CITATION: Saini v. Sun Life Assurance Co., 2013 ONSC 4463
COURT FILE NO.: CV-09-385413
DATE: 20130628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gurvinder Kaur Saini, Plaintiff/Respondent

– AND –

Sun Life Assurance Company of Canada, Defendant/Appellant

BEFORE: E.M. Morgan J.

COUNSEL: *Jillian Van Allen*, for the Plaintiff/Respondent

Mark E.P. Cavanaugh, for the Defendant/Appellant

HEARD: June 14, 2013

ENDORSEMENT

[1] This appeal from a ruling by Master Haberman raises the question of whether, on the "first time up" at a status hearing, the court should work to get a delayed action back on track.

[2] According to the Court of Appeal in two very recent decisions, it should not. As the Court has explained it, the object of a status hearing is not to manage the case, as might previously have been thought, but rather to determine whether the relevant party has an adequate explanation for the delay. Sharpe J.A. stated the point with clarity in *1196158 Ontario Inc. v 6274013 Canada Ltd.* (2013), 112 OR (3d) 67, at para 28, where he noted that "the focus of the inquiry on a rule 48.14 status hearing is the conduct of the plaintiff".

[3] The Court of Appeal followed up and re-emphasized this approach in *Faris v Eftimovski*, 2013 ONCA 360, where it imposed an onus of proof on a plaintiff that must be met with specific evidence justifying the delay. Since a status hearing only ensues where the action has not been set down for trial within two years, it will always favour the defendant with a presumption of dismissal. Tulluch J.A. commented, at para 33 of *Faris*, that since the overriding purpose of the status hearing is to "ensure that disputes are resolved in a time-effective manner, imposing the onus on the plaintiff to show cause why the action should not be dismissed for delay is fair."

[4] Master Haberman's ruling in the present case, which is reported at 2012 ONSC 4671, was made on August 15, 2012. The *1196158 Ontario Inc.* decision was rendered by the Court of Appeal one week after that, on August 21, 2012, while the *Faris* decision was rendered by the Court of Appeal ten months later, on June 4, 2013. Accordingly, the learned Master did not have the benefit of those two appellate decisions when she rendered her own judgment herein.

[5] The present appeal arises in the context of an insurance claim for a critical illness benefit. The request for coverage was submitted by the Plaintiff in November 2007 and was denied by the Defendant in September 2008. The Plaintiff's lawyers were retained in October 2008, and the Statement of Claim was issued on August 20, 2009. The Statement of Defence was served on November 10, 2009 and the Defendant's affidavit of documents was served on June 2010. From the time that the Statement of Claim was served on August 24, 2009 until the Notice of Status Hearing was issued by the court on October 6, 2011, the Defendant and its lawyer never heard from the Plaintiff or her lawyer.

[6] As it turns out, the Master applied what the Court of Appeal now says is an outmoded approach to a status hearing. She commenced her endorsement by citing *Clements v. Greenlaw*, [2009] OJ No 2688 (Ont Div Ct) for the proposition that, "[s]tatus hearings are a management tool to get cases on track, and move a case forward in a reasonable fashion if it has been languishing." In doing so, she failed to apply the requisite onus of proof to the Plaintiff and thereby erred in law.

[7] The applicable standard of review on a question of law is that of correctness. *Zeitoun v The Economical Insurance Group* (2008), 91 OR (3d) 131, at para 41 (Ont Div Ct). It must be said, however, that here the legal error has more to do with the Court of Appeal's re-thinking of the issue than it does with any weakness in the analysis applied by the Master. Indeed, in her ruling Master Haberman engaged in a thorough and detailed assessment of the within action. She concluded on the facts that there was unlikely to be prejudice to the Defendant that could not be compensated in costs.

[8] That said, it is now necessary to approach a status hearing under Rule 48.14(8) with the attitude that "the initiating litigant generally suffers the consequences of a dilatory regard for the pace of the litigation." *Wellwood v. Ontario Provincial Police* (2010), 102 OR (3d) 555 (Ont CA), at para 48. The thrust of the recent case law from the Court of Appeal is that the judge or master presiding at a status hearing is not to aim at fixing a tardy action but at dismissing it, unless there is cogent evidence in the record establishing a reason not to do so.

[9] The status hearing has become a forum in which the Plaintiff must show cause why there has been delay and why the action should proceed. If the Plaintiff cannot bring sufficient evidence to meet this burden, the action must be dismissed for delay even if it could theoretically be set back on track with little or no non-compensable prejudice to the Defendant. As the Court of Appeal stated at para 32 of *1196158 Ontario Inc.*, and reiterated at para 42 of *Faris*, a status hearing imports a two-part test: "a plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation *and* that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice. [emphasis in the original]

[10] In the present case, there was no evidence tendered by the Plaintiff herself. While this may not be fatal in all cases, it is certainly a factor to be taken seriously. *Khan v Sun Life Assurance Co. of Canada*, 2011 ONSC 455, at para 13 (SCJ). Here, the evidence submitted in support of the Plaintiff's case were the affidavits of her lawyer, his associate, and his legal

assistant, all three of which in effect said that the matter had fallen through the cracks in the lawyer's office.

[11] It is clear from the cases, however, that this is not enough to satisfy the onus of proof on a show cause hearing. At best, the evidence shows that the Plaintiff's lawyer "had put the file in abeyance", which is not an adequate explanation for delay. *Marché d'Alimentation Denis Thériault Ltée v Giant Tiger Stores Ltd.* (2007), 87 OR (3d) 660, at para 13 (Ont CA). At worst, the evidence might show that the delay "resulted not from the solicitor's inadvertence, but from "his negligence or lack of proper organization bordering on negligence", which is also not an acceptable explanation for delay on the Plaintiff's part. *Mandal v. 575419 Ontario Ltd.* (1994), 23 CPC (3d) 172 (Ont Gen Div).

[12] As the Master herself pointed out at para 30 of her endorsement herein, the Plaintiff's lawyer "attributes this delay to his own inadvertence. No detail as to how or why this matter appears to have fallen through the cracks is provided, however." This inherent weakness in the evidence, and the absence of any affidavit from the Plaintiff, made for a record that could not tip the scales in the Plaintiff's favour now that those scales come pre-weighted on the Defendant's side. See *Sepehr Industrial Mineral Exports Co. v Alternative Marketing Bridge Enterprises Inc.* (2007), 86 OR (3d) 550, at para 22 (SCJ).

[13] An explanation based on oversights or inertia within the Plaintiff's lawyer's office does not meet the evidentiary burden which the Court of Appeal says a Plaintiff must meet at a status hearing. As Tulloch J.A. said at para 50 of *Faris*, "[i]t was incumbent on the [Plaintiff] to conduct his action in a proactive manner."

[14] In the case before me, the Master found that the Plaintiff had intended to pursue the claim at its inception, and she reasoned that this was sufficient to meet a case management standard for setting the action back on track at the status hearing. However, there was nothing in the record to suggest that the Plaintiff was pursuing the action, or that since commencing the action she intended to pursue it, in a "proactive manner" as the Court of Appeal now requires.

[15] I would therefore grant the appeal and set aside the Master's Order.

[16] Although the appeal is granted, I am not inclined to dismiss the action for delay at this point. Just as Master Haberman did not have the Court of Appeal's two recent decisions before her in ruling on the status hearing, the parties did not have those decisions available to them in preparing the record for the hearing. I would therefore order that there be a new status hearing and that the parties have an opportunity to prepare a new evidentiary record for that hearing.

[17] The onus is on the Plaintiff to arrange a new status hearing to be scheduled at the court's earliest available date. The Plaintiff must provide notice to the Defendant of any steps taken in this regard. If the Plaintiff has not taken steps to have a status hearing scheduled within 30 days of the date of this endorsement, the Defendant shall be at liberty to move, without notice, to have the action dismissed for delay.

[18] Given that my reasons for this decision are based on recent Court of Appeal judgments that were not available at the hearing before the Master, there will be no costs of this appeal payable to either party.

Morgan J.

Date: June 28, 2013