

CITATION: Muscay v. Urszula, 2018 ONSC 5427
COURT FILE NO.: CV-11-3837-00
DATE: 20180919

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PELIVAN MUSCAJ v. GRZYB URSZULA

BEFORE: EMERY J.

COUNSEL: J. Van Allen, Counsel for the Plaintiff
K. Dunn, Counsel for the Defendant

HEARD: August 15, 2018

REASONS FOR DECISION

[1] On September 29, 2009, the car Pelivan Muscay was driving was struck at the intersection of Dundas Street West and Erin Mills Parkway in Mississauga by a motor vehicle Grzyb Urszula was operating.

[2] Mr. Muscay initially retained Anton Brunga as counsel to make a claim for damages. Mr. Brunga commenced this action for Mr. Muscay by having a statement of claim issued on September 25, 2011.

[3] Mr. Muscay changed counsel in October 2012 when he retained Natal Gosai to represent him.

[4] Ms. Gosai completed the examinations for discovery in the case and had used her best efforts to make much of the disclosure required from Ms. Muscay by November 3, 2016. At that time, Ms. Gosai arranged a mediation with Kelly Dunn, who had taken over the defence for Mr. Urszula. This mediation was scheduled for March 9, 2017.

[5] On January 3, 2017, the registrar of the Superior Court of Justice in Brampton issued an Order Dismissing Action for Delay. The action was dismissed without notice because of the failure of Mr. Muscay as the plaintiff to set the action down for trial by the later of the fifth anniversary of the action or January 1, 2017 as required by the provisions of Rule 48.14 at the time.

[6] Mr. Muscay now brings this motion under Rule 37.14 to set aside the registrar's order dismissing his action.

Chronology of relevant events

[7] When the car that Mr. Muscay was driving was struck on September 29, 2009, his wife Adelina Muscay was riding in that car as a passenger. Mr and Mrs. Muscay were initially both represented by Mr. Brunga. In addition to commencing this action on behalf of Mr. Muscay, Mr. Brunga brought an action for Mrs. Muscay as against Mr. Urszula (the "related action").

[8] Aviva Legal responded to this action and the related action on behalf of Mr. Urszula. After a brief time under a waiver of defence, Aviva Legal served a statement of defence and a jury notice in the related action on April 3, 2012.

[9] On April 5, 2012, Aviva Legal had a third-party claim issued on behalf of Mr. Urszula against Mr. Muscay in the related action. Mr. Brunga ultimately served a statement of defence on behalf of Mr. Muscay to the third-party claim.

[10] On August 15, 2012, Mr. Brunga wrote to Aviva Legal to revoke the waiver of defence in this action, and to demand a statement of defence within 20 days.

[11] On August 20, 2012, Aviva Legal wrote to Mr. Brunga to enclose the statement of defence and jury notice on behalf of Mr. Urszula in this action. Aviva Legal takes the position these documents were served on April 5, 2012.

[12] After Mr. Muscay changed counsel from Mr. Brunga to Ms. Gosai in 2012, Ms. Gosai's office wrote letters between April 10 and 23, 2013 to various non-party sources to obtain documentation that would support the claim Mr. Muscay had made. Between May 30, 2013 and October 15, 2013 Ms. Gosai disclosed medical records and documents related to her client's employment to Aviva Legal. By all accounts, Mr. Muscay's representation by new counsel was off to a good start.

[13] Mr. Urszula was examined for discovery in this action and the related action on April 2, 2014. Mr. Muscay was examined for discovery as a plaintiff in this action and as the third-party in the related action on the same day.

[14] In preparation for trial, Aviva Legal arranged for Mr. Muscay to be seen on June 23, 2014 by Dr. Abraham Shayton, a rheumatologist, for an independent medical examination.

[15] Between July 8, 2014 and September 16, 2014, Aviva Legal exchanged letters with Ms. Gosai's office relating to various undertakings that had been given by or on behalf of Mr. Muscay at discovery.

[16] On September 10, 2014, Adelina Muscay executed a full and final release to cover both the main action, as well as the third-party claim against Mr. Muscay to settle the related action. On October 2, 2014, an order dismissing the related action was taken out.

[17] On September 8, 2014, Mr. Muscay was ultimately examined by Dr. Shayton.

[18] On October 21, 2014, Aviva Legal served the defence medical report of Dr. Shayton from his independent examination of Mr. Muscay.

[19] Throughout the balance of 2014, Aviva Legal and Ms. Gosai's office exchanged correspondence about answers to undertakings given by or on behalf of Mr. Muscay at his examination and to provide further disclosure in support of his claim.

[20] On December 17, 2014, Ms. Gosai's assistant contacted Aviva Legal to schedule a telephone conference for settlement discussions in early January 2015. Aviva Legal advised Ms. Gosai's assistant that it required files from the accident benefit claim Mr. Muscay had made, and his own doctor's clinical notes and records, failing which they would not be in a position to schedule settlement discussions.

[21] Aviva Legal further advised Ms. Gosai's office at that time of the defendant's position that Mr. Muscay would not meet the "permanent and serious impairment threshold" requirement under the *Insurance Act*.

[22] A settlement conference by telephone was finally arranged for February 23, 2015. During the settlement call, Aviva Legal advised Ms. Gosai that the position it had previously taken on behalf of Mr. Urszula remained unchanged, and that no monetary offer would be made.

[23] On May 8, 2015, Andrew McCutcheon of Aviva Legal served a Notice of Change of Lawyer indicating his name as the lawyer of record for the defendant

Urszula. Mr. Urszula takes the position on this motion that, except for the service of this Notice of Change of Lawyer, there was no communication between Aviva Legal and Ms. Gosai's office for the 17 months between February 23, 2015 and July 18, 2016.

[24] Ms. Dunn took carriage of the defence file at Aviva Legal on July 19, 2016 and served a Notice of Change of Lawyer on Ms. Gosai.

[25] On July 25, 2016, Ms. Gosai's office contacted Ms. Dunn with a view to setting up another settlement conference by telephone. This telephone conference was scheduled for August 29, 2016.

[26] Ms. Dunn followed up that scheduling call with a letter to Ms. Gosai on August 23, 2016. In that letter, Ms. Dunn provided a list of undertakings that she considered outstanding, and requested Ms. Gosai's response to those undertakings at the earliest opportunity.

[27] Settlement conferences occurred by telephone on August 29 and 30, 2016. After those calls, Ms. Dunn wrote to Ms. Gosai to confirm their conversation that Ms. Gosai had agreed to provide further information to update the information she had already provided on behalf of Mr. Muscaj.

[28] On August 30, 2016, Ms. Dunn's law clerk and Ms. Gosai agreed to a mediation for the case, and to engage Richard Sadowsky as the mediator. However, Ms. Dunn's law clerk reiterated that Ms. Dunn had requested documents that she required before mediation.

[29] On October 24 and November 10, 2016, Ms. Dunn's assistant wrote to Ms. Gosai's assistant to follow up with scheduling the mediation.

[30] On November 3, 2016, Ms. Gosai's office produced the plaintiff's income-tax returns for 2013-2015 to answer the relevant undertaking given on discovery.

[31] On November 11, 2016, Ms. Dunn wrote to Ms. Gosai to enclose an updated list of the remaining undertakings to be answered, and to request further information for the mediation.

[32] In late November 2016, the mediation was scheduled for March 9, 2017.

[33] Ms. Gosai's office wrote to Mr. Muscaj's doctor and to his accident benefit insurer to request further information that could respond to the requirements of Aviva Legal for the mediation.

[34] Between December 9, 2016 and January 3, 2017, Ms. Gosai's office received further information from the City Clerk's office in Toronto and from the Region of Peel with respect to her client's Ontario Works file in those municipalities.

[35] On January 3, 2017, the registrar of the (Ontario) Superior Court of Justice in Brampton issued the Order Dismissing Action for Delay. According to Ms. Gosai's affidavit, this order was not received by her office until or about March 6, 2017.

[36] Ms. Gosai has sworn an affidavit in support of her client's motion to set aside this order. Paragraph 74 of that affidavit contains the only evidence with respect to the reason why she did not set down this action by January 1, 2017:

74. The focus and attention of me and my office staff towards the end of 2016 and the beginning of 2017 was our participation in a mediation on March 9, 2017. I overlooked that this action was commenced on January 1, 2012 and would be caught by the changes to Rule 48.14, which came into effect on January 1, 2017. I overlooked that this action would be dismissed on January 1, 2017 without notice to me if it had not been set down for trial or scheduled for a status hearing. It was my intention to proceed with the mediation in this matter on March 9, 2017 and if the file did not settle at mediation, to set the action down the trial.

[37] Ms. Gosai's affidavit also contains paragraph 77, which simply states that:

77. It has always been mine and the Plaintiff's intention to proceed with this action and with this motion to set aside the Registrar's Dismissal Order.

[38] These paragraphs contain the only evidence given on this motion of an intention to set the action down for trial.

[39] Notwithstanding the fact that the action had been dismissed, Ms. Gosai's office continued to request Mr. Muscaj's employment file from Oakville Golf Club and to seek a breakdown of the accident benefits he had received in answer to those undertakings.

[40] On February 23, 2017, Aviva Legal retained the services of a process server to attend at the Brampton Courthouse to confirm the status of this action. It was then and there it learned that the action had been dismissed.

[41] The mediation proceeded on March 9, 2017 as scheduled, despite the fact the action had been dismissed.

[42] On May 14, 2018, Ms. Gosai's office produced the plaintiff's updated clinical notes and records from Dr. Lee and from Dr. Tan, in answer to outstanding undertakings.

Issues and Analysis

[43] This motion arises from circumstances that occur all too frequently when lawyers do not observe strict timelines under the rules by which to set an

action down for trial. A motion to set any dismissal aside must be considered carefully, and the relevant principles applied in the manner developed by the authorities to ensure justice is done. The dismissal of an action remains a dismissal unless it is set aside.

[44] The parties agree that the court must take a contextual approach on a motion to set aside the administrative dismissal of an action by a registrar under Rule 48. The form of Rule 48.14 effective January 1, 2015, required that an action be set down for trial within five years or by January 1, 2017 whichever was later, unless that requirement is relieved by a court order. If neither requirement is met, the registrar is required by the mandatory language of the rule to dismiss the action for delay without further notice.

[45] When deciding a motion to set-aside the administrative dismissal of an action, the court is required to make an order that is just in the circumstances of the case.

[46] The relevant principles the court is to apply are set out by Master Dash in *Reid v. Dow Corning Corp* (2011), 11 C.P.P. (5th) 80. Although that decision received other treatment at the Divisional Court level, those principles have been preserved and remain the four-part test as approved by the Court of Appeal in *Scaini v. Prochnicki*, 2007 ONCA 63. These four factors, which have

become known as the “*Reid* factors”, have most recently been approved and applied by the Court of Appeal in *Prescott v. Barbon*, 2018 ONCA 504.

[47] In *Prescott*, Justice Pepall describes the contextual approach for applying the *Reid* factors in the following way:

[14] The legal test for setting aside a registrar’s order dismissing an action for delay was originally described by Master Dash in *Reid* and adopted by this court in *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179: (i) Have the plaintiffs provided a satisfactory explanation for the litigation delay? (ii) Have the plaintiffs led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence? (iii) Have the plaintiffs demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention, and Page: 7 (iv) Have the plaintiffs convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiffs’ delay or as a result of steps taken following the dismissal of the action?

[15] This is not a rigid, one-size fits all test. Rather, a contextual approach is required: *Scaini*, at paras. 23-25. Prior to *Scaini*, a plaintiff had to satisfy each of the four elements. Thereafter, courts were to consider and weigh all relevant factors to determine the order that is just. See also *Marché d’Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660. In *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, at para. 23, Laskin J. A. observed that the overriding objective is to achieve a result that balances the interests of the parties and takes account of the public’s interest in the timely resolution of disputes. The four *Reid* factors provide a structured approach to achieving this result.

[48] On the motion before this court, counsel for the defendant Urszula made no submissions to challenge the timeliness of bringing the motion to set aside the registrar’s order to engage the third *Reid* factor. Therefore, the areas of contention were focused on the three remaining factors relating to litigation delay,

the continuing intention to prosecute this action within the time limits, and prejudice.

1. Litigation Delay

[49] It is the responsibility of counsel when representing a party in the conduct of an action to ensure that no deadlines are missed. Counsel takes on this responsibility whether she or he has acted for the party from the outset of the litigation, or whether she or he has taken over carriage of the file from another lawyer at any time in the life of the action.

[50] There is authority for the proposition that a party represented by counsel should not be prejudiced by the inadvertence of counsel, and that reference to the potential liability of the lawyer acting as counsel for that party is not an answer to a claim for delay. The Court of Appeal in *Marché d'Alimentation Denis Theriault Ltd. v. Giant Tiger Stores Ltd*, 2007 ONCA 695 addressed this proposition, particularly where the solicitors conduct is not merely inadvertent, as follows:

[28] One important consideration is that the plaintiff will not be left without a remedy. I recognize here the need to ensure that adequate remedies are afforded where a right has been infringed. 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: see, e.g., *Chiarelli v. Wiens* (2000), 2000 CanLII 3904 (ON CA), 46 O.R. (3d) 780, [2000] O.J. No. 296 (C.A.), at para. 9. [29] However, this calculus implicitly assumes that the court is left with a stark choice between defeating the client's rights and forcing the opposite party to

defend the case on its merits. That assumption is faulty where, as in this case, the solicitor's conduct is not mere inadvertence, but amounts to conduct very likely to expose the solicitor to liability to the client. When the solicitor is exposed in this way, the choice is different; refusing the client an indulgence for delay will not necessarily deny the client a legal remedy.

[51] Although the weight of the authorities refer that cases be decided on their merits, this view prevails often in situations where the conduct leading to the dismissal concerns more the conduct of counsel than that of the litigant. On the other hand, the value of finality is an important consideration: *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386 (Ont. C.A.).

[52] Rules are made to be followed. In *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, [2012] O.J. No. 3877, the Court of Appeal made that clear by stating:

[36] The balance to be struck in the circumstance of a case such as this was very well put by Glithero J. in *Riggitano*, at para. 45, a decision affirmed by this court:

It is never pleasant to dismiss a plaintiff's action for delay. Nevertheless, Rule 48.14 clearly contemplates that two years following the filing of a statement of defence is viewed as being ample time to complete remaining steps and have a matter set down for trial, absent some satisfactory explanation. Where a contest arises, sub-rule (8) squarely puts the onus on [the] plaintiff to show cause why the action should not be dismissed for delay. Here more than five years, and hence more than twice the normal time period contemplated by the rule, has gone by and in my assessment the plaintiff has done very little to move the matter along. In my opinion, the materials do not disclose any satisfactory explanation for the delay. If the common submission, as made here, to the effect that a dismissal would be unfair to the plaintiff is permitted to always trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions, then the rule would be effectively gutted. (Emphasis added)

[53] There is no burden on a defendant to explain the delay in an action, or to move that action to trial: see *Wellwood v. Ontario Provincial Police* at paragraphs 37 to 41 and at paragraph 84, and *Jadid v. Toronto Transit Commission*, 2016 ONCA 936, at paragraph 23. Justice Pepall in *Prescott v. Barbon* reiterated the principle set out by that court in *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 that the primary responsibility for the progress of an action lies with the plaintiff.

[54] Ms. Gosai took on the responsibility for the orderly conduct of the action on behalf of Mr. Muscaj when she took over the file from Mr. Brunga. She represented Mr. Muscaj for the next four years. During that time, she completed examinations for discovery and answered undertakings for Mr. Muscaj to complete the discovery and disclosure process. Ms. Gosai also participated in two settlement conference calls. These settlement conferences met with the same refrain: the defendant would not make a monetary offer because he took the position the injuries Mr. Muscaj had allegedly suffered did not meet the statutory threshold. Nonetheless, Ms. Gosai succeeded in scheduling a mediation to take place on March 9, 2017, more than two years after the first settlement call.

[55] This activity does not amount to an acceptable pace of litigation. There is no evidence to explain the yawning gap of 17 months between the settlement call on February 23, 2015, and the next contact by Ms. Gosai's office to

arrange another call in July 2016. It was as if Mr. Muscay remained content to let his lawyer labour under the impression that the passage of time would improve the merits of his case, or change the defendant's view on whether he could satisfy the threshold test to encourage settlement.

[56] Time alone does not heal all when it comes to avoidable delay. The perennial adage, "justice delayed is justice denied" should benefit a defendant as much as a plaintiff where circumstances warrant.

[57] I find that Mr. Muscay has not provided a satisfactory explanation for the overall delay in this litigation.

2. Intention to Prosecute within the time limits

[58] The only evidence given by or on behalf of Mr. Muscay of his intention to prosecute this action to trial within the time limits prescribed by the *Rules of Civil Procedure* is found in paragraphs 74 and 77 of Ms. Gosai's affidavit. I find it significant that Mr. Muscay did not swear an affidavit that sets out what efforts he made to prompt his lawyer to prosecute the action in a more timely manner.

[59] The evidence given in paragraph 74 of Ms. Gosai's affidavit is therefore the only evidence of an explanation why the action was not prosecuted with diligence; and it proves the point that she was focused on settlement alone.

Ms. Gosai then states in paragraph 77 that she intended on setting the action down for trial if the file did not settle, and that it had always been the intention of the plaintiff and of hers to proceed with the action.

[60] These bald statements are starkly out of context with other evidence on the motion. They are not satisfactory evidence, nor do they provide an adequate explanation, of the failure to proceed with the action by setting it down for trial within the time limits through inadvertence. It would have been a straight forward process to assemble, serve, and file the trial record to set the action down. Following through in this manner would have also provided Ms. Gosai with a golden opportunity: to discuss settlement at a pre-trial conference, with a judge or Master.

3. Prejudice

[61] Under the *Reid* factors, the plaintiff has the onus of persuading the court that the defendant has not demonstrated significant prejudice to present their case at trial.

[62] The Court of Appeal in *Prescott v. Barbon* placed the emphasis on the finality principle as an important consideration on a motion to set aside a dismissal for delay. Justice Pepall in *Prescott* stated the proposition this way:

[37] There is no need to resort to presumptions or inferences of prejudice. The question as described by Sharpe J.A. in *Marché* is simply whether the interest in finality must trump the opposite party's pleas for an indulgence.

[63] The burden is on the plaintiff, and not on the defendant to establish prejudice on a motion of this nature: see *Jadid v. Toronto Transit Commission* at paragraphs 63 and 85. Further, there is no requirement for the defendant to adduce evidence of actual prejudice. This is particularly the case if the plaintiff has not been able to provide a satisfactory explanation for the delay: *1196158 Ontario Inc. v. 6274013 Canada Ltd.*

[64] On this motion, there was no evidence given by the plaintiff relating to actual or accrued prejudice to the defendant caused by the delay of the action. It is not the burden of the defendant to show prejudice. Therefore, Mr. Muscaj has not satisfied this part of the test.

Conclusion

[65] I find on the evidence that it would not be just to set aside the registrar's order dismissing this action.

[66] Accordingly, the motion of Pelivan Muscaj is dismissed.

[67] If Mr. Urszula seeks costs, his counsel may file written submissions by September 28, 2018 consisting of no more than three pages, not including time

dockets or disbursement receipts. Counsel for Mr. Muscaj shall then have until October 12, 2018 to file responding submissions limited to the same extent. No reply submissions are permitted without leave. All written materials may be filed by sending a copy to my judicial assistant, Ms. Melanie Powers by email at melanie.powers@ontario.ca or fax at 905-456-4834 in Brampton.

Emery J.

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