Truong v. *City of Toronto*

Court File No.: CV-09-370123

Motion Heard: March 3/15

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

K. Shani, for the defendant

By the court:

[1] The plaintiff moves for an Order setting aside the Registrar's second dismissal Order herein.

[2] On January 18/07, the plaintiff allegedly tripped and fell on a City of Toronto roadway. Notice was given to the City on March 21/07 of a "slip and fall". The City's independent adjusters responded to the plaintiff's notice letter complaining of late notification and a failure to comply with the notice provisions of the *City of Toronto Act*. The plaintiff's imperfect notice notwithstanding, the adjusters requested, and were given, particulars of the plaintiff's claim so that investigations could be (and were) undertaken. Though particulars were given, they were given after a period of delay. Three separate requests for particulars went unanswered by the plaintiff until September 26/08; and, a request for clarification made in October/08 was not addressed--save by delivery of a statement of claim in February/09.

[3] What *was* done in a timely fashion?

[4] Documentary requests were immediately made by plaintiff's counsel for the plaintiff's OHIP summary (7 years pre-fall), the plaintiff's doctor's notes and records and the notes and records of the hospital at which the plaintiff received care.

[5] At or about the same time as the statement of claim was served, the plaintiff's lawyers sent to the City's insurer medical documentation (the documentation referenced above) and details of OHIP's subrogated interest.

[6] By July/09, the City had defended the action.

[7] From March-April/10, plaintiff's counsel continued efforts to provide the defendant with fulsome documentary disclosure, by requesting further documents from non-parties, including CRA documents (income tax returns for 7 years pre-accident and following), the plaintiff's

employment records and employment insurance records, and notes and records from a pain rehabilitation clinic at which the plaintiff was treated.

[8] By May/10, the plaintiff had proposed a discovery plan, provided the defendant with a draft affidavit of documents, produced the plaintiff's Schedule "A" documents and served a notice of examination for October/10 discoveries. At the defendant's request, discoveries were deferred until November/10.

[9] In November/10, the defendant served its Schedule "A" productions and the plaintiff was examined for discovery.

[10] In July/11, a status notice was issued by the court. A status hearing took place in September/11, in the context of which a consent timetable was put in place. Both the plaintiff and the defendant agreed, and the court ordered, that the action be set down for trial by the end of March/13.

[11] Further documents were then requested by the plaintiff (of non-parties) to enable the plaintiff to fulfill undertakings--this from January/12-July/12. In March/12, the City's representative was examined for discovery. Efforts to schedule mediation were made by the plaintiff in July/12. And, by August/12, the plaintiff had fulfilled all undertakings.

[12] All of these steps having been taken by August/12, the plaintiff had largely fulfilled all of her obligations in furtherance of the claims made as at then.

[13] After August/12, the action took a turn sideways. The plaintiff's prosecution of her claims was thwarted when carriage of the plaintiff's file was transferred from the lawyer who had commenced the action on the plaintiff's behalf. In October/12, Michael Rubin (of SLS) assumed carriage of the plaintiff's file (in addition to a further 250-300 files which were transferred to him at the time). He advises that he instructed his assistant to diarize the March/13 set down deadline fixed by consent Order and to schedule mediation. His assistant did neither.

[14] In February/13, one month before the action was to be set down for trial, Mr. Rubin's assistant left the SLS firm. It was not until after the action was dismissed for delay (the action was dismissed only four days after the set down deadline) that Mr. Rubin turned his mind to the fact that mediation had not taken place and to the fact that the action had not been set down. Less than two weeks after the action was dismissed, a motion date was requisitioned for a motion to reinstate the action. Mr. Rubin then sought the defendant's consent to set aside the dismissal and canvassed mediator choices. Not content to simply wait until he had an answer, Mr. Rubin served his motion materials—this on May 31/13.

[15] On June 5/13, the City told Mr. Rubin that it consented to the reinstatement of the action. A consent Order was thus obtained from Master Muir, setting a new set down deadline of November 4/13. Mr. Rubin says that he instructed his assistant (a different assistant than the first

assistant who failed to carry out his instructions) to schedule mediation and set the action down. This was not done, in part (Mr. Rubin posits) because the defendant did not respond to an inquiry as to its preferred mediators.

[16] Mr. Rubin left the SLS firm (and left behind this action, with the firm) in early August/13.

[17] Between August/13 and December 31/13, a new SLS lawyer assumed carriage of the plaintiff's file: Mr. Mendelsohn. The evidence before me is the file had been transferred to him, in addition to other of Mr. Rubin's files. By January 3/14, Mr. Mendelsohn seemingly was in a position to focus on the plaintiff's claim and instructed his assistant to conduct a status check of the court file. He says that he did so with the added instructions that if the action were still active, his assistant was to deliver a notice of change of lawyer on his behalf (the notice was served on January 16/14), schedule mediation and set the action down for trial. A status check was done and the action was determined to be active. Mr. Mendelsohn says that he reminded his assistant of next steps on January 6/15 and, again, on January 28/15.

[18] These steps were not taken and, though there is no affidavit from Mr. Mendelsohn's assistant and though I accept that Mr. Mendelsohn had ultimate responsibility for the file, Mr. Mendelsohn's evidence is that his assistant advises that she was overwhelmed by the transfer of files from Mr. Rubin and, through inadvertence, failed to follow instructions fully.

[19] On January 31/14, this action was dismissed for delay a second time.

[20] Immediately after the action was dismissed for delay, Mr. Mendelsohn served further documents and particulars and witness summaries. And within three weeks after the action was dismissed, a notice of motion for a motion returnable on a date requisitioned within 4 days of the dismissal were served. I note that the plaintiff failed to deliver the supporting motion materials and, the City says, unilaterally adjourned the motion date to a later date.

[21] The defendant now declines to agree to the setting aside of this second dismissal Order referencing, *inter alia*, the prejudice it says it has suffered as a result of delayed notice of the plaintiff's fall.

[22] In considering whether or not to reinstate the action, I am to have regard to the *Reid* factors: explanation of the litigation delay, inadvertence in missing the set down deadline, promptness in bringing the motion to reinstate the action and prejudice to the defendant. And, in accordance with the Court of Appeal decision in *Scaini* v. *Prochnicki* (2007), 85 O.R. (3d) 179 (at paras. 23-24), I am to take a contextual approach in doing so. I am to "consider and weigh all relevant factors to determine the Order that is just in the circumstances".

[23] Leaving aside the initial delay in providing notice and, in the nascent stages of this action, furnishing particulars, there is no doubt but that the action proceeded in the normal course

at least until the first dismissal Order was made. And, even then, *notwithstanding the initial delay now relied upon by the defendant*, the dismissal Order was set aside *on consent*. Until June/13, the prejudice complained of was not an impediment to this action continuing. And by June/13, all steps but mediation and the setting down of the action were taken by the parties.

[24] The delay in the prosecution of the claims herein, including (and in particular) from June/13 until this action was dismissed a second time, only a few months later, has been explained. A reasonable, if imperfect, explanation has been proffered. While I accept that there seems to have been some inattention to detail on the part of those representing the interests of the plaintiff (members of the SLS firm) during periods of staff/lawyer turnover and, perhaps, undue reliance on administrative staff, there is nothing before me to suggest that the delay was undue or that the failure to set the action down was a matter of choice. The steps taken to advance the litigation, at least from the time the action was commenced, have been many and (for the most part) have been continuous. The evidence of the plaintiff herself, though admittedly general in nature, is corroborative of the fact that there was no intention on her part to abandon her claims. The evidence adduced by Messrs. Mendelsohn and Rubin is that the two set down deadlines were missed through inadvertence; and, in all of the circumstances, their evidence in this regard is plausible. The various and varied steps that were taken by the plaintiff and on her behalf are in keeping with the notion of an inadvertently missed deadline.

[25] Was there delay in bringing this motion? The answer to this question cannot be answered with a simple 'yes' or 'no'. The motion date was requisitioned with alacrity and the motion materials were filed, without delay. A notice of motion was served on February 25/14 for a motion returnable on May 13/14, *but* motion materials were not delivered in a timely fashion. The motion was adjourned by Mr. Mendelsohn, ostensibly without the defendant's consent, to August 25/14. The defendant again delayed in delivering motion materials, compromising the August 25/14 motion date. Only after prompting from the defendant's lawyer (with two letters said to have gone answered) was this matter reported to LawPro and counsel assigned by LawPro. While the defendant is not critical of anything LawPro counsel did or did not do, she is critical of the plaintiff for having delayed in serving motion materials and having compromised two motion dates. While I understand the frustration expressed and agree that the manner in which the motion was addressed was halting and questionable, when I consider the period of delay in context (with a notice of motion having been delivered as quickly as it was), I cannot say that the delay was undue or of such a nature that it tips the balance in the defendant's favour.

[26] As for the issue of prejudice, of concern is any prejudice to the defendant's ability to defend the action that would "[arise] from steps taken following dismissal, or which would result from restoration of the action following the registrar's dismissal" (*806480 Ontario Ltd.* v. *RNG Equipment Inc.*, [2014] O.J. No. 2979 (at para. 4)). This prejudice must be balanced against the prejudice to the plaintiff in having the case dismissed.

[27] The defendant suggests that the plaintiff's delay in notifying it of her trip and fall is prejudice that ought not to be relieved against. I cannot agree. The prejudice complained of did not prevent the defendant from consenting, without conditions (save the imposition of a new deadline for setting the action down), to this action being reinstated in June 2013. This suggests that the prejudice now complained of, which is prejudice that preceded the reinstatement of the action in June/13, is not actual prejudice to the defendant's ability to make answer to the claims brought against it. There is no reason that the defendant cannot rely on the delay on a go-forward basis in its defence of the action; but, "[t]he fact that the defendant consented to set aside the first dismissal…[with the same delayed notice]…suggests that there was no actual prejudice to its ability to defend the action at that point as a result of the delay or the dismissal" (*MDM Plastics Ltd.* v. *Vincor International Inc.*, 2015 ONCA 28 (at para. 34).

[28] Discoveries have been completed. Documents have been exchanged and preserved. Undertakings have been fulfilled, and requests for updated records in furtherance of the plaintiff's ongoing discovery obligations have been made. Even more work to ready the action for trial (in mitigation of the delay) was done by the plaintiff in the few months between reinstatement of the action and the second dismissal. But for the outstanding mediation, the action is ready to be tried.

[29] Then too, and in any event, while I accept that there has been degradation of the asphalt on which the plaintiff tripped (which degradation, the defendant posits, has prejudiced its investigative ability), there are field patrol inspectors report that have been preserved for the period preceding and post-dating the plaintiff's fall: specifically January 11/07, January 16/07, January 18/07 and January 22/07. These reports were sufficient to permit the defendant to agree to the first reinstatement of the action and they ought to be sufficient now.

[30] Another consideration that I must take into account in determining whether reinstatement of the action would here be just is whether the defendant gained security of legal position through the dismissal Order. I cannot say that it did. The issuance of the second dismissal Order was (relatively) proximate in time to the issuance of the first. And, within days of the Order's issuance, the plaintiff made it known that a motion would be brought to reinstate the action. Whatever the failings on the part of plaintiff's counsel in ensuring that the motion would be heard without delay (and addressed in a professionally courteous manner[1]), there was no doubt but that the plaintiff had evinced a clear intention to move forward.

[31] In all, therefore, and looking at this motion in context, I think it to be in the interests of justice that this action be reinstated. The balance tips in the plaintiff's favour. Whatever errors may be attributed to the plaintiff and her lawyers, I cannot agree with the defendant's submission that the plaintiff "has failed to move this matter forward in any meaningful fashion" (see: defendant's factum at para. 41). The evidence before me is otherwise.

[1] With professional discourtesy having been alleged by the defendant.

[32] The dismissal Order is hereby set aside, with a new set down deadline of August 14/15 now imposed by me.

[33] I note that the defendant says that (irrespective of outcome) the plaintiff's lawyer (***not*** Ms. Van Allen who argued the motion as counsel for the plaintiff's lawyer) should pay costs to it. Counsel are directed to confer as to how and when they wish to address the issue of costs and as to when and with whom this action might be mediated. Counsel are to report back to me, on this, by the end of June/15.

[34] As a postscript, I would be remiss if I did not comment on *Nadarajah* v. *Lad*, 2015 ONSC 925, a decision brought to my attention by counsel for the defendant as being critical of and raising concerns about systemic problems in the firm of lawyers acting for the plaintiff. Whatever problems the SLS firm may or may not have and whatever problems Master Haberman found it to have, I remain satisfied on the evidentiary record now before me that this case is not one of "ongoing, persistent and chronic neglect" (*Nadarajah* v. *Lad*, *supra*, at para. 147). This case stands on its own. In my view, and in all, the action merits reinstatement.

June 1/15 _____