CITATION: Mastrogiuseppe v. Ivanhoe Cambridge, 2015 ONSC 1160
COURT FILE NO.: 09-CV-394224
MOTION HEARD: December 5, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

Re: Nancy Mastrogiuseppe

Plaintiff

v.

Ivanhoe Cambridge Inc., Ivanhoe Cambridge Limited operating as Upper Canada Mall, Omers Realty Corporation and Regional Shopping Centres Limited

Defendants

BEFORE: Master Thomas Hawkins

APPEARANCES: Jillian Van Allen for moving plaintiff
F (416) 869-0271

David J. Olevson for responding defendants
F (416) 860-0003

REASONS FOR DECISION

Nature of Motion

[1] This is a motion by the plaintiff for an order setting aside the order of the registrar of May 16, 2012 dismissing this action for delay. The plaintiff commenced this action for damages as a result of an alleged slip and fall accident in which she was injured. The accident occurred on December 29, 2007.

[2] The plaintiff brings this motion pursuant to subrules 37.14(1)(c) and (2). These subrules provide as follows.

> 37.14 (1) A party or other person who,
>
> (a) is affected by an order obtained on motion without notice;
>
> (b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary 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.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[3] The plaintiff is a party affected by an order of a registrar.

[4] Before I set out the history of this action, I wish to make it clear that references to the plaintiff's lawyers are not references to Jillian Van Allen who argued this motion for the plaintiff, nor are they references to her firm. Before Ms. Van Allen and her firm became involved with this motion, the plaintiff was represented by two previous lawyers. I shall refer to the first such lawyer as lawyer J.M. and to the second such lawyer as lawyer W.R.C. Lawyer W.R.C is not responsible for any of the delays in this action.

History of Action

[5] The following is a history of this action with an emphasis on the events leading up to the registrar's dismissal order of May 16, 2012 and to argument of this motion before me on December 5, 2014.

Date	Event
December 29, 2007	Plaintiff trips and falls at Upper Canada Mall. Incident is reported to a mall security officer.
January 16, 2008	Lawyer J.M., recently retained by plaintiff, writes to Ivanhoe Cambridge Upper Canada Mall putting it on notice of plaintiff's intended claim and providing detailed information about the plaintiff's trip and fall incident.
February 19, 2008	Insurers for Upper Canada Mall retain Crawford & Company (Canada) which writes lawyer J.M. requesting information supporting

	plaintiff's claim.
April 9, 2008	Crawford & Company (Canada) writes lawyer J.M. denying liability to plaintiff. Further exchanges of correspondence follow.
December 24, 2009	Lawyer J.M. has court registrar issue statement of claim.
January 29, 2010	Defendants deliver statement of defence and jury notice.
June 4, 2010	Defence counsel sends lawyer J.M. a notice of examination for discovery of the plaintiff for September 9, 2010. The examination does not proceed that day.
June 7, September 25 and October 30, 2010	Layer J.M. writes plaintiff's family physician requesting her report.
September 9, 2010	Defence counsel reschedules examinations for discovery of all parties to December 2, 2010.
September 25, 2010	Lawyer J.M. arranges for orthopedic surgeon Dr. Kliman to examine plaintiff on November 25, 2010. Her medical examination does not proceed that day. The same September day lawyer J.M. writes OHIP requesting a decoded summary of services for the plaintiff from January 1, 2003 forward.
December 2, 2010	Examinations for discovery of all parties conducted. Plaintiff gives many undertakings.
December 3, 2010	Lawyer J.M. writes plaintiff enclosing a chart of her undertakings and refusals.
June 15, 2011	Master Glustein orders plaintiff to answer outstanding undertakings.

February 2, 2012	Court registry sends out a status notice: action not on a trial list (Form 48C.1).
April 2, 2012	Lawyer J.M., aware of the status notice, has trial record prepared and served on defence counsel. He then instructs McRoberts Legal Services to file trial record.
May 8, 2012	McRoberts Legal Services sends lawyer J.M. a note advising that a mediation certificate must be provided before trial record can be filed. This note does not immediately come to lawyer J.M.'s attention. Lawyer J.M. is unaware of this mediation certificate requirement and does not meet it in time.
May 16, 2012	Registrar dismisses this action for delay.
June 2, 2012	Lawyer J.M. writes defence counsel enclosing medical records and reports on the plaintiff and agrees to make a settlement proposal. He does not deal with dismissal order and believes action may settle.
June 2012 to Spring 2014	Lawyer J.M. undergoes medical treatment which includes taking medication. This medication interferes with his ability to tend to files including his file on this action.
January/February 2013	Lawyer J.M. tends to this file and contacts defence counsel to see if this action can be settled without a motion to set aside the dismissal order. Defence counsel tells him that this action cannot be settled and that he must proceed with a set aside motion. With concurrence of defence counsel, he obtains a motion hearing date for September 2013 thereafter he

	"freezes" and does not prepare a motion record.
Spring 2013	Lawyer J.M. advises plaintiff that (a) her action has been dismissed, (b) that he will report this matter to his insurers and (c) that she should retain a new lawyer. Thereafter he freezes again and does not report this matter to his insurers.
March 2014	Plaintiff retains lawyer W.R.C. This prompts lawyer J.M. to report matter to his insurers who retain repair counsel.
November 24, 2014	Repair counsel has motion record for present motion served.
December 5, 2014	Motion is argued before me. I reserve judgment.

Comments on Case History

[6] The above history of this action is incomplete. The thorough motion record which repair counsel prepared contains many letters which lawyer J.M. wrote in the course of collecting information from O.H.I.P., a pharmacy and health care professionals who treated the plaintiff for the injuries which she suffered on December 29, 2007. That motion record includes an affidavit from lawyer J.M. which is 81 paragraphs long and includes 57 exhibits. I have not mentioned all the letters which lawyer J.M. wrote in the process of prosecuting this action, and collecting information supporting the plaintiff's claims.

Legal Test for Setting Aside Registrar's Dismissal Order

[7] In *Scaini v. Prochnicki*, 2007 ONCA63, 85 O.R. (3d) 179, Goudge J.A., speaking for the Court of Appeal for Ontario, allowed an appeal from a motion judge. The motion judge had dismissed a plaintiff's motion to set aside a registrar's dismissal order because the plaintiff had failed to satisfy one of four criteria often used in deciding such motions. Master Dash originally laid down these four criteria in *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80.

[8] At paragraphs 21 to 24 of his decision, Goudge J.A. expressed himself as follows.

> 21 More importantly, I do not agree that the case law reviewed in *Reid, supra*, yields the proposition that an appellant must satisfy each relevant criterion in order to have the registrar's order set aside. None of the cases referred to say so expressly and several proceed on a more contextual basis. For example, in *Steele v. Ottawa-Carleton (Regional Municipality)*, [1998] O.J. No. 3154 (Gen. Div.) Master Beaudoin, at para. 17, described the guiding principle in deciding whether to set aside a Rule 48.14 dismissal by the registrar as follows:
>
> > ... Ultimately, the Court will exercise its discretion upon a consideration of the relevant factors and will attempt to balance the interests of the parties.
>
> 22 I agree with Master Beaudoin.
>
> 23 In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1) (c) and (2). The latter invites the court to make the order that is just in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.
>
> 24 That is not to say that there are no criteria to guide the court. Indeed I view the criteria used by the motion judge as likely to be of central importance in most cases. While there may be other relevant factors in any particular case, these will be the main ones. The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[9] Because Goudge J.A. said that the four *Reid* criteria used by the motion judge were likely to be of central importance in most cases, I will consider these four criteria, using a contextual approach respecting the facts underlying this motion while attempting to balance the interests of the parties.

<u>First *Reid* Criterion</u>

[10] The first *Reid* criterion may be expressed as follows.

> Has the plaintiff provided a satisfactory explanation for the litigation delay?

[11] This explanation must cover all delays in the prosecution of this action from its inception on December 24, 2009 forward.

[12] Applying a contextual approach to this motion involves in part recognition of the fact that effective January 1, 2015, (a few weeks after this motion was argued on December 5, 2014) rule 48.14 was extensively amended. Rule 48.14 is the rule which, before it was amended, gave the registrar authority to dismiss this action for delay on May 16, 2012.

[13] As amended, rule 48.14 now directs the registrar to give plaintiffs substantially more time to set their actions down for trial or otherwise terminate them than was previously the case. What is now an acceptable level of due diligence in the prosecution of an action is a much easier test to meet.

[14] To express the same basic point another way, because of the amendments to rule 48.14, it is now much easier to meet the first *Reid* criterion than in the past.

[15] The amendments to rule 48.14 had been passed by the time this motion was argued on December 5, 2014. These amendments were not made with force retroactive to a date prior to May 16, 2012 when the registrar made the dismissal order in question. The amendments were made effective as of January 1, 2015, as I have said.

[16] Nevertheless, I consider the passage of these amendments to rule 48.14 and their practical consequence of giving plaintiffs substantially more time to set their actions down for trial before the registrar dismisses their actions for delay to be part of the context in which I should decide this motion.

[17] I have considered the history of this action as summarized after paragraph [5] above and the letters which lawyer J.M. wrote in the process of collecting information supporting the plaintiff's claims, many of which letters I have not mentioned in that summary. Having done so, I am of the view that this action was satisfactorily prosecuted up to April 2012. At that point things seem to have gone off the rails.

[18] Lawyer J.M. was then aware that the court registry had issued a status notice (Form 48C.1) and that he had to set the action down for trial shortly or see the registrar dismiss the plaintiff's action for delay.

[19] Lawyer J.M. had a trial record prepared and served on defence counsel. He then instructed his agent to file the trial record in this court's Toronto registry.

[20] Lawyer J.M. seems to have been unaware that unless certain steps respecting mandatory mediation are complied with, Toronto court registry staff will not accept for filing a trial record for most actions commenced in the Toronto Region. This is one such action.

[21] These requirements respecting mandatory mediation were no secret. In the spring of 2012 they were found in paragraphs [34] to [37] of the Practice Direction for Civil Applications, Motions and Matters in the Toronto Region, in force as of January 1, 2010, (the "Practice Direction").

[22] Lawyer J.M. did instruct his agent to file the trial record before the registrar dismissed this action for delay. Court registry staff would not accept the trial record for filing because lawyer J.M. had not complied with the Practice Direction requirements respecting mandatory mediation which I have referred to.

[23] McRoberts Legal Services sent lawyer J.M. a note reading "8 May Mediation Certificate Required". This is a reference to the requirements set out in paragraph [36] of the Practice Direction.

[24] Lawyer J.M. says that he overlooked this requirement through inadvertence and mistake. He also says that the McRoberts Legal Services note of May 8, 2012 did not come to his attention at the time his office received it and that he did not have time to meet the mandatory mediation requirements before the registrar dismissed this action for delay on May 16, 2012.

[25] The plaintiff has also sworn an affidavit in support of this motion. In her affidavit she says that she has always intended to proceed with this case. Certainly she retained lawyer J.M. promptly after her accident of December 29, 2007.

[26] The plaintiff also says that she left her claim in the hands of lawyer J.M. and that from time to time she was in contact with his office. She always understood that her action was proceeding in the normal course. I assume this was so until lawyer J.M. told her in the spring of 2013 that her action had been dismissed for delay.

[27] On the whole, while the explanation for the litigation delay is less than ideal, I consider it to be satisfactory. The plaintiff has therefore met the first *Reid* criterion.

[28] I now turn to the second *Reid* criterion. That criterion (edited so as to apply to the facts before me) is as follows.

> Has the plaintiff led satisfactory evidence to explain that lawyer J.M. always intended to set this action down for trial within the time limits set out in rule 48.14 but failed to do so through inadvertence?

[29] In my view, one purpose of this criterion is to identify those situations in which a plaintiff or a plaintiff's counsel, with the approval of his or her client, has deliberately flouted the Rules of Civil Procedure or orders of the court.

[30] Some of the cases describe this attitude as contumacious or stubbornly disobedient behaviour. I do not regard lawyer J.M. as a stubbornly disobedient person. There is no evidence that the plaintiff herself instructed lawyer J.M. to delay the prosecution of this action.

[31] As I have said, in the spring of 2012 lawyer J.M. was aware that the deadline for setting this action down for trial was looming.

[32] Lawyer J.M. took steps to meet this deadline but failed to do so. There were several reasons for this failure. First, lawyer J.M. was unaware of the mandatory mediation requirements in the Practice Direction which had to be met before this action could be set down for trial. Secondly, he appears not to have diarized the need to follow up with McRoberts Legal Services promptly to ensure that they had succeeded in setting this action down for trial.

[33] This failure to diarize the need to follow up had two consequences. First, over a month passed between April 2, 2012 when lawyer J.M. sent a memo to McRoberts Legal Services instructing them to file the trial record and confirm to him that they had done so and May 8, 2012 when they reported back in a note that a mediation certificate was required. Secondly, more time passed without follow up action from lawyer J.M. because his staff did not immediately bring the May 8, 2012 note to his attention.

[34] When the May 8, 2012 note finally came to his attention, lawyer J.M. did not have time to arrange a mediation and then to serve and file the required mediation certificate. As a result, the registrar dismissed this action for delay on May 16, 2012.

[35] In these circumstances, the failure of lawyer J.M. to meet the set down deadline was the product of inadvertence and not of stubbornly disobedient behaviour.

[36] I am therefore of the opinion that the plaintiff has met the second *Reid* criterion.

[37] This brings me to the third *Reid* criterion. This criterion may be expressed as follows.

> Has the present motion been brought promptly?

[38] In argument before me, Ms. Van Allen conceded that this motion was not brought promptly.

[39] In the excerpts from his decision in *Scaini* which I have set out in paragraph [8] above Goudge J.A. makes it clear that the failure to meet all four *Reid* criteria is not invariably fatal to the success of a motion like the present one. Rather one should take a contextual approach. Here that contextual approach

involves a consideration of (a) why this motion was not brought promptly, (b) how extensive the delay was, and (c) whether the defendants have been prejudiced by the delay in bringing this motion.

[40] I will deal first with the subject of why this motion was not brought promptly. There are several reasons for this.

[41] From June 2012 to the spring of 2014 lawyer J.M. underwent medical treatment. This included taking medication which diminished his ability to deal with files including his file on this action.

[42] Lawyer J.M. initially delayed bringing a motion to set aside the registrar's dismissal order of May 16, 2012 because he hoped this action could be settled without the need for such a motion. By February 2013 lawyer J.M. realized that this action would not settle and that a set aside motion would be necessary.

[43] In March 2013 and with the concurrence of defence counsel, lawyer J.M. then booked a hearing date for the set aside motion for September 2013. However he then froze and did not prepare any motion materials. The set aside motion was not heard in September 2013.

[44] In the spring of 2013 lawyer J.M. told the plaintiff that her action had been dismissed and that he would report the situation to his insurers. Notwithstanding the need to do this, lawyer J.M. froze once again and did not report the situation to his insurers at that time.

[45] In March 2014 lawyer J.M. finally reported this situation to his insurers. Typically this delays the bringing of a set aside motion for several months. Here the insurers decided to retain repair counsel. Repair counsel had to interview the insured lawyer J.M. and then prepare and serve motion materials.

[46] In paragraph [6] above I have described the extensive and thorough motion materials which repair counsel prepared. Materials that extensive cannot be drafted overnight. These materials were served on defence counsel on November 24, 2014. The motion was argued on December 5, 2014 at which time I reserved judgment.

[47] In my view, the delay in bringing this motion was not the result of defiance or stubborn, deliberate disobedience as regards the need to move promptly. It was the result of human frailty, of the side effects of medication, and of the decision which lawyer J.M. made to report the situation to his insurers rather than bring the set aside motion himself.

[48] Next, I must consider the length of the delay in bringing this motion. The registrar dismissed this action for delay on May 16, 2012. Lawyer J.M. was

aware of the dismissal order by May 18, 2012 when he sent a copy of the order to defence counsel. Repair counsel sent defence counsel a draft notice of motion on August 18, 2014. This draft notice of motion was the first time defence counsel had heard from anyone on behalf of the plaintiff since March 2013, some 17 months earlier. There was no affidavit material sent with the draft notice of motion. However the draft notice of motion alerted defence counsel to the fact that the set aside motion hearing date was December 5, 2014.

[49] Repair counsel served the full motion record with supporting affidavits on defence counsel on November 24, 2014. That was 30 months after the date of the registrar's dismissal order. The motion was argued less than two weeks later.

[50] In *Marché D'Alimentation Denis Theriault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA695, 85 O.R. (3d) 179, ("*Giant Tiger*") the set aside motion was not brought until almost five years after the date of the registrar's dismissal order and not argued until almost six year after the order. Defence counsel did not hear from plaintiff's counsel for almost five years. This delay alone was fatal to the plaintiff's set aside motion.

[51] In *Finlay v. Van Paassen*, [2010] ONCA204 ("*Finlay*") the delay in bringing the set aside motion was two years. This was not fatal to the motion.

[52] The situation before me is closer to that in *Finlay* than it is to the situation in *Giant Tiger*. Defence counsel in this action did not hear from anyone representing the plaintiff for 17 months. The period of silence in *Giant Tiger* was almost five years.

[53] There remains the important issue of prejudice to the defence during a period of delay by the plaintiff.

[54] Here on December 1, 2014 defence counsel Frank DelGiudice swore a 30 paragraph affidavit in response to this motion.

[55] In his affidavit, the closest Mr. DelGiudice comes to the subject of prejudice is to state that by the time Ms. Van Allen served her draft notice of motion on his firm on August 18, 2014 both his firm and his clients had closed their files on this action. That is easily remedied. Those files can simply be re-opened. Mr. DelGiudice does not say that in the course of closing files anyone discarded documents helpful to the defence in this action.

[56] I will deal with the subject of prejudice to the parties at greater length when I discuss the fourth *Reid* criterion.

[57] In summary, the plaintiff has not met the third *Reid* factor. However that failure to move promptly was not due to conduct that was defiant or that

amounted to stubborn, deliberate disobedience. The length of the delay in moving was not so egregious as to justify dismissing this motion on that ground alone.

[58] This brings me to the fourth *Reid* criterion. To my mind, this criterion is the most important of the four criteria. This criterion may be expressed as follows.

> Have the defendants suffered any significant prejudice in presenting their case at trial as a result of the plaintiff's delay in the prosecution of this action or as a result of steps taken following the registrar's dismissal of this action?

[59] The plaintiff has the onus of persuading me that the defendants have not suffered such prejudice. That said, in most motions like the present one, as between the plaintiff on the one hand and the defendants on the other, the defendants have the better means of knowledge as to whether they have suffered prejudice.

[60] When the plaintiff fell at Upper Canada Mall on December 29, 2007 her accident was reported to a mall security officer. The plaintiff says that she tripped and fell because one or more floor tiles were missing. A mall staff member photographed the area where floor tiles were missing.

[61] Lawyer J.M. gave one of the defendants notice of the plaintiff's claim less than three weeks after the plaintiff fell. By April 2008 Crawford & Company (Canada) had completed its investigation of the plaintiff's slip and fall accident. Lawyer J.M. sent Crawford & Company (Canada) a photograph taken by mall staff reflecting the absence of floor ceramic tile in the area where the plaintiff says she fell.

[62] The defendants and their representatives therefore had ample opportunity to investigate the plaintiff's accident and to take witness statements when the memories of witnesses were still fresh. Both the plaintiff and the defendants were examined for discovery in December 2010.

[63] As I have said, Mr. DelGiudice swore the only affidavit served in response to this motion. The closest he comes to the subject of prejudice to the defence is to say that by August 18, 2014 both his firm and his clients had closed their files on this action.

[64] There is no evidence that any witness helpful to the defence has died or can no longer remember what happened. There is no evidence that any such witness has disappeared and cannot be located despite reasonable efforts to find such witness. There is no evidence that any documents helpful to the defence have gone missing or were destroyed in the mistaken belief that the plaintiff had abandoned this action after the registrar dismissed it.

[65] In conclusion, Ms. Van Allen has convinced me that the defendants have not suffered and will not suffer such prejudice in presenting their case at trial or such prejudice as a result of steps taken following the registrar's dismissal of this action that this motion should be dismissed.

[66] The delays in the prosecution of this action are not so egregious that this motion should be dismissed regardless of whether the defendants have suffered prejudice.

[67] In my view the plaintiff has met the fourth *Reid* criterion.

Balancing Exercise

[68] Finally, I must balance the interests of the parties. If this motion is dismissed and the allegations in the statement of claim are true, the plaintiff will suffer prejudice. Because the registrar dismissed this action with costs, if this motion is dismissed the plaintiff must pay those costs to the defendants. Because this action is almost ready to be set down for trial those costs would be substantial. In some cases where the court has dismissed a motion like the present one the court has said that the plaintiff will not be without a remedy because the plaintiff can sue her or his negligent lawyer. In other cases the courts have cautioned against speculating as to whether the plaintiff has such a remedy. At the very least, if the plaintiff's motion is dismissed and she is left to start a new action, the day she receives compensation will be delayed for several years.

[69] I must also consider whether the defendants will be prejudiced if this motion is granted. In that event, I am of the view that the defendants will not be prejudiced because on the evidence before me, they can still present their case at trial.

Conclusion

[70] This motion is therefore granted. The registrar's dismissal order of May 16, 2012 is set aside. The time for the plaintiff to set this action down for trial is extended to 90 days from the final disposition of this motion. This may seem like a very generous time extension. However, my experience in other motions has been that even diligent lawyers experience considerable delays in getting formal orders issued and entered by court staff.

Costs

[71] Ms. Van Allen did not ask for costs. The price of an indulgence is the payment of the costs of those who have sought, unsuccessfully, to prevent tis being granted. *See Fox v. Bourget* (1987), 17 C.P.C. (2d) 94 (Ont. Dist. Ct.). I therefore award the costs of this motion, fixed at $7,000, to the defendants and order the plaintiff to pay such costs to them within 30 days.

J. R. Hawkinson

Date: March 3, 2015

Master Thomas Hawkins

* * * Communication Result Report (Mar. 11. 2015 3:36PM) * * *

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