COURT FILE NO.: 03-CV-258308CM
DATE: 20070320

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CYNTHIA HUTCHINSON and LLOYDEL HUTCHINSON	)	*Michael K. Housley*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
SOPHIE HORISIK, 1174235 ONTARIO INC. o/a Y2K BUDAPEST TRAVEL	)	*Jillian Van Allen*, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** March 19, 2007

NEWBOULD J.

REASONS FOR DECISION

[1] This is a motion by the plaintiffs to set aside an order of the registrar under rule 77.08 dismissing the action as abandoned. The statement of claim was issued on November 6, 2003. The action was dismissed by the registrar on May 17, 2004.

[2] The affidavit of Cynthia Hutchinson, on which she was not cross-examined, stated that she was injured in a motor vehicle accident on January 27, 2002 and that she suffered serious and permanent injuries. The statement of claim states that while she was in the westbound lane of Bloor Street West, her vehicle was struck from behind by the defendant Horisik. On March 6, 2002 the defendant's insurer wrote to Mrs. Hutchinson with a "right to sue" pamphlet and

advised that any lawsuit against the insured had to be brought within two years of the accident or the claim would expire on January 27 2004. Mrs. Hutchinson retained a paralegal to assist her with claims. The paralegal assisted her with her accident benefits claim and also prepared a statement of claim for her and her husband that was issued on November 6, 2003. In the statement of claim general damages of $1 million and special damages of $150,000 were claimed.

[3] Mrs. Hutchinson further states that she was referred to a lawyer named Leslie Dorrett by the paralegal and she met with Ms. Dorrett on April 27, 2004 to retain her. It was the paralegal who served the statement of claim on April 30, 2004. Mrs. Hutchinson says that she did not have much further contact with Ms. Dorrett until July 2005 when she contacted her to ask her where matters stood and when she could expect the discovery process to take place. At that time she was surprised to be informed that there was a procedural impairment to the case going forward, namely, that an affidavit of service from the paralegal had not been provided and that until it was provided no further steps could be taken. Ms. Dorrett told her that she was not acting for her, although she did not tell Ms. Hutchison to seek new counsel or to transfer her file. Nor was she told that her case had been dismissed by the registrar or that she required a motion to reinstate it. Presumably Ms. Dorrett did not know that.

[4] Mrs. Hutchinson then wrote a letter to the Law Society of Upper Canada complaining of the conduct of Ms. Dorrett. The Law Society has investigated her complaint, which is still continuing, but did not advise her to seek a new lawyer until September, 2006. She only learned where matters stood in October 2006 when she sought separate legal advice and retained Mr. Housley on October 18, 2006. She stated:

> "If I had been aware that I was required to seek specific relief to reinstate the case, I would have done so forthwith, as I am doing at this time."

[5] One other step that Mrs. Hutchinson took was to write to the defendants' insurer on September 29, 2005. In the letter she said that she was writing to the insurer because she had recently learned that Ms. Dorrett had indicated that she was not acting for her any further. She asked the insurer to contact her by return post and provide a copy of all information that Ms.

Dorrett had provided to the insurer and copies of all correspondence between Ms. Dorrett and the insurer. She said she would like to have the matter resolved and asked if the insurer was in a position to resolve the claim directly. She said she had various medical reports and was aware from a review by a lawyer that her case was worth $150,000. She asked if the insurer was interested in meeting with her and her husband at the November Insurance Bureau of Canada settlement conference held each year in November in Toronto.

[6] The insurer sent no reply to this letter to Ms. Hutchison.

Applicable Test

[7] Ms. Van Allen for the insurer submits that the proper test to be applied is as set out in the following paragraph of *Hudon v. Colliers Macaulay Nicolls Inc.*, [2001] O.J. No. 1588 (Ont. Div. Ct.):

> Because the effect of the registrar's order is to dismiss the action as abandoned – that is, for delay – and because the dismissal does not constitute a dismissal on the merits, the Master of Judge hearing a motion to set aside such an order should be governed by the established common law principles that apply to dismissals for want of prosecution or delay. The court should exercise its powers to dismiss (or to permit a dismissal to stand) only where the default has been intentional and "contumelious", or where there has been an inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible, or where there would be serious prejudice to the defendant if the action were not dismissed: see, *Birkett v. James,* [1978] A.C. 297 (H.L.), [1977] 2 All E.R. 801.

[8] This test was adopted by Master Dash in *Kassam v. Sitzer,* [2004] O.J. No. 3431, and he made some useful comments as to how he would apply that test at paragraphs 50 to 54 of his decision. I have found his comments of assistance. I will assume the *Hudon* test is the applicable test on this motion.

[9] Has the default been intentional? In my view, on the evidence, it has not. Mrs. Hutchinson stated that had she been aware that she was required to seek specific relief to reinstate the case, she would have done so forthwith. There is no evidence on the record that she sat back after learning that the action had been dismissed and deliberately took no steps.

[10] Has the default been "contumelious", which is the word used in several decisions, including *Hudon*? I doubt that that is the right word. "Contumelious" is defined in the Oxford dictionary as "insolent or insulting language or treatment". I suspect that the proper word in these circumstances should be "contumacious", which is defined in the Oxford dictionary as "stubbornly or willfully disobedient to authority". The actions of the plaintiff in this case cannot be so described.

[11] Has there been an inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible? I do not think so. I say that for the following reasons:

a) There has been no delay from the time when the plaintiff learned that the action had been dismissed.

b) It was argued that there was unreasonable delay from the time when Mrs. Hutchinson first met with Ms. Dorrett on April 27, 2004 until her contact with her in July 2005 when she asked where matters stood and when the discovery process would take place. It must be remembered that at this stage there was no knowledge that the action had been dismissed and, as is quite often in litigation, a party waits to hear from their solicitor as to what should be done. I cannot be critical of Mrs. Hutchinson.

c) Perhaps one can be critical of Mrs. Hutchinson for first retaining a paralegal rather than a lawyer. To some extent this is hindsight. The paralegal made a statutory accident benefits claim on behalf of Mrs. Hutchison and made sure that the statement of claim was issued well within the prescribed limitation period. She also put Mrs. Hutchinson in touch with a lawyer. Unfortunately, the paralegal did not take steps soon enough to see that the statement of claim was served. As it turned out, the registrar dismissed the case 17 days after the statement of claim was served, just 3 days before a statement of defence was required to be delivered.

d) This is not a case, such as the kind of case discussed by Master Dash in paragraph 53 of *Kassam v. Sitzer*, in which notice of the claim was not given to the defendant until after a limitation period had passed. In this case, the insurer for the defendants was aware shortly after the accident of the occurrence, as evident from the letter of March 6, 2002 sent by the insurer to Mrs. Hutchinson. The statement of claim was issued within the limitation period and served on April 30, 2004. The claim for general and special damages totaling $1.15 million would certainly have put the insurer on notice that the claim was substantial.

e) There were a number of cases in the Ontario Court of Appeal in the 1960's and 1970's that held there to be a presumption of prejudice in delay cases if a limitation period had expired during the period of delay. In *Clairmonte v. Canadian Imperial Bank of Commerce,* [1970] 3 O.R. 97, Jessup J.A. stated:

> " The force of the presumption...will depend on the time which has passed after the expiration of a limitation period as well as on the nature of the action."

f) It must be remembered that these cases were during a time when most limitation periods were six years, so that the effect of time passing after a limitation period had expired was more pronounced than in this day of two year limitation periods. As well, a concern for memory loss, which was behind many of those cases, is not likely to be a factor in this case as the collision was a rear end collision and liability is unlikely to be an issue. The force of the presumption in my view is not very high in this case, particularly with all of the knowledge that the insurer had about the case before and not long after the limitation period expired.

g) It is argued that the defendants have lost the opportunity for early surveillance of Mrs. Hutchinson. I cannot accept that argument. There was nothing to stop them from surveilling her from the moment the claim was served in April 2004. Mr. Brown, the senior partner of the firm of solicitors acting for the defendants, simply states in his affidavit that the defendants have lost the opportunity for early surveillance. This is not

an affidavit of the insurer, and while it can be inferred from the affidavit that there was no early surveillance, there is no explanation as to why it could not have been carried out earlier.

h) The insurer was sent a copy of the collision report on December 4, 2002. The report stated that Mrs. Hutchinson was hit from behind by Sophie Horisik, who is now a defendant. The insurer had every opportunity from that time to investigate whether in fact the accident was a rear end collision and to have its adjuster obtain any necessary witness statements. If it did not take such steps at that time, or at a later time when the statement of claim was served, that is not the fault of the plaintiff. There is no affidavit evidence that witness statements were not obtained by an adjuster. The affidavit Mr. Brown appears to deal only with issues relating to damages, which is not surprising as it would appear likely that liability is not an issue.

i) Mr. Brown asserts in his affidavit a concern that documents and information the defendants may require to substantiate their defence is, with the passage of time, now dated and/or unavailable. There is no evidence that such documents in fact are unavailable. In any event, if Mrs. Hutchinson is unable to substantiate her claim for lost income because of the unavailability of her past employer's records or a lack of her income tax returns, that is going to be a problem for Mrs. Hutchinson who has the burden of proof.

j) Mr. Brown asserts in his affidavit that the plaintiff has not provided any medical records. There is no basis to conclude that records of Mrs. Hutchinson's treating physicians would not be available. So far as expert reports are concerned, Mrs. Hutchinson stated in her letter of September 29, 2005 to the insurer that she had medical reports. The insurer did not ask for them. There is no basis to conclude that these reports are no longer available.

k) The defendants did not file a statement of defence. One can perhaps assume that it learned that the action been dismissed and thus there was no need to file a defence. However when the letter of September 29, 2005 was received, one would have expected the insurer to respond and, if nothing else, advise Mrs. Hutchinson that the action had been dismissed. So far as the insurer's position of possible prejudice on this motion is concerned, it seems to me that it ought to have realized that Mrs. Hutchinson, without a lawyer at the time as she told them, was intent on proceeding with her claim and obviously unaware of her procedural difficulty at the time. Even if the insurer did not think it necessary to respond to Mrs. Hutchison, it could have protected itself and engaged in surveillance activity had it wished to do so.

l) In my view, the insurer ought to have responded to the letter of September 29, 2005, rather than sitting in the weeds, and advised Mrs. Hutchinson that the action had been dismissed as abandoned. Had it done so, this matter would have been brought on much earlier. The insurer is as much responsible for any delay in this motion being brought as Mrs. Hutchinson or her advisors.

[12] In summary, in my view, while the way in which the action proceeded was less than desirable, what occurred in this case has been explained. The plaintiffs have not intentionally sat back without regard to their need to have the action prosecuted. There is not, my view, a substantial risk that a fair trial will not be possible or that any serious prejudice to the defendant has been established on any cogent evidence.

[13] The motion setting aside the order of the registrar of May 17, 2004 in which he ordered the action to be dismissed as abandoned is granted. Further, as requested, it is ordered that the statement of claim be amended to correct the spelling of the defendant Sophie Horisik to Sophie Hirosik and that the statement of claim on the defendants on April 30, 2004 is validated. In the circumstances, I do not think that this is a case for costs.

Newbould J.

Released: March 20, 2007

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B E T W E E N:

CYNTHIA HUTCHINSON and LLOYDEL HUTCHINSON

Plaintiffs

- and -

SOPHIE HORISIK, 1174235 ONTARIO INC. o/a Y2K BUDAPEST TRAVEL

Defendants

REASONS FOR DECISION

Newbould J.

Released: March 20, 2007