

SUPERIOR COURT OF JUSTICE

BETWEEN:

Michelina McRae

-and-

Norma G. Sanchez et. al.

REASONS FOR DECISION

BEFORE THE HONOURABLE MASTER GRAHAM  
on FEBRUARY 19, 2016 at TORONTO, Ontario

APPEARANCES:

J. Van Allen ..... Counsel for Ms. McRae  
S. Schmoranz ..... Counsel for Ms. Sanchez et al.

Table of Contents

SUPERIOR COURT OF JUSTICE

TABLE OF CONTENTS

5  
10  
15  
20  
25  
30

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Transcript Ordered: ..... February 19, 2016  
Transcript Completed: ..... February 29, 2016  
Ordering Party Notified: ..... March 1, 2016  
Approved by Master Graham ..... March 8, 2016

Further revisions made by Master Graham on March 15, 2016 and March 31, 2016

1.  
McRae v. Sanchez et. al.  
Reasons for Decision

FRIDAY, FEBRUARY 19, 2016

(11:50 a.m.)

MASTER GRAHAM (ORALLY):

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The plaintiff's motions in the two actions before the Courts in court files CV-12-445063, and CD 13-483487, in both of which the titles of proceedings are Michelina McRae as plaintiff and Norma Sanchez and Jorge Rios as defendants, are to set aside the dismissal orders dismissing both of those actions as abandoned. The order in the 2012 action was made by the Registrar on September 21, 2012. The order in the 2013 action was made by the Registrar on February 24, 2014.

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As it is conceded by the plaintiff based on the Court of Appeal's decision in Mintz v. Wallwin, [2009] OJ No. 843, that the 2013 action constitutes an abuse of process, I will address the motion to set aside the dismissal of the 2012 action.

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The factors to be considered on the motion to set aside a Registrar 's dismissal order are enumerated in Reid v. Dow Corning Corp., 11 CPC (5<sup>th</sup>) 80, and set out by the court of appeal in Habib v. Mucaj [2012] OJ No. 5946. The factors that the court should consider are whether there has been an explanation of the litigation delay; whether the deadline resulting in the dismissal was missed owing to inadvertence; whether the

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McRae v. Sanchez et. al.  
Reasons for Decision

motion to set aside the dismissal was brought promptly; and whether there would be any prejudice to the defendants in the event that the action were reinstated. As the Court stated in Habib:

5 "No one factor is necessarily decisive of the issue, rather a contextual approach is required where the Court weighs all relevant considerations to determine the result that is just. Furthermore, on a motion to set aside a dismissal order the court should be concerned primarily with the rights of the litigants not the conduct of their counsel."

10 The Court of Appeal provided further guidelines with respect to motions to set aside Registrars' dismissal orders in HB Fuller Company v. Rogers, 2015 ONCA 173. The Court of Appeal stated as follows in paragraph 25:

15 "The factors that guide the Court's choice between ending the plaintiff's action before trial and enforcing the opposite party to defend the case despite the delay, require a judge to resolve the tension between two underlying policies. The first is that civil actions should be decided on their merits, the second is that civil actions should be resolved in a timely and efficient manner in order to maintain public confidence in the administration of justice."

20 In paragraph 26 the court states:

25 "When reviewing a Registrar 's dismissal for delay under the former rule 48.14, the weight of authority from this Court has leaned towards the first policy consideration. The Court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."

30 In paragraph 27 of HB Fuller, the Court of Appeal

McRae v. Sanchez et. al.  
Reasons for Decision

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stated: "The Court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel."

In paragraph 28 the Court states:

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"In determining whether to reinstate an action that has been dismissed for delay, keeping in mind the above observations, the Court must consider the rights of all the litigants. This necessarily requires consideration, not only of the plaintiff's right to have its action decided on the merits, but also consideration of whether the defendant has suffered non-compensable prejudice as a result of the delay; whether or not a fair trial is still possible; and even if it is, whether it is just that the principle of finality and the defendant's reliance on the security of its position should nonetheless prevail."

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The court has considered in some of the authorities whether the possibility of a negligence action by the plaintiff against his or her lawyer may be a reason not to excuse the delay and not to set aside the dismissal order. In *Finlay v. Van Paassen* 2010 ONCA 204, at paragraph 32, the Court of Appeal stated:

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"Speculation about whether the party has a law suit against its own lawyer, or the potential success of that law suit should not inform the Court's analysis of whether the Registrar's dismissal order ought to be set aside."

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The Court then makes the statement that is quoted in *Habib*: "In my view on a motion to set aside a dismissal order the Court should be concerned primarily with the rights of the litigants, not

McRae v. Sanchez et. al.  
Reasons for Decision

with the conduct of their counsel.”

5 As Sharpe J. noted in Marche at paragraph 28: “The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor.”

10 And finally in reviewing the applicable law, I refer to the decision of Wilson J. sitting as a Divisional Court judge in Klaczskowski v. Blackmont Capital Inc., 2015 ONSC 1650, and in particular paragraphs 30 through 33.

15 Starting at paragraph 30, Madam Justice Wilson states: “Rule 48.14 has been amended to extend the time for dismissal for delay from two years to five years after the filing of the defence.” And going on to paragraph 32, in El Khouli, 2014 ONSC 6140: “In assessing whether to set aside a Registrar 's order Master Short considers as a relevant factor the impact of the rule change, effective January 1, 2015.”

25 At paragraph 39, he explains that “the two year time limit imposed needless costly work upon both Masters and litigants.” He confirms at paragraph 48 that “proportionality requires incorporating the rule change into the contextual approach previously discussed.”

30 At paragraph 33 Wilson J. states: “I agree with

McRae v. Sanchez et. al.  
Reasons for Decision

this conclusion. The impact of the significant rule change is appropriately considered as part of the contextual analysis weighing the benefits of timely justice against the right to be heard."

I'll now turn to the consideration of the Reid factors, and the first of those factors is whether there is an explanation for the litigation delay. In this case, the action arises out of motor vehicle accident that occurred on June 26, 2011. The statement of claim was issued seven months later, well within the two year limitation period, on January 27, 2012, and was served promptly on the defendants on February 1, 2012.

Counsel for the defendants did not contact the plaintiff's counsel with respect to the defence of the action until September 20, 2012, the day before the Registrar dismissed the action on September 21, 2012. The delay in the defendant's counsel contacting plaintiff's counsel following the service of the statement of claim is more than seven months, and accordingly part of the litigation delay at least is attributable to the defendant's failure to defend the action promptly.

During that period of time, between the service of the statement of claim and the first contact from defendant's counsel, plaintiff's counsel was compiling documents to substantiate the claim. The litigation delay between the issuing of the action and the Registrar's dismissal order, in

McRae v. Sanchez et. al.  
Reasons for Decision

this case, is accordingly minimal, and is a delay for which the defendants are at least partly responsible.

5 The second factor to be considered is whether the deadline resulting in the dismissal of the action was missed owing to inadvertence. Counsel for the defendants makes the submission that there is no evidence from Mr. Gosio, who was the plaintiff's lawyer at the time, which would explain, or provide evidence, that the deadline was missed through his inadvertence on his watch. There is no evidence from the defendants that would suggest that the deadline was missed intentionally. To 10 the contrary, counsel's conduct, in this case Mr. Gosio's conduct, in requesting medical records between June and September of 2012 is consistent with an intention to proceed with the action, and is not consistent with a deliberate failure to comply with the pending deadline. This leads to the reasonable inference that the deadline was missed through inadvertence, because if Mr. Gosio actually intended to ignore the deadline, it would have made no sense for him to be compiling medical 15 documentation during that period of time. I conclude that the deadline was missed through inadvertence.

20 The third factor to be considered is whether the motion to set aside the dismissal order was brought promptly. In this case, there is a significant delay between the dismissal of the 25 30



McRae v. Sanchez et. al.  
Reasons for Decision

2012 action on September 21, 2012, and the service of the notice of motion to set aside the dismissal order, which was effected in May of 2015.

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However, this delay must be considered in the context of plaintiff's counsel's continued efforts to obtain documents, his effort to continue to advance the claim by starting the second action in 2013, and the change of plaintiff's counsel with the new counsel Mr. Bourdon not being aware of the dismissal of the 2012 action until February of 2015. The motion was then brought three months after the new counsel, Mr. Bourdon, became aware of the dismissal.

As indicated, there is a lengthy delay between the dismissal of the action and the motion being brought, but that delay must be seen in the context of the other events that I have enumerated.

With respect to the fourth factor to be considered under Reid v. Dow Corning, the defendants acknowledge that there's no evidence to indicate that there would be any prejudice to the defendants arising from the delay, such that a fair trial would not be possible. The evidence is that there was timely notice provided to the defendants of the intention to claim, and there was timely investigation of the liability issue by the defendant's insurer. Further there was even surveillance conducted of the plaintiff by the defendant's insurer prior to their counsel

McRae v. Sanchez et. al.  
Reasons for Decision

contacting plaintiff's counsel in September of 2012.

5 The damages documentation compiled by the plaintiff's counsel is quite extensive as set out in paragraph 83 of the plaintiff's counsel's factum. Most significantly the documents that are available include the plaintiff's income tax returns from 2005 to 2011, meaning that there are 10 six full years of income tax returns available prior to the year of the accident, which is as many years as would typically ever be available for the defendant's review in a personal injury case. Further, plaintiff's counsel has a decoded 15 OHIP summary of service commencing January 1, 2007, which is for more than four years before the accident of June 26, 2011, which is more than adequate to provide the defendants with the opportunity to review the plaintiff's pre-accident 20 health history. Accordingly, I conclude that there would be no prejudice to the defendants in the event that the action were to proceed, and no risk that a fair trial could not be held.

25 In addition to the four Reid factors, there are two other factors that the court should consider. First, there is no evidence the defendants have relied on the dismissal order to their detriment. The second factor arises from the Klaczskowski 30 decision referred to earlier in these reasons. The motor vehicle accident occurred on June 26, 2011. There was no requirement to start the

McRae v. Sanchez et. al.  
Reasons for Decision

action until two years following that date, or June 26th of 2013.

5 Under the current rule the action would not be dismissed for delay until June 26, 2018, more than two years from now. Accordingly, in the context of the current rule, the delay is not such as would have resulted in the dismissal of the action under the current rule, and that should also be considered in determining whether or not to set aside the dismissal order.

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15 Reviewing all of the factors that I've considered included the four Reid factors and the fact that the defendants had not relied on the dismissal order to the detriment and the change in the rule considered in Klaczskowski, the only factor that really would militate against the setting aside of the dismissal order would be the delay between the dismissal order of September 21, 2012, and the motion being initiated in May of 2015. However, considering that delay in the context of everything that transpired in the action, including the defendants' failure to defend the action promptly in the first place, the fact that the deadline was missed through inadvertence, and most significantly the fact that there would be no prejudice to the defendants if the action were to proceed, the action should be allowed to proceed and the dismissal order should be set aside.

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30 Accordingly, I hereby order that the dismissal order of September 21, 2012 in action CV-12-445063

10.  
McRae v. Sanchez et. al.  
Reasons for Decision

be set aside.

5 The motion was also brought to set aside the dismissal order in the 2013 action. As discussed earlier in these reasons, I accept that action does constitute an abuse of process and I exercise my jurisdiction under section 106 of the Courts of Justice Act and rule 2.1.01(1), to stay the 2013 action as an abuse of process.

10 I will now hear counsel's submissions, with respect an appropriate timetable for the 2012 action, and also with respect to costs of the motions. Thank you.

15 ...FILES ENDORSED AS TO COST

20 ...WHEREUPON COURT ADJOURNED

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Certification

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

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Evidence Act

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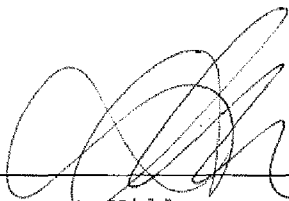
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Feb 29, 2016  
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Florent Villeneuve

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