CITATION: Lattuca v. Smith et al., 2015 ONSC 7737
COURT FILE NO.: 10-19662
DATE: 2015-12-16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JOSEPH LATTUCA	)	J. Van Allen, for the Plaintiff (Moving Party)
	)	
Plaintiff (Moving Party)	)	
	)	
- and -	)	
	)	
FRANK C. SMITH, GAMAL KOUSA, JOHN DOE, JANE DOE, HAMILTON HEALTH SCIENCES CORPORATION	)	A. M. Porter, for the Defendants F. Smith and G. Kousa; and L. Crowell, for the Defendant Hamilton Health Sciences Corporation
	)	
Defendants (Respondents)	)	
	)	**HEARD:** September 17, 2015

RULING

PARAYESKI J.

[1] The plaintiff moved for an order, *nunc pro tunc*, extending the deadlines for completing the action's remaining steps as set out in the timetable annexed to the order of Milanetti J. dated October 8, 2013. I dismissed the motion and directed the Registrar to issue forthwith an order dismissing the action for noncompliance with the order of Milanetti J., for written reasons to follow. These are those reasons.

[2] The following chronology sets out the litigation steps taken in this 2010 action. The plaintiff alleges medical malpractice relating to two surgeries that took place in 2008.

1. the statement of claim was issued October 27, 2010;

2. the defendant Hamilton Health Sciences was served with the statement of claim April 30, 2010;

3. attempted service of the statement of claim on Dr. Kousa occurred April 30, 2010;

4. Dr. Smith was served with the statement of claim May 10, 2010;

5. Hamilton Health Sciences served its statement of defence September 8, 2010;

6. Dr. Kousa was served with the statement of claim October 4, 2010;

7. Drs. Smith and Kousa served their statement of defence December 10, 2010;

8. notice of change of solicitors relative to the plaintiff was dated July 19, 2011;

9. Drs. Smith and Kousa served an amended statement of defence on consent October 7, 2011;

10. plaintiff was examined for discovery on July 24, 2012;

11. Carpenter-Gunn J. grants a consent order on December 4, 2012 imposing a timetable that, *inter alia*, required that the action should be set down for trial by October 2, 2013;

12. Milanetti J. grants a consent order on October 8, 2013 which amends the timetable included in the order of Carpenter-Gunn J. The new timetable includes, *inter alia*, the requirement that the action be set down for trial by May 31, 2014; and,

13. motion seeking to extend the timetable imposed by the order of Milanetti J. dated October 8, 2013 is issued on August 20, 2014, returnable September 23, 2014.

[3] Paragraph 3 of the consent order of Milanetti J. dated October 8, 2013 reads as follows:

> 3. THIS COURT ORDERS Pursuant to Rule 48.14(4) (sic) the Registrar shall dismiss the action for delay with costs unless the action has been set down for trial or terminated by any means on or before the new deadline for setting the action down for trial which shall be May 31, 2014.

[4] The action has not been set down for trial. The plaintiff has not fulfilled any or at least most of the undertakings given by him or on his behalf in July of 2012. None of the defendants have been examined for discovery. While some of the delay in conducting those examinations flows from the fact that one of the doctors has or had relocated, and the other was unavailable on an agreed upon date, the evidence shows that plaintiff counsel has been neither diligent nor cooperative on this front.

[5] I agree with the assertion of counsel for Drs. Smith and Kousa that the issue before me is analogous to the seeking of an order to set aside a Registrar's dismissal order. The same considerations apply.

[6] The Ontario Court of Appeal in *Marche d'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, has directed that the factors to be considered, in the context of the entire evidentiary record and with a just result in mind, are as follows:

> 1) any explanation for the litigation 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.

[7] I have carefully reviewed the supporting affidavits of Eric Heath (sworn on September 11, 2014) and Peter Mendelsohn (sworn February 5, 2015) to find and consider any explanations tendered with respect to the obvious delays revealed above.

[8] Mr. Heath deposes, in this regard, the following at the paragraphs indicated in his affidavit:

> "9. I am advised by review of file (sic) and verily believe, that Mr. Michael Rubin, a past employee of SLS [the firm of plaintiff counsel], previously had carriage of this file, and was the lawyer of record until he recently left SLS on August 9, 2013.
>
> 10. I verily believe that immediately upon Mr. Rubin's departure from the firm, I took carriage of this file on a temporary basis for the sake (sic.) of drafting a motion to amend the Timetable. After Mr. Rubin's departure, this file and numerous other files were required to be reassigned to myself (sic.) and other associates within the firm…
>
> 12. In December, 2013, the file was re-assigned to my colleague Mr. Peter Mendelsohn. Purely through inadvertence, steps were not taken to complete the action's remaining steps by the required deadlines dates."

[9] Of course, by December of 2013, the timetable imposed by the order of Milanetti J. dated October 8, 2013 was already in place. That order, *inter alia*, required that the action be set down for trial by May 31, 2014.

[10] Mr. Mendelsohn deposes as follows as regards explaining delay:

> "68. This file was assigned to me by Eric Heath in or around December of 2013. I did not realize that this file had been assigned to me because I routinely handle accident benefits tort files and slip and fall files but do not routinely handle medical malpractice cases. Further, files are not usually assigned as between associates and if files are assigned to me, they are assigned by one of the partners."

[11] At paragraphs 69, 70 and 71 of his affidavit, Mr. Mendelsohn deposes that counsel for the defendant Hamilton Health Sciences wrote to him on February 6, 2014, April 7, 2014, and May 16, 2014 pointing out, *inter alia*, that no progress had been made with respect to the scheduling of examinations for discovery since the imposition of the second timetable and that the plaintiff's undertakings were still outstanding.

[12] Mr. Mendelsohn's affidavit continues as follows:

> "72. I have reviewed the Plaintiff's file. BLG's letters [BLG being counsel for Hamilton Health Sciences] of February 6, 2014, April 7, 2014 and May 16, 2014 are not contained in the Plaintiff's file. I do not recall those letters coming to my attention. However, if those letters had been brought to my attention I would have immediately responded to them given the urgent nature of the letters.
>
> 73. In August of 2014 [3 months after the passing of the second deadline for setting the action down for trial] Eric Heath reviewed the file and determined that steps had not been taken to comply with the Order of Justice Milanetti dated October 8, 2013 and thereafter he prepared and served the Notice of Motion for the within motion on August 25, 2014…
>
> 74. Thereafter, Eric Heath and I discussed this file and he brought the file and the Order of Justice Milanetti to my attention. Thereafter, I reviewed this file for the purposes of preparing an affidavit of Eric Heath which has been sworn in support of this motion.
>
> 75. I have been advised by Mr. Heath that he overlooked diarizing the deadline set out in the Order of Justice Milanetti because he had assumed carriage of this file on a temporary basis."

[13] These explanations, if that is what they really are, are not compelling. I do not accept or even understand the relevance of some of what was deposed.

[14] In *Riberio v. Amaral*, reported at 2005 Carswell Ont. 2077, Stewart J. rejects the notion that consented to timetables are strictly enforceable contracts as between the parties and suggests "a more generous approach". That approach, according to His Honour, would entail taking into

consideration "unforeseeable factors that can put such a timetable off the rails, including the illness of counsel or witnesses or other events over which the parties and those counsel may have no control". If Mr. Rubin's departure from the firm of plaintiff counsel was unforeseeable, and there is no evidence that it was, that departure was in August of 2013, i.e. before the second timetable was imposed in October of that year.

[15] Mr. Heath deposes that he was temporarily assigned the file in August of 2013 for the purpose of amending the timetable. He did that and obtained the Order of Milanetti J. in October of that year. He did not diarize the new deadlines, including the key one of setting the action down for trial by May 31, 2014.

[16] Other than its starting date, i.e. "immediately" upon Mr. Rubin's departure on August 9, 2013, I do not know the temporal parameters stipulated by the temporary assignment to Mr. Heath, or even by whom the assignment to him was made. There is no explanation regarding why Mr. Heath did not return the file to its assigning counsel once he had completed his purportedly limited task of extending the deadline. Neither is there any explanation why he waited two months to reassign this file to another associate (Mr. Mendelsohn), especially when facing a deadline of some eight months to set the action down for trial. It is obvious that a great deal of work needed to be done to prepare the trial for setting down.

[17] In any event, the file was reassigned to Mr. Mendelsohn in December of 2013. He, frankly, appears not to have been aware of that fact until Mr. Heath spoke to him sometime after the file was reviewed in August of 2014. Mr. Mendelsohn's assertion that he did not "realize" the reassignment because he usually handles tort files other than medical malpractice ones does not make sense to me.

[18] I assume that if there exists any form of written or electronic communication confirming the re-assignment a copy would have been produced. None is in evidence.

[19] While I might be able to understand one of the letters addressed to Mr. Mendelsohn going astray, I find it impossible to accept that three of them did not make their way to the firm at least. Any one of those letters, read by anyone competent enough to work in a law firm, would have triggered at least a review of the extant timetable and, presumably, precipitated some kind of action.

[20] I am not satisfied that what happened or did not happen was beyond the control of plaintiff counsel.

[21] I turn now to the element of inadvertence. I am not satisfied that what occurred was the result of inadvertence. To be sure, merely employing that term in an affidavit does not provide a definitive answer on that point. The word is not magic.

[22] As described above, here there was a series of errors and oversights that not only stretched over many months but which were repeated. Two separate deadlines, both consented to and both captured in court orders, were missed. The facts have transcended anything that legitimately can be described as inadvertence.

[23] I accept and adopt Master J. Haberman's observation at paragraph 113 of his decision in the *Nadarajah v. Lad* case, reported at [2015] O.J. No. 640, that "Inadvertence is a one-off error, not a failure to create a necessary date-tracking system". In the present case, if there was a date-tracking system in place at all, it was so inadequate that it failed twice.

[24] I am satisfied that the motion seeking relief was brought reasonably promptly. According to the affidavit of Mr. Mendelsohn referred to above, sometime in August of 2014 Mr. Heath got around to reviewing the file and determining that the second deadline to set the action down for trial had passed months earlier. Still, the motion seeking relief was issued on September 11, 2014, with an initial return date of September 23, 2014. In isolation, the moving party acted appropriately and promptly.

[25] As to prejudice to the defendants, that being the fourth factor to be considered in context, there is no assertion here of "actual" prejudice. Actual prejudice would be something akin to a key witness having died or relevant records having been destroyed or irretrievably deleted. Rather, the defendants assert that with the passage of time between the subject's surgeries in 2008 and now and with the delay by the plaintiffs being inadequately explained, prejudice should be presumed. The onus then shifts to the plaintiff to rebut that presumption.

[26] Here, while the plaintiff was discovered on July 24, 2012, there remain outstanding undertakings, including at least one undertaking relating to the production of medical records. That those records have not been provided at this late date suggests that they may be no longer available. It is up to the plaintiff to demonstrate that they are. He has not done so, despite his counsel having requested or re-requested them in January of 2015. The defendants have not been examined for discovery. As we approach the eighth anniversary of the impugned surgeries, it is legitimate to assume that memories of its details will have faded.

[27] Considering all of the four factors contextually, I am satisfied that a dismissal of the motion is appropriate.

[28] If the parties are unable to agree upon costs, they may make brief written submissions in that regard. Each set of submissions, if any, shall not be more than three typewritten pages in length, not including a costs outline. No copies of decisions are to be attached, although citations may make up part of the three pages referred to above. The respondents shall have until January 22, 2016 to make their submissions. The plaintiff shall have until February 12, 2016 to respond. There shall be no reply. All submissions are to be sent to my attention at the John Sopinka Court House at Hamilton.

Parayeski J.

Released: December 16, 2015

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B E T W E E N:

JOSEPH LATTUCA

Plaintiff/Moving Party

- and –

FRANK C. SMITH, GAMAL KOUSA, JOHN DOE, JANE DOE, HAMILTON HEALTH SCIENCES CORPORATION

Defendants (Respondents)

RULING

MDP:mw

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