CITATION: Khan and Abbasi v. Hutton, 2015 ONSC 3064
OSHAWA COURT FILE NO.: 71529/11
DATE: 20150513

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
Sajid Khan and Shahina Abbasi	)	Jillian Van Allen, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
Patricia Hutton	)	David Visschedyk, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** April 30, 2015

RULING ON MOTION

GILMORE J.:

Overview

[1] This is a motion brought by the plaintiffs for an order setting aside the order dismissing the action as abandoned, dated October 20, 2011. The plaintiffs also seek an order extending the time for service of the statement of claim *nunc pro tunc* to December 26, 2011.

Background Facts

[2] The motor vehicle accident giving rise to the plaintiffs' claim occurred on February 24, 2009, when the plaintiffs' motor vehicle was struck in the rear by the defendant's motor vehicle. The plaintiff, Sajid Khan, was the driver and the plaintiff, Shahina Abbasi, was the passenger.

[3] The plaintiffs issued a statement of claim on February 25, 2011. On August 25, 2011, the registrar issued a notice that the action would be dismissed as abandoned. In response to receiving the notice, the defendant was personally served with the statement of claim on September 26, 2011. On October 20, 2011, the registrar issued an order dismissing the

action as abandoned. The dismissal order was not brought to the attention of the plaintiffs' then lawyer of record, Sandra Zisckind, at the time it was received.

[4] On January 31, 2012, the defendant's insurer, Royal and Sun Alliance (RSA), wrote to the plaintiffs' firm, Grillo Barristers, to confirm receipt of the statement of claim and affidavit of service and to inform Ms. Zisckind that it was acting under a waiver of defence pending settlement negotiations and requested thirty days' notice if Ms. Zisckind required a defence.

[5] On June 19, 2012, RSA wrote to Grillo Barristers to advise that they would assign the matter to defence counsel to determine the status of the action and enter a defence and counterclaim. Thereafter, RSA assigned the firm of Aronovitch MacAulay Rollo LLP (AMR), to defend the insured. On July 23, 2012, AMR wrote to Grillo Barristers to request the plaintiffs' affidavit of documents, together with Schedule "A" productions.

[6] On October 19, 2012, AMR served a statement of defence and counterclaim on behalf of the defendant; however, the statement of defence could not be filed because of the dismissal. AMR has not indicated when they attempted to file the document and/or when the dismissal order came to its attention.

[7] The plaintiffs' counsel believed that the statement of defence and counterclaim had been filed with the court, overlooking that the action had been dismissed as abandoned by the registrar on October 20, 2011.

[8] Ms. Zisckind left Grillo Barristers in October 2012 and did not bring the dismissal order to Mr. Grillo's attention before leaving his employ. In October 2012, another lawyer in Mr. Grillo's firm, namely Dario Kagn, assumed carriage of the file, but left abruptly in February 2013, without leaving any direction regarding the status of the matter or bringing the dismissal order to Mr. Grillo's attention. There was no lawyer in charge of this file until April 2013, when Francine Rogovein took over the file.

[9] Ms. Rogovein immediately took steps to have the dismissal order set aside and instituted the within motion. The motion record was prepared, but through inadvertence was made returnable in Toronto. As the file is an Oshawa matter it had to be reconstituted and re-served for a motion returnable August 23, 2013 in Oshawa. The August 23, 2013 date was adjourned to October 22, 2013 as the defendant advised of her intention to oppose the plaintiffs' motion. The motion was then further adjourned to March 25, 2014 so it could be heard as a long motion.

[10] On March 25, 2014, the judge hearing the motion adjourned it and suggested the matter be reported to LawPRO. Thereafter, Mr. Grillo reported the matter to LawPRO and retained counsel to assist him with the motion. Counsel for LawPRO arranged for the matter to be put on the list during the trial sittings in November 2014; however, the matter was never reached. A fixed date for a long motion was set for April 30, 2015 and the matter proceeded on that date.

[11] Throughout, various correspondence took place between and on behalf of the parties.

[12] On behalf of the plaintiffs:

(a) On May 21, 2010: On behalf of Ms. Abbasi, a request to Toronto Healthcare Centre Limited for clinical notes and records for three years prior to February 24, 2009;

(b) On December 14, 2011: On behalf of Ms. Abbasi, requests were made for income tax returns from Canada Revenue Agency (CRA) for 2006 to present; her employment file from Popeyes Chicken; her complete accident benefits file and a breakdown of monies paid from AAA Michigan; a decoded OHIP summary for seven years prior from the Ministry of Health; and, a follow-up to the Toronto Healthcare Centre Limited's letter of May 21, 2010;

(c) On December 15, 2011: On behalf of Mr. Khan, the following documentation was requested: the complete accident file from AAA Michigan; clinical notes and records from Toronto Healthcare; clinical notes and records for three years prior from Dr. Jing; academic records from Wayne State University; employment file from Primary Response Inc.; income tax returns from CRA from 2006 to date; decoded OHIP summary for seven years prior from the Ministry of Health; and, property damage documentation from AAA Michigan;

(d) On January 27, 2012: On behalf of Mr. Khan, follow-up letters were sent to Dr. Jing; AAA Michigan; Toronto Healthcare; CRA; and, the Ministry of Health;

(e) On March 12, 2012: On behalf of Mr. Khan, follow-up letters sent to AAA Michigan; Dr. Jing; Ministry of Health; and, CRA;

(f) On March 9, 2012: On behalf of Ms. Abbasi, follow-up letters sent to Popeye Chicken; AAA Michigan; Ministry of Health; and, CRA;

(g) On August 9, 2012: On behalf of Ms. Abbasi, Grillo Barristers wrote to the defendant's counsel to enclose clinical notes and records of Dr. Marrat and CRA income tax information from 2009 to 2010;

(h) On August 9, 2012: On behalf of Ms. Abbasi, Grillo Barristers sent follow-up letters to AAA Michigan; Ministry of Health; and, Popeyes Chicken;

(i) On August 9, 2012: On behalf of Mr. Khan, Grillo Barristers wrote to AMR enclosing clinical notes and records of Dr. Jing; OHIP summary from 2004 to 2011; the employment file from Primary Response Inc.; CRA income tax information from 2006 to 2010; and, school records from Wayne State University;

(j) On September 10, 2012: On behalf of Mr. Khan, Grillo Barristers requested the clinical notes and records of Dr. Mahmuda Khan; and, clinical notes and records of Dr. George Zahrebelny;

(k) On October 2012: Grillo Barristers provided Mr. Khan and AAA Michigan with a copy of the statement of defence and counterclaim;

(l) On February 26, 2013: On behalf of Mr. Khan, Grillo Barristers requested updated clinical notes and records from Dr. Jing; clinical notes and records from February 24, 2009 from Dr. Zia; and, a follow-up letter was sent to Dr. Zahrebelny requesting clinical notes and records;

(m) On February 26, 2013: On behalf of Ms. Abbasi, Grillo Barristers requested the clinical notes and records of Om Sai Physiotherapy Clinic Inc.; and, clinical notes and records of Toronto Healthcare Clinic;

(n) On March 20, 2013: On behalf of Mr. Khan, Grillo Barristers wrote to AMR and enclosed the clinical notes and records of Dr. Zahrebelny;

(o) On June 13, 2013: On behalf of Ms. Abbasi, Grillo Barristers wrote to Om Sai Physiotherapy Clinic Inc. requesting a response to their letter of February 26, 2013 for their clinical notes and records.

(p) On March 25, 2015: Grillo Barristers sent AMR records received from Kaiser Permanente, the plaintiffs' U.S. health coverage insurer with respect to clinical notes and records of all trading doctors for the plaintiffs; and,

(q) On April 20, 2015: On behalf of Ms. Abbasi, counsel to the lawyer for the LawPRO claim has sent AMR records received from Toronto Healthcare and a decoded OHIP summary for services rendered between December 2008 and October 2011.

[13] Correspondence sent to the plaintiffs' counsel by RSA and AMR is as follows:

(a) On September 30, 2011: RSA wrote Grillo Barristers to confirm receipt of the statement of claim and request an affidavit of service. Follow-up letters in this regard were sent on October 17 and December 22, 2011;

(b) On June 9, 2012: RSA wrote to Grillo Barristers to advise it would assign the matter to defence counsel;

(c) On July 23, 2012: AMR wrote to Grillo Barristers to request the plaintiffs' affidavit of documents with productions;

(d) On September 5, 2012: AMR wrote to Grillo Barristers to again request the plaintiffs' affidavit of documents and additional clinical notes and records from treatment providers identified in Mr. Khan's OHIP summary;

(e) On September 6, 2012: AMR wrote to Grillo Barristers to request the clinical notes and records of Dr. Zia for Ms. Khan; and,

(f) On January 8, 2013: AMR wrote to Grillo Barristers to request various documentation in support of the plaintiffs' claims.

Issues and the Law

Explanation of the Litigation Delay and Inadvertence of Missing the Deadline

[14] It is well established that in deciding whether or not to set aside a registrar's dismissal order, the four factors in *Reid v. Dow Corning Corp.*,[1] are to be considered by the court. Those well-known factors are as follows:

(a) Explanation of the litigation delay – a deliberate decision not to advance the litigation will usually be fatal;

(b) Inadvertence in missing the deadline;

(c) The motion to set aside is brought promptly or as soon as possible after the order came to the parties attention; and,

(d) There is no prejudice to the defendant – the prejudice must be significant and arise out of the delay.

[15] In *Finlay v. Paassen*[2], the court held that no single factor is necessarily decisive of the issue. A contextual approach is required where the court weighs all relevant considerations to determine a just result.

[16] As well, in *Habib v Mucaj*[3] the court held that 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 so long as the lawyer's conduct is inadvertent and not deliberate."

[17] Finally, it is not necessary that a plaintiff satisfy all four of the *Reid* factors to succeed on a motion to set aside a dismissal order, although prejudice will always be a key factor.

[18] The statement of claim in this matter was served on the defendant on September 26, 2011. On September 30, 2011, the defendant's insurer acknowledged receipt of the claim. On January 31, 2012, RSA confirmed they were acting under a waiver of defence pending settlement negotiations. On June 12, 2012, RSA advised they would be assigning the case to defence counsel and on October 19, 2012, the statement of defence was served.

[19] The plaintiffs have sworn affidavits indicating that it was always their intention to proceed with this litigation. Further, it was clear there was ongoing communication between the plaintiffs' counsel and defendant's counsel as evidenced in the history set out herein. While in the normal course, the defendant would likely have received a copy of the dismissal order personally, there was no evidence that the defendant either received

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[1] (2001), 11C.P.C. (5th) 80 (Ont.Div.Ct.).
[2] 2010 ONCA 204.
[3] [2012] O.J No. 5946 at para. 7.

the notice or ultimately advised her counsel of it. The plaintiffs' counsel, upon receiving the statement of defence, was unaware that it had not been filed with the court because of the dismissal order.

[20] The affidavit of Salvatore Grillo, sworn September 15, 2014, indicates that his firm did not maintain a diary system for the deadline for dismissal of actions as abandoned. He further deposed that the registrar's dismissal order, dated October 20, 2011, was not brought to the attention of the then lawyer of record, Sandra Ziskind, at the time it was received. When Ms. Kagn assumed carriage of the file in October 2012 after Ms. Ziskind left, she did not bring the dismissal order to Mr. Grillo's attention when she, in turn, left the firm in February 2013. It was not until April 2013, when Ms. Franceen Rogovein took over the file, that a lawyer became aware of the dismissal order and immediately took steps to have it set aside.

[21] The defendant complains that there is no satisfactory explanation that the deadline was missed through inadvertence. Mr. Grillo, in his affidavit, does not indicate it was inadvertence, but simply advises that he cannot determine why no steps were taken.

[22] I accept that the first factor under the *Reid* test has been met and a satisfactory explanation given for the litigation delay for the following reasons:

(a) The plaintiffs and their counsel have never abandoned the action and have always indicated an intention to proceed;

(b) Case law distinguishes between inadvertence and intentional conduct. The inadvertence in this case is not having the proper diary system, which it is hoped would have been put into place since this situation came to light. Even if this court found that not having such a system was bordering on negligent, that is not fatal so long as the conduct is not deliberate or intentional, as per the *Giant Tiger* case;

(c) The relevant rule, being 48.14 under the *Rules of Civil Procedure*, has since been amended to extend the time for dismissal for delay from two years to five years after the filing of a defence. This amended rule became effective on January 1, 2015. In *Klaczkowski v. Blackmont Capital Inc.*[4], the court held that the change of rule 48.14 is a relevant factor to consider as part of the contextual analysis, and weighing the benefits of timely justice against the right to be heard. In my view, there is no reason not to consider the amendment to the rule as a relevant factor. Clearly, a two year time frame was insufficient, given the course of most civil litigation cases. This was recognized and the amendment was the result.

(d) It is unknown exactly when the dismissal order came to the attention of the defendant, but regardless, they carried on as if the action remained a live one, continuing to receive correspondence from the plaintiffs and responding and following-up with that correspondence. It was not until this motion was served

[4] 2015 ONSC 1650, at para. 33.

that the defendant took the position that they would not consent to setting aside the dismissal order.

Delay in Bringing the Motion to Set Aside the Dismissal Order

[23] When Ms. Rogovein became aware of the dismissal in April 2013, she immediately instituted a motion to set aside the dismissal order. For some reason, it was originally prepared as a Toronto matter, which resulted in some delay as the matter had to be reconstituted as an Oshawa matter and was made returnable in August 2013. It was adjourned at the defendant's request because she indicated her intention to oppose the motion. As a result, the matter was adjourned to March 25, 2014 for a long motion. The judge, at that time, was not only unable to deal with the matter because of a lengthy list, but advised that LawPRO should become involved. Counsel for the plaintiffs reported the matter, LawPRO assigned counsel and the matter was scheduled to be called during the trial sittings in November 2014. Unfortunately, the matter was not called and the matter was put to a fixed motion date on April 30, 2015.

[24] The defendant takes the position that the delay from October 20, 2011 to August 2013 is a one and a half year delay and that therefore the motion should not be considered to have been brought promptly.

[25] The failure to bring the motion cannot be disconnected from the inadvertence factor, which was brought about by the first two counsel having carriage of the file being unaware of the dismissal order, and counsel for the plaintiffs and the defendant carrying on as if the action were a live one. When the matter came to Ms. Rogovein's attention in April 2013, she acted promptly. The balance of delay was, in my view, systemic. The first adjournment was requested by the defendant. The second delay resulted from the plaintiffs' counsel's decision to involve LawPRO, which was entirely appropriate. The delay in November 2014 was purely systemic with respect to a lack of availability of court time and/or judicial resources.

[26] In the circumstances, I do not find that the lack of promptness in bringing the motion was sufficient that the plaintiffs should be denied their relief.

Prejudice

[27] The most recent Court of Appeal case to deal with this issue is *MDM Plastics Limited v. Vincor International Inc.*[5]. In that case, the Court of Appeal considered a motion before a master who refused to set aside the dismissal order. The matter was appealed to Divisional Court and a single judge of the Divisional Court reversed the master's decision. The Court of Appeal upheld the Divisional Court's decision. In doing so, the court focussed on the fourth *Reid* factor, namely prejudice, and disagreed with the master's interpretation of the Ontario Court of Appeal's decision in *Wellwood v. Ontario*

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[5] 2015 ONCA 28.

Provincial Police[6]. The court held that *Wellwood* does not stand for the general proposition that:

> "...the plaintiff must lead affirmative evidence to rebut a presumption of prejudice that arises from the passage of time in prosecuting an action or from the expiry of a limitation period. Rather, in evaluating the strength of the presumption of prejudice, the master or motion judge must consider all of the circumstances, including the defendant's conduct in the litigation."[7]

[28] Generally, the court held in *MDM Plastics* that a strict requirement that there must be evidence provided by the plaintiff rebutting the prejudice is insufficient contextually, in that it fails to take into account the defendant's conduct. In this case, the plaintiffs submit that liability is not an issue because it was a rear-end accident. In addition, significant documentation has been obtained in relation to both plaintiffs, including clinical notes and records of doctors, OHIP summaries, employment files, income tax returns, school records and U.S. health coverage insurer's files. The plaintiffs submit that they have led affirmative evidence that there would be no prejudice to the defendant if the dismissal order is set aside.

[29] The defendant submits that there are records missing for certain periods and there is a concern that, given the delay, some records simply will not be available. The plaintiffs' response is that the prejudice to the defendant must be significant. Further, if the plaintiffs are unable to prove their case at trial as a result of unavailable records or proof of any ongoing injury, then that is prejudicial to the plaintiffs as opposed to the defendant.

[30] Further, I note that as per *MDM Plastics Limited*, the contextual approach entitles this court to take into account the actions of the defendant. It does not appear that prior to being served with the motion record for relief to set aside the dismissal order the defendant ever took the position that she was refusing to participate in the litigation because of the dismissal order. She would have known that she could not file her statement of defence because of this, but this does not seem to have been adverted to in any of the correspondence. The defendant is not in a position to continue to participate in the litigation and then, a year and a half down the road, claim that she will no longer do so because of the dismissal order and that the defendant is the only one prejudiced as a result.

[31] In the circumstances, I find that while there may be some prejudice to the defendant, it is not significant enough to meet the test set out in the case law.

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[6] 2010 ONCA 386.
[7] *Ibid*, para. 32.

Conclusion

[32] Given all of the above, I grant the relief requested by the plaintiffs and the dismissal order is hereby set aside.

Service of the Statement of Claim

[33] The statement of claim was served on September 26, 2011 and should have been served on August 25, 2011. The plaintiffs seek an order to extend the time for service. The defendant did not strenuously oppose this relief, given the conclusions in *Chiarelli v. Wiens*[8].

[34] Given the *Chiarelli* case and the fact that the delay was not significant, the time for service of the statement of claim is hereby extended and service validated.

Costs

[35] If the parties cannot agree on costs, I will receive written submissions on a seven day turnaround, commencing with the moving party, followed by responding submissions, then reply submissions, if any, commencing fourteen days from the date of release of this endorsement. Costs submissions shall be no more than two pages in length, exclusive of any costs outline or offers to settle. All costs submissions shall be delivered via email through my assistant at jennifer.beattie@ontario.ca. If no submissions are received within thirty-five days of the release date, the issue of costs will be deemed to have been settled as between the parties.

C. Gilmore J.

Justice C.A. Gilmore

Released: May 13, 2015

[8] 46 O.R. (3d) 780.