the merits. The trial judge does not appear to have sufficiently taken into account that his order deprived the parties, especially the appellant, of a determination of "the real matters in dispute."

(Emphasis added) [page645]

See, also, Ariston Realty Corp. v. Elcarim Inc., [2007] O.J. No. 1497, 51 C.P.C. (6th) 326 (S.C.J.), at paras. 33, 36 and 38.

Application of the Legal Principles

[6] Here, there are some factors favouring an adjournment refusal, to be sure. The action has proceeded at a leisurely pace, particularly since examinations for discovery were completed in October 2006. And, as Mr. Scott candidly conceded, the frailties in the explanation for the delay -- the appellant's failure to arrange to obtain the necessary medical reports in a timely fashion -- works in favour of the respondents' position. As the motion judge noted, it is puzzling why it took the appellant until May 2010 to arrange for the medical examinations necessary to obtain the medical reports she required to establish her claim for damages -- particularly where the matter had been restored to the trial list on consent in May 2009 and a trial date of September 13, 2010 had been agreed to in July 2009.

[7] However, there are two factors that the motion judge did

not take into account which, in my view, bring this case into the category of cases where, in spite of the foregoing, the overall interests of justice call for a decision of the real matter in dispute on the merits. First, liability was admitted. Secondly -- apart from the general implications of delay (not really a factor in this case) -- there is nothing in the record to indicate that an adjournment would result in prejudice to the respondents that could not be compensated for in costs. "[N]on-compensable prejudice plays a pivotal role in deciding whether to grant an amendment or an adjournment:" Khimji, at para. 19.

[8] It is significant that liability was admitted in this case. The only issue to be determined was the quantum of damages sustained by the appellant. This factor does not appear to have been considered by the adjournment judge -- and in fairness, counsel were not able to confirm to us that it had been brought to her attention -- but it is an important factor. Fading memories over time are less of an issue where determination of the quantum of damages will depend primarily on expert evidence, rendering the motion judge's principal concern about prejudice considerably less significant.

[9] This feeds into the second consideration. There is nothing to suggest that the respondents would suffer from any non-compensable prejudice if the trial had been adjourned from September 2010 to the following spring. Examinations for discovery had been completed and undertakings answered. The respondents had a defence medical assessment of the appellant. There is nothing in the record to indicate there are any witnesses [page646] important to the defence whose memory might be impaired by the passage of time. The length of the proposed adjournment was not lengthy, approximately six months, and would not have disrupted the court schedule.

[10] Finally, while the motion judge was justified in observing that the medical assessments should have been arranged prior to May 2010, she gave undue weight to the appellant's lawyer's failure to do so when all of the foregoing factors are taken into consideration. As Hambly J. noted [at para. 15] when granting leave to appeal to the Divisional Court

[[2011] O.J. No. 495, 2011 ONSC 377] in this matter, "the often applied principle that the sins of the lawyer should not be visited upon the client applies in this case". This principle was enunciated by this court in Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd., [1985] O.J. No. 101, 8 O.A.C. 369 (C.A.), at para. 11:

> Undoubtedly counsel is the agent of the client for many purposes . . . but it is a principle of very long standing that the client is not to be placed irrevocably in jeopardy by reason of the neglect or inattention of his solicitor, if relief to the client can be given on terms that protect his innocent adversary as to costs thrown away and as to the security of the legal position he has gained. There may be cases where the plaintiff has so changed his position that this is impossible.

[11] This is such a case, in my opinion. There is nothing to indicate that a further adjournment of six months would have in any way affected "the security of the legal position [the respondents had] gained" or changed their position in any way that could not be compensated for in costs. Mr. Black submitted that it is inaccurate to say the appellant was "placed irrevocably in jeopardy" by reason of the adjournment refusal and the dismissal of the action, because she has other remedies open to her, namely, a potential claim against her solicitor. I am not prepared to say that she should be required to resort to such a remedy in the circumstances of this case.

[12] Apart from the understandable frustrations experienced by presiding judicial officials and opposing parties over delays in the processing of civil cases, it is the overall interests of justice that, at the end of the day, must govern. Perell J. expressed this sentiment well in Ariston Realty Corp., at para. 38:

> In my opinion, a concern for the principles of natural justice and the appearance of justice being done explains why, perhaps to the chagrin of those opposing adjournments and indulgences, courts should tend to be generous rather than overly strict in granting indulgences, particularly

> where the request would promote a decision on the merits. This liberality follows because it is in the public interest that whatever the outcome, a litigant should perceive that he or she had their day in court and a fair chance to make out their case. [page647]

[13] Here, at the end of the day, the interests of justice favour the appellant's having her day in court to put forward her claim for damages on the merits.

Disposition

[14] For the foregoing reasons, I would set aside the order of Milanetti J. refusing the adjournment. It follows from this that the order of Ramsay J. dismissing the appellant's action must be set aside as well. The action is reinstated and a new trial ordered.

[15] Recognizing that his client is seeking an indulgence, Mr. Scott does not seek costs of the proceedings before either Milanetti J. or Hambly J. Nor did he strenuously press for costs here. In all the circumstances, we think this is not a case for costs in this court and we make no order as to costs.

Appeal allowed.