Qaquish v. *Nayani*

Court File No.: 07-CV-343153PD 3

Motion Head On: January 27/15

Counsel: W. G. Scott, counsel to the lawyer for the plaintiff

T. Desamour, for the defendant

By the court:

[1] The plaintiff moves to set aside a Registrar's dismissal Order dated November 3/10. For the reasons that follow, the Order is set aside.

[2] The plaintiff's claim arises out of a November/05 motor vehicle accident. The plaintiff was rear-ended by the defendant's vehicle. The defendant pleaded guilty to a charge of following too closely, pursuant to section 158(1) of the *Highway Traffic Act*, and paid a fine. There were no witnesses to the accident.

[3] By November/07, a statement of claim had been delivered on behalf of the plaintiff. One month later, the defendant delivered a statement of defence.

[4] From March/08-May/08, documentary requests were made on behalf of the plaintiff, including to Dr. Magda Ishac, The Personal Insurance Company, CRA (for income tax returns for 2 years prior to the accident and following) and OHIP (for decoded OHIP summary for 4 years prior to the accident and following).

[5] On May 26/08, the plaintiff provided the defendant with an unsworn affidavit of documents and copies of his Schedule "A" documents, with a promise that a sworn copy of the affidavit of documents would be provided at the outset of examinations for discovery. The plaintiff was examined for discovery on July 15/08.

[6] By December/08, the plaintiff began to take steps to fulfill his (discovery) undertakings, including by requesting further documents from Dr. Ishac, documents from Dr. Martin Heller, and documents from Dr. Nejad and from Dr. Khoury.

[7] By January/09, six undertakings were fulfilled by the plaintiff. In February/09, a further request was made by the plaintiff to OHIP and to Dr. Ishac and prescription summaries were requested by him from two pharmacies. Then too, a request for documents was made of Dr. Patmanidis.

[8] In April/09, a further request was made by the plaintiff of The Personal Insurance Company for the plaintiff's accident benefits file and property damage documents. In May and June/09, further documents, still, were requested and follow-up was made of Dr. Morgan, Regain Health Rehabilitation Services (with respect to a 1998 accident in which the plaintiff was involved), Health Recovery Clinic, and Sports Specialist Rehabilitation Centre and follow-up requests were made of Drs. Khoury and Morgan, Ontario Medical Imaging and The Personal Insurance Company.

[9] By the end of June/09, 17 of the plaintiff's 34 undertakings had been fulfilled.

[10] In September/09, plaintiff's counsel made follow-up requests of Dr. Morgan and Health Recovery Clinic; he requested documents from MDS Sciex; and he requested updated documents from Dr. Ishac. Also in September/09, he made a third request for documents (in follow-up) of the The Personal Insurance Company.

[11] The documentary requests made by (on behalf of) the plaintiff between March/08 and September/09 were many and varied. Of note, no undertakings/refusals motion and no R. 30.10 motion was brought by the defendant during that time frame (or, indeed, thereafter).

[12] In December/09, the court issued a status notice--in response to which the plaintiff served a trial record. Because the action had not yet been mediated, the trial record could not be filed. The evidence before me is that the failure to file the trial record was not made known to the lawyer who directed service of the trial record. Instead, the trial record was returned to the file by a staff person in the plaintiff lawyers' office, a person who is no longer in the plaintiff lawyers' employ.

[13] By March /10, there were only three undertakings outstanding (undertakings in respect of which multiple requests of non-parties had been made by the plaintiff). Still no R. 30.10 motion was brought.

[14] On March 23/10, plaintiff's counsel advised (and agreed with defendant's counsel) that the parties could proceed to mediation with mediator, Guy Jones; and, a number of dates for mediation were then proposed. Mediation was scheduled for October 6/10.

[15] Because the trial record had not been filed, a status hearing was held herein--this on April 15/10. Again, and the status hearing notwithstanding, counsel for the plaintiff failed to turn his mind to the fact that the trial record had been served but not filed.

[16] A consent timetable was put in place by Order of Master Muir. The Order provided, *inter alia*, that this action be set down by October 29/10.

[17] Plaintiff's counsel continued to prosecute his client's claims after the status hearing. Further documents were requested by him in May/10 from Drs. Liaw, Parris, Han, Samuel, Wong, Edward, and Barsoum. A further follow-up was made by him of Dr. Ishac in June/10 and of CRA in September/10. Also in September/10, plaintiff's counsel learned that the plaintiff's AB file had been sent by The Personal Insurance Company to the wrong office address. Follow-up was made to ensure that the file would be re-directed to the appropriate address.

[18] The defendant requested the plaintiff's AB file from his 1998 motor vehicle collision. The plaintiff could not recall with which insurer he had dealt at the time. Defendant's counsel was able to determine that the insurer was Intact and notified plaintiff's counsel, accordingly. The Intact file, as well as documentation/particulars as to the plaintiff's dealings with State Farm in 2007 (about which defendant's counsel had questions), were requested by defendant's counsel in late September/10.

[19] Given the further requests and given the fact that the plaintiff did not yet have The Personal Insurance Company's file by late September/10, the parties agreed to reschedule the October 6/10 mediation.

[20] On November 5/10, plaintiff's counsel received an Order Dismissing Action for Delay. Plaintiff's counsel indicates that he thought that the Order was issued in error because he had

assumed (incorrectly) that the trial record served by him had been filed. Consistent with this mindset (i.e. the thought that an error had been made), some five days later counsel wrote to Human Resources and Skills Development Canada to request the plaintiff's complete CPP Disability file. Work on this file, by plaintiff's counsel, did not cease.

[21] On November 10/10, counsel for the defendant wrote to counsel for the plaintiff enclosing the dismissal Order and inquiring as to the plaintiff's intentions. Rather than respond to the letter--which, in retrospect, would have been the correct first response--plaintiff's counsel continued to work on the file requesting documentation, including in January 2012, from Dr. Li.

[22] It was not until July 2012 that counsel for the plaintiff turned his mind to the fact that the dismissal Order, even if issued in error, needed to be addressed. He sought the defendant's consent to the restoration of the action. The defendant advised, in late July/12, that his consent would not be forthcoming.

[23] Rather than address the dismissal Order then, plaintiff's counsel requested further documentation in respect of the plaintiff's claim from non-parties. Updated notes and records were requested from Dr. Ishac and notes and records were requested from Dr. Li--this in January/13.

[24] In May/13, after three letters had been written by counsel for the defendant in respect of the dismissal Order (one of which plaintiff's counsel cannot find among the documents in his file), counsel for the plaintiff addressed, *directly*, the dismissal Order and the need for a motion. On July 12/13, in response to a fourth letter in which defendant's counsel indicated that he had closed his file, a notice of motion was served.

[25] As at today, what undertakings remain outstanding? As at the date of the hearing of this motion, the plaintiff had his accidents benefits file. He did not have his property damage file, though it was requested multiple times (including *before* the October 2010 set down deadline). The only other outstanding undertaking relates to the plaintiff's 1998 accident. Until reminded of the identity of his 1998 insurer, the plaintiff did not know from whom to seek documents relative to the accident (although he did request and produce medical documentation from those who gave him medical care). He has now written his 1998 insurer, Intact, for documents and has been told that none can be located. While there was a delay in seeking the 1998 documentation

from 2010 until very recently, there is nothing before me to suggest that the delay was intentional or contumelious[1]. Then too, had requests for documents been made of Intact even as at 2010, it is questionable (although, admittedly, possible) as to whether the documents could be accessed even then. 2010 was some twelve years post-accident.

[26] That said, the plaintiff has now provided fulsome details of his 1998 injuries and has answered the defendant's questions about the 2007 State Farm file (referenced above), which file involved the plaintiff's ex-wife and not him.

[27] I note that there were two lawyers, from the same firm, who addressed the plaintiff's claims. I have referred to them, collectively, as plaintiff's counsel. Both advanced the plaintiff's claims and both erred in failing to set the action down in a timely fashion. But, in all and in my view, the advancement of the plaintiff's claims here eclipses the errors made. Why do I say this?

[28] The plaintiff has explained the litigation delay and the failure to set the action down for trial (the first two *Reid* factors), as required. The trial record was served and, even after the trial record was served, positive steps were taken to move this action forward. Until late November/10, I cannot say that this action languished. And while the explanation proffered for the delay from late 2010 until 2013 (when a motion date was obtained) has a few flaws (I accept that the action may have "fallen out of [counsel's] tickler system" as suggested, but why was there a delay in responding to defendant's counsel's letters?), the plaintiff's delays until October 29/10 are few. There were a few bumps in the road (such as the rescheduling of the plaintiff's examination for discovery and the cancellation of mediation) but litigation is seldom conducted without any bumps, including some reasonable delays. Further, and in any event, there is no evidence before me to suggest that a deliberate decision was made by plaintiff's counsel or by the plaintiff to fail to advance the litigation towards trial (and, indeed, the steps taken throughout negate that notion).

[29] I acknowledge, however, that the motion was not brought promptly (as was argued). In respect of the third of the *Reid* factors, plaintiff's counsel fails. I understand counsel's confusion about the trial record but it only takes counsel so far. Even if it was thought that the dismissal

[1] Indeed, at qq. 49-51 of his July 15/14 cross-examination, counsel for the plaintiff said that he did not become aware of the letter notifying him that the plaintiff's insurer for the 1998 accident was Intact until in or about December/13.

Order was made in error, the dismissal Order ought to have been addressed before it was. Two years passed and reminders were sent by counsel for the defendant, to little avail. Noteworthy, though, is the fact that defendant's counsel did not choose to speak with plaintiff's counsel by phone. While I am not faulting defendant's counsel, I do find it curious that, in a file that had progressed as much as this one had and in respect of which a trial record had been served (if not filed), the parties resorted to the exchange of letters, only.

[30] All that said, the key consideration I must ponder is that of prejudice (the fourth and most important of the *Reid* factors). With the action having been advanced by the plaintiff as much as it has been, with the plaintiff having been discovered, with undertakings having been fulfilled save minimally, with documentary disclosure being extensive and temporally far-reaching, with there being a plausible explanation as to why the last two undertakings have not yet been fulfilled (and with extensive efforts having been made in respect of one of the two and with the second involving an event that is temporally remote and in respect of which there is some evidence in the medical documentation already produced), with the underlying action involving a rear-end collision in respect of which the defendant has pled guilty, with there being no witnesses to the accident save the parties, with the defendant himself not having moved for fulfillment of undertakings or under R. 30.10 (before the action was dismissed and with the October 29/10 set down date having been settled, on consent) such that it cannot be said that the defendant considered the two outstanding undertakings to be fundamental (and, if outstanding, fatal) to its ability to defend, and with there being no evidence from the defendant or about the defendant as to a compromised ability to recall events (to the extent that liability remains in issue), I cannot say that the defendant has been significantly prejudiced in his ability to present his case at trial. Indeed, the plaintiff has led affirmative and persuasive evidence to rebut the presumption of prejudice that arises from the passage of time/the expiry of the limitation period.

[31] Defendant's counsel advises that he did not have notice of other accidents in which the plaintiff was involved until recently and has not been able to properly investigate them. That is not the fault of the plaintiff, necessarily, and is certainly not attributable to anything he did or did not do in addressing the consent timelines fixed by Master Muir. Perhaps a more fulsome examination of the plaintiff might have been conducted or questions arising out of answers given might have been posed.

[32] As for the suggestion on the part of defendant's counsel that the plaintiff delayed in notifying the defendant and his counsel of his claims herein, that is not prejudice that factors into my consideration of the issues. That is a question to be answered in another context. The defendant was content to defend the action, proceed to discoveries, schedule mediation, and agree to a litigation timeline that would have had this action set down for trial by the end of October/10, the delayed notice notwithstanding.[2] The defendant took too many fresh steps and sat quietly for too many years to now suggest now that the prejudice attendant on delayed notice somehow ought to derogate from the plaintiff's ability to prosecute his claims (see: *MDM Plastics Limited* v. *Vincor International Inc.*, 2015 ONCA 28, at para. 25: the prejudice to be considered is that which arises from steps taken following dismissal or would result from the restoration of the action following dismissal).

[33] Considering and weighing the whole of the evidence before me including the defendant's conduct in the litigation (see: *MDM Plastics Limited* v. *Vincor International Inc*., *supra*, at paras. 32-35), recognizing and respecting the defendant's interest in finality, and taking a contextual approach so as to arrive at an Order that I think is just in the circumstances (see: *Scaini* v. *Prochnicki*, 2007 ONCA 63, at paras. 23-24), I am satisfied that the balance tips in favour of the plaintiff such that this action ought to be restored.

[34] Failing agreement as to the costs of the motion, I may be spoken to. Unless the parties otherwise agree, in which case I am to be spoken to, the action is to be set down for trial by July 31/15--with mediation to be completed before then (if not yet completed).

April 17/15

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Master Abrams

[2] Parenthetically, though, Mr. Scott advises that the defendant's insurer had notice of the 2005 accident at least as early as November 10/05, with the accident having been referenced in the defendant's property damage file.