

COURT OF APPEAL FOR ONTARIO

CITATION: Sultan v. Hurst, 2018 ONCA 37

DATE: 20180117

DOCKET: C64087

Feldman, Pepall and Huscroft JJ.A.

BETWEEN

Muhammad Asim Sultan

Plaintiff/Appellant

and

Mark Hurst

Defendant/Respondent

Jillian van Allen, for the appellant

Jeffrey Goit, for the respondent

Heard and released orally: January 11, 2018

On appeal from the judgment of Justice Harper of the Superior Court of Justice, dated June 22, 2017.

REASONS FOR DECISION

[1] The appellant appeals the decision of the motion judge refusing to validate the late service of the statement of claim. The claim was issued within the two year limitation period following the accident, but was served more than two years after the expiry of the six month limit to serve a statement of claim set out in r. 14.08(1) of the *Rules of Civil Procedure*. By the time the claim was served, the

limitation period had expired. Therefore, the practical effect of the motion judge's order was to prevent the plaintiff from pursuing his claim.

[2] The appellant raises two alleged errors. First, he says that the defendant waived the irregular service by delivering a statement of defence. We do not accept this submission. Besides the fact that this issue was not raised before the motion judge, the respondent's statement of defence did not waive the irregularity but specifically pleaded and relied on it as part of the defence.

[3] The second alleged error is that the motion judge erred in his analysis and conclusion that the defendant suffered prejudice by the delay. We see no error in the motion's judge's analysis or conclusion.

[4] The respondent made several attempts to request information regarding the plaintiff's injuries from the plaintiff's counsel, who never responded. The respondent gave evidence that its ability to conduct a defence medical, timely surveillance of the plaintiff and a full investigation, were hampered by the delay. The motion judge was entitled to accept this evidence. He also found prejudice in the ability of the defendant to get timely OHIP records which are only obtainable for seven years from the date of request.

[5] In our view, there is no basis on this record to interfere with the decision of the motion judge.

[6] The appeal is therefore dismissed, with costs in the amount of \$4,500, inclusive of disbursements and HST payable to the respondent.

“K. Feldman J.A.”

“S.E. Pepall J.A.”

“Grant Huscroft J.A.”