CITATION: Zuk v. Atkinson, 2014 ONSC 4090
COURT FILE NO.: CV-10-2296-00
DATE: 2014-07-08

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Zuk v. Atkinson

BEFORE: Lemon, J.

COUNSEL: Jillian Van Allen, for the Plaintiff

Frank Delgiudice, for the Defendants

HEARD: June 05, 2014

E N D O R S E M E N T

THE ISSUE

[1] Justice Murray dismissed the plaintiff's action on August 10, 2012. The plaintiff now moves to set aside that order and to extend time for compliance with the orders of O'Connor J. dated February 16, 2012, and Wein J. dated May 29, 2012. Justices O'Connor and Wein extended the time for the plaintiff to fulfil his undertakings and to pay costs. Justice Murray dismissed the plaintiff's action when the plaintiff's lawyer failed to comply with the undertakings or to pay costs orders totalling $3,400.

BACKGROUND

[2] This much of the background is not in dispute.

[3] The plaintiff alleges that he was injured in a motor vehicle accident on July 8, 2008. On June 18, 2010, a Statement of Claim was issued; the Statement of Defence was filed September 8, 2010. The plaintiff was examined for discovery on May 4, 2011.

[4] From July 13, 2010, through May 26, 2011, plaintiff's counsel made efforts to obtain and forward productions and undertakings.

[5] The record indicates that the plaintiff's counsel took no further steps through the summer of 2011, with respect to the undertakings.

[6] On September 1, 2011, the defendants' counsel wrote to plaintiff's counsel with respect to the outstanding undertakings. He pointed out 30 outstanding undertakings at that time and warned that the defendants were ordering the transcripts from the examination for discovery in order to begin preparing the motion materials for a motion for undertakings.

[7] The plaintiff then took steps to obtain and forward further undertakings from September 23, 2011, through to February 6, 2012.

[8] On February 7, 2012, counsel for the defendants served a motion for productions returnable on February 16, 2012.

[9] There is a dispute between counsel as to discussions relating to the arranging of motions and agreements that may or may not have been entered into before they were heard. Be that as it may, on February 16, 2012, O'Connor J. ordered the plaintiff to comply with his undertakings by April 2, 2012, and to pay $1,000 in costs forthwith. The defendants' counsel provided a copy of that order to plaintiff's counsel, as he says in his affidavit, within "a couple of days" of February 16, 2012.

[10] The plaintiff's counsel continued to make efforts to provide productions to the defendants. The record indicates that those efforts were carried out from February 6, 2012, to March 1, 2012.

[11] On March 8, 2012, the defendants' counsel wrote to plaintiff's counsel providing a chart of the undertakings and refusals that were still outstanding. Defendants' counsel advised that if he were not in receipt of the answers to all undertakings and refusals by April 2, 2012, he would proceed with a second motion.

[12] In April 2012, the defendants' counsel contacted plaintiff's counsel's office staff to arrange a date for that second motion. The office staff provided dates for the week of April 26 without contacting plaintiff's counsel. Once he saw those dates, plaintiff's counsel instructed his office staff to arrange alternate dates for the motion because he was going to be away for a week in April and had a number of mediations and discoveries in the last two weeks of April. Plaintiff's counsel "assumed that [defendants' counsel] changed the motion date as I had requested and went on vacation from April 16 to 22, 2012".

[13] The motion date, however, had not been changed and no one appeared for the plaintiff on April 27, 2012. Accordingly, the matter had to be adjourned to May 29, 2012.

[14] The plaintiff continued to obtain and provide undertakings through to May 28, 2012.

[15] It is agreed that all undertakings were not completed by May 29, 2012. The costs order of O'Connor J. was also not paid.

[16] On May 29, 2012, Wein J. granted a further extension to the plaintiff to complete the undertakings by June 29, 2012. At that time, Wein J. also

ordered the plaintiff to pay costs of $2,400. Combined with the costs ordered by O'Connor J., a total of $3,400 was required by June 29, 2012. Finally, Wein J. ordered that if the plaintiff failed to comply with the terms of her order by June 29, 2012, the defendants could move without notice to dismiss the action. Although plaintiff's counsel had not been in attendance for the other order, it is agreed that he was in court when Wein J. made her order.

[17] The record indicates that plaintiff's counsel continued to make efforts to obtain and provide undertakings for the period from May 31, 2012, to August 10, 2012.

[18] Despite those efforts, it is agreed that the undertakings were not completed and the costs were not paid when the matter came before Murray J.

[19] As a result of an administrative error in the office of the defendants' lawyer, some of the undertakings that had been provided by the plaintiff were not properly filed and were not included in the materials before Murray J. Consequently, the defendants' lawyer told the court that there were 23 outstanding undertakings. At the time of the argument before me, there was still some dispute as to what undertakings had been provided and which had only been partially been completed by August 10, 2012. In any event, the plaintiff agrees that there were seven outstanding undertakings, three partially

answered undertakings and two ongoing undertakings. It is agreed that the costs orders had not been paid.

[20] The defendants forwarded the order of Murray J. to plaintiff's counsel on August 13, 2012. It is agreed that it was received by the plaintiff at that time; however, it did not come to his attention until "in or around September of 2012". There is no explanation for that late awareness of the order.

[21] This motion to set aside Justice Murray's order and to extend time for compliance with the orders of O'Connor J. and Wein J. was first brought December 11, 2012.

[22] The costs were paid January 29, 2013.

[23] The undertakings were fully complied with on April 11, 2013.

APPLICABLE LAW

[24] Rules 37.14(1) and (2) of the *Rules of Civil Procedure* state that:

> 37.14 (1) A party or other person who,
>
> (a) is affected by an order obtained on motion without notice;
>
> (b) fails to appear on a motion through accident, mistake or insufficient notice; or
>
> (c) is affected by an order of a registrar,

> may move to set aside or vary 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.
>
> (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[25] One test for a motion under rule 37.14(1) (a) of the *Rules* was outlined in *Wayne v. 1690416 Ontario Inc.*, 2012 ONSC 4861, aff'd 2013 ONCA 108. There, Leach J. said at para. 67:

> In other words, a party moving pursuant to rule 37.14(1)(a) inherently takes the position that, because it did not receive notice of a hearing that led to an order affecting its interests, it was prevented from attending, filing responding material and/or making submissions that might have led to a different result than that embodied in the *ex parte* order the party seeks to vary or set aside.

[26] Although this order is at the discretion of the court, I must balance the interests of the parties in the context of the evidence before me. Similar principles have been applied in the context of a registrar's dismissal for delay (see: *Williams v. Whitefish River First Nation,* 2014 ONSC 1817, 119 O.R. (3d) 551) and striking pleadings for failure to comply with orders to produce in the context of family law proceedings (see: *Kovachis v. Kovachis,* 2013 ONCA 663, 367 D.L.R. (4th) 189; and *Chiarmonte v. Chiarmonte,* 2013 ONCA 641, 370 D.L.R. (4th) 328). From these cases I am mindful that trial participation should be denied only in exceptional circumstances and where no other

remedy would suffice. Without the participation of both parties in the trial, there is a risk that the court will not have enough accurate information to reach a just result.

[27] In coming to my decision, I should also consider the explanation for the failure to produce the undertakings and whether that was by inadvertence. I should consider whether the motion was brought promptly and whether the defendants have suffered prejudice by the plaintiff's failure to comply with the orders.

[28] In *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, Sharpe, J.A. said:

> 19 Time lines prescribed by the *Rules of Civil Procedure* or imposed by judicial orders should be complied with. Failure to enforce rules and orders undermines public confidence in the capacity of the justice system to process disputes fairly and efficiently. On the other hand, procedural rules are the servants of justice not its master. We must allow some latitude for unexpected and unusual contingencies that make it difficult or impossible for a party to comply. ...
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> 20 The challenge posed in cases involving dismissal for delay is to find the right balance between, on the one hand, the need to ensure that the rules are enforced to ensure timely and efficient justice and, on the other, the need to ensure sufficient flexibility to allow parties able to provide a reasonable explanation for failing to comply with the rules to have their disputes decided on the merits.
>
> ...

> 32 Actual prejudice or the lack thereof is an important factor to consider in cases of dismissal for delay: *Hamilton*, at para. 33. However, it is certainly not the law that an action cannot be dismissed for delay at a rule 48.14 status hearing without proof of actual prejudice. The status hearing judge applied the test as stated by this court in *Khan v. Sun Life Assurance*, 2011 ONCA 650, [2011] O.J. No. 4590, at para. 1: "the appellant [plaintiff] bore the burden of demonstrating that there was an acceptable explanation for the involved litigation delay and that, if the action was allowed to proceed, the respondent [defendant] would suffer no non-compensable prejudice". The test is conjunctive, not disjunctive. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. And if the plaintiff is not able to provide a satisfactory explanation for the delay, it is still open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant.
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> 33 As I have noted, the goal of the civil justice system is ensure "the just, most expeditious and least expensive determination of every civil proceeding on its merits". Consideration of actual prejudice focuses on the just determination of the dispute on its merits. The absence of actual prejudice does not automatically or inevitably trump the values of timeliness and efficiency. At some point, a party who has failed to respect the rules designed to ensure timely and efficient justice loses the right to have its dispute decided on the merits. If that were not the case, the rules and the time lines they impose would cease to have any meaning and any hope of ensuring timely and efficient justice would be seriously jeopardized.

[29] I note that rule 4.01(7) of the Law Society of Upper Canada's *Rules of Professional Conduct* states that a lawyer shall *strictly and scrupulously* carry out an undertaking to another legal practitioner in the course of litigation. The Advocate Society's *Principles of Professionalism for Advocates* recommends that an undertaking should also be fulfilled *as promptly as circumstances*

permit. And the Canadian Bar Association's *Code of Professional Conduct*, states that an undertaking given by the lawyer to another lawyer in the course of litigation or other adversary proceedings must be *strictly and scrupulously* carried out.

[30] Finally, rule 39.01(6) of the *Rules of Civil Procedure* states that where a motion is made without notice, the moving party shall make full and fair disclosure of all material facts, and failure to do so is, in itself, sufficient ground for setting aside any order obtained on the motion.

POSITION OF THE PLAINTIFF

[31] The plaintiff submits the material before Murray J. was not full, frank and fair disclosure of all of the material facts. As a result, the order should be set aside. The material placed before Murray J. on the ex-parte application submitted that there were 23 outstanding undertakings. However, the plaintiff says that there were seven outstanding undertakings, three partially answered undertakings and two ongoing undertakings. The plaintiff therefore submits that the defendants were not full, frank and fair with Murray J.

[32] The plaintiff also states that the defendants must show noncompliance rising to the point of potential or actual prejudice before I should dismiss the motion. The plaintiff submits that such prejudice has not been shown.

POSITION OF THE DEFENDANTS

[33] The defendants submit that this motion was not brought forthwith. They submit that the plaintiff must establish that had the motion been brought with notice and if he had been given the opportunity to respond to the motion, he would have been able to provide evidence that would have altered the outcome of the motion. While agreeing that mistakenly incorrect information was put before Murray J., the defendants submit that given the admitted state of the undertakings and costs orders, the degree to which the undertakings had not been complied with was not a material fact before Murray J.

ANALYSIS

[34] In my view, the motion should be dismissed.

[35] Justice Murray's order was provided to plaintiff's counsel three days after it was obtained. There is no explanation why plaintiff's counsel did not review it until sometime in September 2012. There is no satisfactory explanation as to why the motion was not brought until December 2012. While

I might not dismiss this motion on this ground alone, the motion was not brought forthwith as required by the rule 37.14(1).

[36] While the motion to dismiss was brought without notice as allowed by Wein J., it must be kept in mind that this was not entirely without notice to plaintiff's counsel. He was in attendance when Justice Wein's order was made. This situation must not be confused with a motion such as an interim injunction brought and heard before the defendant is even aware that an action has been commenced. The plaintiff knew exactly what should be done and by when to avoid the motion.

[37] In his affidavit and factum, the plaintiff submits that:

> "[G]iven [plaintiff counsel's] ongoing best efforts to provide and request outstanding undertakings, [plaintiff's counsel] did not anticipate that the Defendants would pursue this matter so aggressively and demand strict compliance. Most importantly, [plaintiff's counsel] did not anticipate that [defendants' counsel] would bring an ex-parte motion to strike the plaintiff's claim so soon following Justice Wein's order. Had [plaintiff's counsel] some notification of [defendant's counsel]'s intention to proceed with a Motion to strike the Plaintiff's claim, he would have undertaken all possible efforts to pay the costs award (which he believed would not be enforced) and deal with the outstanding undertakings on an urgent basis."

[38] I do not accept this submission. The defendants had been prodding the plaintiff with correspondence before the motions were brought. Two motions had been successfully argued and substantial costs were ordered.

Despite the defendants' clear intention and the court's clear orders, there is no reason why the plaintiff would not have undertaken all possible efforts to pay the costs and deal with the outstanding undertakings on an urgent basis. This is not a reasonable explanation for inadvertent error or technical non-compliance with the rules or orders.

[39] I do not accept that the motion should be granted because no prejudice was shown. Given the failure to provide a reasonable explanation, prejudice is less of a factor. Even so, I am satisfied that there was some prejudice to the defendants for the following reasons.

[40] The plaintiff's admitted list of outstanding undertakings included the requests that he provide:

(1) whether he intended to obtain any expert opinions;

(2) the plaintiff's business registration and confirm when the plaintiff started his business; and

(3) whether the results of the accident benefits testing was a proper assessment of the plaintiff's ability to move.

[41] There were also rather simple undertakings such as to advise whether the plaintiff experienced any pain in his lower back while working in

construction or at all prior to the accident and to advise if the plaintiff was aware of a significant economic downturn in 2008.

[42] The first three are significant undertakings to allow the defendants to properly respond to the claim. A failure to deal with expert evidence until almost five years after the accident will likely significantly delay the proceedings. The latter two undertakings would provide the defendants with necessary background information to accurately assess the claim. They also suggest an inattention to the file by the plaintiff himself.

[43] There is no responding affidavit from the plaintiff but his counsel sets out a number of letters sent to his client to respond to the undertakings even as late as May 2012. A lawyer's errors should not be visited upon the client; however, it appears that Mr. Zuk was involved in this failure to provide undertakings in a timely fashion, even after an order to do so. In any event, Mr. Zuk may have his own remedy against his lawyer if he is blameless.

[44] There is nothing in the material filed by the plaintiff that would suggest that he would have been any more successful in front of Murray J. with the material that he now puts before this court. The undertakings were not completed; the costs were blithely ignored. Counsel had already been provided with two opportunities to extend the time for compliance and he failed

to meet them. Indeed, using his own words, he could and should "have undertaken all possible efforts to pay the costs award and deal with the outstanding undertakings on an urgent basis." Given those circumstances, the difference in the number of outstanding undertakings is not material.

[45] Before dismissing an action or striking pleadings, the court should consider other alternate or less extreme remedies. Faced with this particular lawyer's response to the outstanding orders, I can think of no other remedy. There is no suggestion that the failure to comply was inadvertent; plaintiff's counsel is simply saying that he could have complied if he chose to but did not. On this record, any other order would not address the interests of the defendants in moving this matter forward and encouraging compliance with orders.

[46] On a regular basis in the courts across Ontario, motions are filed to require counsel to live up to their undertakings. Time after time, they are resolved on the morning of the motion by a consent to extend the time for compliance with or without costs. Invariably the motion records are thick and correspondingly expensive. If counsel would simply comply with their undertakings as and when they are given, those motions would not be necessary and that time and money would not be wasted. While I hope that I

see a distorted picture based only on the cases that come before me, there appears to be a culture in civil litigation that undertakings will be given at examinations but only complied with when pressed by the other side with letters, motions that are threatened or motions that are brought. That culture should come to an end; it should not be encouraged by granting orders such as requested in this case.

RESULT

[47] Accordingly, the motion is dismissed.

[48] If the parties cannot agree on costs, written submissions may be made to me. The defendants shall provide their costs submissions within 15 days of the date of release of this endorsement and the plaintiff shall respond within 15 days thereafter. Those submissions shall be no more than three pages not including any offers to settle or bills of costs.

Lemon, J.

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Frank Delgiudice, for the Defendants

ENDORSEMENT

Lemon, J

DATE: July 08, 2014