12-~~452144~~ 451344

Pham v. Ravaliya et al.

Silverman, N. for the moving party

Van Staalduinen, D. for the responding party

ENDORSEMENT

Master Haberman: This motion to extend the time for service is dismissed with costs fixed at $2000, payable within 30 days.

Evidence

The plaintiff's main problem is the state of the evidence. In the context of the facts of this case, it does not come close to meeting the mark. The evidence is contained in the affidavit of Michael Rubin, former counsel at the firm who acts for the plaintiff.

Delay

The action stems from a motor vehicle accident that occurred on **January 27, 2010**. The action was not commenced until **April 16, 2012**, two and a half months after the expiry of the applicable limitation period. The plaintiff relies on discoverability, pleading in his statement of claim that it was only after his second unsuccessful attempt to return to work in October 2011 that he realized he would *never again be able to work in his field of choice and expertise as a result of his accident-related injuries*. The plaintiff appears to be relying on this event as the appropriate starting point for the commencement of the limitation period, though it is not clear why and no evidence regarding discoverability has been presented on this motion.

According to Rubin the claim was not served within 6 months of its issue, as required *due to a clerical oversight*. The explanation for the oversight is rather convoluted, and actually involves no less than two "oversights.". First, Rubin claims that he had instructed his former assistant to serve the claim but she failed to do. He does not say when he did this or whether he followed up. In view of the fact that the action had already been started after the expiry of the limitation period, one would have expected a certain degree of oversight to have been exercised here.

There is no evidence that anything was actually done in this file from the time the claim was issued on **April 16, 2012** until receipt of the Notice that the Action will be Dismissed **on October 15, 2012,** a period of 6 months. This is not explained in the evidence, nor was counsel at the hearing aware that this was a time frame that he had to account for, focusing only on the period that followed.

Rubin claims that, as a result of receipt of the above Notice, he:

> *...had my old former assistant schedule this motion, and instructed her to confirm that that service had been effected, or to effect service if it had not yet been done; unfortunately, she failed to do either task.*

By this time, the deadline for service of the claim had already expired and, as he claims he had asked her to deal with this earlier, once again, one would have expected Rubin to have followed up with his then assistant this time, all the more so in view of the limitation problem and the fact that she had failed to heed his instructions earlier. It seems Rubin failed, again, to do so and there is no evidence of any memos he sent, or any indication of what he actually did in regards to conveying these instructions.

It seems Rubin did not become aware of these two oversights until **February 2013** – no actual date is provided and there is no evince indicating how or why this problem suddenly came to Rubin's attention at least 4 months after he says he again asked his assistant to serve the claim.

This time, Rubin claims he immediately asked his new assistant to get the claim served and he asserts that it was – on **March 7, 2013.** However, only one defendant was actually personally served, the other served through a member of their household, so that was not good service absent an order permitting this form of service. Both defendants were served with a statement of claim that had expired. Service was therefore not effected, as alleged.

Rubin leaves the issue of delay by talking generally about some confusion regarding the address on file and a search he ordered to get the address at which he believes the defendants were ultimately served – but again, there are no details about earlier efforts to serve at an incorrect address, and when they were made, or what was done to locate a current address for the

defendants. No searches or affidavits of attempted service are appended as exhibits to Rubin's affidavit.

At the end of the day, I am not satisfied that there is any cogent explanation that has been put forward for the delay in serving these defendants.

In response, the defendants assert that their first notice of the claim was on **March 6, 2013**, more than 37 moths post-accident, when they were served by an alternative mode to personal service. The matter was reported to the insurer later in **March 2013, more than three years after the accident.** As the defendants did not claim for property damage to their own vehicle, this was the insurer's first notice of the incident.

I note from the case history that this motion, originally returnable on **March 14, 2014**, did not proceed as scheduled that day as it was not confirmed, so it was marked as withdrawn. There is no explanation for this in the plaintiff's evidence. The motion was next scheduled **March 27, 2013**, but was adjourned again at that time as Rubin had sent a student to speak to it, without appreciating it would be opposed.

The motion then came before me on **September 19, 2013**, at which time it was adjourned yet again, this time because the plaintiff sought to walk in their factum and brief of authorities. Although I made it clear how I viewed this issue last day in my endorsement of that date, counsel tried to reargue at this hearing that this delay was not their fault, as they had only received the responding materials late in the day. He entirely missed the point that this was his motion, in which he was seeking an indulgence of the court and on which he had the burden of proof, so it was up to him to have filed a factum and brief of authorities **before** getting the responding materials.

Prejudice

Rubin does not address prejudice under a separate heading but tosses it in after his repeated assertion that the defendants have now been served. This ignores the fact that they were not served properly. He claims, at paragraph 10 of his affidavit, *that there is no apparent prejudice to any parties.* That is the sum total of the evidence adduced regarding prejudice.

The defendants, on the other hand, devote a section of their evidence to this key issue. Colleen Dickson, a claims adjuster with Security National Insurance Company, had primary carriage of the matter and she provides the defendants' evidence.

Ms. Dickson's evidence is clear: the insurer's first notice of the claim was on March 13, 2013, when they were advised by their insureds that they had been served with process. It is interesting that Rubin did not even send them the standard letter before issuing the claim, putting the insurer on notice that it was coming.

In view of this timing, Dickson asserts that the insurer's ability to investigate the claim and alleged insures has been significantly prejudiced. She goes on and explains that they were precluded from conducting an early investigation into the accident *including locating potential witnesses, taking contemporaneous statements, and preserving evidence.*

She also notes that the defendant sold their car sometime in 2012, eliminating the insurer's ability to take photographs of the property damage to it, or to obtain a reconstruction report to assist in resolving *critical issues of liability and severity of impact.*

Dickson states further:

> *I verily believe that the insurer's ability to investigate the Plaintiff's claim an alleged injuries has been prejudiced due to the fact that it has been unable to obtain timely medical assessments, including a vocational assessment to determine the full extent of the Plaintiff's injuries and functional abilities.*

She adds that prejudice also flows from the fact that an OHIP summary can only be obtained 7 years back, so that finding out about the accident so long after the fact limits the amount of medical history the insurer can now obtain. This could be a factor if the plaintiff has injuries or medical issues that pre-date this accident

The timing of notice has also interfered with the insurer's ability to conduct timely surveillance and, as time passes, witnesses' memories fade.

Further, despite two requests (made on April 15 and July 9, 2013), the plaintiff has failed to provide any medical evidence or any of the other items referred to in the two letters, though it is

now more than four years post-loss, so the insurer continues to be unable to investigate the claim. There is no explanation in the plaintiff's materials for this omission, nor does it appear that plaintiff's counsel responded to either of these requests before July 11. At that time, they provided the plaintiff's tax returns and on August 8, 2013, they provided and the motor vehicle accident report. Those are the sole documents provided to-date.

Dickson concludes:

> *I verily believe that it would be improper and/or prejudicial to this Defendant to extend the time to serve the Statement of Claim in light of the above and in light of the passage of time since (the) Accident.*

The Law, Analysis and Conclusion

The parties appear to agree on the applicable legal principles that apply here. The dispute lies in the application of those principles.

The Court of Appeal's decision in *Chiarelli v. Wiens*, (2006) 46 (3d) 780, summarises the legal principles well, as follows:

> *...on a motion to extend the time for service, the court should be concerned **mainly** with the rights of litigants, not with the conduct of counsel.*

In reviewing what the motions judge had done, the Court stated that he was correct in holding that:

> ***... the court should not extend the time for service if to do so would prejudice the defendant, and that the plaintiffs bore the onus to show that the defendant would not be prejudiced by an extension.***

The first point to take from *Chiarelli* is that the court's focus should be **mainly** on the rights of the litigants, rather than counsel's conduct. *Mainly* is not the same as *exclusively*. There is therefore some room for consideration of counsel's conduct, though it appears that, it alone, will not be determinative of motions of this kind. If it were, delay alone would be a ground for dismissing this motion. The facts set above speak for themselves, and the gaps in the evidence

leaves considerable scope for the court to infer that nothing much at all was being done in the file to locate and serve the defendants.

The second point the Court makes in *Chiarelli* is that prejudice is the key issue, such that the focus of the inquiry should be on that issue, with the plaintiff bearing the onus of demonstrating that the defendant will not suffer any prejudice if an extension of the deadline is granted.

What that onus involves is also discussed in the case. In *Chiarelli*, the defendant's evidence about prejudice was vague and speculative in nature. The evidence filed on that point was as follows:

> *It is my belief that the defence of this action has been seriously prejudiced due to the passage of time and the strong possibility that pre-accident and post-accident record and witnesses may not be available or that their recollection may not be accurate.*

In the face of that evidence, the Court of Appeal said as follows:

> *Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension, in the face of such a general allegation, the plaintiff cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will cause prejudice. It seems to me that* ***if the defence is seriously claiming that it will be prejudiced by an extension it has as least an evidentiary obligation to provide some details.*** *The defence did not do that in this case.*

The Court also discussed the fact that the defence cannot rely on prejudice by its failure to have done something it reasonably could or ought to have done. Thus, failure to interview police officers at the time will not be accepted as a basis for a claim of prejudice as it is something the insurer could have done at the time but failed to do.

The Court also notes that the defence was aware in 1989 that the plaintiffs' injuries were serious such that surveillance could have been undertaken at that time, but wasn't. The Court added that the defence has *all of the particulars of the file maintained by Ms. Chiarelli's no-fault insurer and could have requested it at any time.*

Finally, the Court was clear that the prejudice complained of had to have been caused by the delay. Prejudice that would exist aside from late service of the claim *ordinarily* is not relevant to a motion of this kind. Thus destruction of police notes within two years of the event was not considered "prejudice" here as there was no obligation to notify the insurer within that two year window.

In the end, the Court of Appeal felt the extension was warranted of the facts before that court.

Chiarelli, however, differs from the case before this court on the basis of the following:

- In *Chiarelli*, the accident occurred on October 26, 2988 and the defendant's insurer was advised of it the following day, so they had **notice of the claim** from a very early point. It was therefore open to them to conduct surveillance and to investigate the loss as well as the circumstances of the accident from the outset. In the case at bar, the first notice to the defendants came more than three year's post-loss;
- In *Chiarelli*, the plaintiffs **moved reasonably promptly** once they learned the claim had expired. Here, the first motion scheduled was not confirmed. The second date booked was adjourned as counsel sent a student to speak to the matter. The third time the matter was before the court, it was adjourned yet again as the plaintiff walked in their factum and brief of authorities, both documents that ought to have been filed before the first attendance, scheduled to occur months earlier. As a result, although Rubin became aware of the problem at some point in February 2013, this motion was not heard until more than a year later;
- In *Chiarelli*, the defendant's evidence of prejudice was vague and speculative, so the Court found that the defendant had failed to meet its evidentiary obligation. The plaintiff was not expected to guess at where the prejudice could be and to somehow address it. Here, the defendant has set out why they believe they will be prejudiced if the deadline for service is extended though two pages of evidence. Rather than being speculative or vague, the adjuster who swore the affidavit provides a detailed analysis of what the insurer could and would have done had they had notice of the claim in a timely fashion.

The plaintiff maintains that the evidence of prejudice that was filed here is also speculative and without specificity. A closer looks at what has been alleged regarding the basis for prejudice, in the context of the facts of the case, is therefore required.

First, there is no dispute that the defence insurer was not aware of this claim until **March 2013,** more than 3 years after the accident had occurred. Nor were they willfully blind – as no claim for property damage was advanced by the defendants, the insurer had no way of knowing about the accident that gave rise to the claim, either. This, too, is not disputed.

Thus unlike the case in *Chiarelli,* the defendant cannot be faulted for not having initiated an investigation as they were left completely in the dark about this claim for a very long time.

The claim here arose in the context of a motor vehicle accident. Liability is not a given – this is not a rear end case, as was the situation in *Bernardo v. Farooq et al.* , 2014 ONSC 377, where the accident that led to the claim did involve a situation where the plaintiff's vehicle was rear-ended.

Based on the factual matrix of *Bernardo,* the master, in that case, opined that it was unlikely that liability would be an issue. Rather, he saw that case as coming down to an assessment of damages. Thus, his focus was solely on the availability of evidence that would go towards proof of damages.

There, the master found there was no specific evidence of prejudice provided, let alone evidence arising from the delay in service. As he put it:

> *The defendant's evidence simply makes vague references to the passage of time and the possibility of missing documents.*

In the end, the master concluded that the plaintiff had met their onus.

The evidence of prejudice in this case touches both liability and damages. In terms of liability, I accept as accurate the defendant's assertion that such late notice interfered with their ability to investigate the accident; locate potential witnesses and take contemporaneous statements.

In terms of damages, I also accept that the insurer was precluded from conducting early surveillance; obtaining medical assessments as well as a vocational assessment. The latter is of

particular importance in this case, as in the plaintiff's own claim, he pleads that he only realized his injuries were serious when he was unable to return to work a second time. This foreshadows a potentially large loss of income claim that the insurers ought to have had an opportunity to address earlier on.

Dickson also makes it clear in her evidence that OHIP records go back 7 years, only, so ordering them now means the defence would only get records back to 2007, or at most, for 3 years pre-loss. If there is a history of pre-existing injuries (there is no way of knowing if that is the case, as no clinical notes or records have been produced as yet), the court is usually inclined to allow a defendant to go back further in their investigations.

Then there is the usual surmise that the witnesses' recollection of the accident may be far less clear now than it was earlier in time. That, without a doubt, is accurate. The earlier a party is aware of a claim, the earlier they can record their recollection so that it is available to refresh their memories down the road.

In the face of these issues, most of which are detailed and specific, there is no reply evidence. There is no evidence from the plaintiff to indicate that have ordered the OHIP summary and when they did so and that they have ensured that all relevant evidence has been ordered, collected and preserved. It seems even the defendants' car is no longer available having been sold in 2012.

In the normal course, the action would have been preceded by a notice letter – here it was not. In the normal course, the action would have been started within the limitation period – again, here it was not. These omissions have exacerbated the delay and increased the likelihood of prejudice if service is permitted now, more than four years post-loss.

Based on all of the foregoing, in my view, this is one of the rare cases where the time for service of a statement of claim should not be extended this very late date.

Master Joan M. Haberman March 7, 2014