

CITATION: LEXFUND v. FERRO, 2019 ONSC 712
COURT FILE NO.: 12-4170-SR
DATE: 2019-01-29

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
LEXFUND INC.)	
	)	Alfred J. Esterbauer, Counsel to Gowling
	)	WLG, Lawyers for the Plaintiff
- and -)	
)	
LUCIO ANTHONY FERRO (aka LOU)	
FERRO) and FERRO & COMPANY ,)	
ANDREW RODNEY, AILEEN FINLAY,)	
KEVIN WATERFIELD, JOSEPH	)	Jillian Van Allen, Counsel for the
MASTROMATTEI, TIMOTHY	)	Defendants Lucio Anthony Ferro aka Lou
MORGAN, LISA CURTIS, and	)	Ferro and Ferro & Company
CHRISTOPHER BEAN)	
)	
Defendants	)	Mary Grosso, Counsel for the Defendants
	)	Finlay, Waterfield, Curtis, Badgerow,
	)	Cirillo, Wright, Badchkam, Findlay, and
	)	Serieux
)	
	)	HEARD: January 25, 2019
)	

THE HONOURABLE MR. JUSTICE J. W. SLOAN

REASONS FOR JUDGMENT

[1] Timothy Morgan is one of several defendants in this action and appeared in person. He had been served personally pursuant to an order of Justice Braid. Although he had not filed any papers, the court allowed him to make some submissions. At the end of the submissions he indicated he was going to talk with Ms. Grosso who currently represents several other defendants in this action. Mr. Morgan advised the court and the

lawyers of his address and cell phone number for purposes of him being served with any future documents.

[2] Christopher Bean, a defendant in 12-41270-SR, has not been served with this motion pursuant to Justice Braid's order and therefore nothing in this judgment affects him.

[3] Erin Chabot (who may now go by the surname Spencer) is a defendant in 15-51822-SR. She has not been served with this motion pursuant to Justice Braid's order and therefore nothing in this judgment affects her.

[4] Ms. Grosso advised the court that the case against Serieux in action number CV-12-33759 has been totally settled.

[5] Ms. Grosso also advised the court that the case against Badchkam in file number 15-51822-SR has been settled with the possible exception of Badchkam having the right to revisit the rate of interest that she paid and the length of time that she paid interest for.

[6] I am the Case Management Judge for a group of court actions, which I refer to as the Lexfund actions.

[7] Lexfund is/was a company which loaned money for the purpose of assisting plaintiffs to finance their litigation, particularly their disbursements, medical expenses and living expenses in personal injury cases.

[8] The personal defendants through Ferro, each obtained separate loans from Lexfund.

[9] Declaratory actions on behalf of the personal defendants were commenced by Ferro against Lexfund seeking (among other things) declaratory relief related to the loan agreements.

[10] Lexfund defended and brought counterclaims for the outstanding amounts owing under the loan agreements in each case.

[11] These counterclaim actions brought by Lexfund, involving Findlay (CV-870-12), Harney (CV-871-12), Maksymchuk (CV-872-12), Slaven (CV-873-12), Rodney (CV-2530-12), Serieux (CV-33759-12), and this action SR-4170-12 were all administratively dismissed by the registrar for delay in 2014, pursuant to Rule 48.

[12] Lexfund did not deliver a notice to proceed with the counterclaims within 30 days of the administrative dismissal and its lawyer claims that its failure to do so was inadvertent. Lexfund further alleges that it always intended to prosecute its counterclaims and that the debtors/defendants were always aware of that intention.

[13] Lexfund brings this motion seeking an order:

- a) To extend the timetable set forth at Schedule "A" of Justice Campbell's order dated the 18th day of May 2017, for the seven actions set forth in paragraph 7, plus action number 15-51822-SR.
- b) To extend the time set out in Rule 24.03 to elect to proceed with its counterclaims.
- c) Pursuant to Rule 10.02 allowing it to proceed with its actions against the estate of Lucio Anthony Ferro, in the absence of a person representing the estate.

Timelines

[14] The following is a list of some of the timelines involved in the Lexfund litigation.

- a) April 11, 2012 – Lexfund files its statement of claim in 12-4170-SR;
- b) June 11, 2012 – Ferro files a statement of defence and counterclaims on behalf of all defendants in 12-4170-SR;
- c) July 18, 2014 – the following actions are administratively dismissed for delay: CV-12-870, CV-12-871, CV-12-872 and CV-12-873; (Counterclaim Actions)
- d) September 8, 2014 – the following action is administratively dismissed for delay CV-12-2530; (Counterclaim Action)
- e) September 24, 2014 – action 12-4170-SR is administratively dismissed;

- f) October 6, 2014 – the following action is administratively dismissed for delay:
CV-12-33759; (Counterclaim Action)
- g) November 12, 2014 - dismissal of action 12-4170-SR is set aside;
- h) March 12, 2015 – Ferro files for bankruptcy;
- i) June 12, 2015 – Ferro passes away;
- j) June 19, 2015 – the court orders that the stay pursuant to the bankruptcy act be lifted;
- k) July 31, 2015 – Goodman J. gives Lexfund judgment in the Ferro actions;
- l) June 22, 2016 – Sloan J. gives a summary judgment for Lexfund in action numbers: C-261-12, 12-4045-SR, 12-4358-SR, 13-4060-SR, 13-4088-SR and 13-4121-SR;
- m) May 18, 2017 – Campbell J. approves a timetable in action numbers: 870-12, 871-12, 872-12, 873-12, 2530-12, 12-4170-SR, 15-51822-SR and 3375-12.

[15] For the main part, the facts that form the underpinnings of the above actions are not in dispute.

[16] All of the non-Ferro defendants were at one time or another involved in a motor vehicle accident and they all retained the law firm of Ferro & Company to represent them.

[17] Mr. Ferro arranged for loans from Lexfund for each of the defendants, who at the time were his clients. The loans were to cover living & medical expenses to allow the now defendants to prosecute their court actions.

[18] With the exception of the dates, amounts borrowed and interest rates, all of the loan documentation is virtually identical.

[19] In all of the cases, the borrowers provided Mr. Ferro with an irrevocable direction, directing and authorizing him to pay the loans upon settlement of their court actions.

[20] Unfortunately this step in the procedure did not take place and Mr. Ferro made an assignment in bankruptcy on March 12, 2015 and passed away on June 12, 2015.

Loan Procedure

[21] The borrowers relied on Ferro's office with respect to obtaining each loan.

[22] All of the defendants acknowledge that Mr. Ferro, on their behalf, received the loans.

[23] None of the borrowers got a loan statement from Mr. Ferro.

[24] It is their position that they were under the impression that Mr. Ferro had taken care of paying off the loans.

[25] Unfortunately, it appears that Mr. Ferro, in relation to the subject loans, breached every obligation he could breach, both with respect to the plaintiff and with respect to his clients as the borrowers.

[26] All of the borrower's MVA court actions were settled and there was, at the time of settlement in most actions, sufficient money to pay off the outstanding balance of the plaintiff's loans, but, they were either not paid at all or not paid in full.

[27] Essentially there is no documentation between Mr. Ferro and his former clients of exactly how the Lexfund loans were to be retired after the settlement of their court actions.

[28] Other than perhaps a general paragraph in a short letter from Mr. Ferro to some of his former clients that he was looking after the loans, money was disbursed from, or kept in trust without paying the loans and without Mr. Ferro seeking and receiving written instructions from his clients regarding the loans and what to do about them.

[29] To compound the problems, Mr. Ferro started acting for all his former clients when Lexfund commenced its actions against them. He did this in the face of a blatant conflict of interest between himself and his then clients and in most if not all cases, without telling his clients that they were parties to a court action.

Lexfund's Position

[30] Although there are a lot of files and some complications because of the passage of time and the number of individual defendants, these actions are essentially debt collection actions.

[31] All of the cases will rise or fall on the documentation confirming the loans and any payments made under them. There are decent accounting records from Ferro's office and also from subsequent lawyers who hold money in trust.

[32] Therefore, there is no prejudice to any of the defendants because of the passage of time. It relies in part on Rule 3.02 which in essence states that "the court may by order extend or abridge any time prescribed by these rules or an order, on such terms that are just." Rule 3.02(2) states "A motion for an order extending time may be made before or after the expiration of the time prescribed."

[33] Lexfund also relies on the case of *Chiarelli v. Wiens* [2000] O.J. No. 296. At paragraphs 12 & 17 of that case, the Court of Appeal states:

[12] ... The guiding principles remain the same. As Lacourciere J.A. said in *Laurin v Foldesi* ... "The basic consideration. . . Is whether the [extension of time for service] will advance the just resolution of the dispute, without prejudice or unfairness to the parties." And the plaintiff has the onus to prove that extending the time for service will not prejudice the defence.

[17] The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided its own facts, focusing as the motions judge did in this case, on whether the defence is prejudiced by the delay. Undoubtedly the delay in this case -- over 6 years from the expiry date for serving the claim -- was significant, much longer than in most if not all of the decided cases where an extension has been granted. However, the motions judge recognized this delay and still found no prejudice. As I have already said I am not persuaded that he erred in making that finding. Thus, the motions Judge did not err in principle by granting an extension though the length of the delay exceeded the two-year limitation period under the Highway Traffic Act.

[34] Lexfund further submits that an extension should be granted if it will advance the just resolution of the dispute between the parties and where there is no prejudice or unfairness to either party.

[35] Lexfund also relies on Rule 1.04 which reads:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and to the amount involved, in the proceeding.

[36] Lexfund further relies on paragraph 7 of the *Nobosoft Corporation v. No Borders Inc.*, 2007 ONCA 441, where the Ontario Court of Appeal stated:

[7] We agree with the observations of Malloy J. of the Superior Court of Justice at para. 2 of *McNeil Electronics Limited v American Sensors Electronics Inc.* ...

Motions to extend the time for delivery of pleadings and to relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually opposing counsel will consent to such relief as a matter of professional courtesy. Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being requested or to the issue of costs ... It is not in the interests of justice to strike pleadings or grant judgments based solely on technical defaults. Rather, the court will always strive to see that issues between litigants are resolved on their merits wherever that can be done with fairness to the parties.

[37] Here, without the relief requested, the plaintiffs lose their right of action. Although Lexfund's lawyer's handling of these files may have been less than sterling, particularly in his follow-up to the administrative dismissals, there can be no doubt that at all times Lexfund was proceeding with its actions on all fronts. In addition, Mr. Gregoire testified to changing firms, not having adequate support staff and running into medical problems.

[38] Notwithstanding the administrative dismissals, it appears that counsel at the time agreed to wait for the summary judgment motion on which judgment was given on June 22, 2016, before proceeding on other fronts. This was because the disposal of the summary judgment motion and appeal might assist with settlement of the other outstanding actions.

[39] Subsequent to summary judgment being given, the summary judgment went through a lengthy appeal process which finally resolved by minutes of settlement on October 24, 2018.

[40] In addition, notwithstanding the administrative dismissal orders in 2014, Justice Campbell approved a timetable on May 18, 2017.

[41] There is currently money in lawyers' trust accounts from settlements of the individual defendants' motor vehicle accidents. Both the settlements of the motor vehicle accidents and whatever money is remaining in trust is there, at least in part because of the litigation funding supplied by Lexfund.

[42] Leaving aside the issue of interest for the moment, there is no juristic reason that the money Lexfund loaned to further the motor vehicle litigation should not be returned to it. There is further no juristic reason why any of the individual defendants should reap a windfall at the expense of Lexfund.

[43] As an example, in the Maksymchuk matter, there remains (as of May 26, 2015) \$29,147.52 in the Poproski Ferro Trust account.

Ferro Defendants' Position

[44] Ms. Van Allen submits there is actual prejudice to individual defendants because, for example, if either Morgan or Maksymchuk wish to make a cross-claim in the counterclaim actions they would be statute-barred from doing so.

[45] It appears to the court that their cross-claims would be, for the most part, limited to the applicable rate of interest that could be charged on the loans and whether or not

any interest could be charged after a date when the loans could have reasonably been repaid by Ferro from each client's settlement funds.

[46] Ms. Grosso submits that it is unlikely the individual defendants at this point in time have the legal right to sue Ferro for reimbursement of interest at any rate, from the time their loan could have been paid until the date of payment, because they are out of time to bring such an action.

[47] Van Allen submits that the test to be applied for the extension of time and reinstating the counterclaims is contextual and what is just, and does not involve only the issue of potential prejudice.

[48] From a contextual point of view, she took the court through numerous times when the issue of reinstating the counterclaims were raised. She suggests that the behaviour of counsel for Lexfund was so outrageous as to bring the administration of Justice into disrepute. In part she relies on the motor vehicle accident case of case of *Nadarajah v. Lad*, 2015 ONSC 4626 where the Divisional Court stated at paragraph 32;

[32] There is a continuum of conduct under this umbrella. If counsel deliberately did not do something for tactical or strategic reasons and a dismissal order was a result, this would be a strong factor weighing against setting aside the dismissal order. On the other end of the continuum is a slight misstep or oversight in otherwise conscientious conduct, such that the deadline gets missed notwithstanding the existence of an efficient tickler system and careful supervision of it. No individual and no system can be perfect and mistakes can sometimes occur. Such circumstances would be inadvertent at the other end of the continuum from deliberate conduct and would weigh strongly towards granting the relief to the plaintiff. However within the spectrum of inadvertent conduct there are vast differences. The conduct of the plaintiff's counsel in this case, while not deliberate was egregious. It is at the opposite end of the spectrum from inadvertent conduct that could be considered to be a mirror slip. As such, in weighing all of the factors, this factor would tend to weigh against the plaintiff notwithstanding that the conduct itself was inadvertent, as opposed to deliberate. The weighing process is qualitative, not quantitative. It is not a matter of how many of the four tests are satisfied by the plaintiff, but the relative merits and weaknesses of the circumstances in each of the categories.

[49] She also relies on the motor vehicle accident case of *Jadid v. Toronto Transit Commission*, 2016 ONCA 936, for the proposition that none of the Reid factors have automatic priority over any others.

[50] The four Reid factors as set out at paragraph 25 in the *Finlay v. Van Passon* 2010 ONCA 204, are essentially:

(1) - the plaintiff must adequately explain the delay and satisfy the court that steps were being taken to advance a litigation towards trial,

(2) - the plaintiff must lead satisfactory evidence that they always intended to set the action down for trial,

(3) - the plaintiff must demonstrate that it moved forthwith to set aside the dismissal order,

(4) - the plaintiff must convince the court that the defendants have not demonstrated any significant prejudice as a result of the plaintiffs delay or as a result of steps taken following the dismissal of the action.

[51] The issue in the *Jadid* case was one step removed from an appeal of an administrative dismissal because the dismissal had been previously set aside by court order on terms which had not been satisfied. In addition, the motion judge concluded that there was non-compensable prejudice to the defendant because of the delay.

[52] Although the Ferro defendants do not allege prejudice, Van Allen submits that Lexfund exhibited a history of unexplained and intentional delay. Lexfund did not apply for an order to continue under Rules 10 and 11, and failed to comply with Justice Campbell's order, notwithstanding numerous reminders from other counsel to do so. Therefore, the failure to obtain the appropriate orders was intentional, not inadvertent.

[53] Van Allen submits that Lexfund had a deliberate intention to abandon the files and has not filed an affidavit to the contrary.

Findings

[54] Certainly with hindsight, Mr. Gregoire's handling of the issues which have been raised in this motion, fell short of what one would expect from a counsel of his stature.

[55] His explanations of changing law firms, being understaffed and having a moderate medical problem explain part of the reason for his not obtaining the appropriate orders, however, the explanations given the correspondence between counsel are quite pale and could certainly be categorized as sloppy practice.

[56] Gregoire relied in part on Master Wiebe's order dated June 19, 2015, which allowed Lexfund to proceed with its action against Ferro in file 12-4358-SR, notwithstanding the bankruptcy proceedings.

[57] Although it was argued that Lexfund's actions were a deliberate litigation tactic, counsel was unable to suggest how such a tactic could ever assist Lexfund.

[58] On the facts of this case, to suggest that Lexfund deliberately formed the intention not to proceed with the actions simply makes no sense. At all times there were multiple actions going on and almost continuous court proceedings as set out under the heading Timelines in paragraph 14 of this judgment.

[59] Even after the administrative dismissals, the court actions and hearings continued on several fronts in Lexfund related litigation, including Justice Campbell's order of May 18, 2017 approving a new timetable for the actions that had been administratively dismissed in 2014.

[60] It certainly made practical sense once my judgment of June 22, 2016 was appealed, to essentially park all the actions until that appeal was disposed of. This did not happen until October 2018.

[61] The Lexfund cases are not like a motor vehicle accident case where evidence may disappear or memories fade as time goes by. In this case the Ferro defendants have whatever documentary evidence Ferro left them with, and the individual defendants on the evidence before me, essentially never did have any documentary evidence.

[62] However, in essence, these cases are relatively simple. There either are or are not records to show what Lexfund advanced. There either are or are not records to show what, if any, payments were made on the Lexfund loans. It appears that there are records

that show a date when the Lexfund loans could have first been retired after the individual settlements of the motor vehicle accidents.

[63] That essentially leaves only the issues being the rate of interest (which this court has already commented on in its judgment of June 22, 2016) and for what period of time interest should be paid.

[64] This is a document case and the documents appear to be available. On the evidence before me, there is money in trust which arguably is there because of Lexfund's loans which funded the motor vehicle litigation.

[65] There is no juristic reason why Lexfund should not be repaid its loans and no juristic reason why the individual defendants should receive a windfall after using the services of Lexfund to further their motor vehicle litigation.

[66] The Lexfund litigation should proceed to a just resolution on its merits.

[67] I find on a balance of probabilities that the individual defendants will likely be prejudiced with respect to the issue of interest because of the delay, which for the main part I place at the foot of Lexfund.

[68] Therefore I make the following orders in subparagraphs 1, 2 and 3 conditional on the orders in subparagraphs 4 and 5:

- 1) I extend the timetable set forth at Schedule "A" of Justice Campbell's order dated the 18th day of May 2017, for the seven actions set forth in paragraph 7, plus action number 15-51822-SR. If counsel are unable to agree on a timetable I may be spoken to.
- 2) I extend the time limit set out in Rule 24.03 for Lexfund to elect to proceed with its counterclaims for 30 days following the date of this order.
- 3) Pursuant to Rule 10.02, all Lexfund proceedings against the Estate of Lucio Anthony Ferro may proceed in the absence of a person representing his estate.
- 4) The rate of interest on any amounts owing by any individual defendants (this does not include Ferro) shall be set at 5% per annum,

simple interest commencing from the date that each individual defendant obtained their loan.

- 5) The individual defendants (this does not include Ferro) shall not be liable for any interest after the last day of the month, following the month in which Ferro could have paid the loans.

[69] The issue of costs is not as clear-cut as it normally is. If the parties are unable to agree on costs, Mr. Esterbauer shall forward his **brief** submissions on costs to me by February 8, 2019. Ms. Van Allen & Ms. Grosso shall forward their **brief** response to me by February 15, 2019. Mr. Esterbauer shall then forward his reply, if any, to me by February 20, 2019. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca. Cost submissions, excluding bills of costs shall be limited to 5 pages using spacing of 1.5 and 12 pitch font.



J. W. Sloan J.

Released: January 29, 2019

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LEXFUND INC.

Plaintiff

– and –

LUCIO ANTHONY FERRO (AKA LOU FERRO)
AND FERRO & COMPANY , ANDREW RODENY,
AILEEN FINLAY, KEVIN WATERFIELD, JOSEPH
MASTROMATTEI, TIMOTHY MORGAN, LISA
CURTIS AND CHRISTOPHER BEAN

Defendants

REASONS FOR JUDGMENT

J.W. Sloan J.

Released: January 29, 2019