CITATION: NGO v. LY, 2013 ONSC 5120
COURT FILE NO.: CV-09-387635
MOTION HEARD: JULY 25, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Am Ngoc Ngo

v.

Lan Ly and Phuc Van

BEFORE: MASTER R.A. MUIR

COUNSEL: Jillian Van Allen, counsel to the lawyer for the plaintiff
Alexander Curry for the defendants

REASONS FOR DECISION

[1] The plaintiff brings this motion pursuant to Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order setting aside the order of the registrar dated November 21, 2011, dismissing this action as abandoned. This action was dismissed by the registrar due to the failure on the part of the plaintiff to comply with the requirements of Rule 48.15. An action may be dismissed by the registrar under Rule 48.15 if no defence has been filed, or the action otherwise disposed of, within 180 days after the proceeding was commenced.

[2] The plaintiff also seeks an order extending the time for service of the statement of claim on the defendants.

[3] The defendants oppose the granting of the relief requested on this motion.

Background

[4] The plaintiff was involved in a motor vehicle accident on September 27, 2007. It appears that the plaintiff's vehicle was struck from behind by a vehicle operated by the defendant Lan Ly and owned by the defendant Phuc Van. Lan Ly was charged with careless driving.

[5] The defendants reported the accident to their insurer on the day it happened. The defendants' insurer contacted the defendants the same day and obtained a statement from the insured.

[6] The plaintiff's current lawyers were retained in September 2008. The defendants and their insurer were put on notice regarding a possible claim on or about September 23, 2008.

[7] The defendants' insurer received a copy of the motor vehicle accident report on or about November 11, 2008.

[8] In May 2009, the defendants' insurer contacted the plaintiff's accident benefits carrier and was advised that there was an open and active accident benefits file.

[9] The statement of claim in this action was issued on September 23, 2009. In early October 2009, the plaintiff's lawyer attempted to serve the statement of claim on the defendant Lan Ly but was unsuccessful. After this unsuccessful attempt at service, absolutely nothing was done to advance this claim until this motion was initially scheduled in October 2012. The plaintiff's lawyers explain this lack of progress as resulting from being too busy and having carriage of a large number of files. The plaintiff's lawyers also point to certain health issues involving a student-at-law employed in their office.

Setting Aside a Dismissal Order

[10] The law relating to motions for an order setting aside an administrative dismissal order is summarized in my decision in *744142 Ontario Ltd. v. Ticknor Estate*, 2012 ONSC 1640 (Master).[1] At paragraph 32 of that decision I set out the applicable principles as follows:[2]

> **32.** In the last five years, the law relating to setting aside registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario. Although each of those decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal

[1] Although most of the applicable authorities deal with orders dismissing actions for delay, the same considerations apply to a motion for an order setting aside an order dismissing an action as abandoned. See *Vaccaro v. Unifund*, 2011 ONSC 5318 at paragraph 34.

[2] The applicable principles are derived from seven decisions of the Court of Appeal for Ontario released over the last several years: *Scaini v. Prochnicki*, [2007] O.J. No. 299 (C.A.); *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, [2007] O.J. No. 3872 (C.A.); *Finlay v. Van Paassen*, [2010] O.J. No. 1097 (C.A.); *Wellwood v. Ontario (Provincial Police)*, [2010] O.J. No. 2225 (C.A.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, [2010] O.J. No. 5572 (C.A.); *Machacek v. Ontario Cycling Assn.*, [2011] O.J. No. 2379 (C.A.); *Aguas v. Rivard Estate*, [2011] O.J. No. 3108 (C.A.).

in *Scaini* has been followed consistently. The principles that emerge from those decisions can be summarized as follows:

- the court must consider and weigh all relevant factors, including the four *Reid* factors which are likely to be of central importance in most cases;

- the *Reid* factors, as cited by the Court of Appeal in *Giant Tiger*, are as follows:

(1) *Explanation of the Litigation Delay*: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

(2) *Inadvertence in Missing the Deadline*: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.

(3) *The Motion is Brought Promptly*: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

(4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

- a plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;

- the key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;

- all factors are important but prejudice is the key consideration;

- prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;

- once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;

> • prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;
>
> • the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;
>
> • in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.
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> [Footnotes Omitted]

[11] I am also mindful of the observations of the Court of Appeal in its decision in *Hamilton (City)*. At paragraphs 20-22 of that decision Justice Laskin notes as follows:

> **20** Two principles of our civil justice system and our *Rules of Civil Procedure* come into play. The first, reflected in rule 1.04(1), is that civil actions should be decided on their merits. As the motion judge said at para. 31 of his reasons: "the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."
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> **21** The second principle, reflected in the various time limits mandated by our rules, and indeed, as noted by the motion judge, in the provision for a status notice and hearing, is that civil actions should be resolved within a reasonable timeframe. In *Marché*, at para. 25, my colleague Sharpe J.A. wrote about the strong public interest in promoting the timely resolution of disputes. Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it.
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> **22** On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles.

[12] I also note that the Court of Appeal has recently emphasized the principle that these motions involve an exercise of the court's discretion. The court must weigh all relevant considerations to determine the result that is just in the circumstances. See *Habib v. Mucaj*, 2012 ONCA 880 at paragraph 6.

[13] Finally, it should be emphasized that the general preference in our system of civil justice is for disputes to be decided on their merits. See *MDM Plastics Ltd. v. Vincor International Inc.*, 2013 ONSC 710 (S.C.J.) at paragraphs 24 and 28.

[14] These are the factors and principles I have considered and applied in determining the issues on this motion. My analysis leads me to the conclusion that the order of the registrar should be set aside.

Motion Brought Promptly

[15] Rule 37.14(1) requires that motions of this nature be brought by way of a notice of motion served forthwith after the order in question comes to the attention of the person affected. The applicable authorities also require these motions to be brought promptly. In my view, the plaintiff has not done so.

[16] The plaintiff's lawyers were aware of the dismissal order shortly after it was made in November 2011. It appears that an articling student was asked to bring a motion to set aside the dismissal order. The student failed to do so, apparently due to certain ongoing health issues. However, no satisfactory evidence has been provided to explain why the student was not being properly supervised. The only explanations provided relate to how busy the lawyers were and how many files they were handling. This is not a satisfactory explanation. If a lawyer in a firm is unable to handle, in a timely fashion, the matters that have been assigned to him, then he should transfer files to other lawyers so they can be properly dealt with. If a firm is understaffed it should hire additional professional staff or take on fewer retainers.

[17] This motion was not scheduled until October 2012, nearly a year after the dismissal order came to the attention of the plaintiff's lawyer. This cannot be described as prompt by any measure. No satisfactory explanation for the delay has been provided.

[18] In my view, the plaintiff has not satisfied this element of the *Reid* test.

Litigation Delay

[19] I am also of the view that the plaintiff has failed to provide a satisfactory explanation for the two year delay encountered with this action from the attempted service of the statement of claim in October 2009 to the receipt of the notice that the action would be dismissed in September 2011. In fact, it appears that the plaintiff did nothing to advance the claim during this lengthy time period. The same explanations are provided for this delay as were provided for the motion delay. The lawyers involved were too busy and had too many files. This matter fell through the cracks in their tickler system. None of this is an acceptable explanation for the reasons stated above.

[20] For these reasons, I am not satisfied that the plaintiff has met this element of the *Reid* test.

Inadvertence

[21] In my view, the plaintiff has satisfied this factor. I am satisfied that the deadline was missed due to inadvertence. The plaintiff's lawyer was aware of the deadline and did instruct the student to bring a motion to obtain an extension of time. The motion was never brought due to the student's health issues and the lawyer's lack of proper supervision. There is no evidence of an intention to abandon this claim. The defendants point to a statement in an affidavit sworn by one of the plaintiff's lawyers to the effect that he chose not to proceed with a motion to extend time. However, it is my view that when that statement is read in context, it simply refers to the timing of such a motion and cannot be interpreted as a statement that the lawyer or the plaintiff was abandoning the claim.

[22] In my view, the plaintiff has satisfied this element of the *Reid* test.

Prejudice

[23] I am also satisfied that the plaintiff has met the onus placed upon her to rebut the presumption of prejudice. Where a limitation period has passed, as it has here, a presumption of prejudice arises and the onus rests with the plaintiff to rebut that presumption. The strength of this presumptive prejudice increases with the passage of time. See *Wellwood* at paragraph 60.

[24] A plaintiff can overcome the presumption of prejudice by leading evidence that all relevant documents have been preserved, that key witnesses are available or that certain aspects of the claim are not in issue. See *Wellwood* at paragraph 62.

[25] This claim involves a rear-end motor vehicle collision. The defendant Lan Ly was charged with careless driving. It would appear that liability will not be in issue.

[26] It also appears from the evidence that much of the plaintiff's medical and other damages evidence has been preserved and is available. Doctor's notes have been requested. Physiotherapy records, other medical records, the plaintiff's accident benefits file and employment and income records have all been preserved. It is also clear that the defendants' insurer had early notice of this claim and conducted at least a partial investigation of the matter.

[27] The defendants have not provided any specific evidence of actual prejudice. The defendants argue that they have been denied the opportunity to carry out early defence medical examinations, vocational assessments, surveillance and other investigations. However, there is no evidence to support these assertions. The defendants have not provided any evidence of what their insurer's usual and customary practice is when it

comes to conducting assessments and investigations of this nature and how they have been prejudiced as a result of the plaintiff's delay.

[28] For these reasons, it is my view that this element of the *Reid* test has been satisfied.

Conclusion

[29] When deciding motions of this nature, the court is to adopt a contextual approach in which it weighs all relevant considerations to determine the result that is just in the circumstances. The court must, of course, balance the strong public and private interest in promoting the timely resolution of disputes with the entitlement of a plaintiff to have her claim decided on the merits. However, the preference in our system of civil justice is for the determination of disputes on their merits.

[30] The plaintiff has failed to provide a satisfactory explanation for the delay encountered with this action as a whole and in bringing this motion. However, I am satisfied that the failure to meet the Rule 48.15 deadline was a result of inadvertence on the part of her lawyers. Importantly, the plaintiff has also satisfied the key consideration of prejudice.

[31] In my view, it is in the interest of justice that the dismissal order of the registrar be set aside.

Extension of Time for Service

[32] Given my conclusions on the issue of prejudice, it is also appropriate that I grant the relief requested by the plaintiff to extend the time for service of the statement of claim. See *Chiarelli v. Weins*, [2000] O.J. No. 296 (C.A.) at paragraphs 12-17.

Costs

[33] The plaintiff does not seek her costs of this motion. There is authority for the proposition that unsuccessful defendants may be entitled to their costs on a motion such as this. See *Evans v. Revenue Properties Co.*, 2011 ONSC 2132 (Master) at paragraph 31 and Rule 57.01(2). In my view, it was not unreasonable for the defendants to have opposed this motion. The plaintiff has been granted a significant indulgence and has not met two of the four important considerations. The plaintiff and her lawyers have failed to satisfactorily explain long periods of delay. The defendants should have their costs of this motion.

[34] I have reviewed the defendants' costs outline. It identifies partial indemnity costs of $3,839.99. This motion involved the exchange of several affidavits, a brief cross-examination, preparation of factums and two hours of oral argument. In my view, the amounts claimed by the defendants are reasonable in the circumstances.

Pre-Judgment Interest

[35] The defendants requested a suspension of pre-judgment interest in the event that I made an order setting aside the dismissal order. I am not prepared to make such an order. Interest is designed to compensate a plaintiff for the period of time a defendant held money it should have paid to the plaintiff. In theory, if the plaintiff is ultimately successful on her claim, then the defendants will have had the use of the money they should have paid to the plaintiff. Presumably, they have invested those funds appropriately and earned a return on the money. There is no reason to compensate the defendants any further.

Order

[36] I therefore order as follows:

(a) the dismissal order of the registrar dated November 21, 2011 is hereby set aside;

(b) the time for service of the statement of claim is hereby extended to February 22, 2013;

(c) the defendants shall deliver their statement of defence by no later than September 30, 2013;

(d) the registrar shall not dismiss this action as abandoned before October 31, 2013; and,

(e) the plaintiff shall pay the defendants' costs of this motion on a partial indemnity basis in the amount of $3,839.99 inclusive of HST and disbursements, payable within 30 days.

Master R.A. Muir

DATE: August 6, 2013