

CITATION: Mulholland v. Bailey, 2017 ONSC 5098

COURT FILE NO.: CV-09-00391385

MOTION HEARD: 20170822

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gerald Mulholland and Janice Mulholland, Plaintiff

AND:

O'Neil Bailey, Defendant

BEFORE: Master B. McAfee

COUNSEL: J. Van Allen, Counsel to Counsel for the Moving Parties, the Plaintiffs

N. R. Carmichael, Counsel for the Responding Party, the Defendant

HEARD: August 22, 2017

REASONS FOR DECISION

- [1] This is a motion brought by the plaintiffs for an order setting aside the order of the Registrar dismissing the action for delay dated August 11, 2015. The defendant opposes the motion.
- [2] For the reasons that follow, the motion is granted.
- [3] The court will apply a contextual approach and consider all relevant factors in determining whether it is just to set aside the dismissal order in the circumstances of the particular case (see *Scaini v. Prochnicki*, 2007 ONCA 63 at paras 23-25, *MDM Plastics Limited v. Vincor International Inc.*, 2015 ONCA 28 at paras 11-12 and *H.B. Fuller Company v. Rogers*, 2015 ONCA 173 at paras 20-27 and *Habib v. Mucaj*, 2012 ONCA 880 at paras 5-7).
- [4] In determining whether the order of the Registrar ought to be set aside, I am mindful of the tension between two principles of our civil justice system: the preference to have civil actions decided on their merits and the promotion of timely resolution of actions (*H.B. Fuller* at para 25). As stated at paragraph 27 of *H.B. Fuller*:

The court's preference for deciding matters on their merits is all the more pronounced where the delay results from an error committed by counsel. As the court stated in *Habib*, at para. 7, "[O]n a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel." In *Marché*, Sharpe J.A. stated, at para. 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”.

- [5] With these principles in mind, I will now consider the relevant factors.
- [6] I am satisfied that the delay has been adequately explained.
- [7] The action arises as a result of a motor vehicle accident that occurred on December 1, 2007.
- [8] Within one week of the accident, on December 6, 2007, the defendant’s insurer wrote to the plaintiff, Gerald Mulholland, to provide him with an explanation of the applicable automobile legislation with regard to any tort claims arising from any injuries sustained, including an explanation of the verbal threshold and deductible.
- [9] In or about June or July 2009, the plaintiffs retained their former counsel to assist them in advancing claims for statutory accident benefits and the within tort claim.
- [10] In or about October 2009, plaintiffs’ former counsel focused on pursuing the plaintiffs’ claims for statutory accident benefits. On October 28, 2009, FSCO mediations took place, which did not result in settlement.
- [11] On November 17, 2009, the statement of claim was issued.
- [12] On November 18, 2009, the defendant was personally served with the statement of claim.
- [13] It is the recollection of plaintiffs’ former counsel that shortly after service of the statement of claim the insurer requested a waiver of defence, which was granted.
- [14] On November 25, 2010, the insurer wrote to plaintiffs’ former counsel noting that a statement of claim had been served but that no documentation had been received.
- [15] In April 2011, the claim of the plaintiff, Janis Mulholland for statutory accident benefits settled at a FSCO pre-hearing for the amount of \$120,000.
- [16] On December 5, 2011, plaintiffs’ former counsel requested various medical documents with respect to the plaintiff Gerald Mulholland.
- [17] On January 12, 2012, the registrar dismissed the action as abandoned. No defence had been filed. The motion to set aside the January 12, 2012, dismissal order was heard on June 6, 2013. The motion was not opposed. Master Haberman set aside the dismissal order and extended the set down date to June 6, 2015.
- [18] On April 23, 2012, the claim of the plaintiff, Gerald Mulholland for statutory accident benefits settled for the amount of \$100,000.

- [19] After receiving Master Haberman's order in or about June 2013, it was former counsel's intention to have the defendant noted in default, and he believed that this was done.
- [20] On August 11, 2015, the registrar dismissed the action for delay.
- [21] I am satisfied that the litigation delay has been adequately explained in these circumstances. Plaintiffs' former counsel was focusing on the accident benefits claims. The defendant did not defend the action. Plaintiffs' former counsel believed the defendant had been noted in default. There is no evidence before me of a deliberate intention not to advance the action. The plaintiffs' evidence is that they always intended to advance the action.
- [22] If I am wrong and the litigation delay has not been adequately explained, I am of the view that, applying a contextual approach, it is just to set aside the dismissal order in all of the circumstances.
- [23] I am satisfied that the deadline was missed as a result of inadvertence. Plaintiffs' former counsel intended to diarize the set down date ordered by Master Haberman and believed that this had been done in accordance with his practice procedure. There is no evidence of a deliberate decision not to set the action down for trial.
- [24] There was delay in bringing the within motion. On or about October 26, 2015, the plaintiffs retained their current lawyer. On October 28, 2015, the current lawyer requested copies of the plaintiffs' files from their former lawyer. The current lawyer followed up on numerous occasions and eventually filed a complaint with the Law Society and contacted another partner at former counsel's firm. On June 14, 2016, the file was available to be picked up from plaintiffs' former counsel.
- [25] In or about June 2016, upon receipt of the file from previous counsel or sometime shortly thereafter, current counsel learned that the action had been dismissed for delay. On November 4, 2016, a notice of motion was served.
- [26] Although the motion was not brought promptly, an explanation for the delay in bringing the motion has been provided. In *Finlay*, a delay of 2 years in bringing the motion was not fatal.
- [27] I am satisfied that there will be no prejudice to the defendant if the dismissal order is set aside. Any presumption of prejudice has been rebutted.
- [28] Although liability has not been formally admitted, I was not referred to any evidence to suggest that the collision was anything other than a rear end collision (see transcript of the cross-examination of P. Baker at question 13).
- [29] The defendant's insurer has had notice of the claims since at least December 6, 2007.
- [30] The plaintiffs' lawyers have in their file available for production relevant medical documentation with respect to both plaintiffs as summarized at paragraph 59(c) and (d) of

the plaintiffs' factum. Further documentation has been requested as summarized at paragraph 59(e) and (f) of the plaintiffs' factum. Additional documentation has now been provided as stated at paragraph 3 of the affidavit of J. Greenwald sworn August 21, 2017. The plaintiffs' property damage file has also now been provided to defendant's counsel.

- [31] The affidavit of P. Baker, a lawyer at law firm of defendant's counsel, states that there is prejudice as a result of a lack of medical and employment related documents and that the availability of this information is unknown. The affidavit also states that the memories of witnesses are presumed to fade. If the defendant was concerned with fading memories or documentation no longer being available, the defendant ought to have taken steps to defend the action and preserve evidence and documents. The defendant cannot create prejudice by failing to do something it reasonably ought to have done (*Chiarelli v. Wiens*, [2000] O.J. No. 296 (C.A.) at para 15).
- [32] I am not satisfied of actual prejudice that would result in a fair trial no longer being possible.
- [33] There is no evidence from the defendant concerning when the defendant first became aware of the dismissal order or when the defendant received the dismissal order. I was not referred to evidence of reliance on the dismissal order dated August 11, 2015. The principle of finality does not weigh against the setting aside of the dismissal order in the circumstances of this case.
- [34] For these reasons, applying a contextual approach, I am satisfied that it is just that the order of the Registrar dismissing the action for delay dated August 11, 2015, be set aside.

Timetable

- [35] The parties shall make reasonable attempts to agree to a timetable for the balance of the steps in the action including a new set down date. If agreed to, the timetable may be submitted to me in writing for approval. If the parties are unable to agree to a timetable, plaintiffs' counsel shall request a telephone case conference before me. The case conference shall be requested, not necessarily take place, within 60 days of today's date.
- [36] The Registrar is directed not to dismiss the action for delay pending further order of this court.

Costs

- [37] The plaintiffs confirm that they are not seeking costs of the motion. If the defendant seeks costs of the motion, and if after reasonable attempts to agree on costs the parties are unable to agree, the defendant may serve and file brief written submissions on costs of three pages or less in length together with a costs outline on or before October 16, 2017. Any responding submissions shall also be three pages or less in length and served and filed on or before October 25, 2017. Any reply submissions shall be one page or less in length and served and filed on or before October 31, 2017. The submissions shall be filed

by hand (not fax) at 393 University Avenue, 6th floor and shall be accompanied with an affidavit of service.

Master B. McAfee

Date: August 30, 2017