CITATION: GREJDIERU v. HUSSEIN, 2013 ONSC 4558
COURT FILE NO.: CV-13-473218
MOTION HEARD: JULY 3, 2013

2013 ONSC 4558 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ivan Grejdieru and Leah Grejdieru

v.

Mohamed Awes Hussein

BEFORE: MASTER R.A. MUIR

COUNSEL: Jillian Van Allen, counsel for the lawyer for the plaintiffs
Christina Nassar for the defendant

REASONS FOR DECISION

[1] The plaintiffs bring this motion pursuant to Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order setting aside the order of the registrar dated May 24, 2011, dismissing this action as abandoned. This action was dismissed by the registrar due to the failure on the part of the plaintiffs to comply with the requirements of Rule 48.15. An action may be dismissed by the registrar under Rule 48.15 if no defence has been filed within 180 days after the proceeding was commenced.

[2] The defendant opposes the granting of the relief requested on this motion.

Background

[3] The plaintiffs were involved in a motor vehicle accident on September 29, 2008. It appears that the plaintiffs' vehicle was struck from behind by a vehicle operated by the defendant.

[4] The defendant's insurer was given notice of the accident by way of a letter from the plaintiffs' North Carolina lawyer dated October 10, 2008. In November 2008, the defendant's insurer received a copy of the collision report. In February 2010, the defendant's insurer was involved in further communications regarding the accident with the plaintiffs' accident benefits insurer and with AB Solutions Legal Services ("AB").

The letters from AB to defendant's insurer provided details of the accident and the plaintiffs' injuries. There also appear to be communications with the defendant's insurer regarding the plaintiffs' property damage claim (US $ 28,488.16).

[5] The statement of claim in this action was issued in Newmarket on September 27, 2010. It was served on the defendant in accordance with the Rules in October 2010. The defendant did not defend the action. It appears that he did not provide a copy of the statement of claim to his insurer either.

[6] On March 28, 2011, the plaintiffs' lawyer received a notice of pending action dismissal from the court. The notice was issued because no defence had been filed by that date. The plaintiffs' lawyer then wrote to the defendant's insurer on April 6, 2011 asking for a defence in order to avoid the dismissal of the action. The defendant's insurer has no record of receiving the letter and the plaintiffs' lawyer cannot locate a fax confirmation sheet.

[7] The plaintiffs' lawyer's evidence is that he was dealing with personal and medical issues at the time. He was also burdened with the pressure of dealing with other files. No particulars of this evidence have been provided. In any event, the plaintiffs' lawyer states that for these reasons he did not follow up on the defence or take other steps to address the pending dismissal notice, and this action was dismissed by the registrar on May 24, 2011.

[8] It appears that due to the same health and personal issues, the plaintiffs' lawyer did not immediately bring a motion to set aside the dismissal order. It appears that this matter was reported to the plaintiffs' lawyer's insurer in October 2011. This motion was then served in December 2011. For reasons chiefly related to the state of the court lists in Newmarket and Toronto, this motion was not argued until July 3, 2013.

Setting Aside a Dismissal Order

[9] The law relating to motions for an order setting aside an administrative dismissal order is summarized in my decision in *744142 Ontario Ltd. v. Ticknor Estate*, 2012 ONSC 1640 (Master).[1] At paragraph 32 of that decision I set out the applicable principles as follows:[2]

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[1] Although most of the applicable authorities deal with orders dismissing actions for delay, the same considerations apply to a motion for an order setting aside an order dismissing an action as abandoned. See *Vaccaro v. Unifund*, 2011 ONSC 5318 at paragraph 34.

[2] The applicable principles are derived from seven decisions of the Court of Appeal for Ontario released over the last several years: *Scaini v. Prochnicki*, [2007] O.J. No. 299 (C.A.); *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, [2007] O.J. No. 3872 (C.A.); *Finlay v. Van Paassen*, [2010] O.J. No. 1097 (C.A.); *Wellwood v. Ontario (Provincial Police)*, [2010] O.J. No. 2225 (C.A.); *Hamilton (City) v.*

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32. In the last five years, the law relating to setting aside registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario. Although each of those decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal in *Scaini* has been followed consistently. The principles that emerge from those decisions can be summarized as follows:

● the court must consider and weigh all relevant factors, including the four *Reid* factors which are likely to be of central importance in most cases;

● the *Reid* factors, as cited by the Court of Appeal in *Giant Tiger*, are as follows:

(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.

(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;

● 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;

● all factors are important but prejudice is the key consideration;

Svedas Koyanagi Architects Inc., [2010] O.J. No. 5572 (C.A.); *Machacek v. Ontario Cycling Assn.*, [2011] O.J. No. 2379 (C.A.); *Aguas v. Rivard Estate*, [2011] O.J. No. 3108 (C.A.).

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> • prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;
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> • once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;
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> • prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;
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> • the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;
>
> • in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.
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> [Footnotes Omitted]

[10] I am also mindful of the observations of the Court of Appeal in its decision in *Hamilton (City)*. At paragraphs 20-22 of that decision Justice Laskin notes as follows:

> **20** Two principles of our civil justice system and our *Rules of Civil Procedure* come into play. The first, reflected in rule 1.04(1), is that civil actions should be decided on their merits. As the motion judge said at para. 31 of his reasons: "the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."
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> **21** The second principle, reflected in the various time limits mandated by our rules, and indeed, as noted by the motion judge, in the provision for a status notice and hearing, is that civil actions should be resolved within a reasonable timeframe. In *Marché*, at para. 25, my colleague Sharpe J.A. wrote about the strong public interest in promoting the timely resolution of disputes. Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it.
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> **22** On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles.

[11] I also note that the Court of Appeal has recently emphasized the principle that these motions involve an exercise of the court's discretion. The court must weigh all

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relevant considerations to determine the result that is just in the circumstances. See *Habib v. Mucaj*, 2012 ONCA 880 at paragraph 6.

[12] Finally, it should be emphasized that the general preference in our system of civil justice is for disputes to be decided on their merits. See *MDM Plastics Ltd. v. Vincor International Inc.*, 2013 ONSC 710 (S.C.J.) at paragraphs 24 and 28.

[13] These are the factors and principles I have considered and applied in determining the issues on this motion. My analysis leads me to the conclusion that it is in the interest of justice that the dismissal order of the registrar be set aside.

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Motion Brought Promptly

[14] Rule 37.14(1) requires that motions of this nature be brought by way of a notice of motion served forthwith after the order in question comes to the attention of the person affected. The applicable authorities also require these motions to be brought promptly. In my view, the plaintiffs have not done so. The only explanation provided by the plaintiffs relates to the health, personal and professional issues of their lawyer. However, no specifics are provided. I agree with the defendant that general statements of that nature are simply not sufficient in the circumstances.

[15] Moreover, the plaintiffs' lawyer did nothing to seek the consent of defendant's insurer or to report this matter to his own insurer for many months after the dismissal order was made. These are simple steps that could have easily been taken. The seven month delay in bringing this motion is excessive in the circumstances.

[16] In my view, the plaintiffs have not satisfied this element of the *Reid* test.

Litigation Delay

[17] I am also of the view that the plaintiffs have failed to provide a satisfactory explanation for the delay encountered with this action from the service of the statement of claim to the receipt of the notice that the action would be dismissed. In fact, it appears that the plaintiffs did nothing to advance the claim during this time period other than respond when prompted by the court. They could have noted the defendant in default or followed up with the defendant's insurer. Instead, nothing was done.

[18] For these reasons, I am not satisfied that the plaintiffs have met this element of the *Reid* test.

Inadvertence

[19] In my view, the plaintiffs have met this aspect of the *Reid* test. Upon receipt of the pending dismissal notice, the plaintiffs' lawyer immediately wrote to the defendant's insurer requesting a defence. Whether the letter was actually received by the defendant's insurer is not material. What is important is that the plaintiffs' lawyer thought the letter had been sent and the letter reveals an obvious intention to continue with the claim. The failure of the plaintiffs' lawyer to follow up with the defendant's insurer can only be explained by inadvertence. Nothing in the evidence would suggest a deliberate intention to abandon the claim.

[20] In my view, the plaintiffs have satisfied this element of the *Reid* test.

Prejudice

[21] I am also satisfied that the plaintiffs have met the onus placed upon them to rebut the presumption of prejudice. Where a limitation period has passed, as it has here, a presumption of prejudice arises and the onus rests with the plaintiff to rebut that presumption. The strength of this presumptive prejudice increases with the passage of time. See *Wellwood* at paragraph 60.

[22] A plaintiff can overcome the presumption of prejudice by leading evidence that all relevant documents have been preserved, that key witnesses are available or that certain aspects of the claim are not in issue. See *Wellwood* at paragraph 62. I have concluded that the plaintiffs have done so. It appears that all important medical evidence is available. This was a rear-end collision. It would not appear that liability is in issue. The defendant's insurer was provided with early notice of the accident (although it appears to have taken no steps to investigate further). The relevant period of delay is only three years from the date of the accident.

[23] The defendant has not provided any specific evidence of actual prejudice. I take the same view as I did with the plaintiffs' lawyer's evidence regarding his personal and medical issues. In my view, the defendant's general statements about prejudice are insufficient in the circumstances to establish actual prejudice.

[24] In my view, this element of the *Reid* test has been met.

Conclusion

[25] When deciding motions of this nature, the court is to adopt a contextual approach in which it weighs all relevant considerations to determine the result that is just in the circumstances. The court must, of course, balance the strong public and private interest in

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promoting the timely resolution of disputes with the entitlement of plaintiffs to have their claims decided on the merits. However, the preference in our system of civil justice is for the determination of disputes on their merits.

[26] The plaintiffs have failed to satisfy two of the four *Reid* factors. However, the litigation delay between October 2010 and May 2011 was relatively brief. Moreover, the plaintiffs have established that their failure to comply with Rule 48.15 was inadvertent and they have also satisfied the key consideration of prejudice.

[27] For these reasons, I have concluded that it is just in the circumstances of this action that the dismissal order of the registrar of May 24, 2011 be set aside. The defendant shall serve a notice of intent to defend or a statement of defence by no later than August 2, 2013. The registrar shall not dismiss this action pursuant to Rule 48.15 before August 29, 2013.

[28] In my view, it was not unreasonable for the defendant to have opposed this motion. The plaintiffs have been granted an indulgence and have not met two of the four important considerations. However, I see no basis for costs on a substantial indemnity scale. I am also of the view that the amount of costs requested by the defendant is excessive in the circumstances. In my view, it is fair and reasonable that the plaintiffs pay the defendant's costs of this motion fixed in the amount of $3,500.00 inclusive of HST and disbursements, payable within 30 days.

Master R.A. Muir

DATE: July 3, 2013

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