COURT OF APPEAL FOR ONTARIO

CITATION: Lattuca v. Smith, 2016 ONCA 476
DATE: 20160615
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MacPherson, Rouleau and Pardu JJ.A.

BETWEEN

Joseph Lattuca

Plaintiff (Appellant)

and

Frank C. Smith, Gamal Kousa, John Doe, Jane Doe, Hamilton Health Sciences Corporation

Defendants (Respondents)

Jillian Van Allen, for the appellant

Andrew M. Porter for the respondents Frank C. Smith and Gamal Kousa

Logan Crowell, for the respondent Hamilton Health Sciences Corporation

Heard: June 9, 2016

On appeal from the judgment of Justice Dale Parayeski of the Superior Court of Justice, dated September 17, 2015.

ENDORSEMENT

[1] The appellant Joseph Lattuca appeals the Order of Parayeski J. of the Superior Court of Justice dated September 17, 2015 dismissing his motion to extend an expired timetable in a medical malpractice action against the respondent doctors and hospital.

[2] The motion judge applied the test from *Marché d`Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, which directs that four factors should be considered when determining whether relief should be granted from an order dismissing an action for non-compliance with statutory time requirements:

(1) any explanation for the delay;

(2) whether there was inadvertence in missing the deadline to set the action down as ordered;

(3) whether the motion seeking relief was brought promptly; and

(4) any prejudice to the defendant(s) should the action be allowed to continue.

[3] The motion judge found in favour of the appellant on the third factor and in favour of the respondents on the other factors. He did not grant the appellant an extension of time.

[4] On appeal, the appellant contends that the motion judge did not consider certain relevant evidence relating to the time periods in the action and failed to take sufficient account of the fact that medical malpractice cases can be complicated and time consuming.

[5] We do not accept these submissions. The history of delay and inactivity by the appellant's lawyers in this case was unrelenting and inexcusable. We agree

with the motion judge that the facts "have transcended anything that legitimately can be described as inadvertence."

[6] The appellant submits that the motion judge erred in her assessment of the prejudice factor. He says that there is no direct evidence from the respondent physicians concerning their ability to recall significant events and that most of the relevant documents from the doctors and the respondent hospital are obtainable.

[7] We are not persuaded by this submission. The surgery giving rise to the action took place almost eight years before the motion, some undertakings remained unfulfilled, and many relevant documents have not been obtained. Moreover, with respect to the hospital, the appellant received ongoing care at the hospital for six months following his surgery. He interacted with many caregivers. Without particulars, it is difficult for the hospital to know what is at issue – witnesses, documents – to preserve the evidence necessary to its defence. Finally, it should not be forgotten that there is always stress and concern when professional caregivers and institutions are accused of negligence relating to their care of patients.

[8] The decision of the motion judge on this discretionary matter is entitled to deference. We can see no error in the way he dealt with each of the four factors or in the way he balanced them in arriving at his ultimate decision.

[9] The appeal is dismissed. The respondents are entitled to their costs of the appeal fixed at $6,500 (doctors) and $3,500 (hospital), inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"Paul Rouleau J.A."
"G. Pardu J.A."