CITATION: Shahrawan v. First Canada ULC, 2015 ONSC 7973
COURT FILE NO.: CV-11-422784
MOTION HEARD: July 24, 2015

SUPERIOR COURT OF JUSTICE – ONTARIO

Re: NAZIMA SHAHRAWAN, ALI MOHAMMED SHARAWAN and MASOOD SHAHRAWAN

Plaintiffs

v.

FIRST CANADA ULC, PHILLIP MUNROE and ACE INA INSURANCE

Defendants

BEFORE: Master Lou Ann M. Pope

APPEARANCES: Jillian Van Allen, Brown & Partners LLP, for moving plaintiffs
Fax: 416-869-0271

Nelson Dewey, Jones Harley LLP, for responding defendants, First Canada and Phillip Munroe
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REASONS FOR ENDORSEMENT

[1] The issue to be determined on this motion is whether to set aside the registrar's dismissal order made on November 7, 2012 pursuant to rule 48.15(1) of the *Rules of Civil Procedure,* R.S.O. 1990, c. C.43.

Background

[2] This action arises out of a motor vehicle accident that occurred on March 23, 2009 when the plaintiffs' motor vehicle was rear-ended by a school bus owned by the defendant, First Canada ULC ("First Canada") and driven by the defendant, Phillip Munroe ("Munroe"). The plaintiffs' vehicle was driven by Nazima Shahrawan and her two sons were passengers.

[3] Plaintiffs' counsel, Kenway Yu ("Yu"), issued the statement of claim on March 22, 2011, the last day before expiry of the limitation period. Initially, the statement of claim named "John Doe" as the driver of the bus. The statement of claim was amended when the identity of the driver was disclosed by First Canada. The defendant, Ace Ina Insurance, insured First Canada and was named as insurer of the unidentified driver, John Doe.

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[4] The statement of claim was served on First Canada and Ace Ina Insurance shortly after the statement of claim was issued; however, First Canada requested a waiver of defence until Yu provided proof of service on the defendant driver. By late April 2011, Yu requested the defendants' statement of defence; however, First Canada stood by its position that it required proof of service on the driver before it delivered a defence on behalf of both the owner and the driver.

[5] As the months went on, the parties had discussions regarding discontinuing the action against Ace Ina Insurance and First Canada disclosing the name of the driver. Ultimately in early December 2011, First Canada disclosed the name of the driver as Munroe and the plaintiffs delivered a notice of discontinuance against Ace Ina Insurance. (The Notice of Discontinuance was not filed by Yu.)

[6] On September 19, 2011, the registrar issued a notice that the action would be dismissed as abandoned under rule 48.15(1) as no defence had been filed and the action had not been terminated. As the plaintiffs failed to comply with the requirements of rule 48.15(1), on November 16, 2011, the action was dismissed as abandoned. On February 29, 2012, on consent, Master Brott granted an order setting aside the registrar's dismissal order and an order that the action was to be set down for trial by February 28, 2013, one year later.

[7] Also at that time, Yu produced medical records of the plaintiff, Ali Mohammed Sharawan.

[8] The plaintiffs' evidence is that Yu failed to diarize the new set down date and failed to have Master Brott's order issued and entered.

[9] Nothing further was done on the file until April 2012 when defence counsel again requested proof of service of the statement of claim on Munroe, as the driver's name had been disclosed some four months prior in December 2011. On May 29, 2012 the plaintiff obtained an order amending the statement of claim replacing John Doe with Phillip Munroe.

[10] Not having received copies of the orders setting aside the dismissal nor the amending order from Yu, on July 4, 2012, defence counsel requested copies of same which Yu provided on August 8, 2012. In addition, by late August 2012, Yu had not provided defence counsel with proof of service of the amended statement of claim on Munroe; therefore, defence counsel again made the request stating that upon receipt they would deliver a statement of defence. The amended statement of claim was not issued until September 28, 2012 some four months after obtaining the amending order.

[11] Munroe was served with the amended statement of claim on October 2, 2012. However, the action was dismissed as abandoned by the registrar a second time on November 7, 2012 pursuant to rule 48.15(1) as no defence had been filed and the action had not been terminated. Yu's name and address are set out at the bottom of the order; therefore, it is presumed that the order was sent to his office. The order would not have been sent to

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defence counsel as a statement of defence had not been filed. (The issue of whether this dismissal order should have been issued by the registrar given the term of Master Brott's order that the action was to be set down for trial by February 28, 2013 will be dealt with later in these reasons.)

[12] Nothing further was done on this file by late May 2013; therefore, defence counsel wrote to Yu and inquired about the status and why Yu had not responded to numerous telephone calls. Yu was reminded that the timeline to set the action down for trial by February 28, 2013 had passed and inquired whether the plaintiffs intended on proceeding with the matter otherwise defence counsel would bring a motion to dismiss the action for delay if he had not heard from Yu by May 30, 2013. Of course, the defendants were unaware that the action had been dismissed on November 7, 2012. Notice had not been sent to defence counsel by the registrar as a defence had not been filed.

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[13] On June 21, 2013, Mike Salamzadeh, Yu's paralegal, described as "Director, Client Relations" on Yu Law Firm letterhead, sent a letter to defence counsel. The contents of this letter is set out below:

> We are in the process of fulfilling the court order from Master Brott and we are setting this down for trial. We understand that it took longer than expected but our assistant responsible for setting this action down for trial was away on maternity leave. Hence, we are working on it and it will be done soon.
>
> The clients have every intention of pursuing their claim and are willing to cooperate to fulfill all production requests you may have. Our firm is also in full cooperation with you with respect to the aforementioned productions and order from Master Brott. As you are aware, we have discoveries booked for November 6, 2013.
>
> We hope that there will be no need for a motion, as previously stipulated, we are committing ourselves to this case and Master Brott's orders.

[14] Four days later, defence counsel telephoned Mr. Salamzadeh to correct errors contained in his letter. She advised him that the November 6th date was for the defendants' motion to dismiss, not discoveries. Mr. Salamzadeh advised that Yu had been out of the office for several months due to a family emergency and they were backed up as a result. He further advised that he had no knowledge of the contents of Master Brott's order and was under the impression that it involved undertakings. It is obvious that he was unaware that discoveries had not been held. Defence counsel advised him that nothing further had been done on the file and that they were still waiting the affidavit of service of the amended statement of claim in order to deliver a statement of defence. Lastly, Mr. Salamzadeh advised that he would try to reinstate the action and file the trial record if the matter had not already been dismissed.

[15] It is the plaintiff's evidence that Mr. Salamzadeh was aware of the dismissal order by the week of June 24, 2013; however, he was under the impression that Yu would deal with it

when he returned to his office. When Yu returned, his focus was on the defendants' motion to dismiss returnable November 6, 2013.

[16] In September 2013, defence counsel served their motion to dismiss for delay and failure to comply with Master Brott's order. The parties were unaware at this time that the action had been dismissed a second time.

[17] On October 30, 2013, a week before the hearing of the defendants' motion, the plaintiffs delivered their affidavit of documents and copies of Schedule "A" documents. In addition, plaintiffs' counsel advised that the action had been dismissed. Thereafter, counsel agreed that the defendants' motion would be withdrawn and that the defendants would oppose any motion by the plaintiffs to set aside the second dismissal.

[18] Yu's office became aware of the dismissal order at this time by confirming with the court that the file was inactive.

[19] After October 30, 2013, nothing further was done on this file until July 2014 when, it is the plaintiffs' evidence that the dismissal order came to their attention. It is also plaintiffs' evidence that Yu's staff erroneously placed the file in the inactive and closed files such that it fell out of the firm's diary system.

[20] It is the plaintiffs' evidence that when their error came to counsel's attention, he recognized the need to report it to Law Pro.

[21] On July 30, 2014, this motion was served on the defendants.

The Evidence

[22] Each of the plaintiffs swore an affidavit under oath before Yu that they always intended to proceed with the action, and that from time to time they were in contact with Yu's office and understood that the action was proceeding in the normal course. Further, they state that none of their doctors or health care providers ever advised them that any of their records were going to be destroyed or have been destroyed.

[23] It is Yu's evidence that the plaintiffs retained him in January 2010. In December 2010 he requested the medical records for Mohammed from Dr. Sharma, his family doctor, and the accident benefits file. After having the statement of claim issued, he arranged to have First Canada and Ace Ina Insurance served. In late April 2011, he provided defence counsel with copies of the affidavits of service and requested a defence.

[24] By the end of 2011, the plaintiffs agreed to discontinue the action against Ace Ina Insurance and delivered a Notice of Discontinuance; however, did not file same. Also at that time, First Canada disclosed to Yu the identity of the driver of the bus and his contact information and requested an amended statement of claim.

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[25] Regarding the first registrar's dismissal on November 16, 2011, it is Yu's evidence that his office did not receive the Notice that Action Will be Dismissed and the Order Dismissing Action As Abandoned. There is no evidence to explain how the dismissal order came to Yu's attention; however, the defendants did not oppose an order setting it aside which culminated in Master Brott's order of February 29, 2012.

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[26] In February 2012, Yu made production of medical records for Mohammad.

[27] Through inadvertence and mistake, Master Brott's order was not issued and entered and the set down date of February 28, 2013 was not diarized by Yu's office.

[28] Yu obtained an order amending the statement of claim to replace John Doe with Munroe's name on May 29, 2012. He provided defence counsel with copies of the orders setting aside the dismissal and amending the claim in August 2012, after requested by defence counsel.

[29] Yu arranged to have the amended statement of claim issued on September 28, 2012 and by October 4, 2012 all defendants had been served.

[30] After the defendants were served with the amended claim in early October 2012, Yu did nothing further on the file until eight months later in June 2013 when Yu's Director of Client Relations, Mike Salamzadeh, responded to defence counsel's letter of a month earlier enquiring why the action had not proceeded any further, why Yu had not responded to her numerous phone calls "over the months," and advised that the defendants intended on bringing a motion to strike the claim for failure to set the action down for trial by February 28, 2013. Mr. Salamzadeh's explanation for the delay was that "the assistant responsible for setting this action down for Trial was on maternity leave." Interestingly, Yu's evidence in paragraph 43 of his affidavit sworn November 11, 2014, was that Salamzadeh confirmed that examinations for discovery had been booked for November 6, 2013; however, Yu offers no explanation for Salamzadeh's obvious error. In defence counsel's response to Salamzadeh's letter, she corrected him by advising that discoveries had not been scheduled and that November 6, 2013 was the date for the defendants' motion to strike the claim.

[31] Yu's evidence is that Salamzadeh became aware of the second dismissal order "by the week of June 24, 2013; however, he fails to state how he became aware of it. He states that Salamzadeh was under the impression that Yu would deal with the dismissal order. Yu states that he was out of his office for a family emergency in or around June 24, 2013. After he returned, his focus was on the defendants' motion returnable on November 6, 2013. He does not state how long he was away from his office.

[32] Yu's office drafted a trial record in July 2013. He blames his office for overlooking a request from the defendants for a jury notice and statement of defence. He says that was due to inadvertence and mistake. He provides no evidence to explain why his office drafted the trial record when no defence had been delivered and he missed the set down date of February 28, 2013. It is also peculiar to state that his office would request a jury

notice from the defendants when it is the defendants' prerogative whether to deliver one. Again, his evidence is that in July 2013, "our focus and attention" was on the defendants' motion returnable on November 6, 2013.

[33] His office delivered the plaintiffs' affidavit of documents on October 30, 2013. Yu's evidence fails to state that it was a *draft unsigned* affidavit. Interestingly, there are only four documents set out at Schedule "A" being Dr. Sharma's notes and records for Mohammed, and the plaintiffs' statements provided to Certas Direct, their accident benefits insurer. Schedule "C" states "Nil." No medical records were listed in the affidavit of documents for the other two plaintiffs, keeping in mind that this was two and one half years after the action had been commenced and nothing was produced for plaintiffs, Mosood and Nazima.

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[34] In or about late October 2013, Yu's office became aware that the action had been dismissed when Melissa from his office confirmed with the court that the file was inactive. Thereafter, defence counsel advised that they would withdraw their motion, oppose any motion to set aside the second dismissal order, and if they had not received the plaintiffs' motion within two weeks, they would assume the plaintiffs had no intention of proceeding with the action.

[35] Yu's evidence regarding the steps taken by him stops in late October 2013.

[36] Yu states that it has always been his intention to proceed with this action.

[37] His evidence is that the dismissal order came to his attention again in July 2014 when he recognized the need to report the matter to LawPro. His evidence is contrary to the defendants' evidence that on May 9, 2014, Yu telephoned defence counsel who documented in a memo the context of the conversation. Mr. Dewey's memo states as follows:

> He doesn't have a clue what's going on on the file. I told him that I wrote on Oct. 31/13 to say that he's got to bring a motion right away. He said, "I thought someone [who?!] was calling your office continuously." I told him I've never heard from anyone since I started at the end of October.
>
> I got him to agree to call me by the end of the month with some indication one way or the other what the plaintiffs want to do.

[38] Counsel for Yu served the notice of motion herein on July 30, 2014.

[39] Subsequently in November 2014 and January 2015, Yu swore supplementary affidavits. In the first one he stated that after the defendants withdrew their motion in late October 2013, he overlooked that this action had been dismissed and that a motion would be required. He further states that "his office staff" did not understand that a motion to set aside the registrar's dismissal order would be required and they placed the file in the inactive and closed files and, as such, the file fell out of his firm's diary system.

[40] In his second supplemental affidavit, Yu states that in October and November 2014, he made letter requests from Dr. Sharma, Certas Direct, and Canada Revenue Agency. In the plaintiffs' third supplemental affidavit, a law clerk for Brown and Partners LLP, counsel to Yu, set out Dr. Sharma's response that he had provided his complete file for plaintiff, Nazima, in November, 2014. In their fourth supplemental affidavit, the same law clerk stated that on January 16, 2015, they had requested OHIP summaries for the last seven years for Masood and Ali. In their fifth supplemental affidavit, a legal assistant for Brown and Partners LLP, stated that she sent a direction and authorization to CRA requesting Ali's income tax returns, received from CRA and produced to defence counsel Ali's income tax returns, and OHIP's summary for Ali from January 1, 2008 to October 26, 2014 and for Nazima from October 27, 2007 to October 27, 2014.

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Law

[41] Prior to the amendments to the *Rules of Civil Procedure* effective January 1, 2015, Rule 48.15(1) provided that the registrar shall dismiss an action as abandoned if specified conditions were satisfied, unless the court orders otherwise. The registrar had authority to dismiss an action if more than 180 days had passed since the date the originating process was issued, a notice of intent to defend or statement of defence had not been filed, the action had not been disposed of by final order or judgment, the action had not been set down for trial and the registrar had given 45 days' notice that the action would be dismissed as abandoned unless the conditions were met.

[42] Subrule 48.15(5) provided that an order under rule 48.15 dismissing an action as abandoned may be set aside under rule 37.14.

[43] Rule 37.14(1) provides that a party who is affected by an order of a registrar may move to set aside the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. The court has discretion to set aside the order on such terms as are just. (subrule (2))

Whether the second dismissal order should have been issued by the Registrar

[44] Arguably, the second dismissal order which is the subject of this motion should not have been issued by the registrar given the term of Master Brott's order dated February 29, 2012 that the action was to be set down for trial by February 28, 2013. The most obvious explanation for the order being issued is that Master Brott's order did not include a provision extending the 180-day timeline provided in rule 48.15(1); that is, a new date by which a defence was to be filed; therefore, since no defence was filed within 180 days from February 29, 2012, the court system generated another dismissal for failure to comply with the rule 48.15(1) timeline.

Test to Set Aside the Registrar's Dismissal Order

[45] The plaintiffs have the onus to satisfy the court that this action should be permitted to proceed.

[46] In considering whether the dismissal order should be set aside, the court will consider the following four factors while taking a contextual approach in order to achieve a result that is just in all the circumstances. It is not necessary for the plaintiffs to satisfy each of the four factors in order to have the order set aside. (*Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80 (Ont. Master), *Finlay v. Van Paassen*, 2010 ONCA 204, 2010 CarswellOnt 1543 (C.A.), at paras 27-29; *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386; *Habib v. Mucaj*, [2012] O.J. No. 5946))

a. Explanation for the litigation delay;

b. Inadvertence in missing the deadline;

c. Promptness in bringing the motion to set aside;

d. Prejudice to the defendants.

[47] In *Ross v. Hertz Canada*, 2013 ONSC 1797 (CanLII), Master Dash provided the following summary of the guiding principles:

- A plaintiff need not satisfy all four of the *Reid* factors but rather a contextual approach is required;
- The key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;
- All factors are important but prejudice is the key consideration;
- Prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;
- Once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;
- Prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;
- The party who commences the litigation bears the primary responsibility under the Rules for the progress of the action; and,
- In weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.

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Analysis

[48] I will now address the four *Reid* factors.

Explanation for the Litigation Delay

[49] There are numerous periods of delay that have not been explained. For example, the delay in amending the statement of claim once First Canada disclosed the identity of the driver in early December 2011 has not been explained. Yu took no steps until defence counsel wrote to him in April 2012 requesting proof of service of the statement of claim on Munroe. Thereafter, Yu obtained an amending order on May 29, 2012.

[50] The plaintiffs have not explained the delay in serving Munroe with the statement of claim until October 2, 2012 despite having obtained the amending order on May 29, 2012 and despite having learned of Munroe's identity in December 2011. Nor have they have explained the delay in having the amended statement of claim issued until September 28, 2012.

[51] They have not explained the delay in failing to provide First Canada with the affidavit of service of the amended statement of claim on Munroe and requesting that a defence be delivered forthwith in order to comply with Master Brott's timetable order.

[52] They have not explained the inactivity on the file from October 2012 when Munroe was served with the statement of claim until late May 2013, some seven months, and some three months after the set down date of February 28, 2013. It was defence counsel who wrote to Yu in late May 2013 to remind him of the passing of the set down date and inquired whether the plaintiffs intended on pursuing this action. When responding to defence counsel's letter, it was Yu's paralegal who advised that the delay in setting the action down for trial was due to the assistant being on maternity leave. It was nonsensical for Mike Salamzadeh to state that they are working on having the action set down for trial when no discoveries had been held, minimal production of medical records had been made by the plaintiffs and mediation had not been held. Further, to blame the delay on the assistant being on maternity leave infers that no one was assigned to take over her responsibilities. Moreover, it is obvious that he was unaware that discoveries had not been scheduled and it was the defendants' motion to dismiss the action scheduled for November 6, 2013.

[53] In addition, the plaintiffs offer no explanation for the fact that Yu had been out of his office for several months and no other lawyer was overseeing his files. There are no dates provided for the period of time Yu was out of his office.

[54] There is no explanation for failing to produce the affidavit of service of the amended statement of claim on defence counsel by the time they requested it again in late June 2013. Munroe had been served in early October 2012, some eight months prior. As a result, First Canada had not delivered a defence by late June 2013.

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[55] There is no explanation why Yu failed to apprise himself of the status of this action when he returned to his office sometime after late June 2013. He states that his focus was on the defendants' motion; however, he does not explain the missed timelines in Master Brott's order, not producing the affidavit of service to defence counsel, lack of attempts to schedule discoveries, failing to request further medical documents and OHIP summaries and failure to deliver an affidavit of documents. By this time, it was more than two years after the action had been commenced and no steps had been taken to schedule discoveries or request any substantial medical records or OHIP summaries.

[56] Yu's explanation for failing to take any steps after late October 2013 until July 2014 (when he states that the dismissal order came to this attention) is that his staff erroneously placed the file in the inactive and closed files "such that it fell out of the firm's diary system." This statement suggests that Yu's office had a diary system in place; however, combined with his earlier evidence that his office failed to diarize the dismissal timelines, it is suspicious whether in fact his office had any form of diary system. Yu offers no particulars of his office's diary system, if in fact there was one. In my view, this evidence questions the veracity of Yu's statement.

[57] I find that the plaintiffs have not provided an adequate explanation for the delay after October 2013.

[58] There is one period of delay which, in my view, was caused by First Canada. Although this point was not raised by any of the parties, it appears from the evidence that First Canada delayed in disclosing Munroe's name to Yu from late March 2011 when First Canada was served with the statement of claim to December 2011, some nine months. However, considering all of the evidence, it is likely that Yu's handling of this file would not have been any different.

[59] In conclusion and for the above reasons, it is my view that the plaintiffs have not provided a satisfactory explanation for the litigation delay.

Inadvertence in Missing the Deadline

[60] Yu's evidence at paragraph 26 of his affidavit is that through inadvertence and oversight he overlooked diarizing the deadline for setting this action down for trial prior to February 28, 2013 in accordance with his usual office procedure. This statement is vague. He does not give any details of his office procedure and how they track deadlines. I have addressed this point earlier in these reasons. In paragraph 25 he states that through inadvertence and mistake the order of Master Brott was not issued and entered. In paragraph 46 he states that in July 2013 his office drafted a trial record but it could not be completed because he had not received a jury notice or statement of defence. Again he states that through inadvertence and mistake his office overlooked requesting a jury notice and statement of defence.

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[61] Yu's explanation for missing the deadline to set the action down for trial by February 28, 2013 is "inadvertence and oversight" in failing to diarize the deadline, which is the same explanation for the majority of the delays and missteps.

[62] In *Re: Nadarajah, and Lad* [2015] O.J. No. 640, at paragraph 113, upheld on appeal at 2015 ONSC 4626, Master Haberman found that the plaintiff's failure to diarize could not be classified as inadvertence in the context of his not having had any form of ticker system. She stated:

> There is no place for inadvertence in this equation. For inadvertence to apply, there had to have been a system in place to track dates, such that the failure to enter a deadline in it can be said [to] have been inadvertent. Inadvertence is a one-off error, not a failure to create a necessary date-tracking system. There was no tracking system here at all. SLS waited for dismissal notices to come in before addressing the issue of timelines. At that point, they left everything to students, who were largely unsupervised. This cannot be viewed as "a system."

[63] In that action the evidence was that plaintiff's counsel did not have a system of tracking deadlines. Rather, when dismissal notice or dismissal orders came in, they were given to an articling student.

[64] There is much similarity in the facts between these two actions. In the within action, although Yu's vague evidence is of a failure to diarize as was his office procedure, all deadlines in this action were missed. This puts into question whether Yu in fact had a system of tracking deadlines in his office, or at a minimum, the adequacy and use of the system. Another similarity is that in the within action, it appears that there was no supervision over this file and it was left to Yu's assistant and a paralegal. For example, it appears that no one in Yu's office was responsible for setting actions down for trial while his assistant was away on maternity leave. Maternity leave can be up to one year which is a significant period of time for no one to be responsible for setting actions down for trial. In addition, it appears that there was no supervision over this file when was Yu out of his office for several months. His paralegal sent a letter to opposing counsel in which it is obvious that he was unaware of the status of this action.

[65] I concur with Master Haberman's view that inadvertence is a "one-off error." At some point, inadvertence, or missteps, when repeated, must be construed as negligence.

[66] Whether or not the registrar ought to have dismissed this action on November 7, 2012 rather than February 28, 2013, is irrelevant considering Yu's evidence that it was due to inadvertence and oversight that the deadline was not diarized. He did not have either deadline diarized. Oversights were rampant in this action. Considering all of the evidence, Yu's explanation for missing the February 28, 2013 deadline is not adequate or satisfactory.

Whether the motion to set aside the dismissal was brought promptly

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[67] Rule 37.14(1) requires that this motion be served forthwith after the order comes to the person's attention.

[68] The evidence is that Yu's office became aware of the dismissal order by the week of June 24, 2013; however, there is no explanation as to how it came to their attention. His paralegal was under the impression that Yu would deal with it when he returned to his office after dealing with a family emergency. When Yu returned, he did not give instructions to bring a motion to set aside the dismissal order. His evidence is that his focus was on the defendants' motion to dismiss returnable November 6, 2013.

[69] After the defendants' motion to dismiss was withdrawn in late October 2013, and despite defence counsel's letter of October 31, 2013 inquiring whether Yu intended to bring a motion to set aside the dismissal order, this motion was not brought. The explanation is that Yu's staff placed this file among the closed files and it fell out of their diarizing system.

[70] Even if the evidence is accepted that Yu's staff placed the file among the closed files in late October or early November 2013, there is no adequate explanation for not bringing this motion immediately after learning of the dismissal order in late June 2013. The explanation that Yu's focus when he returned to his office was on the defendants' motion fails to address the fact that a motion was required in order to set aside the dismissal order; irrespective of the defendants' motion. Yu's evidence does not address this point.

[71] For the above reasons, I find that this motion was not brought promptly, nor have the plaintiffs provided an adequate explanation for failing to do so.

Prejudice to the Defendants

[72] In my view, there is a presumption of prejudice to First Canada as the limitation period expired the day after the action was commenced in March 2011, more than three years before this motion was filed. In addition, the presumption arises due to the delay in bringing this motion for some 20 months after the dismissal order was made.

[73] As there is a presumption of prejudice, the plaintiffs have the onus to lead evidence to rebut the presumption.

[74] When this motion was brought, no OHIP summaries had been produced for any of the plaintiffs. OHIP produces summaries for up to seven years prior to a request. Subsequently, counsel for Yu requested Nazima's OHIP summary on October 27, 2014. Therefore, at best, OHIP will produce summaries back to October 2007; however, as the accident occurred in March 2009, First Canada will only have OHIP summaries for 17 months pre-accident. The evidence is that Nazeema complained to her family doctor in 2014 about insomnia, depression and her right shoulder due to the accident. She asked that her doctor refer her to a psychiatrist. Therefore, First Canada wants to determine if these complaints pre-dated the accident and the OHIP summary will set out the names of

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the health practitioners she saw pre-accident. Given the late request, First Canada will only have a summary for 17 months pre-accident. Thus, medical records may be lost to First Canada because it will not have the OHIP summary for more than 17 months pre-accident. This means that First Canada will have to proceed to trial with extremely limited pre-accident records faced with Nazeema's allegation that the accident significantly impacted her life. In my view, this is irreparable prejudicial to First Canada which has not been rebutted by the plaintiffs.

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Balancing the Interests of the Parties

[75] The evidence bears out that there was minimal or no supervision of staff in Yu's office and a poor or non-existent system for monitoring files.

[76] There had been minimal disclosure of medical records by the plaintiffs despite repeated requests by First Canada throughout. Since counsel for Yu was appointed, numerous requests were made for medical records; however, I am unable to say whether Yu will conduct the balance of the steps in this action any differently than he has done once his counsel is not overseeing this file if this action is permitted to proceed.

[77] Yu admitted to repeated missteps. The party who commences litigation bears the primary responsibility under the Rules for the progress of the action. Essentially, any steps in this action were precipitated by defence counsel.

[78] Of the factors to be considered, prejudice is the key consideration. In my view, it would be unfair to visit on the defendants the prejudice caused by plaintiffs counsels' missteps and neglect in the conduct of this action. At some point repeated inadvertence and missteps, as occurred here, is indicative of a larger problem which led to neglect of this case.

[79] In weighing the relevant factors, our courts have held that the court should not ordinarily engage in speculation about the rights of action a plaintiff may have against their lawyer, but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. Thus, the primary focus should be on the rights of the litigants and not with the conduct of their counsel.

[80] While I have not concluded that Yu's conduct, or lack thereof, was deliberate, I repeat, at some point repeated inadvertence and missteps become complete neglect which occurred here.

[81] The plaintiffs have not satisfied any of the four *Reid* factors and there will be irreparable prejudice to the defendant should this action proceed. For the above reasons, the defendants' rights to a fair trial and to put forth a full and fair defence, outweighs the plaintiffs' rights to have their action heard on its merits. Therefore, I decline to grant to plaintiffs' motion to set aside the registrar's dismissal order.

Costs

[82] Given First Canada's success, it is entitled to costs of the motion and the action. The costs outline filed covers this motion only, which is reasonable given that cross-examinations were held. Therefore, First Canada shall have its costs of the motion fixed in the amount of $7,158.27 payable within 60 days.

[83] If the parties cannot agree on costs of the action, they may make written submissions by February 1, 2016.

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(original signed)

December 21, 2015

Master Lou Ann M. Pope