CITATION: Hasan v. Go Transit, 2014 ONSC 2654
NEWMARKET COURT FILE NO.: CV-11-106777-00 and CV-11-106778-00
DATE: 20140428

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mahnaz Hasan, Plaintiff

AND:

Go Transit, A Division of Metrolinx, and Greater Toronto Transit Authority, and The City of Toronto, Defendants

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: W.G. Scott, Counsel for the Plaintiff

D.W. Ballard, Counsel for the Defendants, Go Transit, A Division of Metrolinx, and Greater Toronto Transit Authority

HEARD: April 3, 2014

ENDORSEMENT

[1] The plaintiff commenced two actions as a result of slip and fall accidents at two different Go Transit stations. The defendants named were Go Transit, A Division of Metrolinx and Greater Toronto Transit Authority (Metrolinx), and the City of Toronto (Toronto). Both actions were commenced November 2, 2011. Both actions were dismissed by the Registrar, as abandoned on June 26, 2012.

[2] The plaintiff moves to set aside the order dismissing the actions for delay, as well as orders extending time for service of the Statements of Claim, and validating service on the defendants.

[3] The following chronology will provide context:

November 6, 2009	Plaintiff had a slip and fall in a parking lot of the Milliken Go Station. An Occurrence Report was filed.
November 10, 2009	The plaintiff slipped on stairs at the Agincourt Go Station. No Occurrence Report was filed.
November 25, 2009	The plaintiff retained counsel, who

	conducted preliminary correspondence requesting medical notes and records.
November 2, 2011	The plaintiff commenced two separate actions by way of Statements of Claim, one for each of the two occurrences, both involving the same defendants.
June 26, 2012	The Registrar issued orders dismissing both actions as abandoned, noting that more than 180 days had passed since the originating process was issued and no defences had been filed.
July 5, 2013	The plaintiff served the defendant, Toronto with both claims.
July 8, 2013	The plaintiff served Metrolinx with both claims.
August 13, 2013	Counsel for the defendant, Metrolinx, served a Notice of Intent to Defend both actions.
August 19, 2013	Plaintiff's counsel was notified by counsel for the defence that the Notice of Intent to Defend the actions could not be filed based on the Registrar's orders dismissing the actions, dated June 26, 2012.
September 6, 2013	Plaintiff's counsel notified defence counsel that he planned to move to set aside the orders dismissing the actions.
September 18, 2013	The defendant, City of Toronto, served a Statement of Defence and Cross-Claim on counsel for the plaintiff.
October 31, 2013	Plaintiff's counsel contacted the Trial Coordinator to request the scheduling of a motion with respect to both matters, and advised the defendants' lawyers of his intention on November 1, 2013.

[4] The plaintiff's lawyer retained counsel with respect to these motions. The defendant, the City of Toronto, took no position with respect to this matter. The defendant, Metrolinx, opposed the relief sought by the plaintiff.

[5] There is no issue that the Statements of Claim were issued within the two-year limitation period. However, they were not served on the defendants in a timely manner and as a consequence, the Registrar's order dismissing both actions was issued.

[6] The affidavit of the plaintiff's lawyer provides an explanation for non-service of both claims. The affidavit deposes that the lawyer instructed his law clerk to arrange for service after the claims were issued on November 2, 2011. As the affidavit sets out in paras. 21-24:

> 21. On April 24, 2012, the clerk who administers this system sent an email to my law clerk asking whether the 2 Statements of Claim had been served.
>
> 22. On Monday, May 7, 2012, my law clerk replied that "Both served and pls rediarize".
>
> 23. In fact, neither Statement of Claim had been served and I confirmed this by emails to our process server on June 19 and 20, 2013. Attached as Exhibit "H" is a copy of this email thread.
>
> 24. From my investigation and review of other files, I have learned that my former law clerk routinely failed to carry out her assigned tasks and falsified records or destroyed records and documents to conceal her failure to do the required work on the files. In this case, my former law clerk failed to send the Statements of Claim to the process server for service and falsely told our limitations clerk that the Statements of Claim had been served. I never saw Status Notices or Dismissal Orders from the Court and I believe that if these notices came to our office, my former law clerk destroyed them so that I would not know that the Statements of Claim had not been served.

[7] In June of 2013, approximately one year after the order dismissing the action as abandoned had been issued by the Registrar, the plaintiff's lawyer became aware that the Statements of Claim had not been served. Both Statements of Claim were then served on both defendants. The defendant, Toronto, served a Statement of Defence. The defendant, Metrolinx, issued and served Notices of Intent to Defend, but was unable to file them in the face of the Registrar's dismissal orders.

[8] When the plaintiff's lawyer was made aware of this, he responded by letter dated September 6, 2013, stating:

> Further to your letter dated August 19, 2013, please be advised that this was my first notice that the claims were dismissed administratively, and I plan to move to set aside said orders. Please advise if you will consent to same, so I can bring my motion over the counter.

No consent was forthcoming, so the plaintiff's lawyer gave written notice on November 1, 2013, that motions would be brought restoring these actions.

[9] The defendant, Metrolinx, opposes the relief sought. It acknowledges that it received an incident report based on the November 6, 2009 slip and fall. In addition, it has its safety and security daily checklist, daily maintenance work records, and diary entries for the dates and Go Stations in question.

[10] Metrolinx points out that the plaintiff has not pointed to any steps taken to advance the litigation between the date of the issuing of the claims on November 2, 2011, and its instructions to the process server in June of 2013, when the plaintiff's lawyer became aware that the claims had not been served. The defence also points out the plaintiff's failure to request Statements of Defence from the defendants in a prompt manner after the original instructions for service.

[11] Metrolinx points out that there is a presumption of prejudice in a situation such as this. In addition, based on the failure of prompt service, they were unable to retain an adjuster earlier in these proceedings to take photographs of the scenes or interview relevant personnel.

Analysis

[12] Under Rule 48.15(1), the Registrar can dismiss an action as abandoned if 180 days have passed since the claim was issued and no defence or Notice of Intent has been filed. However, such an order can be set aside under Rule 37.14.

[13] Rule 37.14 provides as follows:

> 37.14(1) *Motion to set aside or vary* – A party or other person who,
>
> (a) is affected by an order obtained on motion without notice;
> (b) fails to appear on a motion through accident, mistake or insufficient notice; or
> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. O. Reg. 132/04, s. 9.
>
> (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[14] Both counsel provided a number of Court of Appeal and other decisions where courts have considered the various principles at play for motions such as this. In *Habib v. Mucaj*, [2012] O.J. No. 5946, the Ontario Court of Appeal provided the following overview of these principles at paras. 5 to 7:

> There are four well established factors to consider when deciding to set aside an order to dismiss an action: (i) *explanation of the litigation delay* – a deliberate decision not to advance the litigation will usually be fatal; (ii) *inadvertence in missing the deadline* – the intention always was to set the action down within the time limit; (iii) *the motion is brought promptly* – as soon as possible after the order came to the party's attention; and (iv) *no prejudice to the defendant* – the prejudice must be significant and arise out of the delay: *Reid v. Dow Corning Corp.* (2011), 11 C.P.C. (5th) 80 (Ont. Div. Crt.).
>
> No one factor is necessarily decisive of the issue. Rather, a "contextual" approach is required where the court weighs all relevant considerations to determine the result that is just. Here, the Master specifically referenced the proper test and engaged in the weighing exercise. He found that, after the weighing exercise, the just result was to set aside the dismissal order. The Master's order was discretionary and was made as part of his duty to manage the trial list. The decision, therefore, attracts significant deference from a reviewing court: *Findlay v. Paassen,* 2010 ONCA 204.
>
> Furthermore, 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. However, where the lawyer's conduct is not inadvertent but deliberate, this may be different: *Marché d'Alimentation Denis Thériault Ltée. V. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 (O.C.A.), at para. 28. Here, the plaintiff lawyers' conduct was found by the Master not to be deliberate. Simply because the appeal judge's view is that the conduct was "negligent" or "bordering on negligent", does not mean the Master was not entitled to find the conduct not to be deliberate or not intentional.

The Principles Applied

[15] The *Reid* factors provide a useful approach to analyzing these issues.

Explanation of the Litigation Delay

[16] The evidence of the plaintiff's lawyer is that the delay was caused by misleading information from his former law clerk that this matter had been served, and further an intentional destruction of the Notice of Dismissal by the law clerk, without bringing it to the lawyer's attention. This is not a case where the lawyer abandoned the plaintiff's file. Although the lawyer could have done more to advance the litigation, he moved promptly to serve the Statements of Claim when non-service came to his attention.

Inadvertence in Missing the Deadline

[17] In this case, because of the lawyer was misled about prompt service of the Statement of Claim and did not receive the status notice, I am satisfied that there was no intentional inadvertence to the deadlines.

[18] I am satisfied that the lawyer acted promptly to bring the motion. He requested consent to an order setting aside the dismissal when the problem came to his attention. When no consent was forthcoming, he gave notice of intention to bring this motion.

No Prejudice to the Defendant

[19] Although there is an assumed prejudice because of this delay, I am not satisfied that there is any actual prejudice to the defendant. The plaintiff's medical records and hospital reports are still available. The plaintiff did give notice with respect to the first accident. There is no evidence that the defendant conducted any investigation in a timely fashion as a result of that report. It is not disputed that the plaintiff did not give notice with respect to the second accident. However, Metrolinx has all of its safety, maintenance and related records for the dates and locations in question. I am not satisfied that there is any actual prejudice to the defendants.

[20] Many of the decisions referred to by counsel focus on the tension that exists between the right of a litigant to have an action tried on the merits as contrasted with the right of a defendant to have finality to these proceedings. In this case the plaintiff's lawyer did not abandon the file. Although his procedures and checklists may not have been exemplary, the clear evidence is that his former clerk actively misled him with respect to the status of this matter. In my view, that malfeasance should not be vested upon the plaintiff. Further, Metrolinx has not demonstrated actual prejudice as a result of this delay. Weighing these factors leads to a conclusion that the Registrar's orders should be set aside.

Conclusion

[21] The plaintiff's motions to set aside the Registrar's orders dismissing the actions and for extending the time for service of the Statements of Claim and validating the service on the defendants are granted.

Costs

[22] The plaintiff acknowledged that if she was successful, she would not be seeking costs and would not oppose costs sought by the defendant, Metrolinx in the amount of $4,977.42. It is therefore ordered that costs are payable by the plaintiff to the defendant, Metrolinx in the amount of $4,977.42 all inclusive, forthwith.

MULLIGAN J.

Date: April 28, 2014