CITATION: Polyakova v. Weiss, 2015 ONSC 1153
COURT FILE NO.: CV-10-414264
DATE: 20150220

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
VERA POLYAKOVA Plaintiff (Respondent)	*Jillian Van Allen* for the Plaintiff
– and –	
SOLOMON WEISS Defendant (Appellant)	*Valerie Wise* for the Defendant
	HEARD: February 19, 2015

PERELL, J.

REASONS FOR DECISION

> The life of the law has not been logic; it has been experience ... and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.
> - Oliver Wendell Holmes, Jr., *The Common Law*, (1881), p. 1.

[1] The Plaintiff, Vera Polyakova, was the dental patient of Solomon Weiss. On November 15, 2010, Ms. Polyakova sued Dr. Weiss for negligence. After Ms. Polyakova's lawyer failed to respond to a status notice under Rule 48, on April 3, 2013, the registrar, pursuant to rule 48.14 (4), dismissed her action. On August 15, 2014, Master Graham set aside the registrar's order.

[2] Dr. Weiss appeals. For the reasons that follow, I dismiss his appeal.

[3] I begin by noting that rule 48.14 was amended effective January 1, 2015, and I shall address this appeal applying the rule as it read before the amendment.

[4] Under rule 48.14(16), the dismissal of an action under subrules 48.14(4) (dismissal by registrar) may be set aside under rule 37.14, and the fulcrum of this appeal is that the Master, somewhat reluctantly, applied the test established by the Court of Appeal in *Scaini v. Prochnicki* (2007), 85 O.R. (3d) 179 (C.A.), *Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 (C.A.), *Finlay v. Van Paassen*, 2010 ONCA 204; *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386; and *Habib v. Mucaj*, [2012] O.J. No. 5946 (C.A.) for the setting aside of a registrar's dismissal order under the combination of rule 48.14(16) and rule 37.14.

[5] Although asked to do so, the Master refused to apply the far more stricter test established by the Court of Appeal for rule 48.14(13) (disposition at status hearing) in *Khan v. Sun Life Assurance Co. of Canada*, 2011 ONCA 650; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, [2012] O.J. No. 3877 (C.A.), and *Faris v. Eftimovski*, 2013 ONCA 360 for determining at a status hearing whether to dismiss an action for delay.

[6] In *Nissar v. Toronto Transit Commission*, [2013] O.J. No. 2553 (C.A.), the Court of Appeal held that the stricter test also applies on motions to restore an action to the trial list under rule 48.11.

[7] In paragraph 13 of his decision, the Master summarized the two tests, and it was his view that the test for setting aside a registrar's order that dismisses a dilatory action (rules 48.16 and 37.14) is far more lenient than the test to determine whether an action should be dismissed for delay at a status hearing (rule 48.14(13)) or the test for restoring an action to a trial list (rule 48.11). He stated:

> 13. The *Scaini* test for setting aside a registrar's dismissal order made under rule 48.14(4) requires the court to consider four factors: the plaintiff's explanation for the delay, whether there was inadvertence in the plaintiff's failure to meet the deadline for dismissal of the action, whether the plaintiff moved promptly after learning of the dismissal order and whether there is any significant prejudice to the defendant arising out of the delay that resulted in the dismissal. It is not necessary for the plaintiff to satisfy all four factors and the court must consider those factors in the context of the action as a whole. The test formulated in *Khan* to determine whether or not an action should be dismissed at a status hearing [rule 48.14(13] requires the court to consider only the first and fourth factors of the *Scaini* test, specifically the explanation for the litigation delay and prejudice to the defendant. Most importantly, however, under *Khan* the plaintiff must satisfy both parts of the test and does not have the benefit of the court taking a contextual approach to its consideration of the two factors. The *Khan* test is the more onerous of the two.

[8] Dr. Weiss submits that the stricter test should have been applied and had it been applied, he submits that Ms. Polyakova's action would not have been resuscitated and would remain dismissed.

[9] The Master agreed with Dr. Weiss's submission that it was illogical for the court to apply a more lenient legal test for a dilatory plaintiff's failure to respond to a status notice than the test it would apply where the dilatory plaintiff actually responded to the status notice by requesting a status hearing.

[10] However, in paragraphs 17 and 18 of his reasons, Master Graham stated that jurisprudentially, there was nothing he could do to address the perceived incongruity; he stated:

> 17. Although I agree with the submission in paragraph 30 of the defendant's factum that "there is no principled basis on which to continue to apply a more lenient test to set aside registrar's orders than would be applied at a status hearing", this incongruous state of affairs cannot be remedied on this motion by this court. The Court of Appeal established the test in *Scaini* in 2007 and reaffirmed it in numerous subsequent decisions. *Khan* was decided by the Court of Appeal on October 18, 2011 and was followed by the Court of Appeal's decision in *1196158 Ontario Inc., supra* on August 21, 2012. Despite these two decisions establishing and confirming the test under rule 48.14(13), on December 10, 2012, the Court of Appeal in *Habib, supra* still applied the test in *Scaini* to the setting aside of a registrar's dismissal order. Similarly, in neither *Faris* nor *Nissar* did the Court of Appeal state that the *Khan* test would replace the *Scaini* test for the setting aside of a registrar's dismissal order.

> 18. If the Court of Appeal intended to change the test established in *Scaini*, then one could reasonably assume that it would do so explicitly, possibly by convening a five judge panel, which is customary when that court is considering overturning one of its previous decisions. As this has not occurred, the test established in *Scaini* is still applicable to motions to set aside a registrar's dismissal for delay.

[11] I disagree with the Master that there is no principled basis on which to continue to apply a more lenient test to set aside registrar's orders than would be applied at a status hearing. It is clear that the Rules Committee wished to apply rule 37.14 for this particular circumstance. (I note parenthetically that this legislative intent is confirmed by the recent amendment to rule 48.14.) Recognizing that a Registrar's dismissal is an administrative, non-judicial, and non-discretionary order made without any review of the particular circumstances, and recognizing that in most circumstances, a plaintiff will respond to a status notice appropriately and avoid a status hearing altogether, it does not strike me as illogical that the test for setting aside the Registrar's order should be more lenient than the determination made at a more robust determination of whether there has been a delay that may be more than a technical non-compliance with the time periods for moving an action along.

[12] On a principled basis, the test used for rule 37.14 seems appropriate for dealing with a request to set aside an administrative, non-judicial, and non-discretionary order, and I disagree with Dr. Weiss's argument that by applying rule 37.14 to a registrar's order, it will just encourage plaintiffs to not respond to the status notice. The reason that plaintiffs, or more precisely their lawyers, fail to respond to status notices is oversight or negligence, and, thus, speaking about encouragement in this context is a *non-sequitur*.

[13] In any event, a body of procedural law can be just and fair without necessarily being perfectly logical and perfectly congruous, and, more to the point, Master Graham's decision was jurisprudentially impeccable as a matter of *stare decisis*. As a lower court, he was bound, just as this lower court is bound, to follow the authority of the Court of Appeal as to what test to apply to the circumstances of a registrar's dismissal, and the Master did so.

[14] The Master made no error in principle, and he made no appreciable error in his application of the tests from the *Scaini* line of authorities.

[15] Accordingly, this appeal should be dismissed.

[16] If the parties cannot agree about costs, they may make submissions in writing beginning with Ms. Polyakova's submissions within 20 days of the release of these Reasons for Decision followed by Dr. Weiss's submissions within a further 20 days.

Perell, J.

Released: February 20, 2015

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