CITATION: Klaczkowski v. Blackmont Capital Inc., 2015 ONSC 1650
DIVISIONAL COURT FILE NO.: 534/14
DATE: 20150313

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: MAX KLACZKOWSKI AND TIRE SOURCE CORPORATION, Plaintiffs/Appellants

AND:

BLACKMONT CAPITAL INC. AND MACQUARIE PRIVATE WEALTH CLINIC INC., Defendants/Respondents

BEFORE: J. Wilson J.

COUNSEL: *William G. Scott*, for the Plaintiffs/Appellants

Matthew C. Scott, for the Defendants/Respondents

HEARD at Toronto: March 10, 2014

ENDORSEMENT

THE APPEAL

[1] This is an appeal from the 7 October 2014 order of Master Dash, dismissing a motion to set aside the registrar's dismissal of this action for delay.

[2] The Master applied the factors outlined in *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (S.C.) at paragraph 41. He accepted that the matter was not set down for trial as a consequence of the solicitor's inadvertence, and that the solicitor moved promptly to set aside the dismissal order. However, the Master concluded that the delay had not been adequately explained and that reviving the action would cause prejudice to the defendants. Therefore he declined to set aside the registrar's dismissal order.

[3] The plaintiffs argue that there are some factual errors in the Master's findings. They also submit that he failed to consider the *Reid* factors in their proper context, by weighing the need for an efficient justice system against the important right of having cases determined on their merits.

THE STANDARD OF REVIEW

[4] The decision of the Master is discretionary and is entitled to deference. The standard of review for a question of fact, or a question of mixed fact and law, is palpable and overriding error. The standard of review for a question of law is correctness. (*119618 Ontario Inc.v. 6274013 Canada Limited*, 2012 ONCA 544 at paragraph 16; *Cascadia Fine Art Limited Partnership v. Gardiner Roberts LLP*, 2014 ONSC 6602, [2014] O.J. No. 5424 (Div. Ct.) at paragraph 50).

[5] The reviewing court is not to conduct a rehearing of the matter. "An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the master." (*Wellwood v. Ontario (Provincial Police)*, 2010 ONCA 386, [2010] O.J. No. 2225 at paragraph 28)

[6] Failure to take a contextual approach and weigh all the relevant factors has been found to be an error of law with the standard of review of correctness. (*Scaini v. Prochnicki*, 2007 ONCA 63, [2007] O.J. No. 299 at paragraph 26; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, [2007] O.J. No. 3872 at paragraphs 20-21)

APPLICABLE LEGAL PRINCIPLES

[7] In *Reid* at paragraph 41, Master Dash enunciated the four well known factors to be considered when deciding whether a registrar's dismissal order should be set aside. These are: an explanation for the delay in pursuing the litigation; whether a deadline was missed through inadvertence; whether the motion to set aside was brought promptly; and whether reviving the action would prejudice the defendant.

[8] Subsequent case law has confirmed that the *Reid* factors are not to be applied in a mechanical or formalistic fashion. Failure to satisfy any one of the *Reid* factors is not enough to demonstrate that a dismissal order by a registrar is to be upheld. (*Scaini* at paragraphs 23-26)

[9] On motions dealing with the dismissal of an action for delay, the court is required to take a contextual approach, considering all of the circumstances surrounding the conduct of the action and balancing the need for a timely efficient justice system against the importance of hearing cases on their merits. See *Scaini* at paragraphs 23-25; *Giant Tiger*, at paragraphs 20-21; *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28, [2015] O.J. No. 265 at paragraph 12.

[10] In *Habib v. Mucaj*, 2012 ONCA 880, [2012] O.J. No. 5946, the Court of Appeal considered the appropriate approach. The panel's summary of the law (at paragraphs 6-7) is instructive:

> 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. …

> 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…

OVERVIEW

[11] The defendants were investment dealers acting for the plaintiffs from 2005 to 2009. The plaintiffs allege breach of contract, breach of fiduciary duties, negligence, and fraudulent misrepresentations related to alleged losses in the plaintiffs' investment accounts.

[12] Since the action was commenced on December 15, 2010, little progress has been made in the file. At a status hearing on July 11, 2013, the parties entered into a consent timetable that has not been respected. Through inadvertence counsel for the plaintiffs missed the date for setting this matter down for trial, thus triggering the dismissal order by the registrar.

[13] The Master accepted that the plaintiff, Max Klaczkowski, has had a variety of personal problems accounting for the delay between the status hearing in July 2013 and the date of this motion. These include the illness of his son, a serious issue involving his ex-wife who may have been defrauded, involvement in another lawsuit, and health problems of an associate. The delay which drew the Master's criticism occurred between the issuance of the statement of claim and the transfer of the file to new counsel in March 2013.

[14] As the Master observed, the plaintiffs must satisfy the court that the delay has not prejudiced the defendants' ability to present their case at trial. The Master stated that there is no evidence that the documents have been preserved, or that essential witnesses are alive with memory intact.

[15] Respectfully, I am of the view that there are two serious problems in the Master's analysis of the facts. The first is that a good portion of the unexplained delay during the period of concern lies at the feet of the defendants. The second is the Master's finding of prejudice in relation to the preservation of documents.

CALCULATION OF DELAY

[16] The statement of claim was served on December 15, 2010. The statement of defence was not filed until May, 2012.

[17] A recent decision of the Court of Appeal decision in *Kara v. Arnold*, 2014 ONCA 871 confirms that delay requiring an explanation by the plaintiff is considered from the time of filing the defence. Blair, J.A. confirms at para 15:

> The hearing judge considered the inordinate length of the delay, the explanations offered by the appellants for that delay, the contribution of the respondent to the delay, the appellant's delay in obtaining expert reports (and the lack of

> explanation for the delay, and the issue of prejudice. He properly took the date of delivery of the statement of defence as the starting point for the delay that required an explanation. He concluded that the appellants had failed to provide a satisfactory or reasonable explanation for the delay of almost 11 years (from delivery of Dr. Arnold's statement of defence to the date of the hearing.)
>
> [Emphasis added]

[18] Two years and two months elapsed from the date of filing the defence to the date that the matter was to be set down for trial. On its face, this is not inordinate delay. The Master calculated delay totaling three years and nine months.

NO ISSUE OF PRESERVATION OF DOCUMENTS

[19] All of the documents in issue directly relevant to the plaintiffs' claim are available. Counsel fairly conceded that the relevant documents for the plaintiffs' investment accounts for the years in question are in the defendants' possession, have been preserved, and have already been analyzed by the defendants. The defendants are challenging the plaintiffs' assertion of financial losses based upon the defendants' calculations. There can be no sustainable finding of prejudice with respect to the availability or preservation of the documents underpinning the plaintiffs' claim.

[20] The defendants have taken the position that the individual plaintiff should be required to produce all his investment accounts with other firms during the period in question to support the defendants' assertion that the plaintiffs are sophisticated, experienced investors with a history of suing other investment advisors.

[21] These documents have not yet been produced by the plaintiffs. The defendants have not brought a motion to compel production. Counsel for the plaintiffs confirms in her affidavit that the individual plaintiff has taken steps to have his investment accounts with the defendants analyzed, but that he has had difficulty gathering the supplementary documents demanded by the defendants due to his personal problems.

[22] If these ancillary documents requested by the defendants are found to be relevant to this proceeding, and if they are no longer available as a result of the plaintiffs' delay, the defendants are still protected. An adverse inference may be drawn against the plaintiffs if the documents are no longer available as a result of delays caused by the plaintiffs after the date that defence counsel requested their production.

[23] In these circumstances, because the core documents relevant to this proceeding have been preserved and analyzed by the defence, the Master's concern about prejudice arising from documentary production appears to be unfounded.

CONTEXTUAL ANALYSIS

[24] Counsel for the appellant criticizes the Master for failing to conduct a contextual analysis of the *Reid* factors. The Master simply states that "In my view the just result in considering all of the *Reid* factors in context against that, in fairness to all parties, not just the plaintiff, this action should not be allowed to proceed".

[25] The appellant argues that there is no analysis of competing values, of fairness to the plaintiffs in having the case determined on its merits, of the nature of the action, or whether the delay was inordinate in the circumstances of this particular case.

[26] As explained above, I conclude that there are problems with the Master's findings of fact in relation to both delay and prejudice. I also agree with the appellant that the Master did not balance the competing interests as required, although he was clearly aware of the appropriate test.

[27] The recent decision of Master Short, *Elkhouli v. Senathirajah et al.* 2014 ONSC 6140 at para 36 and 37 (October 27, 2014) is helpful in assessing context. He considers the practical reality of these cases: if a meritorious claim is dismissed because a solicitor missed a deadline to set the matter down for trial, as happened in this case, this only leads to new litigation because the plaintiff must sue his or her former counsel to obtain a remedy.

> A consumer of litigation services is entitled to expect that his action will be conducted professionally, expeditiously and in compliance with the appropriate rules of civil litigation.
>
> In my view such a consumer ought not to be forced to seek new counsel to pursue possible recovery by way of an indemnity claim against his counsel. Such an action will first require the proof of the likely liability of the defendants in the original action without having the normal rights of discovery and production, from the others involved in the accident. In addition, more costs and court time will be consumed in addressing the questions of whether or not the lawyers ought to be responsible for the losses suffered as a result of the apparent deleterious conduct of that action.

[28] I agree with Master Short's concerns. The *Rules of Civil Procedure,* and in particular rule 48.14 are intended to foster timely, accessible justice, not to spawn new lawsuits against counsel who have made an inadvertent procedural mistake.

SIGNIFICANT AMENDMENTS TO RULE 48.14

[29] Counsel submitted that another contextual aspect should be considered.

[30] Rule 48.14 has been amended to extend the time for dismissal for delay from two years to five years after the filing of the defence (see O. Reg. 170/14 published in the September 6, 2014 *Ontario Gazette*).

[31] This amended rule became effective on January 1, 2015, but it was passed by the Civil Rules Committee well before the Master Dash made his decision in October 2014.

[32] In *Elkhouli*, in assessing whether to set aside a Registrar's order, Master Short considers as a relevant factor the impact of the rule change effective January 1, 2015. At paragraph 39 he explains that the two-year time limit imposed needless costly work upon both Masters and litigants. He confirms (at paragraph 48) that proportionality requires incorporating the rule change into the contextual approach previously discussed.

[33] I agree with this conclusion. The impact of this significant rule change is appropriately considered as part of the contextual analysis weighing the benefits of timely justice against the right to be heard. This case was argued in October 2014, after the amendment was adopted but before its effective date of January 1, 2015. If the longer time limit applied to the case before me, there would be no breach of Rule 48.14.P

[34] For all of these reasons, I set aside the dismissal order of the Registrar and the decision of the Master. The plaintiffs shall set this matter down for trial within 30 days of these reasons. If the parties are not able to agree to a new scheduling order they shall reattend before a Master for assistance.

[35] Neither counsel sought costs of this motion.

[36] I thank both counsel for their able submissions and courtesy.

J. Wilson J.

Date: March 13, 2015