

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: S.N., Plaintiff, Moving Party

AND:

G[...] INC.. and P.T.

Defendants, Responding Parties

BEFORE: MASTER RONNA M. BROTT

COUNSEL: Jillian Van Allen, Counsel, for the Plaintiff

Jennifer McAleer, Counsel for the Defendant G[...] Inc.

James Morton Counsel for the Defendant P.T.

HEARD: May 7, 2014

ENDORSEMENT

- [1] The plaintiff brings this motion to set aside the Registrar's Order Dismissing the within action dated October 9, 2012. The defendant P.T. brings a cross-motion to continue the cross-claim against G[...] Inc..
- [2] The plaintiff, S.N. ("S.N.") claims damages against the defendants G[...] Inc.. ("G[...] Inc.") and P.T. ("P.T.") for an alleged sexual assault perpetrated by P.T. from February to June 2006. As well, the plaintiff claims damages against the defendant G[...] Inc. for constructive dismissal. Both S.N. and P.T. were employees of G[...] Inc. during the relevant period and P.T. was the plaintiff's supervisor. P.T. was criminally charged with sexual assault.

CHRONOLOGY

- [3] On February 11, 2008 the law firm of Srebrow Lebowitz Spadafora ("SLS") wrote to G[...] Inc. and P.T. to put them on notice of the plaintiff's intention to pursue a claim for damages. A Statement of Claim was issued on February 13, 2008. On February 21, 2008 a Notice of Intent to Defend was served on behalf of G[...] Inc.. The Statement of Defence and Crossclaim of G[...] Inc. was served on April 1, 2008.
- [4] On April 8, 2008 SLS wrote to Steinberg, Morton, Hope and Israel LLP ("SSHI") to advise that P.T.'s waiver for a Defence had expired but agreed to waive it further until

April 15, 2008. On April 15, 2008 SMHI served a Statement of Defence and Crossclaim on behalf of P.T.. On April 18, 2005 SMHI served a Defence to the Crossclaim.

- [5] On May 25, 2009 SMHI wrote to SLS to confirm that the criminal proceedings against P.T. had been stayed and that it would be pushing ahead with its crossclaim and claim for set-off. They requested that all parties deliver their Affidavits of Documents.
- [6] On October 29, 2009 the parties scheduled examinations for discovery to be conducted on February 2, 2010. The plaintiff served an Affidavit of Documents in early December 2009 and on December 16, 2008 counsel for G[...] Inc. acknowledged receipt of the Affidavit of Documents and requested additional documents. Defence counsel followed up on January 27, 2010 again requesting the plaintiff's further and better Affidavit of Documents together with copies of all Schedule "A" documents and suggested that examinations for discovery be delayed to allow time for the production of documents and to obtain the Crown brief in advance of examinations for discovery. All counsel agreed to postpone examinations pending more complete production and particularly, the production of the Crown brief.
- [7] On January 29, 2010 G[...] Inc. delivered an unsworn Affidavit of Documents and its Schedule "A" productions. On February 1, 2010 the unsworn Affidavit of Documents of P.T. was delivered.
- [8] The Court issued a Status Notice on February 22, 2010. The Status Hearing proceeded on June 7, 2010 where Master Muir ordered that the parties adhere to their consent timetable which included that the action was to be set down for trial by June 15, 2011.
- [9] Counsel for G[...] Inc. sent correspondence to SLS on or about June 24, 2010, August 4, 2010 and October 20, 2010 requesting compliance with the timetable. On June 13, 2011 plaintiff's counsel advised that through inadvertence he had missed the timetable dates but confirmed that he had requested productions as per the defendants' requests including Wagg disclosure. On June 14, 2011 he obtained the date of September 14, 2011 for the hearing of a motion to amend the timetable.
- [10] On August 25, 2011 SMHI wrote to SLS to inquire of the status of the matter and in particular whether the motions to obtain Wagg disclosure and to extend the timetable had been brought.
- [11] On October 3, 2011 an Order was obtained on consent approving a timetable and requiring that the action be set down for trial by October 3, 2012. A Wagg motion was scheduled by the plaintiff to be heard January 11, 2012.
- [12] In March 2012 new counsel (within the law firm of SLS) assumed carriage of the file. On March 22, 2012 the Wagg order was obtained.
- [13] On or about October 12, 2012 SLS received an Order dismissing the action for delay dated October 9, 2012. SLS booked the motion to set aside the Registrar's dismissal

order. Plaintiff's counsel also instructed his assistant to serve the Wagg order on the Toronto Police Services.

- [14] The Notice of Motion for the within motion was served on December 12, 2012. Documentation was received by SLS from the Ministry of the Attorney General pursuant to the Wagg order on June 19, 2013 and it was delivered to the defendants on June 24, 2013.

LAW

- [15] *Reid v Dow Corning Corp* [2001] O.J. No. 2365 (S.C.J. – Master), reversed on other grounds [2002] O.J. No. 3414 (Div. Ct.) (“Reid”), sets out the relevant factors to be considered in determining whether a Registrar’s Dismissal Order should be set aside.

(1) *Explanation of Litigation delay*: The Plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why...If either the lawyer or the Plaintiff made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

(2) *Inadvertence in Missing the Deadline*: The Plaintiff or her lawyer must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence.

(3) *The Motion is Brought Promptly*: The Plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to the Plaintiff’s attention.

(4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the Defendant has not demonstrated any significant prejudice in presenting its case at trial as a result of the Plaintiff’s delay or as a result of the steps taken following the dismissal of the action.

- [16] Courts have held that the evaluation of the factors should be made on a contextual basis to determine the Order that is most just in the circumstances of each case. It is not necessary that a Plaintiff satisfy all four of the Reid factors to succeed on a motion to set aside a Dismissal Order.

Scaini v. Prochnicki, [2007] 85 O.R. (3d) 179 (ONCA)

Marché D’Alimentation Denis Theriault Ltee et al.v. Giant Tiger Stores Ltd., (2007), 87 O.R. (3d) 660 (ONCA)

Finlay v. Van Paassen, 2010, ONCA 204

Wellwood v. Ontario Provincial Police, 2010, ONCA 204

Aguas v. Rivard Estate, 2011, ONCA 494

Vaccaro v. Unifund, 2011 ONSC 5318

Explanation of Litigation Delay

- [17] A key factor in determining whether or not a Registrar's dismissal order should be set aside is whether the plaintiff has provided a reasonable and sufficient explanation for the litigation delay. G[...] Inc. submits that the plaintiff failed to make timely production of relevant documents and further, failed to provide a reasonable explanation for the delay.
- [18] The defendants allege that the plaintiff put forward no evidence of unusual or unexpected contingencies to demonstrate that the timetable was difficult or impossible to comply with and relies on *1196158 Ontario Inc. et al. v 6274013 Canada Ltd.*, 2012 ONCA 544, 2012 CarswellOnt 10154 where Sharpe, J. for the Court of Appeal states that where there is complete disregard to the timetable, the action should not be revived. In my view *1196158 Ontario*, supra, is distinguishable on the basis that it involved a contested status hearing where the test is conjunctive requiring a plaintiff to satisfy that there is both an explanation for the delay AND no prejudice on the defendant. On this motion to set aside a Registrar's Order, the court is to examine all four *Reid* factors and must determine the most just result on a contextual basis.
- [19] As noted above in the chronology, the plaintiff did take steps to advance the litigation and did satisfactorily explain the delays. There is no question that the litigation should have proceeded more quickly but there is no evidence of any intentional delay by the plaintiff. Further, although the plaintiff was slow in obtaining relevant documentation, it was the defendants who insisted that examinations for discovery proceed only after production of the Toronto Police records.

Inadvertence in Missing the Deadline

- [20] The plaintiff must lead satisfactory evidence to explain that the deadline to set the action down for trial was missed as a result of inadvertence.
- [21] G[...] Inc. takes issue with the plaintiff's submission that the deadline to set that action down by October 3, 2012 was missed because of counsel's busy practice. They rely on *Jones v Sidhu*, 2014 ONSC 1487 where Justice Trimble held:

“The hurly-burly of a plaintiff lawyer’s busy practice, with a large number of files and a turn-over of staff, does create some unavoidable delay and can be used to excuse short periods of delay. However, the lawyer must staff his office and move files appropriately. His resourcing in his office and files should never become a client’s problem and cannot be used as an excuse for failing to move an action forward promptly.”

[22] Plaintiff’s counsel did provide an explanation. Counsel was involved in a five-week trial. Two lawyers left the firm increasing counsel’s file load on short notice to over 300 files. Jewish holidays intervened. Counsel admits to failing to realize that the timetable in place had not been complied with, noting that had he realized it, he would have scheduled a motion to vary the timetable.

Was the Motion Brought Promptly

[23] The Registrar’s Order of dismissal was issued on October 12, 2012. The Notice of Motion to set aside the dismissal order was served on December 18, 2012. There has been little if no motion delay.

Prejudice to the Defendant

[24] Where a limitation period has passed there is a presumption of prejudice and the onus rests on the plaintiff to rebut that presumption. The plaintiff submits that the presumption does not arise in this case as the plaintiff’s claim arises as a result of an alleged sexual assault for which there is no limitation.

[25] The defendants submit that many witnesses with familiarity of the circumstances surrounding the incident are no longer employed with G[...] Inc.. Further, they allege that as so much time has elapsed since the alleged incident, memories have faded resulting in prejudice to the defendants.

[26] The plaintiff asserts that if there is a limitation issue, the presumption of prejudice has been rebutted for the following reasons:

(a) The defendants have had notice of the plaintiff’s claim since February 11, 2008 and have had the opportunity to carry out a full and complete investigation;

(b) All medical records are available and have been produced or requested.

(c) All of the individuals identified by G[...] Inc. as potential witnesses, either remain employed by G[...] Inc. or left their employ prior to the dismissal order and G[...] Inc. has their last known contact information.

(d) G[...] Inc. has preserved and produced or claimed litigation privilege over the investigations it has undertaken with respect to the plaintiff’s claim.

- [27] The defendants have not demonstrated any evidence of significant prejudice as a result of the delay.
- [28] For a Registrar's Order of Dismissal to be set aside, it is not necessary that the plaintiff meet all four *Reid* factors. In my view, the most just order in the circumstances is one which sets aside the Registrar's Order and permits the plaintiff to proceed with the litigation. Neither of the defendants ever brought production motions nor did they seek to have the action dismissed for delay. To deny the plaintiff the right to proceed would be unjust. For these reasons, it is ordered that the motion by the plaintiff to set aside the Registrar's Order dated October 9, 2012 is hereby granted.

CROSSCLAIM

- [29] G[...] Inc. asserts that the onus is on P.T. to demonstrate why the cross-claim has not proceeded and that he has failed to do so. It was P.T. who requested the Wagg disclosure and recommended that discoveries be delayed until productions were complete. G[...] Inc. has not shown prejudice and now that the claim has been ordered to proceed it is completely reasonable and appropriate and just for the cross-claim to be continued.

COSTS

- [30] The plaintiff's solicitor advised that she is not seeking costs on her motion. G[...] Inc. seeks costs of \$10989.50 on a partial indemnity basis. In oral argument she asserted that she was seeking them whether or not successful on the motion however the Costs Outline notes that costs will be sought 'if successful'. P.T. seeks costs of \$7321.36, but advised the court that if successful, he was prepared to accept \$5000.00 all-inclusive. If unsuccessful, he would not seek costs.
- [31] Because the plaintiff was successful, in the ordinary course, the plaintiff would be entitled to her costs as costs follow the event. However, a court can exercise its discretion, particularly where a party is seeking the court's indulgence, as on this motion. In assessing costs, the court is to consider rule 57 factors including inter alia, complexity, conduct of counsel in lengthening or shortening the hearing and what an unsuccessful party might expect to have to pay.
- [32] Here G[...] Inc. was completely unsuccessful on both motions. The defendant P.T. was partially successful yet he too sought the court's indulgence with respect to the continuation of the cross-claim. Taking into consideration the results, the written and oral submissions and rule 57 factors, it is ordered that each party shall bear their own costs.

(original signed)

MASTER RONNA M. BROTT

Date: August 13, 2014.