CITATION: Shahrawan v. First Canada ULC, 2016 ONSC 3154
DIVISIONAL COURT FILE NO.: 38/16
DATE: 20160510

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	)	
	)	
NAZIMA SHAHRAWAN, ALI MOHAMMED SHARAWAN and MASOOD SHAHRAWAN	)	*Jillian Van Allen*, for the Plaintiffs (Appellants)
Plaintiffs (Appellants)	)	
– and –	)	
FIRST CANADA ULC, PHILLIP MUNROE and ACE INA INSURANCE	)	*Nelson M. Dewey*, for the Defendants (Respondents)
Defendants (Respondents)	)	
	)	**HEARD at Toronto:** May 10, 2016

DAMBROT J. (ORALLY)

[1] The appellants appeal the order of Master Pope dated December 21, 2015 which dismissed their motion to set aside the Registrar's order dated November 7, 2012, dismissing their action as abandoned for the second time. Further, if the appeal is unsuccessful, the appellants seek leave to appeal Master Pope's order awarding the respondents costs of this action fixed in the amount of $4,150.00.

[2] The underlying action arose from a minor motor vehicle accident which happened on March 23, 2009. In January 2010 the appellants retained Mr. Yu to represent them. Mr. Yu issued a Statement of Claim on March 22, 2011. Mr.'s Yu's handling of the file can only be characterized as disastrous, displaying an utter lack of attention to the matter. He allowed the action to be dismissed as abandoned the first time on November 16, 2011. After the November 16, 2011 order was set aside and a timetable put in place he failed to diarize the set down date and the action was dismissed as abandoned a second time on November 7, 2012. He then did nothing to set aside the November 7, 2012 order until July 30, 2014, and only after being reminded to do so by the respondent's counsel.

[3] Master Pope's reasons for refusing to set aside the Registrar's order are found in a fourteen page endorsement in which she carefully outlined the history of the matter and the evidence placed before her. She correctly set out the test for setting aside the Registrar's order and correctly outlined the four so called *Reid* factors and the guiding principles generally applied on such motions. She then carefully outlined the circumstances relating to each of the *Reid* factors. She found that: the plaintiffs did not provide a satisfactory explanation for the litigation delay; the motion was not brought promptly and there was not an adequate explanation for failure to do so; and the defendants were prejudiced. Upon balancing the interest of the parties, she concluded at para. 81 of her decision:

> 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.

[4] The decision of the Master is owed deference. The standard of review on questions of law is correctness and on matters of fact and mixed fact and law is palpable and overriding error. The appellants could point to no error of law in this decision but argued that there was palpable and overriding error.

[5] Specifically, counsel identified a number of factors that she said were not considered or adequately considered by the Master. In particular she said:

(i) that the Master failed to consider that the respondents contributed to the delay;

(ii) erred in failing to consider that the respondents had not opposed the first setting aside of the order of dismissal; and

(iii) erred in failing to take the amendments to the rules into account.

[6] In my view, there is no merit to any of these points. First, the record does not support the view that the respondents contributed to the delay in a relevant way. The case law supports passivity on the part of a defendant as contributing to delay. Here the defendants were far from passive and conducted themselves in an entire defensible manner. Second, the fact that the respondents consented to the order to set aside the dismissal the first time is an indication that they were not significantly prejudiced at that time but does not detract from the Master's specific findings of prejudice as of the date of the motion before her. Third, regarding the amendment to the rules the appellant relies on the decision J. Wilson J. in *Klaczkowski v. Blackmont Capital Inc.,* 2015 ONSC 1650. She noted, at para. 30:

> Rule 48.14 has been amended to extend the time for dismissal for delay from two years to five years after the filing of the defence (see O. Reg. 170/14 published in the September 6, 2014 *Ontario Gazette*).

[7] She then continued at para. 33:

> The impact of this significant rule change is appropriately considered as part of the contextual analysis weighing the benefits of timely justice against the right to be heard. This case was argued in October, 2014, after the amendment was adopted but before its effective date of January 1, 2015. If the longer time limit applied to the case before me, there would be no breach of Rule 48.14.

[8] I do not think that the failure to advert to this consideration in this case amounts to palpable and overriding error or in any way undermines the deference owed to the exercise of the Master's discretion.

[9] In any event, I rely on the decision of Molloy J. in *Nadarajah v. Lad,* 2015 ONSC 4626. She stated, at para. 64:

> There is authority for the proposition that the amendment to the Rule is part of the context to be taken into account in weighing the benefits of timely justice against the determination of cases on their merits. The argument of the motion in this case should have been completed in 2012, two years before the amendment to the Rule. In that event, the amendment could clearly not have been raised at all. The unconscionable delay by the defendant in bringing the motion forward should not be permitted to stand in his favour. In this case, I would give no weight to that particular factor.

[10] I agree with the comments of Molloy J. and conclude that they apply equally here.

[11] In the result, I find that there was no palpable or overriding error made by the Master and the appeal from her decision must be dismissed.

[12] As for the application for leave to appeal the Master's order awarding costs of the action to the respondents, the appellants argue that there was no jurisdiction to award costs as a result of the silence of the rule to make reference to costs. I see no merit to this argument. As a result, leave to appeal is refused.

COSTS

[13] I have endorsed the Appeal Book, "Appeal dismissed. Motion for leave to appeal costs of action refused. On consent, costs to the respondents in the amount of $5,000 all in."

DAMBROT J.

Date of Reasons for Judgment: May 10, 2016

Date of Release: May 19, 2016

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BETWEEN:

NAZIMA SHAHRAWAN, ALI MOHAMMED SHARAWAN and MASOOD SHAHRAWAN

Plaintiffs
(Appellants)

– and –

FIRST CANADA ULC, PHILLIP MUNROE and ACE INA INSURANCE

Defendants
(Respondents)

ORAL REASONS FOR JUDGMENT

DAMBROT J.

Date of Reasons for Judgment: May 10, 2016

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