# FACSIMILE TRANSMISSION COVER SHEET

**From the Office of Master Wiebe**

Assistant Trial Coordinator: Al Noronha

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**DATE: 9/12/16**

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**NUMBER OF PAGES INCLUDING COVER SHEET: 10**

**COMMENT: Krishnamoorthy v. Zaidi**

**COURT FILE NUMBER(S):** CV-12-448707

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**CITATION:** Krishnamoorthy v. Zaidi 2016 ONSC 5689
**COURT FILE NO.:** CV-12-448707
**MOTION HEARD:** 20160907

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** VIJAY ARAJINI KRISHNAMOORTHY, Plaintiff

**AND**

SYED AHMED ABBAS ZAIDI and SYED AHMED ABBAS ZAIDI SARIA, Defendants

**BEFORE:** Master Lou Ann M. Pope

**COUNSEL:** Counsel for plaintiff: Jillian Van Allen, Brown & Partners LLP
Fax: 416-869-0271

Counsel for defendants: Kenneth Raddatz, Evans Philp LLP
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## REASONS FOR ENDORSEMENT

[1] The plaintiff seeks an order to set aside the registrar's order dismissing this action for delay dated January 6, 2015 made pursuant to rule 48.14(1) of the *Rules of Civil Procedure, R.R.O. 1990, Reg. 194* ("Rules"), for failing to set the action down for trial by on or about May 23, 2014, as ordered by Master Haberman on January 23, 2014. This motion is brought pursuant to rule 37.14.

[2] This action arises out of a motor vehicle accident that occurred on July 5, 2010 when it is alleged that the defendant's vehicle rear-ended the plaintiff's vehicle.

[3] This action was commenced on March 13, 2012 and the defendants served a statement of defence, jury notice and draft affidavit of documents on October 30, 2012. Thereafter, the action proceeded with the normal steps including plaintiff's counsel requesting relevant documents from non-parties, delivery of the plaintiff's affidavit of documents and discoveries being completed on March 11, 2013. However, the parties did not agree to a discovery plan, nor was a motion brought for same.

[4] Following discoveries, the plaintiff answered some of his undertakings; however, in December 2013, the defendants served a motion seeking compliance with the plaintiff's undertakings. This motion resulted in a consent order made by Master Haberman on January 23, 2014 and included provisions that required the plaintiff to comply with the balance of his undertakings within 30 days, and that the action be set down for trial within 120 days, or on or about May 23, 2014.

[5] It is the evidence of Fabio Longo, counsel of record for the plaintiff and responsible counsel for this file, that due to inadvertence and mistake, the deadline to set the action down for trial was not diarized in accordance with his office procedure.

[6] Immediately following Master Haberman's order on January 23, 2014, plaintiff's counsel requested defence counsel's availability for mediation and a mediator's name on February 3, 2014, which was met with no response. At that time, plaintiff's counsel also paid the costs order as set out in Master Haberman's order.

[7] Plaintiff's counsel did not follow up on his letter of February 3, 2014 until September 9, 2014, which was well past the deadline to set the action down for trial on May 23, 2014.

[8] It is Mr. Longo's evidence that between February 2014 and November 2015, there were a number of events that delayed this action, including his spinal surgery in February 2014 where he was absent from his office for four weeks followed by a gradual return, the hiring and termination of several law clerks and associate lawyers, and his departure from Neinstein & Associates to his newly-formed law firm of Trianta Longo LLP. During that time, several associate lawyers were responsible for this file and several law clerks worked on this file.

[9] It is also Mr. Longo's evidence that both before and after the May 23, 2014 deadline to set the action down for trial, steps were taken by all parties to advance this action. In particular, the defendants served a medical report of Dr. Cividino in late June 2014, the plaintiff made a second attempt in September 2014 to schedule mediation, Mr. Longo delivered a notice of change of lawyer, and made several attempts to schedule this motion as early as April 2015. His evidence is that two motions were scheduled to set aside the dismissal order in April and August 2015; however, the dates were not diarized as was his firm policy. The two motion dates were ultimately vacated by the court as notices of motion were not filed within the prescribed timelines.

[10] Upon receipt of the registrar's dismissal order dated January 6, 2015, plaintiff's counsel immediately advised defence counsel of the dismissal order and sought consent to an order to set aside the order. Defence counsel never responded to this request as no motion material was ever served on the defendants.

[11] It is Mr. Longo's evidence that the missteps in his office were due to inadvertence and that it was always his and the plaintiff's intention to proceed with this action and with this motion.

[12] The plaintiff swore an affidavit in support of this motion. His evidence is that he has always intended to proceed with this action, that after retaining Mr. Longo, he left the matter in his hands and he did not see the need to follow up with him regarding the status of this action on a regular basis. He states that from time to time he was in contact with Mr. Longo and his office and he understood that the action was proceeding in the normal course.

[13] The defendants point out that in Mr. Raddatz's letter of April 30, 2014, less than a month before the deadline to set the action down for trial, he reminded plaintiff's counsel that the deadline was approaching.

[14] The defendants' evidence is that they heard nothing from plaintiff's counsel for ten months from January 16, 2015 when plaintiff's counsel advised them of the motion to set aside the dismissal order until November 11, 2015 when plaintiff's counsel inquired about mediation. In response, defence counsel advised that he would seek instructions but highlighted the uncertainty as to what instructions he would receive as the action had been dismissed in January of that year. Three months later, in late February 2016, in a discussion between counsel, defence counsel again advised plaintiff's counsel that the action had been dismissed over a year prior.

**Law**

[15] Subrule 48.14(10) provides that an order made under that rule may be set aside under rule 37.14.

[16] Rule 37.14(1) provides that a party who is affected by an order of a registrar may move to set aside the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. The court has discretion to set aside the order on such terms as are just. (subrule (2))

[17] The plaintiff has the onus to satisfy the court that this action should be permitted to proceed.

[18] In considering whether the dismissal order should be set aside, the court will consider the following four factors while taking a contextual approach in order to achieve a result that is just in all the circumstances. It is not necessary for the plaintiffs to satisfy each of the four factors in order to have the order set aside. (*Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80 (Ont. Master), *Finlay v. Van Paassen*, 2010 ONCA 204, 2010 CarswellOnt 1543 (C.A.), at paras 27-29; *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386; *Habib v. Mucaj*, [2012] O.J. No. 5946 (C.A.))

a. Explanation for the litigation delay;
b. Inadvertence in missing the deadline;
c. Promptness in bringing the motion to set aside;
d. Prejudice to the defendants.

[19] In *Ross v. Hertz Canada*, 2013 ONSC 1797 (CanLII), Master Dash provided the following summary of the guiding principles:

- A plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;

- The key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;

- All factors are important but prejudice is the key consideration;

- Prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;

- Once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;

- Prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

- The party who commences the litigation bears the primary responsibility under the Rules for the progress of the action; and,

- In weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.

**Analysis**

[20] I will now address the four *Reid* factors.

**Explanation for the Litigation Delay**

[21] The plaintiff is required to adequately explain the delay in the progress of the action from the institution of the action until the deadline for setting the action down for trial. The plaintiff must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why. (*Reid v. Dow Corning Corp.* [2001] O.J. No. 2365, at para. 41)

[22] Therefore, the plaintiff herein must adequately explain the delay from March 13, 2012 when the action was commenced to May 23, 2014, the deadline for setting the action down for trial as ordered by Master Haberman on January 23, 2014.

[23] For the following reasons, I find that the plaintiff has adequately explained the litigation delay during the relevant period. As stated above, this action proceeded in a normal fashion after the defendants delivered their statement of defence in late October 2012. Discoveries were held quickly in March 2013. Mr. Longo's evidence sets out a lengthy list of relevant documents he obtained and produced. After the consent order was entered into on January 23, 2014, the plaintiff promptly moved to schedule mediation which was required to be conducted, or at least scheduled, before the action could be set down for trial.

[24] The plaintiff explained the error made in his office by failing to diarize the set down date. As set out above, starting in February 2014, the plaintiff has provided evidence of events that delayed this action.

**Inadvertence in Missing the Deadline**

[25] The plaintiff or his solicitor must lead satisfactory evidence to explain that they always intended to set the action down for trial by the deadline ordered in Master Haberman's order, or request an order extending the deadline, but failed to do so through inadvertence. In other words, the dismissal order was made as a result of inadvertence. (*Reid,* at para.41)

[26] The defendants submit that the missteps in Mr. Longo's office cannot be considered mere inadvertence as there were excessive missteps or slips which should be more properly characterized as intentional or a deliberate choice not to ensure that this file was handled properly. They submit that it can be inferred that Mr. Longo was aware of the staff turnover in his office and therefore it was his choice to fail to ensure that this matter was being handled properly. It is further submitted that based on the plaintiff's evidence some 11 people handled this file including Mr. Longo. They argue further that this file was left unattended, evidenced by long periods of time when there was no communication from plaintiff's counsel.

[27] Although the defendants' submissions are strong, I am not persuaded to go so far as to find that the failure of the plaintiff to set the action down for trial by the deadline was due to a deliberate and thoughtful choice by the plaintiff and his counsel not to pursue this action. Such a finding would conflict with the abundance of evidence filed by the plaintiff that demonstrates an intention to advance this action to trial. Simply put, there is no evidence whatsoever of any deliberate act which resulted in the deadline being missed. The plaintiff himself gave evidence that he always intended to pursue this action and he thought Mr. Longo was doing so. Furthermore, after the consent order was made on January 23, 2014, plaintiff's counsel immediately took the next step to schedule mediation which demonstrates that he was alert to the need to complete mediation, or at least have it scheduled, before he could set the action down for trial.

[28] For those reasons, I find that the failure to set the action down for trial by the deadline was due to inadvertence by plaintiff's counsel.

**The Motion is Brought Promptly**

[29] The plaintiff must demonstrate that he moved forthwith to set aside the dismissal order as soon as the order came to his attention. (*Reid*, at para. 41)

[30] Before I can determine this factor, I must first determine when the plaintiff or his counsel learned of the dismissal order.

[31] The evidence is clear that plaintiff's counsel received the dismissal order on January 9, 2015. Immediately thereafter on January 16, 2015 Mr. Longo's law clerk wrote to defence counsel and advised him of the dismissal order and their intention to bring a motion to set aside the dismissal order. However, Mr. Longo's evidence is that he

personally did not become aware that the action had been dismissed until speaking with defence counsel in early February 2016, following which he gave instructions to his assistant to schedule this motion. The notice of motion was served on April 4, 2016 returnable May 26, 2016. This was followed by a request for a long motion from the Masters' office. This motion was heard on September 7, 2016.

[32] The said letter written by Mr. Longo's law clerk is very telling of not only the intention of plaintiff's counsel, but also the fact that it is reasonable to infer that someone with authority and control of the file in Mr. Longo's office gave instructions to his law clerk at that time to bring a motion to set aside the dismissal order. Therefore, given the clear evidence of the date plaintiff's counsel received the dismissal order in January 2015 and their stated intention to bring a motion to set aside the dismissal order, I find that plaintiff failed to move forthwith to set aside the dismissal order as soon as the order came to their attention. In other words, I do not accept that the dismissal order came to the attention of the plaintiff in February 2016 when Mr. Longo says he learned of the order. If I accept that proposition, it would conflict with the clear evidence that someone in Mr. Longo's office who had control of this file gave instructions to bring a motion to set aside the dismissal order.

**Prejudice to the Defendant**

[33] The law with respect to prejudice is summarized as follows.

[34] The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action. The court takes note that witnesses' memories generally tend to fade over time and that sometimes it is difficult to locate witnesses or documents. However, to bar the plaintiff from proceeding with his action on the ground of prejudice, the defendant must lead evidence of actual prejudice. This might include evidence of specified documents lost over time, or destroyed following a dismissal, or of specific witnesses who have died, or have disappeared and the defendant has been unable to locate them with due diligence. While litigation is outstanding the defendants must take care to obtain and preserve evidence. (*Reid*, at para. 41)

[35] There is no automatic presumption of prejudice with the passage of time or the limitation period. Prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the dismissal order was made or the limitation period has expired. This is to be determined by the court taking a contextual approach to all of the facts. Prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action. (*Ross v. Hertz Canada*)

[36] Where the presumption arises, the plaintiff bears the burden of rebutting the presumption, on proper evidence. Where the presumption is so displaced, the onus shifts to the defendant to establish actual prejudice. The plaintiff can overcome the presumption by leading evidence that all relevant documents have been preserved, that key witnesses are

available or that certain aspects of the claim are not in issue. (*Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, at paras. 60, 62 (CanLII))

[37] Here, the defendants do not assert that they will be prejudiced in any way if the action were allowed to proceed. Rather, they submit that the action should not be revived based on fairness and the finality principle given the delay and the deliberate conduct not to advance this action.

[38] For that proposition, the defendants rely primarily on the Ontario Court of Appeal's decision in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 ("*119*"), where the Court of Appeal dealt with a lower court's decision on a status hearing. The defendants recognize that a different test is applied at a contested status hearing but they submit only that the test for prejudice is the same as on a motion such as the motion herein to set aside an administrative dismissal order.

[39] The Court of Appeal opined on a number of factors a court will consider when assessing the impact of delay, including the following, at paragraphs 39, 42 and 44:

(a) strong public interest in promoting the timely resolution of disputes;

(b) excusing significant delay risks undermining public confidence in the administration of justice;

(c) the timelines imposed by the rules of civil procedure are relatively generous thus there is a heavy price to be paid when they are not respected;

(d) if flexibility is permitted to descend into toleration of laxness, fairness itself will be frustrated;

(e) even if there is no actual prejudice, to allow stale claims to proceed will often be unfair to the litigants;

(f) disputes are more likely to be resolved fairly if they are resolved in a timely fashion, thus the enforcement of timelines helps achieve the ultimate goal of fair resolution of disputes;

(g) stale claims are more difficult to defend;

(h) harm that flows from delay is that it leaves the litigant with the claim hanging over its head in a kind of perpetual limbo, thus fairness requires allowing parties to plan their lives on the assumption that, barring exceptional or unusual circumstances, litigation timelines will be enforced; litigants are entitled to have their disputes resolved quickly so that they can get on with their lives and delay multiplies costs and breeds frustration and unfairness.

[40] It is important to note that *119* can be distinguished on its facts. In *119*, the action had not proceeded beyond the close of pleadings five years after it had been commenced. At the status hearing, the parties consented to a timetable for completion of discoveries and for the action to be set down for trial. After the plaintiff failed to take the steps within the time limits required by the timetable, a second status hearing was held when the action

was dismissed for delay. However, in the within action, numerous steps had been completed and the action was essentially ready for mediation and to be set down for trial. Here, there was less than a three-year delay from its commencement to the date of the dismissal order, and during that time, numerous steps had been completed. With respect, I would have great difficulty finding that this was a stale claim or that it will be more difficult for the defendants to defend this action. The evidence is uncontroverted that the parties delivered their affidavits of documents and produced their Schedule "A" documents. Furthermore, the defendant has had the plaintiff examined by their own medical expert and served the report. Moreover, when asked by the plaintiff for mediation dates, the defendant did not advise that they were not ready for mediation as it is clear that the defendant had already obtained a defence medical assessment. There is no evidence that it was the defendant's position that some or all of the plaintiff's undertakings were outstanding and that they were awaiting compliance with the undertakings in order to conduct mediation. In fact, the defendant was silent to the plaintiff's request for mediation dates.

[41] The defendants submit further that they did nothing to resist any attempt by the plaintiff to advance the action and that the matter was from all appearances "dead on the vine".

[42] I respectfully disagree with those submissions and characterization of this matter. Firstly, had the defendants responded to the request from plaintiff's counsel in early February 2015 for available mediation dates and the name of a preferred mediator, it is reasonable to conclude that mediation would have been scheduled, which would have permitted the plaintiff to set the action down for trial by the deadline. In other words, had the defendants responded to the plaintiff's request, the course of the litigation may have been different. Thus, I do not accept that the defendants did nothing to resist the plaintiff's attempts to advance this action.

[43] Furthermore, I find that the defendants' conduct in serving Dr. Cividino's medial report in late June 2014 demonstrates that the defendants intended to proceed with this action even after the deadline to set the action down for trial had passed. It is reasonable to assume that if the defendants thought this action was "dead on the vine", they would not have served that report.

[44] In conclusion, in my view, the facts herein do not support a finding that finality should trump the plaintiff's right to have his action heard on its merits, particularly because, admittedly, the defendants will suffer no prejudice should the action be allowed to proceed.

**Additional Factor**

[45] The plaintiff submits that the court ought to consider the impact of the recent amendments to rule 48.14 in its analysis. Had current rule 48.14(1) applied to this action, it would not have been dismissed until March 2017, or five years from its commencement.

[46] While I recognize the effect the revised rule would have had on this action, what distinguishes the facts herein is that the cause of the dismissal order was the plaintiff

having failed to comply with deadline ordered by Master Haberman, not the two-year dismissal deadline under former rule 48.14. Therefore, this factor does not affect my decision.

**Conclusion**

[47] I have found that the plaintiff met his onus with respect to the three of the four *Reid* factors, but that he did not bring this motion promptly.

[48] It is my view that the delay in setting this action down for trial was due to inattention by plaintiff's counsel and not any conduct by the plaintiff himself. In these circumstances, the plaintiff ought not to lose his right to have the action heard on its merits, particularly when there will be no prejudice to the defendants if the action is permitted to proceed.

[49] For the above reasons, the plaintiff's motion is hereby granted and the following timetable shall apply:

(a) complete mediation by November 30, 2016;

(b) set the action down for trial by January 16, 2017.

**Costs**

[50] If successful, the plaintiff recognizes that he is being granted an indulgence and therefore he does not seek his costs of this motion.

[51] In my view, it was reasonable for the defendants to oppose this motion given the delay; therefore, the defendants shall be entitled to their partial indemnity costs fixed in the amount of $2,496.68, payable within 30 days.

Master Lou Ann M. Pope

September 12, 2016