

CITATION: Piccone v. Jack Astor's, 2017 ONSC 1112
COURT FILE NO.: CV-09-0910-00
DATE: 2017-02-15

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

AMBROSE PICCONE and
ANGELA PICCONE

Plaintiffs/Moving Parties

- and -

JACK ASTOR'S BAR AND GRILL,
SIR CORP., FIMA
DEVELOPMENT, NORTH
COUNTRY PROPERTY
MAINTENANCE INC.,
INCOGNITUS CORPORATION,
and JOHN DOE

Defendants/Responding Parties

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)
) *Jillian Van Allen*, for the
) Plaintiffs/Moving Parties
)
)

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)
) *Sophia Souffront*, for the
) Defendant, North Country
) Property Maintenance Inc.
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)
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)
) **HEARD:** October 12, 2016,
) at Brampton, Ontario

Price J.

Reasons For Order

NATURE OF MOTION

[1] Angela Piccone slipped on snow or ice and fell in a parking lot outside a Jack Astor's restaurant in Etobicoke in March 2007. In 2009, she and her husband commenced an action against the restaurant, the owner of the plaza,

and the snow removal contractor for damages for the personal injuries she says she suffered.

[2] Mr. and Ms. Piccone's lawyer improperly served the Statement of Claim on North Country Property Maintenance Inc. ("North Country"), the snow removal company, in March 2009 by causing it to be delivered to Jack Astor's. As a result, North Country says that it did not have knowledge of the action until February 2015. It is not disputed that North Country's insurer, Lombard Canada Ltd. ("Lombard"), had knowledge of the incident in 2007 and received snow removal information from North Country as well as documents and correspondence regarding settlement discussions between the Plaintiff and the other Defendants. Later, when North Country did not receive the Claim, Lombard closed its file.

[3] Mr. and Ms. Piccone now move for an order extending the time for service of their Statement of Claim on North Country to February 26, 2015, when they brought the motion. North Country opposes the motion, saying the delay has prejudiced it.

BACKGROUND FACTS

[4] In 2006 and 2007, Fima Development ("Fima") owned the plaza at 1900 The Queensway in Etobicoke, Ontario, where Jack Astor's was located. On October 31, 2006, Fima had hired North Country to provide winter maintenance service for Jack Astor's.

[5] On March 4, 2007, Angela Piccone ("Ms. Piccone") slipped and fell on snow and ice in the Jack Astor's parking lot. Ms. Piccone reported the fall to Jack Astor's.

[6] On March 5, 2007, Crawford & Company, the independent adjusters for Jack Astor's, prepared a Web Occurrence Report. Ms. Piccone provided a statement in which she gave a detailed description of the incident itself and of the injuries she said she had suffered.

[7] On March 28, 2007, Lombard became aware of Ms. Piccone's fall when Fima's insurer, ING Insurance ("ING") advised it by letter that Ms. Piccone reported her fall to Jack Astor's manager, who later reported it to Fima.

[8] Between March 28, 2007 and July 11, 2008, ING and Lombard exchanged communications concerning liability issues and settlement of Ms. Piccone's claim. The letters were dated March 28, April 2, April 23, May 29, and June 1, 2007. The March 28, 2007 e-mail from ING to Lombard indicated that ING would not be contributing to a settlement, and asked Lombard to engage in settlement talks directly with Ms. Piccone.

[9] On April 2, 2007, Lombard's adjuster, Steven Ho, advised Mr. and Ms. Piccone that Lombard had contacted North Country (its insured). North Country agreed to send copies of their logs that recorded what salting they did in the parking lot to Lombard. Mr. Ho told Mr. and Ms. Piccone that he would provide copies of North Country's contract and of the salting logs to them.

[10] On June 17, 2007, Mr. Ho spoke with Ms. Piccone's husband, Ambrose Piccone. Mr. Piccone advised Mr. Ho that Ms. Piccone was still in a lot of pain and that they had not yet spoken to a lawyer, but were thinking about it. He said that they were not yet ready to settle, because Ms. Piccone was not feeling well. Ms. Piccone had been working full-time as a perfume counter attendant at Sears before her fall, and had only resumed work on a part-time basis following her fall. The adjuster advised that he would obtain Ms. Piccone's medical documentation and then speak to them further.

[11] On April 3, 2008, ING's adjuster wrote to Ms. Piccone, with a copy to Lombard, concerning her injuries. He advised Ms. Piccone that ING had been in contact with the snow removal contractor hired to clear the snow and ice from the parking lot, who had expressed an interest in resolving the matter.

[12] On June 18, 2007, Lombard wrote to Ms. Piccone, enclosing a form authorizing the release of her medical records to it, which she signed and returned. On June 29, 2007, ING also provided Lombard with some of Ms. Piccone's medical documentation, including the clinical notes and records of her family physician, Dr. Brian S. Strom.

[13] On April 3, 2008, ING wrote to Ms. Piccone regarding her injuries and a possible settlement of her claim. ING copied Lombard with its correspondence. On July 11, 2008, ING wrote to Ms. Piccone again, attaching a copy of its earlier letter of April 3, 2008. Again, ING copied Lombard with its correspondence.

[14] On November 11, 2008, Lombard closed its file.

[15] On March 2, 2009, Mr. and Ms. Piccone's lawyer, Ken Harris ("Mr. Harris"), caused a Notice of Action to be issued and served, before the expiry of the two year limitation period prescribed by the Limitations Act, 2002. On March 27, 2009, he filed a Statement of Claim, naming North Country as one of the defendants. The plaintiffs in the action are Ms. Piccone and her husband, who makes a claim pursuant to s. 60 of the *Family Law Act*.

[16] The Notice of Action and Statement of Claim were served on North Country at Jack Astor's location, where the fall had occurred. It is not disputed that delivery of the Claim to Jack Astor's did not constitute proper service of the Claim pursuant to the *Rules of Civil Procedure*.

[17] On August 1, 2012, Jack Astor's filed their Statement of Defence. It included a Crossclaim against North Country, which listed the same incorrect address for service on North Country as Mr. Harris had employed, namely, 1900 The Queensway, Etobicoke.

[18] Mr. Harris died in 2014. On November 18, 2014, Mr. and Ms. Piccone retained new counsel, Mr. Philp. When Mr. Philp reviewed Mr. Harris' file, he expressed concern that North Country had not been properly served and had not delivered a Statement of Defence. This possible error was reported to Mr. Harris' indemnity insurer, LawPRO, who retained counsel on behalf of the late Mr. Harris.

[19] On February 26, 2015, Mr. Philp, on behalf of Mr. and Ms. Piccone, served the Notice of Motion for their motion to extend the time for service of the Claim on North Country. The motion was served on North Country at 1945 Lockhart Road, Innisfil, Ontario. This address obtained from a Corporate Profile Search conducted on November 19, 2014. The Motion Record was served on Lombard on May 26, 2015, and on North Country on May 28, 2015.

[20] On September 20, 2016, Justice Fairburn granted Mr. and Ms. Piccone leave to amend their Claim by adding Ken Harris, by his Estate Trustee, as a defendant, with the appropriate additions and amendments of the allegations, set out in a draft "Fresh as Amended Statement of Claim".

[21] The Piccone's motion for an extension of time to serve their Claim on North Country was heard on October 12, 2016, and judgment was reserved. For the reasons that follow, the motion will be granted.

ISSUES

[22] The Court must determine whether an extension of time for service of the Claim would advance the just resolution of the dispute without causing prejudice or unfairness to North Country.

PARTIES' POSITIONS*Mr. and Ms. Piccone's position*

[23] Mr. and Ms. Piccone argue that extending the time for service of their Claim would not prejudice North Country. They submit that North Country and Lombard had notice of the claim by at least June 18, 2007, and had the opportunity to preserve their records and investigate the claim at that time.

North Country's Position

[24] North Country argues that Mr. and Ms. Piccone have not provided an adequate explanation for not properly serving North Country in 2007. They argue that Mr. and Ms. Piccone have shown a lack of interest in their claim and should not be afforded the indulgence they seek to the prejudice of North Country.

[25] North Country asserts that because it did not receive timely notice of the Claim, it had no knowledge of it until February 2015, when it received notice of the present motion. It submits that, as a result, it has been significantly prejudiced in the following ways in its ability to defend the claim:

- Key witnesses helpful and/or critical to the defence of the claim cannot be located, despite reasonable efforts to find them.
- Witnesses who are available will likely have eroded memories of the incident.

-
- North Country is no longer able to conduct investigations, neighbourhood interviews, or surveillance to assist its defence.
 - Ms. Piccone's pre-existing injuries can no longer be accurately identified and assessed;
 - Relevant documents are no longer available;
 - Defence medical examinations will no longer disclose Ms. Piccone's condition following her fall, or accurately assess whether her condition was affected by the fall.

[26] North Country argues that a potential defendant should be secure in his reasonable expectation that he will not be held to account for old obligations.

ANALYSIS AND EVIDENCE

Legislative framework

[27] The *Rules of Civil Procedure* make the following provisions for service of a Statement of Claim and Notice of Action, and for extensions of time for service:

14.08(1) Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued.

(2) Where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued.

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

59.01 An order is effective from the date on which it is made, unless it provides otherwise.¹ [Emphasis added]

Jurisprudence

[28] The Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, (2015), held that the courts have inherent jurisdiction to issue orders *nunc pro tunc* (back-dated), a power which is implied by rule 59.01, above.² The Court held that the following non-exhaustive factors guide the courts in determining whether to exercise this jurisdiction:

[29] The opposing party will not be prejudiced by the order;

[30] The order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;

[31] The irregularity is not intentional;

[32] The order will effectively achieve the relief sought or cure the irregularity;

[33] The delay has been caused by an act of the court; and

[34] The order would facilitate access to justice.

[35] None of these factors is determinative. An order granting leave to proceed with an action can theoretically be made *nunc pro tunc*, where leave is sought prior to the expiry of the limitation period. However, a court should not exercise

¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

² *Canadian Imperial Bank of Commerce v. Green*, 2015 3 S.C.R. 801, [2015] 3 SCR 801

its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

[36] Justice Fedak stated the principles to be applied in a motion to extend the time for service in *Lico v. Griffiths* (1996). He stated:

In reviewing the case-law I derive the following propositions that are applicable to the present case. Firstly, the court may order time for filing a statement of claim be extended where it will advance the just resolution of the dispute, without prejudice or unfairness to one or both of the parties. Secondly, the assessment of whether an extension of time is appropriate on this principle will turn on the facts of each individual case. Thirdly, a plaintiff's solicitors inadvertence in not issuing or serving the statement of claim, should not undermine the just resolution of the dispute on its merits, where the defendants ability to defend the proceeding has not been jeopardized by the delay caused by the plaintiffs solicitor.³ [Emphasis added]

[37] The Court of Appeal applied these principles in *Chiarelli et al. v. Wiens* (2000), the facts of which bear some resemblance to the present case.⁴ In *Chiarelli*, the plaintiff's lawyer notified the defendant's insurer of the claim a month after the car accident in which the plaintiff was injured. Over the next three years, the plaintiff's lawyer forwarded medical information to the insurer as it became available. During this period, the insurer never indicated that it was disputing liability. Just within the two-year limitation period, the plaintiff's lawyer issued the Claim, but was unable to serve it because of incomplete information about the defendant's address and because the defendant's insurer refused to accept service. The six-month period for service expired and, the defendant's insurer wrote to the plaintiff's lawyer to say that it assumed that the plaintiff had abandoned her claim. The lawyer wrote back to say that this was not the case and that he would move for an order extending the time for service. However, succumbing to work pressure, depression and embarrassment from his negligence, the lawyer took no action. The insurer closed its file in February 1994

³ *Lico v. Griffiths*, 1996 CanLII 7990 (ON SC), 28 O.R. (3rd) 688, p. 699-700

⁴ *Chiarelli et al. v. Wiens*, 2000 CanLII 3904 (ON CA), 46 O.R. (3d) 780 O.C.A.

(5 years post-accident). Two and a half years later, the plaintiff retained a new lawyer, who obtained the file from the first lawyer and moved for an order extending the time for service of the Claim, six years and four months after the time for service had expired. Taliano J. granted the motion, but his order was reversed by the Divisional Court. The Court of Appeal allowed the plaintiff's appeal from the Divisional Court's decision and restored the order granting the extension.

[38] The Court of Appeal in *Chiarelli* held that, although the onus remains on the plaintiffs to show that the defendant would not be prejudiced by an extension, they 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 not cause prejudice. Laskin J.A. stated, "It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details."

[39] Additionally, the Court of Appeal held that "the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done... If, as the defence now maintains, it is contesting liability, then it should have interviewed the police officer at the time and cannot blame its failure to do so on the plaintiffs' delay." The Court additionally noted that the insurer could have undertaken surveillance for several years after the accident, and that its failure to do so when it knew that the plaintiff's injury was serious was not caused by the delay in serving the Claim.

[40] Laskin J.A. continued, stating:

Ferguson J. found it "very significant" that the defendant herself never knew that a statement of claim had been issued. I would give no weight to this consideration. State Farm took a statement from its insured and then negotiated

on her behalf with the plaintiffs' lawyer for nearly three years. **The plaintiffs cannot be held accountable if, for tactical reasons, State Farm chose not to tell its own insured that an action had been started, and refused to accept service of the statement of claim for her or even seek instructions from her to accept service.**⁵

[41] In *Heaps Estate v. Jesson* (2007), Justice Dunn allowed the plaintiff's motion, brought in 2006, to extend the time for service of a Claim, 7 years after the time for service had expired in 1999. Additionally, he made an order for substituted service on the defendant's insurer. The plaintiff's process server had tried to serve the defendant with the Claim in 1999 but encountered difficulties, and the plaintiff's solicitor put the file away. After the plaintiff discovered the omission in 2004, he retained a new solicitor to represent him, but that solicitor died in 2005. Justice Dunn stated:

The defendants, through the insurer, were aware of the particulars of this claim well within any limitation period. On the facts of this motion, I am convinced that an extension will advance the just resolution of a dispute involving a fatality. I am not convinced that the prejudice to the defendant by such an extension would so adversely impact upon the defendants' ability to defend in trial that the "just resolution" should be avoided.⁶

Applying the legal principles to the facts of the present case

a) *Will the extension prejudice North Country?*

[42] North Country submits that, as a result of the delay in serving the Claim, it has been significantly prejudiced in its ability to defend the claim. Patrick Corrado ("Mr. Corrado"), the owner and president of North Country, states in his affidavit sworn April 15, 2016:

I have conducted a search of the records of North Country Property Maintenance Inc. Despite **reasonable efforts**, in light of the passage of time, I was unable to locate any **further records with respect to the loss in question, other than those already contained within the file record**, including the Snowplowing

⁵ *Chiarelli v. Weins*, at para. 18

⁶ *Heaps Estate v. Jesson*, 2007 CanLII 12892 (ON SC), para. 14.

Quotation/Contract dated October 31, 2006 and written note regarding salting services for the month of March 2007.

Most of the employees who have knowledge of the events surrounding the incident are no longer employed by North Country Property Maintenance Inc. I have conducted a search of the records for North Country Property Maintenance Inc. and despite reasonable efforts, I was unable to locate the employee records and/or the last known contact information of the employees who are no longer employed by the company with knowledge of the loss in question.

[43] Mr. Corrado does not identify any records with respect to the loss, or categories of records, that once existed and that are no longer available. He does not state that there would be other relevant records or, if they existed, what his belief is as to when or under what circumstances they ceased to become available. In particular, he does not identify any relevant records that once were in his possession that ceased to be available during the period after the expiry of the six month period for service following the issuance of the Claim in 2009.

[44] Mr. and Ms. Piccone have provided evidence as to the following records that their lawyer obtained and that were preserved:

[45] North Country Property Maintenance Inc. Snowplowing Quotation/contract dated November 1, 2006;

[46] Web Occurrence Report from Crawford dated March 5, 2007;

[47] Unsigned and undated statement of Ms. Piccone;

[48] Weather records from Environment Canada for March 1, 3, and 4, 2007;

[49] Mr. Corrado does not identify any “key witnesses,” or categories of witnesses, who would have been available in September 2009 (when the six month period for service of the Claim expired), but are no longer available to provide relevant evidence in defence of the Claim.

[50] If such witnesses existed, Mr. Corrado has not explained what “reasonable efforts” he has made to identify and locate them. He states that witnesses who are available will likely have eroded memories of the incident, but he has not identified such witnesses, or described any efforts to inquire into what recollection they now have of the events, or what memories they are likely to have had in September 2009.

[51] While it is true that some of the investigations, neighbourhood interviews, or surveillance that it once might have conducted cannot now be conducted, it is unlikely that such steps, if not taken by September 2009, when the period for service of the Claim expired, would have yielded helpful evidence afterward. In any event, North Country’s insurer could have conducted such investigations had it chosen to, as it had knowledge of the incident within a month after it occurred.

[52] Shortly after Ms. Piccone’s fall, Fima informed Mr. Corrado of Ms. Piccone’s fall, and asked him to provide a summary of the salting services that it had provided to Jack Astor’s in March 2007. Mr. Corrado’s note to Fima indicates that salting services were provided on March 2, 3, and 4, 2007 (March 4 being the date of the incident), and then not again until March 7, 2007.

[53] Mr. Corrado stated at his cross-examination that neither his broker nor a representative from his insurance company contacted him with respect to this incident and/or to request any of his records with respect to winter maintenance services that North Country had provided. He stated that the only records he would have had at the time were the contract and the invoice for salting services, which he would have sent to Fima, and which would have set out the dates on which North Country attended to provide salting services. Mr. Corrado stated that he had not yet searched for the invoice.

[54] Lombard was aware of Ms. Piccone's fall and injury by March 28, 2007, when ING wrote to Lombard and advised it about the incident. Between that date and July 11, 2008, ING and Lombard exchanged communications concerning liability issues and settlement of Ms. Piccone's claim. On April 2, 2007, Lombard's adjuster advised Mr. and Ms. Piccone that Lombard had contacted North Country, which had agreed to send copies of their logs, recording what salting they did in the parking lot. Mr. Corrado stated that his insurer did not contact him until this motion was brought. As the Court of Appeal stated in *Charelli*, plaintiffs cannot be held accountable if, for tactical reasons, an insurer chooses not to tell its own insured that a claim is being made against it.

[55] On June 17, 2007, Lombard's adjuster spoke with Ms. Piccone's husband, who indicated that they were thinking about speaking to a lawyer. Lombard had the opportunity to investigate the circumstances of Ms. Piccone's fall and to follow up with respect to her injuries. Mr. and Ms. Piccone should not be precluded from being granted an extension based on prejudice which Lombard could have avoided at the time by taking those steps.

[56] Mr. Corrado states that defence medical examinations will no longer disclose Ms. Piccone's condition following her fall, or accurately assess whether her condition was affected by the fall. The records that would have disclosed this, however, are still available, as the Piccones' evidence attests. Mr. and Ms. Piccone have the following documentation available with respect to liability and damages:

i) OHIP Records

1. Decoded List of Services from April 1, 2007, to December 4, 2014;

2. Payment summary from OHIP subrogation dated July 12, 2007;

3. OHIP payment summary dated July 12, 2012;

ii) Employment records

1. Ms. Piccone's employment file from Sears Canada;

2. Ms. Piccone's income tax returns for 2002 to 2015;

3. Letter from Sears to Dr. Strom dated July 6, 2007;

4. Initial Assessment/Disability Form from Sears Canada dated January 31, 2008 for Ms. Piccone;

iii) Clinical notes and records of Ms. Piccone's family doctor

1. Clinical notes and records of Dr. Brian S. Strom for the period April 17 to June 5, 2007;

2. Initial Assessment/Disability Form by Dr. Strom dated February 24, 2008 for Ms. Piccone;

3. Report of Dr. Strom dated September 8, 2012;

4. Up-dated clinical notes and records of Dr. Strom dated January 30, 2015;

iv) Other clinical notes and records from

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1. Trigenics Wellness Clinic from Jan 1 to Dec. 31, 2007;
 2. Dr. Seligman;
 3. Dr. Joseph Wen;
 4. Walk-In Mobility Clinics;
 5. Trillium Health Partners/Credit Valley Hospital;

[57] For the foregoing reasons, I do not find, in the words of Justice Dunn in *Heaps Estate*, that allowing the extension “would so adversely impact upon the defendants’ ability to defend in trial that the “just resolution” should be avoided.”

b) *Would the extension have been allowed if the application had been made in September 2009?*

[58] I find that if the Piccones had applied for the extension in September 2009, it would have been allowed. There is no evidence that an extension, if it had been granted at that time, would have caused prejudice to North Country.

c) *Was the delay intentional?*

[59] Mr. Harris attempted to serve North Country in 2009 by delivering the Notice of Action and Statement of Claim to them at Jack Astor’s restaurant, whose parking lot they were contracted to clear of snow. There is no evidence that any of the defendants notified him that the service on North Country was irregular. Indeed, Jack Astor’s filed their Statement of Defence on August 1, 2012, in which it listed the same address for service on North Country that Mr. Harris had employed. Mr. Harris died in 2014 and when Mr. and Ms. Piccone’s new lawyer was retained, he noticed the irregularity and promptly brought the

present motion. Under these circumstances, I do not find the delay to have been intentional.

d) Will the order requested effectively achieve the relief sought or cure the irregularity?

[60] The request is to extend service *nunc pro tunc* to February 26, 2015, when the Notice of Action and Statement of Claim was served on North Country at the address obtained through a Corporate Profile search. The order sought, in validating that service, cures the irregularity.

e) Would the order facilitate access to justice

[61] Mr. and Ms. Piccone are seeking an extension of time for service of five years and five months, from September 27, 2009, to February 26, 2015. In *Chiarelli v. Weins*, the Court of Appeal granted a six year and four month extension of the time for service, from April 24, 1991 to August 1997.⁷ As Lacourcière J.A. said in *Laurin v. Foldesi* (1979), "The basic consideration . . . is whether the [extension of time for service] will advance the just resolution of the dispute, without prejudice or unfairness to the parties."⁸ The extension requested will not cause prejudice or unfairness to North Country and will promote the resolution of the claim, and facilitate the Piccones' access to justice.

CONCLUSION AND ORDER

[62] For the foregoing reasons, it is ordered that:

[63] The plaintiffs' motion for an extension of time to serve their Claim is extended, *nunc pro tunc*, to February 26, 2015.

⁷ *Chiarelli v. Weins*

⁸ *Laurin v. Foldesi* (1979), 1979 CanLII 1875 (ON CA), 23 O.R. (2d) 331

[64] If the parties are unable to agree on costs, they shall submit written arguments, not to exceed 4 pages, and a Costs Outline, by February 28, 2017.

Price J.

Released: February 15, 2017

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ONTARIO

SUPERIOR COURT OF JUSTICE

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PICCONE

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REASONS FOR ORDER

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