CITATION: Frances v. TTC Insurance Company, 2020 ONSC6495
COURT FILE NO.: CV-10-395662
DATE: October 24, 2020

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Helen Frances v. TTC Insurance Company, Toronto Transit Commission, Paul Manherz, Peter Ashbourne, Julie Stafford, John Doe, Faruk Hatia and The Toronto Police Services Board;

BEFORE: **MASTER C. WIEBE**

COUNSEL: Jillian Van Allen for Helen Frances;
Daniel Styler for TTC Insurance Company ("TTCIC"), Toronto Transit Commission ("TTC"), Paul Manherz, Peter Ashbourne, Julie Stafford and Faruk Hatia;
David A. Gourley for The Toronto Police Services Board ("TPSB").

HEARD: September 17, 2020.

REASONS FOR DECISION

[1] The plaintiff, Helen Frances, commenced this motion in late February, 2020, close to the expiration of the deadline in the fifth timetable order for setting this action down for trial. The motion seeks two kinds of relief. One is for an extension of the set down deadline and a sixth new timetable order, which I will call the "Schedule Issues." A failure of this motion will result in a dismissal of this action pursuant to Rule 48.14.

[2] The other requested relief concerns discovery undertakings, discovery refusals, reattendance at further discoveries and the production of persons at discovery, which I will call the "Discovery Issues." I was assigned this motion on February 25, 2020 and convened a case conference on March 2, 2020, where I set a schedule that contemplated the motion argument in person on July 14, 2020.

[3] The COVID-19 pandemic interrupted court operations starting in mid-March, 2020. Ms. Van Allen, LawPro counsel for the plaintiff's lawyer, Adam Romain, was brought in to represent Ms. Frances on the Schedule Issues, not the Discovery Issues. I was advised by email on June 24, 2020 that the motion schedule could not as a result be met by the plaintiff and that a new schedule was necessary.

[4] I convened another case conference on July 2, 2020, and with the concurrence of the parties bifurcated the motion, requiring that the Schedule Issues to be dealt with first and the Discovery Issues later if this action survived. I set a schedule for a videoconference hearing of the Schedule Issues on September 17, 2020.

Background

[5] The following facts do not appear to be in dispute.

[6] On December 18, 2005 Ms. Frances boarded a bus. The parties disagree as to what happened. Ms. Frances alleges that she was injured in an accident on a Toronto Transit Commission ("TTC") bus. The defendants allege that she was not so injured. On March 16 and 20, 2006, Ms. Frances, through her lawyer, filed a claim with the TTC and made an application for accident benefits from the TTC accident benefits insurer, the TTC Insurance Company.

[7] The TTC investigated the claim. Peter Ashbourne was the adjuster who investigated the claim. He examined Ms. Frances under oath. She identified the bus driver, Mr. Hatia, and a witness she said witnessed the event, Ms. Jelyn Pinor. Mr. Ashbourne interviewed Mr. Faruk who recalled that Ms. Frances fell outside of his bus.

[8] On June 6, 2006 Mr. Ashbourne interviewed Ms. Pinor, who said that Ms. Frances fell outside of the bus and then asked her to confirm Ms. Frances' version in return for Ms. Frances' promise to share equally any recovery from the TTC with Ms. Pinor. In November, 2006 Ms. Frances replaced her lawyer with Mr. Romain.

[9] Based on the evidence of Ms. Pinor and Mr. Faruk, Mr. Ashbourne advised the TTC accident benefits adjuster, Julie Stafford, that there were grounds for a criminal fraud charge. The TTC Special Constable, Paul Manherz, was engaged and he initiated the process that led to the laying of charges of criminal fraud against Ms. Frances on April 4, 2007. These charges were, however, withdrawn on January 25, 2008.

[10] On March 28, 2008 the TTC sued Ms. Frances for damages of $50,000 due to alleged fraudulent misrepresentation concerning her accident benefits application. In September, 2009 the TTC delivered an affidavit of documents and productions in that action.

[11] On January 25, 2010 Ms. Frances started this action, suing the defendants for $7 million in damages, namely for unpaid accident benefits, tort damages and damages for malicious prosecution. The parties agreed to allow the TTC action to lapse and have the TTC claim asserted as a counterclaim in the Frances action.

[12] On May 10, 2010 the Toronto Police Services Board ("TPSB") requested an indulgence in delivering its statement of defence which was granted. The defendants other than the TTPSB (the "TTC Defendants") delivered their statement of defence and counterclaim on July 12, 2010. The counterclaim mirrored the claim in the TTC action. The damage claim was increased to $150,000. On August 4, 2010, Ms. Frances delivered her defence to this counterclaim.

[13] Nothing happened for the next 22 months. On July 16, 2012 a status notice was delivered. The parties agreed to a timetable order which included a set down deadline of August 31, 2013. Master Muir signed that order on August 23, 2012 ("the First Timetable Order").

[14] Ms. Frances delivered her affidavit of documents on August 1, 2012 and her productions on December 20, 2012.

[15] The discovery of Mr. Faruk proceeded on December 17, 2012 despite the absence of the defendant productions. The other TTC defendants were not available at that time. In May, 2013 the discoveries of the remaining TTC Defendants and Ms. Frances were scheduled for October, 2013.

[16] On June 18, 2013 the TTC Defendants delivered their affidavit of documents and productions. This was almost three years after their pleading.

[17] In June, 2013 the parties consented to a second timetable order which required that the action be set down for trial by September 30, 2014. On September 4, 2013 Master Muir signed this order (the "Second Timetable Order").

[18] The discovery of the TTC Defendants resumed on October 1, 2013 with the discovery of Mr. Ashbourne. This discovery continued into October 2, 2013. There is a dispute as to whether the Ashbourne discovery was terminated prematurely.

[19] The TPSB delivered its statement of defence on December 23, 2013. This is when pleadings were officially closed.

[20] Nothing further happened for almost a year. On September 23, 2014 Mr. Romain wrote seeking answers to undertaking. On September 29, 2014 he served a notice of motion for a motion returnable March 23, 2015 for an order for a further and better affidavit of documents from the TTC Defendants and relief concerning the Ashbourne discovery. The set down deadline of September 30, 2014 passed without any dismissal order.

[21] The TPSB served its affidavit of documents and productions on February 12, 2015. The Frances motion record was served on February 24, 2015. The Frances motion was then adjourned on consent to July 23, 2015 and then to November 13, 2015.

[22] On March 2, 2015 the TTC Defendants delivered a further and better affidavit of documents and answers to undertakings given by Mr. Ashbourne.

[23] On November 13, 2015 Master Abrams issued a ruling requiring further production from the TTC Defendants by a certain deadline. There is a disagreement was to whether these defendants have complied with this ruling. On consent, Master Abrams issued another timetable order specifying a set down deadline of January 31, 2017 (the "Third Timetable Order").

[24] On November 24, 2015 Mr. Gourlay wrote to the other counsel confirming the TTC's admission that it is responsible for Officer Manherz and seeking a dismissal as against the TPSB.

[25] In late March, 2016, four months after the Abrams order, Mr. Romain started correspondence concerning the scheduling of further discoveries and a mediation. None, however, were scheduled. On September 1, 2016 Mr. Romain's office advised that the plaintiff would not proceed with discoveries until the Abrams order was complied with.

[26] On August 10, 2016 the TTC Defendants delivered further documents. On October 19, 2016 the TTC Defendants delivered answers to undertakings given by Mr. Hatia and Mr. Ashbourne. On October 24, 2016 the TTC Defendants delivered two further and better affidavits of

documents and one new affidavit of documents. These affidavits itemized the documents delivered 2 ½ months earlier.

[27] There was further correspondence about scheduling discoveries. Again, none were scheduled. In late January, 2017 Mr. Romain advised that he would be taking a short leave of 2 ½ months starting in mid-May, 2017 on account of his first born child.

[28] In January, 2017 a dismissal notice was delivered. The parties agreed to a consent new timetable order. On March 1, 2017 Master Graham issued that consent order specifying a new set down deadline of February 28, 2018 (the "Fourth Timetable Order").

[29] Nothing further happened in this matter in 2017 and early 2018. Mr. Romain's parental leave extended well beyond 2 ½ months, namely until September, 2017. On February 16, 2018 Mr. Romain's office wrote asking for a consent to another timetable order. That consent was given.

[30] On April 17, 2018 Master Muir signed another consent timetable order ("the Fifth Timetable Order") imposing deadlines including a discovery deadline of December 31, 2018 and a set down deadline of February 28, 2020.

[31] The TTC Defendants counsel wrote proposing discovery dates in May, 2018. There was no response. On May 30, 2018 senior counsel, Chad Townsend, took over carriage of this file for the TTC Defendants. Mr. Townsend wrote on two occasions seeking to schedule discoveries, all without response. Finally, on September 21, 2018 Mr. Romain's assistant wrote advising that Mr. Romain was away at trial in October and November, 2018. On November 15, 2018 Mr. Townsend wrote back blaming the plaintiff for delaying the action and advising that his client was prepared to give the plaintiff "one last chance."

[32] Eventually, discoveries were scheduled to take place on April 30 and May 1, 2019. Mr. Townsend wrote several emails to Mr. Romain from February 11, 2019 to April 18, 2019 seeking to create a more detailed discovery plan. On April 24, 2019 Mr. Romain responded by email stating that he could not get instructions because he had lost contact with Ms. Frances. The discoveries did not take place on April 30 and May 1, 2019 because Mr Romain became ill at the last minute. The discoveries were re-scheduled to take place on October 21 and 23, 2019.

[33] The discovery of Mr. Ashbourne resumed on October 21, 2019 and was terminated. Mr. Cerqueira representing the insurer was then discovered. Mr. Manherz was discovered on October 23, 2019 but this discovery also was terminated. Ms. Stafford was not available because she was ill. Mr. Romain refused to produce Ms. Frances relying on an apparent agreement that the defendants would be discovered first.

[34] On October 30, 2019 Mr. Romain wrote advising that he was bringing another discovery motion, this time to force Mr. Manherz to reattend at discovery. Mr. Townsend wrote on December 6, 2019 suggesting ways to move forward. Two months later, on February 24, 2020, Mr. Romain filed a requisition for this motion.

Explanation for delay

[35] This is in effect a status hearing motion under Rule 48.13(6) and (7) as there has been no agreement concerning a Sixth Timetable Order. At such a hearing, the plaintiff must show cause why the action should not be dismissed for delay. The court may dismiss the action for delay, or, if the court is satisfied that the action should proceed, set a schedule for the remaining steps necessary to have the action set down for trial.

[36] It is well established, that in such a status hearing the onus rests on the plaintiff to establish both of the following: (1) an acceptable explanation for the delay; and (2) the defendant will not suffer non-compensable prejudice if the action proceeds; see *Faris v. Eftimovski,* 2013 ONCA 360 (Ont. C.A.) at paragraph 32.

[37] I will deal with the first part of the test, the explanation for the delay. Ms. Van Allen conceded that there were several instances when the plaintiff delayed matters. Mr. Styler highlighted five major instances of plaintiff delay.

[38] First, there was the 22 months from the delivery of the plaintiff's defence to counterclaim on August 10, 2010 to the delivery of the status notice on July 16, 2012. I accept Mr. Styler's point about not believing Mr. Romain's primary explanation in his affidavit, namely the explanation that he believed that the lawyer for the TTC Defendants was ill and that carriage was being transferred. There is no evidence that the TTC Defendants ever informed Mr. Romain in this regard. In fact, the evidence shows that the TTC lawyer with carriage only became ill in 2012. As to Mr. Romain's other explanation, namely that he had trials in other matters that occupied his time, this turned out to be a repeated explanation for delay with no corroboration. Furthermore, this explanation begs the question about the priority Mr. Romain gave to this file. As to his other explanation, namely the family tragedy, there was again no corroboration. As to his final explanation, namely the alleged working out of responsibility for Mr. Manherz between the TTC and TPSB, there was again no corroboration. I also fail to understand how that could have justified delay even if it were the case.

[39] Second, there was the 12-month period from October 2, 2013, the completion of the October, 2013 discoveries, to September 29, 2014, when Mr. Romain delivered a notice of motion for discovery related relief. The plaintiff did nothing during this time, despite the requirement in the Second Timetable Order to have discoveries done during this time. At his cross-examination, Mr. Romain stated that he had a jury trial and a "mountain of work" in other matters. Again, there was no corroboration for this assertion. I reiterate my earlier point that this just begs the question about whether Mr. Romain gave sufficient priority to the within file.

[40] Third, there was the period from March 1, 2017, the date of Master Graham's Fourth Timetable Order, to February 16, 2018, when Mr. Romain's office wrote seeking consent to yet another timetable order. Nothing was done during this time. Mr. Romain's explanation was he was on parental leave with his first child. He gave notice of this leave to the defendants in January, 2017, but the leave lasted much longer than expected due to complications with the child birth. This explanation was not seriously questioned by the defendants and I accept it.

[41] Fourth, after the Fifth Timetable Order of April 17, 2018, TTC counsel wrote to Mr. Romain several times seeking a discovery schedule. There was no response until September 21, 2018, when Mr. Romain's office wrote advising that Mr. Romain was occupied with a trial from October to December, 2018 and, therefore, could not offer dates. Under the Fifth Timetable Order, discoveries were to be completed by December 31, 2018. The discoveries were eventually scheduled to resume on April 30 and May 1, 2019 and were adjourned due to Mr. Romain's illness to dates in late October, 2019.

[42] In cross-examination Mr. Romain admitted that he had a trial scheduled for the spring of 2018 that was adjourned to the fall, 2018. When asked why he had not reached out to Mr. Townsend to schedule discoveries in the spring of 2018, namely 1 ½ years before they in fact took place, Mr. Romain stated that he "understood" that the TTC Defendants were unavailable in the spring of 2018 as Mr. Townsend had proposed only fall dates. He never confirmed that "understanding" with Mr. Townsend. Given the requirements and criticality of the Fifth Timetable Order, this conduct shows Mr. Romain's lack of genuine commitment to meeting the timetable and moving this case forward.

[43] Fifth, on December 6, 2019 Mr. Townsend wrote to Mr. Romain advising of ways to move this case forward expeditiously. Mr. Romain did not respond for two months. This despite the fact that it was now the eve of the fifth set down deadline of February 28, 2020. At his cross-examination, Mr. Romain explained this two-month delay in response as the result of yet another trial in yet another matter. Again, no corroboration. Again, this answer just begs the question as to whether Mr. Romain gave sufficient priority to the within matter.

[44] Therefore, on balance, Mr. Romain did not give an acceptable explanation for four out of the five major instances of delay by Ms. Frances. But that does not end the matter.

[45] Ms. Van Allen made the persuasive argument that the existence of the counterclaim of the TTC Defendants negated these considerations. It is undisputed that this counterclaim in this case concerns the very issues that are the subject matter of Ms. Frances' claim. Both concern the question of whether Ms. Frances suffered an accident on the TTC bus and the damages that flow from that accident, or whether this accident was a fabrication by her and the damages that flow from that fabrication. There is strong authority for the proposition that it is not in the interest of justice to dismiss an action for delay where there is such a counterclaim that is so closely linked to the action. In *Samuels v. Mai*, 2020 ONCA 408 at paragraphs 37 and 38, the Court of Appeal stated the following:

> In *Cardon Developments Ltd. et al. v. Butterfield,* 1999 BCCA 642, 131 B.C.A.C. 197 at para. 5, Southin J.A. set aside an order dismissing a claim for delay because a counterclaim that arose out of the same events remained. Since the claim and counterclaim were "inextricably wound up one with the other" and the defendants were planning on proceeding on the counterclaim, the interests of justice would not be properly served if the claim was not permitted to proceed.
>
> As in *Cardon,* it was not in the interest of justice to dismiss the appellant's claim while allowing the respondents to litigate the very same issues in their counterclaim. The order did not promote the timely and efficient resolution of the proceeding. While the claim and counterclaim were well past their "best before" dates, neither party had displayed any diligence in moving the proceeding forward

> and there was no evidence of prejudice. When the litigation was finally ready for determination, the motion judge erred in failing to consider the fact that dismissing the claim would leave the counterclaim outstanding, exposing the appellant to liability in relation to the same issue he was litigating.

[46] Based on this strong authority, I find that the inadequacies in the plaintiff's explanation for her delays are negated by the reality of the TTC counterclaim. Dismissing Ms. Frances' claim would leave her exposed to liability on the TTC counterclaim in relation to the same issues that are in her claim and would also leave her without recourse should she succeed. This is simply not fair and cannot be countenanced. All this, as indicated in *Samuels*, is subject to the issue of prejudice, about which I will have more to say.

[47] Mr. Styler responded to this point by arguing in his factum and orally that the TTC Defendants were really nothing but "defendants" in this litigation. He argued that the TTC Defendants never actively pursued their counterclaim. He said that his clients never proposed any of the timetables and never took steps to avoid dismissal orders. He even went so far as to propose a dismissal of the counterclaim along with a dismissal of the Frances claim. In the factum, he stated the following in paragraph 38: "The TTC Defendants do not disagree and would not take issue with its counterclaim being dismissed along with the Plaintiff's claim."

[48] I find this position lacking in credibility and unfair. The TTC Defendants were the ones who commenced the criminal and civil proceedings that predated this action and that led to this action. The TTC civil proceeding was in effect joined to this action by way of the counterclaim (with a higher damage claim) when this action commenced in 2010. It is fair to say that Ms. Frances' claim of malicious prosecution stems from these earlier TTC initiated proceedings. I was not made aware of any evidence that the TTC Defendants at any time in the over ten years of this action contemplated or proposed abandoning their counterclaim. Most importantly, Mr. Styler's statement does not come from any evidence from his clients. Therefore, I do not accept that this is the position of the TTC Defendants. Also, to now suddenly suggest in a responding factum that the counterclaim be dismissed with the claim to bolster the position of the TTC Defendants on this motion, is self-serving and unfair and not to be countenanced. I do not accept that position.

[49] This leads to another point. Dilatory conduct of a plaintiff-by-counterclaim should assist the plaintiff in explaining delays in the prosecution of the claim. As plaintiffs, the TTC Defendants had a responsibility to move the counterclaim forward and did not do so. Mr. Styler objected to this proposition but provided no authority in support of this objection.

[50] That the TTC Defendants were dilatory is now not really in issue. I would only add other observations to what Mr. Styler has admitted. It took almost three years for the TTC Defendants to deliver an affidavit of documents. It took 1 ½ years for the TTC Defendants to deliver some answers to discovery undertakings and further and better affidavits of documents. These further and better affidavits of documents also confirmed that the initial affidavit of documents was inadequate. It took a motion and another year for the TTC Defendants to deliver further answers to undertakings and other documents. These delays were compounded by the delays of the TPSB, who took 3 ½ years to deliver a defence and another 1 ½ years to deliver an affidavit of documents. It was no doubt on account of these delays that all of the parties, including all of defendants, readily

consented to the first five timetable orders. As in *Samuels*, neither party displayed diligence in moving this proceeding forward. The defendants' unacceptable delays ameliorate the result of Ms. Frances unacceptably explained delays.

Prejudice

[51] On the issue of prejudice, there are certain principles to be kept in mind. The question of prejudice is a factual issue and Ms. Frances bears the onus of demonstrating that the TTC Defendants would suffer no non-compensable prejudice if the action was allowed to proceed; see *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592 (Ont. C.A.) at paragraph 49. The mere passage of time does not create an insurmountable hurdle in determining prejudice; see *Carioca* at paragraph 49.

[52] The conduct of the defendants can be considered. While the TTC Defendants are not obligated to present evidence of actual prejudice, the court is entitled to consider their conduct in light of their assertions of prejudice; see *Carioca* at paragraph 50. The court can consider whether the defendant's conduct is consistent with its assertion of prejudice; see *MDM Plastics Limited v. Vincor International Inc.*, 2015 ONCA 28 (Ont. C.A.) at paragraph 33. A defendant cannot create the prejudice that would otherwise justify a dismissal order. In discussing the issue of whether to extend the time to deliver a statement of claim and the defendant's assertions of prejudice, Justice Laskin of the Court of Appeal in *Chiarelli v. Wiens*, 2000 CanLII 3904 (Ont. C.A.) at paragraph 15 made the following statement that I think also applies to the discussion of prejudice in a status hearing motion: ". . . the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done."

[53] In applying these principles, Ms. Van Allen made a persuasive argument that the TTC Defendants will not be prejudiced if the action continues, at least not by the actions or inactions of Ms. Frances.

[54] First, much of the critical evidence, at least as to liability, rests with three witnesses, Ms. Frances, bus driver Hatia, and Ms. Pinor. There was no evidence that these witnesses have died or become incapable of giving evidence. Furthermore, while there has been a significant passage of time and while I acknowledge that memories fade with time, there are ways in which these witnesses can refresh their memories. TTC Defendants conducted an extensive investigation of the incident in 2006. There is an Occurrence Report from Mr. Hatia that the TTC Defendants have refused to produce; there is Mr. Hatia's handwritten statement about and diagram of the accident that he prepared in May, 2006; there is the transcript of the Examination under Oath that was conducted of Ms. Frances on April 21, 2006; there is the transcribed oral statement given by Ms. Pinor on June 6, 2006; there is the surveillance that was conducted in 2006 and 2008 and the photographs of a TTC bus that were taken on May 17, 2006. These documents should assist the witnesses in refreshing their memories.

[55] Second, Mr. Styler made much of the fact that the TTC Defendants have lost touch with Ms. Pinor. Indeed, Mr. Townsend admitted in cross-examination that these defendants made no effort to stay in contact with Ms. Pinor after they obtained her statement on June 6, 2006 over fourteen years ago. The TTC Defendants argue that this inability to contact Ms. Frances should be viewed as

a failure by the plaintiff to show that the TTC Defendants will not suffer non-compensable prejudice if the case continues.

[56] I do not agree. Based on her June 6, 2006 statement, Ms. Pinor is clearly a critical witness for the TTC Defendants, not Ms. Frances. That these defendants did not stay in contact with Ms. Pinor shows in my view that they caused this prejudice, not Ms. Frances. Furthermore, I agree with Ms. Van Allen that the refusal of the TTC Defendants to produce the Pinor OHIP card, the last known address for Ms. Pinor in their possession, and the instructions they gave to their skip tracer when they recently finally started looking for Ms. Pinor all seems suspicious. This behavior suggests that the TTC Defendants know more about the whereabouts of Ms. Pinor than they admit to.

[57] Third, Mr. Styler made much of the absence of medical records from Ms. Frances' family physician, Dr. Betty Choi-Fung. In particular, the complaint is about the absence of these medical records for the period December 18, 2000, which is five years prior to the accident, to February 3, 2010, when Mr. Romain began making requests for these records. After this action was commenced in January, 2010, Mr. Romain made several requests for records from Dr. Choi-Fung, and records have been obtained for the period subsequent to February, 2010. I accept that the absence of the earlier records is critical to the issues of causation and damages. It appears that obtaining these records now may be impossible given the document retention regulations that govern the medical profession.

[58] However, I also accept Ms. Van Allen's argument that this is another example in part of self-inflicted prejudice. She pointed out that, as the statutory accident benefits insurer, the TTC Insurance Company could have requested that Ms. Frances complete a Permission to Disclose Health Information form in 2006 when Ms. Frances filed her accident benefits claim. Using this form the insurer could have obtained the records in question from Dr. Choi-Fung. The TTC Defendants could also have brought a Rule 31.10 motion for third party production after this action commenced.

[59] Mr. Styler did not dispute the existence of the accident benefits insurer disclosure form for obtaining the medical documents. He argued, however, that this process would not have led to the production of all the necessary pre-accident records. There was no evidence to corroborate this point. He also argued that Ms. Frances may not have agreed to this disclosure. This is speculation which I doubt, as Ms. Frances would probably have cooperated in establishing her claim.

[60] Mr. Styler finally argued that the existence and lack of use of the disclosure form did not negate the obligation of the plaintiff to show that the TTC Defendants will suffer no non-compensable prejudice if the action continues. I disagree. First, while it is highly unlikely that the documents still exist, that fact has not apparently been confirmed. Second, if the documents are gone, the behavior of the TTC Defendants must again be considered. These documents are important to both parties concerning the issues of causation and damages. As a result, I find that both parties are culpable in this failure of production. Mr. Romain waited too long to make inquiries and then did not pursue the issue more aggressively. The TTC Defendants could have independently obtained these records quite early as indicated above and did not do so. They also did not pursue these documents when this action was underway. Therefore, I find that the issue of Dr. Choi-Fung's records is not determinative of the outcome of this motion.

[61] Fourth, there is another issue concerning witnesses. There are in the documentation hospital records concerning Ms. Frances' accident. There is an Ambulance Call Report which was filled out by paramedics who attended to Ms. Frances on December 19, 2005. It indicates that Ms. Frances was suffering from a week-long history of right knee pain prior to the incident. There is information from a triage nurse which also indicates that Ms. Frances was suffering from a week-long history of knee pain prior to the incident. There is an emergency record from an emergency room doctor, a Dr. Jim Chung, that suggests that Ms. Frances may have twisted her knee getting onto the bus, which would contradict Ms. Frances' version of the incident. Mr. Styler stated that the TTC Defendants do not know whether these witnesses are alive or have capacity to testify, and whether the plaintiff will agree to the admission of these records in any event. He argued that the plaintiff should have found these witnesses in order to meet her onus on this motion and did not.

[62] I place this evidence in the same category as the evidence concerning Ms. Pinor. The evidence of these medical professionals appears to favour the TTC Defendants, not Ms. Frances. Therefore, the fact that the TTC Defendants made no effort to obtain the pretrial evidence of these witnesses (such as pursuant to Rule 36.01) redounds to their disfavor on this motion. This, again, is self-inflicted prejudice. That is, if there is any prejudice at all, as there was no evidence that these records will not be admitted at trial in any event. Finally, the probative value of this oral evidence seems limited beyond confirming the authenticity and admissibility of the documents. These witnesses will probably rely entirely on the contents of the documents for their evidence.

[63] There is another point to be made. The fact that the defendants consented to five timetable orders in the course of the ten years of this action is conduct that is not consistent with an assertion of prejudice. This must also be taken into consideration.

[64] I have, therefore, concluded that Ms. Frances has met her onus of showing that the TTC Defendants would not suffer non-compensable prejudice on account of her actions or inactions if this action continues. She has done so by showing that the dimming of memories of key witnesses from the passage of time can be minimized, and that these defendants were the primary cause of, or significant contributor to, any other prejudice they identified.

Plan going forward

[65] In *Donskoy v. Toronto Transit Commission,*2008 CanLII 47020 (Ont. Div. Crt.) at paragraphs 13-14 the Divisional Court indicated that the sufficiency of the plaintiff's plan to move this action forward is a consideration at a status hearing. I find that this is particularly the case where, as here, there have been five timetable orders that have not been complied with, and where, as I have found in this case, the plaintiff has failed to acceptably explain four out of the five major instances of her delay in this action. Ms. Frances herself filed an affidavit in which she swore that she always intended to proceed with this action. This affidavit is not a plan of action.

[66] Mr. Styler rightfully pointed out that not only is there no plan in the plaintiff's motion material, Mr Romain refused to elucidate his plan in his cross-examination. He refused to answer questions about how long he expects to be in his discoveries of the defendants. Her refused to answer questions about his plans concerning the motion on the Discovery Issues. Mr. Romain has indicated that he intends to take a second paternity leave this fall. But he refused to answer questions

about when this leave will commence and when it will come to an end. He refused to answer questions as to when he expected to get this case to trial. He indicated that again he has many upcoming trials in other matters, but he did not say more on this subject.

[67] I found this lack of a plan quite troubling given the plaintiff's history of inadequately explained delay. If the plaintiff is to be given a "second chance," the court must have some level of confidence that this time the timetable will be complied with.

[68] I grilled Ms. Van Allen on this subject. In the end, she agreed with two propositions I put to her, namely that the deadlines I impose in my timetable order could be made peremptory on the parties, and that I require that the plaintiff be discovered next, regardless of the state of the discovery of the defendants.

[69] Given my earlier discussion about delay explanation and prejudice, I will not dismiss this action despite this egregious lack of a go-forward plan of action. I have instead decided to exercise my discretion to give the plaintiff a second chance. In doing so, however, I will impose a plan that should insure that this time the action will be set down within the timetable. This plan has the following features:

a) Ms. Frances must be discovered next regardless of the state of the discovery of and production from the defendants;

b) The discovery of Ms. Frances must take place on or before January 31, 2021;

c) Ms. Frances must comply with her discovery undertakings within sixty days from the date they are given;

d) There must be a mediation on or before June 30, 2021;

e) This action must be set down for trial (by either side) on or before October 31, 2021;

f) The deadlines for the completion of the discoveries of the TTC Defendants will be set in the motion concerning the Discovery Issues;

g) All of these deadlines (including the deadlines that will be set in the motion concerning the Discovery Issues) will be peremptory to both sides and can be changed only by the court by way of motion brought to me on short notice electronically, at which motion the party seeking the change must explain the reason for the requested change in detail and show that this action will still be set down for trial on or before October 31, 2021 or as soon as possible thereafter;

h) If these deadlines are not complied with, either side can bring a motion on short notice before me electronically to have the action and counterclaim stayed or dismissed or any of the defences struck for non-compliance with an interlocutory court order and delay.

[70] This plan should enable the TTC Defendants to set this action down for trial within the above noted timetable, if the plaintiff does not do so. I will not dismiss the action, but I do order the above noted terms going forward.

Motion to strike affidavit paragraphs

[71] Ms. Van Allen also brought a motion to have certain paragraphs of the responding affidavit of Mr. Townsend sworn July 21, 2020 struck. She attacked affidavit paragraphs 22, 23, 24, 31, 33, 34, 35, 44, 45, 51, 52, 54, 60, 62, 66, 69, 80, 83, 84, 90, 99, 100, 102, 109, 120, 128, 130, 134, 135 and 136. The basis for her attack is that, according to her, Mr. Townsend expressed his opinion on the issues in this motion in these paragraphs, and the lawyer of record for a party cannot do this.

[72] Due to my decision on the substance of the motion, I have decided not to address this collateral motion. It is not necessary to do so. Ms. Frances succeeded in getting another timetable order which is what she wanted. She achieved this result despite the impugned paragraphs in Mr. Townsend's affidavit.

Costs

[73] Ms. Van Allen stated at the end of the argument that the plaintiff is not seeking costs of this motion.

[74] I allowed the defendants to serve and file a costs outline late. The TTC Defendants emailed a costs outline to the court on September 18, 2020. This costs outline shows a partial indemnity total of $22,240.12.

[75] Because the TTC Defendants failed in this motion and because of their contribution to the delay of this action and other issues on this motion, I am not prepared to award them costs. I do not do so.

Conclusion

[76] Therefore, there will be a sixth timetable order that must include the terms specified in paragraph 69 of these reasons. There will be additional deadlines and terms imposed in the motion concerning the Discovery Issues.

[77] Concerning the motion concerning the Discovery Issues, I am herewith scheduling a teleconference between counsel on that motion and me to take place on Friday, October 30, 2020 at 10 a.m. with the following being the coordinates for the teleconference: phone: 866-500-5845; ID#: 3232044. If this time is unacceptable to either side, counsel must confer and advise me forthwith providing other times that are within a week of this date.

DATE: October 24, 2020

Charles Wiebe

MASTER C. WIEBE