FACSIMILE TRANSMISSION COVER SHEET

Masters' Office
March 13/15

Court House 393 University Avenue 6th Floor Toronto, ON M5G 1E6	Superior Court of Ontario Toronto Region Masters' Chambers	Chambres des Protonotaires Cour supérieure de Justice Région de Toronto

TO: J. Van Allen	FAX: 416-869-0271
TO: E.C. Marques/D. Awad	FAX: 416-868-0673
TO: E.N. Kolers	FAX: 416-947-0866
TO:	FAX:
TO:	

NUMBER OF PAGES INCLUDING COVER SHEET: 9

PROCEEDING(S) AT ISSUE: *Sertzes* v. *Lasik MD et al.*

COMMENTS: See Master Abrams' endorsement re: motion heard by her on December 18/14

NOTE: If there is anyone to whom this fax should have been addressed, but was not, it is the responsibility of counsel for the plaintiff/s (or, if the plaintiff is self-represented, counsel for the defendant/s) to forward a copy of this facsimile cover sheet, and all attachments, to the person(s) missed.

-ATTENTION-

If you do not receive all the pages, please call (416) 326-1083
Si vous ne recevez pas toutes les pages, veuillez appeler: (416) 326-1083

Masters' FAX Number/Nombre de Télécopieur: (416) 326-5416

Sertzes v. *Lasik MD et al.*

Court File No. : CV-08-350695

Motion Heard: December 18/14

Motion Heard By: Master Abrams

In attendance: J. Van Allen, counsel to the lawyer for the plaintiff

E.C. Marques/Dina Awad, for the defendants Dr. Bashour

E.N. Kolers, for the remaining defendants

Motion to reinstate the action

By the court:

[1] On March 14/06, the plaintiff underwent laser eye surgery at the defendant Lasik MD Clinic. Following the surgery, the plaintiff fell off an examining chair and allegedly suffered injuries.

[2] Notice of an intention to commence an action was first communicated by Jeffrey Raphael of Raphael Barristers on May 31/06. Mr. Raphael wrote to the defendant Clinic in that regard. On November 20/06, an insurance adjuster wrote to request medical records from the plaintiff in respect of her proposed claim. As requested, medical records and other documentation (medical/financial/employment documentation) were produced.

[3] On March 12/08, two days before the expiry of the limitation period, a statement of claim was issued by the plaintiff. On October 13/09, the claim was defended by Dr. Bashour (the doctor who performed the laser eye surgery), and a request was made of plaintiff's counsel for dates for examinations for discovery. With no response received, a further letter was written by

counsel for Dr. Bashour in an effort to schedule discoveries. Again no response was forthcoming.

[4] On December 15/09, counsel for the Clinic served a statement of defence on behalf of the Clinic and all of the remaining defendants.

[5] It is acknowledged on behalf of the plaintiff that the file "remained Jeffrey Raphael's file" but Robert Besunder assumed primary carriage of the file in early 2010. Mr. Besunder chose to attempt to resolve the litigation, amicably, before proceeding to discoveries. He suggested, in February/10, that a teleconference be scheduled to determine whether the claims might be settled. The litigation was not settled.

[6] On April 16/10, the court issued a status notice herein. Counsel for Dr. Bashour wrote Mr. Besunder on April 29/10, again seeking to schedule examinations for discovery. No response to that letter was received. Counsel for Dr. Bashour followed up in early May/10 urging against "[t]he continued delay".

[7] On July 12/10, rather than respond to the urging of Dr. Bashour's lawyers that discoveries be scheduled, Mr. Besunder contacted counsel for all of the defendants asking them to agree to a litigation timetable. A timetable was settled, on consent, and endorsed by Order of Master Dash dated August 11/10. The parties booked examinations for discovery for November 9 and 10/10.

[8] None of the steps, timetabled by way of consent Order, have taken place--by the dates agreed to or at all.

[9] In late October 2010, Mr. Besunder suggested that Dr. Bashour's examination for discovery be put on hold. He unilaterally cancelled the November/10 discovery dates, indicating that he was due in Newmarket Court and that he was dealing with the illness of a family member. He suggested alternative discovery dates in late 2010/early 2011.

[10] The evidence of Mr. Besunder is that "as of the Fall of 2010, [he] was out of the office on account of the illness and subsequent death of a close family member. Thereafter, [he] began suffering from undiagnosed anxiety and depression which inhibited [his] ability to attend to [the plaintiff's file] as [he did not recognize [his] condition and was not ultimately diagnosed until

June of 2013" (affidavit of Mr. Besunder, sworn November 21/14). He says that his problems caused him to fail to ask for assistance in dealing with this file.

[11] After numerous unanswered letters from counsel for Dr. Bashour and the threat of a motion for summary judgment on the part of counsel for Dr. Bashour, Mr. Besunder again raised the prospect of settlement. When counsel for the Clinic responded, Mr. Besunder did not follow through. He failed to acknowledge the response.

[12] On July 13/11, this action was dismissed for delay. Mr. Besunder says that he did not know about the dismissal until September 2012—at which time he requisitioned a February/13 date for a motion to reinstate the action. He says that he wrote to counsel for the defendants but neither has any record of having received correspondence from him at or about that time.

[13] In early January/13, Mr. Besunder wrote to counsel for the defendants, hoping to resolve the action or settle on a second consent timetable. He was told that Dr. Bashour would not agree to a timetable and that a February/13 motion date was not convenient and would need to be rescheduled. Four letters and four telephone messages from counsel for Dr. Bashour later, the intended February/13 motion did not proceed. No motion materials had been prepared on behalf of the plaintiff.

[14] In March/13 and April/13, counsel for the defendants indicated that they were treating "the matter as being closed". Mr. Besunder says that he wrote to counsel for the defendants in May/13 advising of a February 18/14 motion date. Neither of the lawyers for the defendants received this letter either. Mr. Besunder says that the acute phase of his depression and anxiety lasted into June 2013 and beyond and, for that reason (and because, he says, he had no junior, student, law clerk or secretary to assist him), he did not respond to letters sent to him by defence counsel in September and October/13.

[15] On January 2/14, Mr. Besunder served a notice of motion on the defendants. Counsel for Dr. Bashour wrote at least three letters in response--including one in which he indicated that the February 18/14 return date was not convenient. An adjournment was sought and the request for the adjournment acceded to by counsel for Dr. Bashour's co-defendants.

[16] Letters and voicemail messages from counsel for Dr. Bashour followed, without response, until February/14 when Mr. Besunder wrote to counsel for the defendants to indicate that he had reported the dismissal of the action to LawPro and was seeking its advice as to how to proceed. It was not until July 29/14 (more than three years after this action was dismissed for delay a second time) that LawPro counsel indicated that she had been retained as counsel to the lawyer for the plaintiff and was going to proceed with a motion to reinstate the action. In November/14 and December/14, motion records were served on behalf of the plaintiff.

[17] Counsel for Dr. Bashour says that there are three periods of unjustified delay, during the course of which the plaintiff was represented by two lawyers and had counsel for LawPro acting on behalf of one of the two lawyers. He points out, fairly, that there is no evidence (and there should be) from Mr. (Jeffrey) Raphael as to: his role as *counsel of record* (counsel with primary carriage of the file), his working relationship/dealings with Mr. Besunder in respect of this action, the nature or his involvement in the file, and his dealings with the plaintiff. He also points out, fairly, that the plaintiff's evidence is bald and skeletal as to her intentions and involvement in the prosecution of her claims. She says, with no details and no substantiation, that it had always been her intention to proceed with the litigation, that she left the claim in the hands of "Raphael Barristers" but followed up from time-to-time, and that she had understood that the action was proceeding. Did she follow up with Mr. Raphael? With Mr. Besunder? With any staff members in the offices of Raphael Barristers? In response to a request from Dr. Bashour's counsel, LawPro counsel has confirmed that there is no correspondence (inquiries/follow-up) from the plaintiff in Mr. Besunder's file. How, then, was follow-up made by the plaintiff? When?

[18] Mr. Besunder has given evidence as to late-diagnosed anxiety and depression which, he says, "paralyzed him from acting on routine tasks". Counsel for Dr. Bashour says that some of the delay herein pre-dated the time when Mr. Besunder began suffering from his stated condition and post-dated the end-date of his diagnosis (with there being no explanation for the delay then). Further, he submits, no medical evidence or substantiation of the nature and/or effect of Mr. Besunder's condition has been proffered and it ought to have been.

[19] Relying on *Merge* v. *HR.com Limited*, 2012 ONSC 5065, Ms. Van Allen says that I ought to take Mr. Besunder at his word. While I do not doubt Mr. Besunder when he says that he had

problems that impeded his ability to do his work and while I have sincere empathy for his circumstances, the difficulty here (one that differentiates this case from that with which I dealt in *Merge*) is that Mr. Besunder is addressing a problem of more than three-years' duration (as opposed to one summer as was the case in *Merge*). Further, he is ascribing to a specific, but unsupported, diagnosis certain acts and omissions in dealing with this one action[1]. The court has been placed in the untenable position of being unable to properly assess Mr. Besunder's evidence. Having identified the nature of the diagnosis, he might have had a doctor confirm it and address its duration and sequella. And while there were other factors at play in *Merge*, including a breakdown in client-lawyer relations, in the case at bar Mr. Besunder seeks to attribute the delays over an extended period of time wholly to his mental state. With no substantiation (if only from one of his colleagues) and with there being no evidence as to the manner in which Mr. Besunder dealt with other work obligations during this period, how much weight can I attach to his evidence as to the nature and effects of his difficulties? I am not suggesting for a moment that Mr. Besunder is seeking to mislead. I do not think that he is. But, most regrettably, he has not laid a sufficient evidentiary foundation for his claims.

[20] Then too, while Mr. Besunder says that he did not have a junior, student, law clerk or secretary assisting him at times during the period of delay, he has provided the court with no evidence to corroborate this contention. The evidence before me is that Mr. Besunder's firm employs six lawyers and a number of support staff, with a photo on the firm's website capturing the image of some thirteen persons (see: affidavit of Lillian Piirsalu, sworn December 10/14). Why was there no one available to work with Mr. Besunder? And, where was Jeffrey Raphael throughout? If Mr. Besunder was indeed as ill as he says he was, why did none of the other lawyers in his firm step in to assist him? And if the answer is that no one knew, why did no one know, why were inquiries not made of Mr. Besunder and why is there no evidence from Jeffrey Raphael (or, indeed, another member of Mr. Besunder's law firm) to that effect?

[21] With that background and considering that a contextual approach ought here to be taken, I must consider the question of whether the July 2011 dismissal Order ought to be set aside. The contextual approach to be applied is guided by the factors articulated in *Reid* v. *Dow Corning*

[1] This is of particular import given that there is nothing before me to suggest that Mr. Besunder withdrew from practice, generally, or even from his duties as a Deputy Small Claims Court judge during the currency of this action.

Corp., [2001] O.J. No. 2365 (S.C.J.). Counsel for the defendants say, and I agree, that the plaintiff's efforts herein fail to meet the tests to be applied.

[22] First, the delay in the progress of the litigation has not been explained with robust particularity. There are no particulars as to letters written to or by Ms. Sertzes, no particulars as to calls made to or by Ms. Sertzes, and no particulars as to meetings with and/or requested by Ms. Sertzes. The plaintiff acknowledges that she had retained and dealt with "Raphael Barristers" (not Mr. Besunder alone) but provides no details as to when/with whom she communicated and what she was told. Then too, while Mr. Besunder blames a large part (indeed, the largest part) of the delay on his depression and anxiety, (as stated above) there is no supporting evidence to document his diagnosis and the manner in which he was affected by his diagnosis generally and/or to explain how and why, at various times, he was able to deal with this litigation. Where is the evidence as to what communications he did or didn't have with the plaintiff, with Jeffrey Raphael or, indeed, with anyone else in his firm (relative to this action)? "...[B]ald statement[s]...[are] unpersuasive without some supporting detail" (*O'Connor* v. *Dominion of Canada General Insurance Co.*, 2013 ONSC 3184, at para. 8). Here there is none. This is particularly troublesome where, as here, the plaintiff is seeking a second indulgence—the action having already been reinstated once (see, in this regard, *1196158 Ontario Inc.* v. *6274013 Canada Ltd.*, [2012] O.J. No. 3877 (Ont. C.A.), at para. 25). There has been no "repentance", with the whole of the history of delay being subject to scrutiny by the court.

[23] Second, there is no evidence before me that the dismissal of this action arose because of inadvertence. The plaintiff has proffered no evidence as to any steps taken by her to advance her claims save that she says "from time to time [she] was in contact with Raphael Barristers" (see: affidavit of Ms. Sertzes sworn December 10/14). She is silent as to what she knew about the litigation timelines, when she learned of the dismissal and what steps she took when she learned of the dismissal (save to instruct her "lawyers" to proceed with a motion to set aside the dismissal Order--Which lawyers? When?) The generalized and unsupported nature of the plaintiff's affidavit evidence is such that I cannot say that the plaintiff displayed the "attentiveness", "diligence" and/or "persistence of effort" here required (see: *Mollicone* v. *Town of Caledon*, 2010 ONSC 4177, at para. 41).

[24] Likewise, Mr. Besunder's evidence is lacking in this regard. He says that he didn't learn of the dismissal Order until it was brought to his attention and, yet, there were repeated communications on the part of the defendants' lawyers that ought to have jogged Mr. Besunder's memory as to the need to advance the plaintiff's claims or to have alerted those involved in the carriage of the file, including Mr. Jeffrey Raphael, that there were steps to be taken. If it was through inadvertence that the timetable deadlines were not diarized in his calendar, as Mr. Besunder says, this is indeed unfortunate. But, baldly saying that this is the case is insufficient to prove inadvertence. With inadequate evidence from the plaintiff and no evidence to substantiate or, even, support what Mr. Besunder has said, I am not persuaded.

[25] Third, this motion was not brought promptly. The plaintiff moved to set aside the first dismissal of this action 2.5 years after the action was dismissed. The plaintiff moved to set aside the second dismissal of this action 3 years after the action was dismissed a second time. Even if I accept that the second dismissal Order did not come to Mr. Besunder's attention until mid-September 2012, there is still a delay of some 1.5 years between the time that he learned of the dismissal and the time that he first delivered a notice of motion.

[26] Fourthly, prejudice is here an issue. At the time of the hearing of the motion, nearly nine years had passed since the plaintiff's cause of action arose. "...[T]he expiry of a limitation period [here approximately 7 years ago] can give rise to some presumptive prejudice, the strength of which increases with the passage of time" (see: *Wellwood* v. *Ontario Provincial Police*, 2010 ONCA 386, at para. 72).

[27] The plaintiff has not rebutted the presumptive prejudice by way of evidence as to who the witnesses required to testify as to the facts in issue are, where they might be located and whether they are available to testify. There have yet to be examinations for discovery and there is no evidence before me that witness statements have been taken. And while the plaintiff has deposed that "[n]one of [her] doctors or healthcare providers [has] ever advised [her] that any of [her] records were going to be destroyed", with a sworn affidavit of documents not having been served and with the documentation in the plaintiff's lawyers' files seemingly not having been updated since 2008, it is unclear as to whether or to what extent there may be gaps in the documentary evidence. There seem to be some—with no persuasive evidence now before me to suggest that they can be filled.

[28] Finally, I accept, as counsel for the defendants posit, that the "...[defendants'] entitlement to rely on the finality principle grows stronger as the years pass" (see: *Marché d'Alimentation Thériault* v. *Giant Tiger*, 2007 ONCA 695, at para. 38). And, here, reinstating the action would undermine the finality principle—upon which, in the particular circumstances of this case, the defendants ought to have been (and ought now to be) entitled to rely.

[29] I note, parenthetically, that the plaintiff takes the position that the defendants delayed in the early stages of this proceeding in delivering their pleadings. That may be true but the delay was relatively brief and, in any event, no one followed up with them on behalf of the plaintiff. This is not a case of the defendants lying in the weeds, as it were, hoping that time would pass with no steps taken to advance the litigation. The evidence adduced on behalf of the defendants references numerous attempts on their part to move the action forward. And, in any event and as Cronk, J.A. noted in *Wellwood* v. *Ontario Provincial Police*, *supra*, at para. 48, "...the party who commences a proceeding bears primary responsibility for its progress".

[30] For all of these reasons, the plaintiff's motion is dismissed. Failing agreement as to the costs of the motion, I may be spoken to.

March 12/15