CITATION: QAYYEUMI v. ROOPNARINE, 2010 ONSC 6461
COURT FILE NO.: 06-CV-311244
MOTION HEARD: October 13, 2010

2010 ONSC 6461 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Abdul Wakeel Qayyeumi et. al. v. Rea Roopnarine

BEFORE: MASTER R.A. MUIR

COUNSEL: J. Van Allen, counsel for the lawyer for the moving parties/plaintiffs

R. Plate, for the responding party/defendant

REASONS FOR DECISION

[1] This motion is brought by the plaintiffs pursuant to Rule 37.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order setting aside the order of the Registrar dated October 16, 2008 dismissing this action for delay. This action was dismissed by the Registrar pursuant to Rule 48.14 as a result of the failure of the plaintiff to have this defended action set down for trial, or otherwise disposed of, within two years from the filing of the first defence. The defendant takes the position that in the circumstances of this case the dismissal order should not be set aside and requests that this motion be dismissed.

BACKGROUND

[2] In this action the plaintiffs seek damages from the defendant arising from a pedestrian/motor vehicle accident that took place on May 11, 2004. It appears that the plaintiffs Abdul Wakeel Qayyeumi ("Abdul") and Zakia Qayyeumi ("Zakia") were crossing Hurontario Street at the intersection of Fairview Road in the City of Mississauga when they were struck by a motor vehicle operated by the defendant. It appears that Zakia's injuries were relatively minor but Abdul's injuries were more serious. The other plaintiffs are making claims pursuant to the provisions of the *Family Law Act*, R.S.O. 1990, c. F.3.

[3] On May 18, 2004, the plaintiffs retained Joseph Gouveia to act on their behalf in connection with this claim and this action was ultimately commenced on May 11, 2006. The statement of claim was served on the defendant on May 25, 2006. It is clear,

however, that the defendant's insurer had notice of this claim since May 11, 2004, the day of the accident. This is confirmed by a letter written to Abdul by the defendant's insurer on October 30, 2004.

[4] Mr. Gouveia also initiated an accident benefits claim against Abdul's insurer through the Financial Services Commission of Ontario. Mr. Plate acted as counsel in respect of both the accident benefits claim and this tort action as the plaintiff's insurer also happened to be the defendant's insurer.

[5] Prior to issuing the statement of claim in this action, Mr. Gouveia made requests for medical documentation and obtained a vocational/earning capacity report, in respect of Abdul, which was provided to the defendant's insurer on February 23, 2006. Mr. Gouveia also obtained a medical-legal report from Dr. Terry Axelrod dated March 17, 2005.

[6] The defendant delivered a notice of intent to defend on June 26, 2006 and her statement of defence and jury notice were delivered on August 14, 2006. Abdul served a sworn affidavit of documents on January 21, 2007, although it apparently failed to include any pre-accident medical records, notes and records from his family doctor or income related documents. The plaintiffs did, however, deliver certain medical documents to the defendant's lawyer on May 17, 25 and 29, 2007.

[7] The defendant's affidavit of documents was served on March 26, 2007. The plaintiffs attempted to schedule examinations for discovery for June 13, July 4, July 27 and August 16, 2007. Those examinations were rescheduled with the consent of all parties, but apparently at the request of the defendant in order to accommodate her schedule.

[8] Ultimately, examinations for discovery of Abdul and the defendant took place on August 29, 2007. It appears that the Abdul gave a number of undertakings during the course his examination, most of which were answered between February and May, 2008, although others were not answered until after this motion was brought. Moreover, the answers to undertakings provided in 2008 were only delivered after the defendant had brought a motion for an order requiring that they be answered and Master Egan had made an order on consent on February 12, 2008 to that effect. It appears that as of the date of the argument of this motion, the plaintiffs had answered all outstanding undertakings and/or made the necessary requests of third parties for documents and information.

[9] On July 4, 2008 Abdul was examined by a medical expert retained by the defendant. The defendant served the report arising from this examination on August 27, 2008.

[10] On August 18, 2008, the plaintiffs served an economic loss report dated August 11, 2008.

2010 ONSC 6461 (CanLII)

[11] A global mediation in respect of both the accident benefits claim and this tort action was held on September 11, 2008. Neither claim was settled at that mediation session.

[12] It appears from the evidence that a status notice was issued by the court on July 2, 2008, although no copy can be found in the court file. Mr. Gouveia's evidence is that this status notice did not come to his attention either because it was not received by his office or it was misfiled if it was in fact received. On October 16, 2008, the Registrar made an order dismissing this action for delay. Again, it is Mr. Gouveia's evidence that this order did not come to his attention at the time it was made and was likely misfiled in his office.

[13] Mr. Gouveia's first notice that this action had been dismissed came in March, 2009 when he was informed of the dismissal order in a telephone conversation with Mr. Plate. Despite being advised of the dismissal of this action, Mr. Gouveia took no steps to prepare the necessary materials for a motion to have the order set aside until February, 2010. Mr. Gouveia's evidence is that he took no such steps because the focus of his attention at that time was on the settlement of the accident benefits claim and thereafter the settlement of the tort claim. The accident benefits claim was partially settled in March, 2009 and finalized in September, 2009 when Mr. Gouveia provided the necessary releases and the settlement funds were received from the insurer. In support of this position, Mr. Gouveia points to the fact that a further report was obtained from Dr. Axelrod in April, 2009 and served on the defendant's counsel in August, 2009, together with a request for a settlement conference. Mr. Gouveia sent a follow up letter in October, 2009 again requesting a settlement conference. Although Mr. Plate had responded to Mr. Gouveia's request in this regard in his August, 2009 letter, it does not appear that Mr. Gouveia received those responses, through no fault of Mr. Plate. It was Mr. Plate's position at that time that this action had been dismissed many months before and his client was not prepared to discuss settlement.

[14] This situation was complicated by the fact that in July, 2009, Mr. Gouveia's mother was involved in a slip and fall accident and suffered a serious injury. For a number of months following his mother's accident, Mr. Gouveia was preoccupied with her health and care in relation to the accident and her other health issues. It also appears that Mr. Gouveia began to suffer from health issues around the same time. All of this kept Mr. Gouveia from devoting his full time efforts to his practice.

[15] This motion was originally booked in November, 2009 with a return date of February 23, 2010 which, according to Mr. Gouveia's evidence, was the first available date. Despite booking this motion in November, 2009, Mr. Gouveia did not alert Mr. Plate to the fact that he was bringing this motion until February, 2010. The initial supporting affidavit for this motion was not sworn by Mr. Gouveia until February 16, 2010. It is Mr. Gouveia's evidence that he still held out hope of resolving the tort claim despite Mr. Plate's position to the contrary and that is why he delayed in preparing the motion materials.

2010 ONSC 6461 (CanLII)

[16] At the return of the motion on February 23, 2010, this motion was adjourned on consent to May 11, 2010 and thereafter adjourned once again, on consent, to be heard by way of a long motion appointment before me on October 13, 2010.

2010 ONSC 6461 (CanLII)

ANALYSIS

[17] The law relating to the setting aside of Registrar's dismissal orders has been the subject of two recent decisions of the Court of Appeal for Ontario. See *Finlay v. Van Paassen*, 2010 ONCA 204 and *Wellwood v. Ontario (Provincial Police)*, 2010 ONCA 386. In *Williams v. Williams*, 2010 ONSC 2636 (Master), Master MacLeod had occasion to comment on and analyze the *Finlay* decision in the context of the prior jurisprudence dealing with this issue. In *K Laboratories v. Highland Export Inc.*, 2010 ONSC 4032 (Master) Master MacLeod revisited and revised his analysis in light of the decision of the Court of Appeal in *Wellwood*. His analysis is set out at paragraph 4 of *K Laboratories* where he summarizes the law on this subject as follows:

> a. An order dismissing an action for delay made by the Registrar is an order of the court. A party having notice of the order must treat it as valid and move promptly to set it aside. Technical deficiencies do not render the order a nullity.
>
> b. The objective of the court reviewing the Registrar's order is not to punish a party for technical non compliance with the rules but to determine whether or not it is just to set aside the dismissal order under all of the circumstances.
>
> c. The court should consider the four *Reid factors* which may be summarized as:
>
> i. explanation of the litigation delay which led to the dismissal notice and order in the first place;
>
> ii. inadvertence in missing the deadline set out in the notice;
>
> iii. promptly moving to set aside the order once it comes to the attention of the moving party; and,
>
> iv. prejudice or lack of prejudice to the defendant.

> d. All of these factors will be important but prejudice will be the key consideration. Prejudice to the defendant may be presumed particularly if time has passed since the order was granted and a limitation period has passed. In the latter case the defendant need not prove prejudice and the onus is on the plaintiff to rebut the presumption.
>
> e. Prejudice to the defendant is not the prejudice inherent in facing the action in the first place but prejudice in reviving the action after it has been dismissed. This could be prejudice caused by delay in the conduct of the action that would itself support dismissal under Rule 24 or it could be prejudice that has arisen post dismissal because of reliance on the finality of the order.
>
> f. In conducting the analysis as to whether or not it is just to relieve against the consequences of the registrar's order, the court should be mindful that the party who commences litigation bears the primary responsibility under our rules for the progress of the action. Thus the burden is on the plaintiff to explain delay.
>
> g. In weighing the relevant factors, the court should not engage in speculation concerning rights of action against a lawyer or former lawyer and should focus on the rights of the parties rather than on the conduct of counsel.

[18] I agree with and adopt Master MacLeod's analysis of the law relating to motions to set aside Registrar's dismissal orders. These are the principles and factors I have applied to the facts before me on this motion.

MOTION BROUGHT PROMPTLY

[19] Although I am satisfied that Mr. Gouveia did not become aware of the dismissal order until March, 2009, I am unable to conclude on the evidence before me that this motion was brought promptly. Even if I accept that Mr. Gouveia was distracted and preoccupied by the health issues encountered by both him and his mother between July and November, 2009, there still remains no satisfactory explanation as to why no attempt was made to bring this motion between March and July, 2009, a period of more than four months. Mr. Gouveia's evidence that he was focused on settling the accident benefits claim and attempting to settle this action is not supported by the evidence and, in any event, is not a sufficient explanation of his failure to bring this motion on a timely basis. Counsel should be focused on the

2010 ONSC 6461 (CanLII)

resolution of claims at all stages of a proceeding but this should not prevent the timely scheduling of necessary motions.

[20] Similarly, there is no satisfactory explanation as to why he waited for nearly three months between November, 2009 and February, 2010 to advise Mr. Plate of his intention to bring this motion and the fact that it had been scheduled with the court. In my view it is not sufficient, for the purposes of this element of the test, to simply book a date for a motion and then wait until the last minute to advise the defendant and serve materials, thereby necessitating an adjournment.

[21] In my view, the plaintiffs have not satisfied this element of the *Reid* test.

2010 ONSC 6461 (CanLII)

INADVERTENCE

[22] I am, however, satisfied that the plaintiffs' failure to set this action down in accordance with the Rules and the status notice was a result of inadvertence. First, I accept that Mr. Gouveia was not aware of the status notice issued in July, 2008 and was not on notice of the pending dismissal. It is clear from the evidence that the plaintiffs, at all times, fully intended to move ahead with this action. A mediation was held in September, 2008 and a further medical report was obtained in the spring of 2009. Moreover, Mr. Gouveia continued to follow up on his efforts to schedule a settlement conference in August and October of 2009. There is no evidence of an intention to abandon this claim and I can see no basis for describing Mr. Gouveia's failure to comply with the Rules and the status notice as anything other than inadvertence. I have therefore concluded that the plaintiffs have met this element of the *Reid* test.

LITIGATION DELAY

[23] Obviously, this action has not proceeded as expeditiously as it could or should have. However, I cannot conclude that the delay, as a whole, has been inordinate and unexplained. There appears to have been full production and discovery and the plaintiffs are ready to have the action set down for trial within 30 days if the dismissal order is set aside. A defence medical examination has been conducted and a mediation has been held. All of the plaintiffs' undertakings have now been answered. Virtually all of these steps (other than answering certain undertakings) were taken by the plaintiffs before this action was dismissed by the Registrar. While there have been periods of inactivity, they have been relatively short or adequately explained.

[24] I have therefore concluded that the plaintiff has provided an adequate explanation of the litigation delay and has satisfied this element of the *Reid* test.

2010 ONSC 6461 (CanLII)

PREJUDICE

[25] Given the passage of a limitation period, there exists a presumption of prejudice to the defendant which strengthens with the passage of time. The onus is on the plaintiffs to rebut this presumption. See *Wellwood* at paragraph 60. As the Court of Appeal has stated, prejudice is the key consideration on motions of this nature. See *Finlay* at paragraph 28. The defendant's insurer has had full knowledge of this claim from the day the accident happened. The evidence before me indicates that all relevant medical and other records have been provided to the defendant. The defendant has had the benefit of its own medical examination of the plaintiff. All necessary pre-trial steps have been completed and Abdul has agreed to submit to a further defence medical and discovery if requested by the defendant. I am satisfied, therefore, that the plaintiffs have rebutted the presumption of prejudice.

[26] The defendant has not provided sufficient evidence of actual prejudice. The defendant argues that she has been prejudiced by the passage of time and the fading of memories. However, no evidence has been put forward to support these bald assertions. There is no indication that relevant documents or witnesses are no longer available. Such assertions, without specific evidence, are insufficient to constitute actual prejudice. See *Finlay* at paragraph 29.

[27] I am therefore satisfied, on the evidence before me, that there exists no non-compensable prejudice to the defendant, either presumed or actual. I have concluded that the plaintiffs have satisfied this element of the *Reid* test.

CONCLUSION

[28] In deciding motions of this nature the court is to apply a contextual approach in which the court weighs all relevant factors to determine the result that is just in the circumstances. It is not necessary for the moving parties to satisfy all four of the *Reid* factors. See *Finlay* at paragraph 27. In my view such an exercise leads me to conclude that the Registrar's order should be set aside for the following reasons:

- this action proceeded without unreasonable delay up to the date it was dismissed;

- neither the status notice nor the dismissal order came to Mr. Gouveia's attention at the time they were issued;

- there is no evidence of an intention to abandon this claim – indeed the evidence shows the opposite intention on the part of Mr. Gouveia and the plaintiffs;

2010 ONSC 6461 (CanLII)

- the plaintiffs have rebutted the presumption of prejudice and there is insufficient evidence of actual prejudice;

- while the delay in bringing this motion is obviously unsatisfactory, it is not so long, by itself, to justify denying the relief sought by the plaintiffs, especially given that the impact of that delay can be obviated by allowing the defendant to conduct further oral and medical discovery of the plaintiff Abdul.

[29] I have therefore concluded that it is in the interests of justice to set aside the dismissal order.

2010 ONSC 6461 (CanLII)

COSTS

[30] At the conclusion of argument, counsel for the plaintiffs indicated that the plaintiffs would not be seeking their costs of this motion if successful. Mr. Plate submitted that if the plaintiffs were successful in having the dismissal order set aside such an order should include terms with respect to a further defence medical and oral examination of the plaintiff Abdul. Mr. Plate also sought an order that the plaintiffs pay the defendant's costs arising from such further discovery in the total amount of $5,500.00 ($3,000.00 for the oral discovery and $2,500.00 for the medical examination). In my view, Mr. Plate's position is a reasonable one in the circumstances of this action.

ORDER

[31] I therefore order as follows:

(a) the dismissal order of the Registrar dated October 16, 2008 is hereby set aside;

(b) the defendant shall have leave to conduct a further oral examination for discovery of the plaintiff Abdul, such examination not to exceed seven hours in length;

(c) the defendant shall have leave to conduct a further medical examination of the plaintiff Abdul;

(d) the plaintiffs shall pay the defendant's costs arising from such further discovery in the amount of $5,500.00, inclusive of applicable taxes and disbursements, within 30 days of the completion of the examinations;

2010 ONSC 6461 (CanLII)

(e) the plaintiffs shall set this action down for trial by January 31, 2011.

Master R.A. Muir

DATE: November 23, 2010

2010 ONSC 6461 (CanLII)