CITATION: James v. Golden Mile Collision Ltd., Abadjian, 2013 ONSC 6433
COURT FILE NO: CV-07-328088PD3
DATE: 20131029

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MERYL JAMES	)	*William Scott*,
	)	for the Plaintiff
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
GOLDEN MILE COLLISION LTD. AND HAGOP ABADJIAN AKA JACK ABADJIAN	)	*David Conn*,
	)	for the Defendants
	)	
	)	
	)	
Defendants	)	
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	)	
	)	**HEARD**: September 23, 2013

FIRESTONE J.

REASONS FOR DECISION

[1] The plaintiff, Meryl James ("James"), brings this motion for an order to restore this action to the trial list under rules 1.04(1), 2.01(1), and 48.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] On January 21, 2008, at the pre-trial, the action was struck from the trial list. Both counsel for the plaintiff and counsel for the defendant were present. A status notice was never served by the court and the action was not subsequently dismissed by the registrar under rule 48.14(4)(a) of the Rules.

Factual Background and Chronology

[3] This is an action for damages for wrongful dismissal and bad faith. The plaintiff, James, was terminated from his position as an auto body technician by the defendant, Golden Mile Collision Ltd. ("Golden Mile") in July,2006

[4] Counsel for the plaintiff was retained on or about January 1, 2007.

[5] On January 16, 2007, plaintiff's counsel wrote to Golden Mile putting them on notice and confirmed his understanding that ownership of Golden Mile changed hands sometime in early 2006. The identity of the prior owners was not known at that time.

[6] On January 29, 2007, after the plaintiff's counsel spoke with Hagop Abadjian a.k.a. Jack Abadjian ("Abadjian") on behalf of Golden Mile, he wrote defence counsel enclosing a copy of his January 16, 2007 letter to Golden Mile. On January 31, 2007, defence counsel wrote to the plaintiff's counsel acknowledging receipt of the letter and indicated he would discuss it with his client and respond.

[7] On February 6, 2007, plaintiff and defence counsel spoke about the matter. That same day, plaintiff's counsel requested from defence counsel the document Golden Mile would be relying on for its position that it was not obligated to give the plaintiff notice commensurate with his 22 years of experience.

[8] The Statement of Claim was issued on February 20, 2007 against Golden Mile and Abadjian. The Statement of Claim was served on February 27, 2007.

[9] The defendants' Notice of Intent to Defend was delivered on March 2, 2007 and their Statement of Defence was delivered on March 23, 2007.

[10] The plaintiff's Reply was delivered on March 31, 2007.

[11] The plaintiff delivered its sworn Affidavit of Documents on April 30, 2007. The defendants' Affidavit of Documents was received by the plaintiff on May 18, 2007.

[12] The plaintiff served a trial record on July 10, 2007.

[13] On November 7, 2007, defence counsel advised that he had been instructed to issue third party proceedings against the individuals who sold Golden Mile to Abadjian. The third party claim was never commenced. On December 12, 2007, mediation between the parties took place and did not result in settlement.

[14] The pre-trial occurred on January 21, 2008. At the pre-trial, it appears that the involvement of additional parties was discussed. As a result, the pre-trial judge removed the

action from the trial list to allow the plaintiff time to consider adding the prior owners of Golden Mile to the action.

[15] Around July, 2008, a Notice of Action and a Statement of Claim was issued and served against the prior owners of Golden Mile ("the second action"). Plaintiff's counsel subsequently learned that the wrong corporate defendant had been served, and he allegedly took steps to locate the defendants including hiring skip tracers. On cross-examination, he could not recall the particular steps taken.

[16] On July 26, 2010, plaintiff's counsel received a "Notice that Action Will Be Dismissed" notification regarding the second action from the court. The second action was dismissed by the registrar on September 21, 2010.

[17] Plaintiff's counsel indicates that it was his intention to proceed with the second action if the other defendants could be identified and located and if recovery against those defendants was available. He had also intended to have the two actions tried together. As a result, he did not move to have the action at issue restored to the trial list during this time.

[18] Plaintiff's counsel states that between the summer of July 2010 until in or around late 2011, he overlooked this file as it fell outside his diary system. In or around December 2011, he states he undertook a review of all his files because of concerns regarding the new deemed dismissal provisions in the Rules effective January 1, 2012. As a result of that review and recognizing that this file may be affected by the changes to the Rules, he took steps to avoid a deemed dismissal by bringing this motion.

[19] At no time was plaintiff's counsel served with a status notice after the action was struck off the trial list under rule 48.14(2) advising that unless the required steps were taken within 90 days, the action would be dismissed for delay. This action was therefore never dismissed by the registrar under rule 48.14(4)(a).

[20] The defendants point out that from the time of the pre-trial on January 21, 2008 and the dismissal of the second action on September 21, 2010, the plaintiff took no steps to restore this action to the trial list until December 23, 2011 when this motion was served.

Applicable Rules of Civil Procedure

[21] Rule 24.01(1)(e) states as follows:

> (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed
>
> …

> (e) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off.

[22] Rule 48.11 states as follows:

> Where an action is struck off the trial list, it shall not thereafter be placed on any trial list except,
>
> (a) in the case of an action struck off the list by a judge, with leave of a judge; or
>
> (b) in any other case, with leave of the court.

[23] Rules 48.14(2) and (4)(a) states as follows:

> (2) Unless the court orders otherwise, if an action that was placed on a trial list and was subsequently struck off is not restored to a trial list within 180 days after being struck off, the registrar shall serve on the parties a status notice in Form 48C.2 that the action will be dismissed for delay unless, within 90 days after service of the notice, the action is restored to a trial list or terminated, or documents are filed in accordance with subrule (10).
>
> …
>
> (4) The registrar shall dismiss the action for delay, with costs, 90 days after service of the status notice, unless,
>
> (e) the action has been set down for trial or restored to a trial list, as the case may be.

Applicable Legal Principles

[24] The factors to be considered and applied under rule 48.11 are the same factors the court will consider under rule 48.14(13) at a status hearing. In *Nissar v. Toronto Transit Commission*, 2013 ONCA 361, 115 O.R. (3d) 713, at paras. 26, 29, Tulloch J.A. writing for the court states as follows:

> For the reasons I gave in *Faris*, a court should treat as distinct a defendant's motion to dismiss for delay under Rule 24 from those procedures made available to the court under Rule 48. Like a status hearing, the requirement that leave be obtained to restore an action to the trial list under rule 48.11 is simply another weapon in the Rule 48 judicial arsenal "to promote the timely resolution of disputes, to discourage

> delay in civil litigation and to give the courts a significant role in reducing delays": Todd Archibald, Gordon Killeen & James C. Morton, Ontario Superior Court Practice (Markham: LexisNexis Canada, 2011), at p. 1205.
>
> …
>
> However, for the sake of consistency and for the reasons I gave in *Faris*, I would instead adapt those factors informing the rule 48.14(13) test recently confirmed by this court in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67 to determine when an action should be restored to the trial list.

[25] Tulloch J.A. goes on to state the appropriate test for restoring an action to the trial list under rule 48.11, at paras. 30-31:

> In my view, it is preferable to place the onus on a plaintiff to explain the delay and satisfy the court that it would not be unfairly prejudicial for the defendant to have the action restored to the trial list. This court has held that it is the plaintiff's responsibility to move the action forward and prosecute the matter as diligently as possible: see *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 102 O.R. (3d) 555, at para. 48.
>
> Therefore, the applicable test is conjunctive: a plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation *and* that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice.

[26] In *Faris v. Eftimovski*, 2013 ONCA 360, 87 E.T.R. (3d) 204, at para. 24, the court confirmed that when exercising discretion under rules 24.01 or 48.14(13) to dismiss an action for delay, "a court must balance the plaintiff's interest in having a hearing on the merits and the defendant's interest in having the matter resolved in an expedient and time-efficient manner." In my view, the same principles apply to this case by implication.

[27] In determining whether there is an acceptable explanation for the delay in moving to have this action restored to the trial list there are some unique circumstances that must be considered.

[28] From the time this action was commenced right up until the pre-trial, this action proceeded without any delay. At the pre-trial, the matter was struck from the trial list so that additional parties, namely the prior owners of Golden Mile, could be pursued. Both plaintiff and defence counsel were present and were well aware why the action was being removed from the trial list. As a result, the action was not ready for trial. This would understandably slow down the current pace of the litigation.

[29] I also note that the registrar did not serve the parties with a status notice under rule 48.14(2), which the parties were entitled to, advising that the action would be dismissed for delay unless the steps available under the Rule were taken. Such notice would have in all likelihood alerted plaintiff's counsel to take steps to restore the action to the trial list much earlier than he did. This, in my view, is a relevant consideration in the delay analysis.

[30] This case, through inadvertence, fell out of the plaintiff's counsel's diary. After the matter was removed from the trial list, defence counsel never brought a motion under rule 24.01(1) to dismiss this action for delay.

[31] In my view, the plaintiff has provided an acceptable explanation for the delay between the pre-trial and the date this motion was brought, especially in light of the entire history of this case, including the necessity that both actions proceed together and the lack of any delay before the pre-trial. It is open to me to consider the entire history of delay: see *Spendiff v. Schmiedl*, 2013 ONCA 120, at para. 8.

[32] There will be no non-compensable prejudice to the defendants if this matter is restored to the trial list. The defendants were given notice of this claim on January 16, 2007, and they have participated in documentary disclosure, examinations for discovery, mediation, and a pre-trial.

[33] The interests of justice and equity require that this action be restored to the trial list so that the action can be heard on the merits.

Disposition

[34] I therefore order as follows:

1. This action is restored to the trial list.

2. The plaintiff is not entitled to pre-judgment interest from January 21, 2008 to today's date.

[35] If the parties are not able to agree on costs, written submissions with a costs outline of no more than two pages may be filed on or before November 18, 2013.

FIRESTONE, J.

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Plaintiff

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Defendants

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REASONS FOR DECISION

FIRESTONE J.

Released: October 29, 2013