

Endorsement

Hejazian v. Emery Adult Learning Centre et al.: CV-12-455782

Motion Heard: November 13/14

In attendance: J. Van Allen, counsel to the lawyers for the plaintiff (416-869-0271, f.)

K. Murphy, for the defendants (416-867-1023, f.)

The plaintiff allegedly fell while clearing snow off her vehicle in a parking lot at the Emery Adult Learning Centre, in December of 2010.

A statement of claim was issued herein on June 8/12 and was served only a few days later. In August 2012, the defendants notified plaintiff's counsel that Adonis Enterprise Inc. ("Adonis") had been providing winter maintenance to the Emery Adult Learning Centre, at the relevant time, such that it would be appropriate that the plaintiff add Adonis as a party defendant.

On August 20/12, counsel for the plaintiff indicated that the claim would be amended so as to add Adonis. A waiver of defence was given to the defendants, pending the plaintiff's amendment of her claim.

On October 31/12 and November 16/12, counsel for the defendants wrote to counsel for the plaintiff, requesting a copy of the amended claim. To these letters, counsel for the plaintiff wrote in reply that she was in the process of obtaining a motion date from the court and would advise counsel for the defendants once the date was secured.

No motion date was ever requested; and no motion to amend the claim was ever brought.

On December 14/12, counsel for the defendants received a copy of a notice indicating that the action would be dismissed as abandoned. The date of the Notice was December 6/12. Not having heard anything from counsel for the plaintiff by February/13, counsel for the defendants again followed up. She inquired as to whether the intended motion to add Adonis had been scheduled.

On February 21/13, counsel for the defendants received a copy of a January 31/13 Order dismissing the action as abandoned and, just a few days later, wrote to counsel for the plaintiff to

confirm receipt of the Order and to inquire as to the plaintiff's intentions. With no response forthcoming, counsel for the defendants followed up again in April 2013.

By January 22/14, counsel for the defendants had received *no* response from counsel for the plaintiff and no motion of any kind (not to add Adonis as a party or to set aside the dismissal Order) had been brought or even scheduled. That being so, she closed her file—believing the action to be at an end.

In all and since serving the statement of claim in June of 2012, the plaintiff and her counsel took no steps whatsoever to advance the plaintiff's claims (before this action was dismissed). Then too, despite urging from the defendants, no steps were taken by either the plaintiff or her counsel to add Adonis as a party defendant.

The plaintiff admits that she did not follow-up with her lawyer on a regular basis. But, she also gives no indication of what contact she did have with her lawyer and when, and what she was or wasn't told in respect of the progress of this action (see: paragraph 4 of her affidavit sworn May 14/14).

And while the plaintiff's lawyer says that "it has always been [her]...intention to proceed with this action...", she fails to explain her inaction including in respect of securing documents. The documents in her file, as set out in her affidavit, largely derive from a 2009 slip and fall in respect of which she represented the plaintiff. Documentary requests, in this action, were not made until April 2014.

The plaintiff's lawyer indicates that she did not receive a copy of the Order dismissing the action as abandoned (or correspondence from the defendants' lawyer, when sent) and, if she did, it was "misfiled and mislaid" by her office staff. What office staff? How does she know? But, even if this is true, she does not explain why she did not diarize the timelines imposed by the *Rules* or follow-up with/supervise staff. Indeed, no explanation has been proffered by plaintiff's counsel for the failure to personally take steps to advance the litigation save that she was carrying a heavy case load. Why did she not delegate tasks to a student or associate (as she did in February/14, see: Exhibit "W" to Ms. Hajje's May 30/14 affidavit) and why did she not supervise those staff persons to whom she says she did delegate tasks? Where are her memoranda of instruction to staff?

And while she ascribes fault to employees of the firm, counsel for the plaintiff does not explain how and why she knows that the fault is attributable to them or provide any independent evidence to substantiate that the failings herein are theirs. The first indication by counsel that a "...law clerk...had been hiding important letters..." was in this motion record. Why did plaintiff's counsel not alert the defendants' counsel to her difficulties with staff in communicating with her before the action was dismissed? How does plaintiff's counsel know that letters had been *hidden* from her? Counsel for the defendants says, and I agree, that the plaintiff's lawyer's statements about what staff did or didn't do are bald and self-serving.

Even if I accept that the plaintiff's lawyer's staff did not do what they were supposed to do, why did the plaintiff's lawyer fail to follow up to ensure that her instructions were being given effect (see: paragraphs 8 and 11 of Ms. Hajje's October 23/14 further supplementary affidavit)? In my view, this is not a matter of inadvertence. This is a matter of lack of care or of preferring other work over work on the plaintiff's file. Indeed, Ms. Hajje references that fact that some of her files required, "on multiple occasions, urgent attention" (see: paragraph 4 of Ms. Hajje's October 23/14 further supplementary affidavit). Why not this file?

Was this motion brought promptly? On February 8/14, counsel for the plaintiff acknowledged for the first time knowing about the dismissal Order. She moved sufficiently promptly from that time onwards in obtaining a motion date. The motion was initially scheduled to be heard in June/14, with the motion date adjourned by plaintiff's counsel to November 13/14.

The most important consideration here at play, in my determination of whether to reinstate the action, is that of prejudice. The defendants themselves failed to have Adonis added to the proceedings because they were assured by the plaintiff that she would attend to doing so. She did not do so. She did commence a further action as against Adonis more than three years after the date of her injury (which action may be statute-barred in any event) and has provided no evidence, in any event, to prove that the claim was served. Indeed, the whereabouts of Adonis are, at present, unknown.

If the defendants were to have themselves taken steps to bring Adonis into the proceedings, they were to have done so by June 12/14. As at then, I accept that they did not know that they needed

to do so (or how, indeed, they might do so). And, even if the whereabouts of Adonis were known, as at now, any claims that the defendants might have vis-à-vis Adonis would be statute-barred. To reinstate the action without the defendants having the concomitant right to look to Adonis to assume or share the burdens of the plaintiff's claims would be prejudicial to the defendants.

Relying on *Chiarelli et al. v. Wiens*, 2000 CanLII 3904 (C.A.), at para. 15, Ms. Van Allen argues that "...the [defendants] cannot create prejudice by [their] failure to do something that [they] reasonably could have or ought to have done". In light of the assurances given by counsel for the plaintiff that she would be amending the claim to add Adonis, the failure on her part to respond to multiple letters from counsel for the defendants or, indeed, to alert counsel as to any difficulties she was experiencing in advancing the plaintiff's claims or, even, as to the plaintiff's continued intention to advance her claims, I do not think it is reasonable to suggest that bringing claim against Adonis was something the defendants ought to have done at any time before this action was dismissed or, indeed, once this motion was brought¹. The defendants believed, reasonably, that the plaintiff was attending to bringing Adonis into the fold.

Then too, and in any event, though the plaintiff points to documents in her possession and documents requested, there is no certainty that, at this stage, all relevant documents can be obtained. I note that some of the documentary requests are recent (April/14); and, to date, there has been no production of documents and no service of a sworn affidavit of documents by the plaintiff.

In considering the history of this action, as set out above, I have had regard to the authorities cited by counsel including, *inter alia*, *Reid v. Dow Corning Corp.* (2011), 11 C.P.C. (5th) 80 (Div. Ct.) and *Habib v. Mucaj*, [2012] O.J. No. 5946 (C.A.). I have looked at the *Reid* factors as they apply to this case and have considered them in context. I have also had regard to the conduct of the lawyer for the plaintiff and have considered whether it has been deliberate or inadvertent.

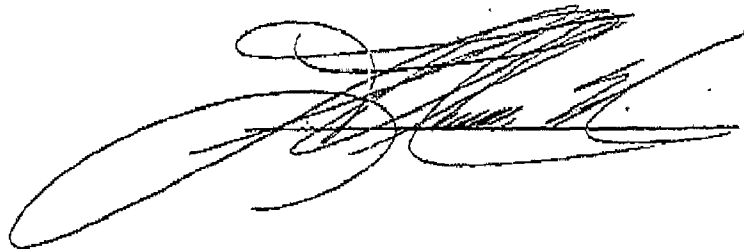
In all, I have concluded that the plaintiff's motion must fail. With there being an inadequate (indeed no) explanation for the delay, with the plaintiff's evidence as to follow up with her

¹ I note, parenthetically, that the motion was brought without notice to Adonis.

counsel being weak, with there being little evidence as to inadvertence (and the evidence as to the alleged inadequacies of office staff being bald), with the evidence before me suggesting a decision to fail to advance the plaintiff's claims and with there being evidence as to real and substantial prejudice (as it relates to Adonis), the plaintiff has not met her onus on this motion. The context within which the motion is brought (i.e. the procedural history of the action) is one of lack of care, unexplained delay, only occasional follow-up on the part of a plaintiff who has been through litigation at least once before (and, so, would have at least a rudimentary knowledge of litigation sufficient to spur her to follow up more assiduously), prejudice which has not been rebutted as it relates to Adonis and, generally, bald and unsubstantiated evidence ascribing blame to others.

The plaintiff's motion is thus denied. Failing agreement as to the costs of this motion, I may be spoken to.

January 12/15

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.