

CITATION: Palachchandran v. Hurczak, 2014 ONSC 5105

COURT FILE NO.: CV-06-315342PD1

DATE: 20140905

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kajanth Palachchandran et al. v. Erica Hurczak

BEFORE: Master Glustein

COUNSEL: William G. Scott for the plaintiffs

Lawrence Hansen for the defendant

HEARD: September 3, 2014

REASONS FOR DECISION

Nature of the motion and overview

[1] The plaintiffs bring a motion under Rule 48.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for leave of the court to restore the action to the trial list.

[2] For the reasons I discuss below, I find that the plaintiffs have provided an acceptable explanation for the litigation delay and that the defendant would suffer no non-compensable prejudice in her ability to defend the action. Consequently, I grant the motion.

Applicable law and analysis

[3] The plaintiffs have to meet the following “conjunctive” test for leave to restore the action to the trial list (*Nissar v. Toronto Transit Commission*, 2013 ONCA 361 (“*Nissar*”) at para. 31):

Therefore, the applicable test is conjunctive: a plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation *and* that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice. [Italics in original]

[4] I address the evidence on each requirement below.

A. Explanation for the delay

[5] The action arises from a motor vehicle accident on July 20, 2004 involving the plaintiff Kajanth Palachchandran (“Kajanth”) when he was struck as a pedestrian. At the time of the

accident, Kajanth was 11 years old and as such the claim was issued on behalf of Kajanth by his litigation guardian. The remaining plaintiffs are plaintiffs pursuant to the *Family Law Act*.

[6] There are several unexplained timing gaps during which the plaintiffs did not proceed with the action. The individual gaps, when added on a cumulative basis, total approximately half of the lifespan of the action during the almost seven years since it was brought in July 2006 until the action was struck from the trial list in May 2013. However, these gaps do not amount to an unacceptable explanation of the delay since between these gaps, the action did proceed in the ordinary course through pleadings, exchange of productions, examinations for discovery, mediation, and setting the action down for trial.

[7] The action can be divided into “active” and “quiet” periods. I review these periods below.

a) July 2006 until March 2008

[8] This was an active period of 20 months. The following steps took place:

- i) The plaintiffs issued the statement of claim on July 19, 2006 and served the claim on September 5, 2006;
- ii) The defendants delivered a statement of defence and counterclaim on November 24, 2006 after the plaintiffs’ counsel requested delivery of the defence on two occasions;
- iii) The parties scheduled examinations for discovery for March 2007 but the examinations for discovery were rescheduled to May 2007 when the defendant’s counsel advised that the person who was to conduct them was not available;
- iv) On May 22, 2007, the plaintiffs delivered Kajanth’s medical brief and other medical documentation in support of Kajanth’s claim;
- v) The May 2007 examinations for discovery were rescheduled as the plaintiffs had to address issues between May and August 2007 with the insurer for Kajanth’s parents concerning who would act for Kajanth’s parents who had been named as defendants by counterclaim;
- vi) On October 12, 2007, counsel for the defendants by counterclaim (Kajanth’s parents) delivered a defence to counterclaim, after the plaintiffs’ counsel wrote to request the pleading as he was “anxious” to arrange discovery;
- vii) In October 2007, the examinations for discovery were rescheduled to March 28, 2008;

- viii) On March 5, 2008, the plaintiffs' counsel wrote to the defendant's counsel to enclose an up-to-date index of Kajanth's medical brief and to request that the defendant's counsel advise of any other reports he required; and
- ix) The examinations for discovery of the defendant and the plaintiffs proceeded on March 28, 2008.

b) April 2008 to December 2009

[9] This was a quiet period of approximately equal length to the first time period. During this 20-month time period, the plaintiffs took no steps in the action, despite numerous requests by the defendant's lawyer for answers to undertakings. The defendant's lawyer wrote five letters between November 2008 and April 2009 without a response, and then booked a motion to compel answers to undertakings.

[10] The undertakings motion was heard on July 13, 2009, at which the court ordered the plaintiffs to (i) satisfy certain undertakings by September 11, 2009, a date chosen on consent and (ii) pay costs to the defendant of \$1,000 within 30 days.

[11] The plaintiffs then failed to comply with the July 13, 2009 order, neither answering undertakings nor paying the outstanding costs, despite repeated requests (starting on August 17, 2009 through November 23, 2009) from the defendant's lawyer to do so.

[12] Consequently, on December 8, 2009 the defendant scheduled a motion returnable February 25, 2010 to strike the plaintiffs' claim for breach of the July 13, 2009 order.

c) December 2009 to March 2010

[13] This was a brief four-month period of activity.

[14] During this time period, the plaintiffs' lawyer requested some files and charts relevant to the action.

[15] On February 16, 2010, the plaintiffs requested a status hearing upon receipt of a status notice.

[16] Further, on February 16, 2010, the plaintiffs (i) provided answers to undertakings and (ii) paid the outstanding costs award from the July 13, 2009 motion.

[17] On February 25, 2010, Master Haberman heard the defendant's motion to strike. Master Haberman ordered that all remaining undertakings be satisfied within 30 days and that the plaintiffs pay costs of \$1,325.55 to the defendant within 30 days.

[18] On March 15, 2010, Master Muir made a consent order at the status hearing requiring that the action be set down for trial by March 14, 2011.

d) March 2010 to March 2011

[19] There is no evidence of any steps taken in the file during this 12-month period. The plaintiffs (i) failed to comply with Master Haberman's order despite three letters from the defendant's lawyer in April, May, and November 2010, and (ii) took no steps to comply with the mediation deadline of December 30, 2010.

e) March 2011 to February 2012

[20] There were steps taken during this 11-month period.

[21] On March 16, 2011, the action was dismissed by registrar's order since it had not been set down for trial by March 14, 2011 as required under Master Muir's order. The plaintiffs then took immediate steps to seek consent of the defendant to set aside the order. After the defendant's lawyer advised in May 2011 that the motion would be opposed, the plaintiffs booked the motion to set aside the dismissal order. The motion was originally scheduled for June 2011, then adjourned to July 2011, and then further adjourned so that the plaintiffs' counsel could report the matter to LawPro who retained counsel on his behalf.

[22] On June 21, 2011, the plaintiffs delivered medical, academic, and employment records and also paid the costs ordered by Master Haberman.

[23] The parties then exchanged motion materials and argued the motion to set aside the dismissal order before Master McAfee on January 11, 2012. Master McAfee set aside the dismissal order by reasons dated January 20, 2012. Master McAfee held that "I am satisfied that the litigation delay from the date of the inception of the action has been adequately explained". Master McAfee ordered that the action be set down for trial by February 20, 2012.

[24] On February 8, 2012, the parties scheduled mediation for December 20, 2012.

[25] The trial record was served and filed on February 13, 2012.

f) February 2012 to December 2012

[26] There is no evidence of any steps taken during this 10-month period.

[27] It appears that the court sent a "Certification Form to Set Pre-Trial and Trial Dates" on or after June 14, 2012 (the "Certification Form"), in which the plaintiffs were warned that the action would be struck off the list if the matter was not scheduled for trial by April 26, 2013. The plaintiffs' counsel's evidence is that he only discovered the notice on April 29, 2013 since as a result of inadvertence, the date for completion of trial certification had not been entered into his follow-up diary.

[28] During this time period, the defendant's counsel sent six letters asking for updated medical and academic records from the plaintiffs. All the requests were ignored. While the plaintiffs' lawyer states that "I did not have any additional records to send to the defendant's lawyer at that time", with the upcoming mediation the plaintiffs ought to have taken steps to request those records.

g) December 2012 to May 6, 2013

[29] There was activity in the matter during this almost 6-month period.

[30] The mediation took place on December 20, 2012 but the action did not settle except for an agreement that the counterclaim of the defendant against Kajanth's parents would be dismissed without costs.

[31] The defendant delivered a settlement offer on January 28, 2013 to which the plaintiffs responded on February 4, 2013.

[32] Between January and April 2013, the defendant sought further examination for discovery of Kajanth which was opposed by the plaintiffs. Correspondence was exchanged between counsel in which they each set out their positions. By letter dated April 18, 2013, the defendant's lawyer advised that he had instructions to bring a motion to compel Kajanth to attend at a continued examination for discovery and for a further and better affidavit of documents.

[33] Also, during this time period, the plaintiffs were seeking to have the plaintiffs' accident benefits insurer fund psychological and orthopaedic assessments for Kajanth, since at the mediation Kajanth advised the plaintiffs' counsel that Kajanth was having ongoing psychological and physical difficulties.

[34] Finally, after the plaintiffs became aware on April 29, 2013 of the notice from the court requiring that the trial date be scheduled by April 26, 2013, the plaintiffs' lawyer forwarded the Certification Form the same day to the defendant's lawyer asking him to complete the Certification Form and requesting his consent, if necessary, to restore the matter to the trial list. The defendant's lawyer responded by letter dated April 30, 2013 that he could not certify that the matter was ready for trial since issues concerning production and additional discovery remained.

[35] On April 30, 2013, the parties agreed to a date of November 6, 2013 for the defendant's motion to require Kajanth to attend for continuing examination for discovery and to satisfy undertakings. On May 6, 2013, the defendant served his motion record for that motion.

[36] On May 1, 2013, the defendant's lawyer asked the plaintiffs' counsel to send him a copy of the completed Certification Form as submitted to the court. The plaintiffs' counsel failed to submit the Certification Form "because I was unsure of the status of the action and the correct procedure to follow".

[37] By email dated June 18, 2013, the plaintiffs' counsel sent the Certification Form to the trial coordinator but was advised that day by the trial coordinator that the action had been struck from the list on May 6, 2013.

h) Review of the litigation delay

[38] The above evidence demonstrates an "acceptable" explanation for the litigation delay. The action has moved forward, albeit slowly and often after the plaintiffs' counsel ignored deadlines and correspondence from the defendants. Examinations for discovery have taken place, productions have been exchanged, mediation has been completed, and the action has been set down for trial.

[39] There is no question that the plaintiffs' lawyer did not move the action forward for certain lengthy periods of time and ignored multiple correspondence from the defendant's counsel. Overall, there is a cumulative period of approximately three and a half years of unexplained delay in the almost seven years from the inception of the statement of claim until the action was struck off the trial list.

[40] However, while (i) the conduct of the plaintiffs' counsel was often dilatory and unresponsive; and (ii) the plaintiffs' counsel failed to diarize deadlines, a review of the steps taken in the action still provides an "acceptable" explanation for the litigation delay. Almost every litigation file will have periods of inactivity. While this file has significant periods of inactivity over a 7-year period, the fact that (i) the action perhaps could have been set down for trial or (ii) the Certification Form could have been submitted to the court, for either step in half the time it took, does not constitute by itself an unacceptable explanation for the litigation delay. The evidence on the whole does not demonstrate an intention by the plaintiffs not to pursue the action or to disregard it.

B. Prejudice

[41] There is evidence to establish that if the action were to proceed, the defendant would suffer no non-compensable prejudice.

[42] The defendant's evidence is that her position is that the accident was caused when Kajanth (i) was rushing to get to school and (ii) ran without looking from behind a parked vehicle into the side of her car. Further, the defendant's evidence is that her position is "supported by the evidence of an independent witness and the physical evidence relating to the point of impact". Consequently, under the defendant's own evidence, restoring the action to the trial list would not prejudice the defendant's ability to present her defence at trial.

[43] The defendant filed no evidence of actual prejudice.

[44] Further, the plaintiffs rebutted any presumption of prejudice that arose due to the passage of time. The evidence is that (i) "examinations for discovery in this matter have been conducted and transcripts ordered"; and (ii) "medical and other records relevant to the action have been obtained and preserved throughout the conduct of the action".

[45] Kajanth was examined for discovery as recently as March 13, 2014 and in the past six months, the plaintiffs have provided updated records for Kajanth with respect to medical, academic, employment, and financial records, as well as treatment plans, the complete accident benefits file, and student loans documentation.

[46] Based on the above, I find that the defendant has suffered no non-compensable prejudice in her ability to defend the action as a result of the litigation delay.

Order and costs

[47] For the above reasons, I grant the motion and grant leave to the plaintiffs to restore the action to the trial list.

[48] However, the motion was made necessary by the plaintiffs' repeated failure to respond to correspondence, inadvertence in diarizing important deadlines, and several gaps of extended inactivity. In these circumstances, while I find that the plaintiffs meet the test in *Nissar* for leave to restore the action to the trial list, the defendant reasonably incurred costs to respond to the motion because the plaintiffs failed, for the second time, to fulfill their obligations to set the action down for trial or schedule a trial date (as required both by Master Muir's order and the Certification Form).

[49] For these reasons, I order costs in favour of the defendant even though the plaintiffs were successful on the motion, as Master McAfee did on the motion to set aside the dismissal order. Counsel for the plaintiffs did not object to such a costs order if the plaintiffs were to be granted the indulgence of leave to restore the action to the trial list.

[50] I fix costs at \$2,730.31, the amount sought by the defendant in her costs outline, on a partial indemnity scale, which (as the plaintiffs agreed) was a reasonable amount an unsuccessful party would expect to pay given the motion records, factums, and briefs of authorities filed.

Master Benjamin Glustein

DATE: September 5, 2014