

CITATION: Pavao v. Jose, 2019 ONSC 5891
COURT FILE NO.: CV-19-1324-00
DATE: 2019 10 18

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
CHRISTOPHER PAVAO) Ava N. Williams, for the Plaintiff
)
)
Plaintiff)
)
- and -)
)
DICKY JOSE) Angelo G. Sciacca, for the
) Defendant
)
Defendant)
)
) **HEARD:** September 20, 2019, at
) Brampton

2019 ONSC 5891 (CanLII)

REASONS FOR JUDGMENT

FRAGOMENI J.

NATURE OF THE PROCEEDING

[1] This is an appeal of the order of Master Wiebe dated February 26, 2019 extending the time to serve the Statement of Claim.

FEBRUARY 26, 2019 ORDER OF MASTER WIEBE

[2] Master Wiebe's order sets out the following:

1. This Court Orders an extension of time for service of the Statement of Claim on the Defendant, Dicky Jose, until March 29, 2019.
2. This Court Further Orders that a copy of this Order is to be served along with the Statement of Claim on the Defendant, Dicky Jose. The defendant can move to set aside this order on proof that he has been prejudiced by the delay in service in ways that cannot be compensated in cost.

[3] The defendant did not move to set aside the order but rather proceeded with this appeal.

STATEMENT OF CLAIM

[4] The plaintiff was injured in a motor vehicle accident which occurred on March 20, 2012. The plaintiff alleges the following damages in his Statement of Claim at paras. 6 to 9:

6. As a result of this collision, the Plaintiff has sustained a permanent serious impairment of important physical, mental and psychological functions including, but not limited to, a fractured wrist, fractured knuckles, and injuries to his right hip, head, back, knees, and lingual frenulum together with a spraining, straining and tearing of the muscles, tendons, ligaments and serves throughout his body. The injuries were accompanied by headaches, dizziness, shock, anxiety, depression, emotional trauma, chronic pain, insomnia, weakness, diminished energy and stiffness which continue to the present and will continue in the future.

7. The Plaintiff has undergone and will be required to further undergo medical therapy, drug and other treatments. He has sustained and will continue to sustain pain and suffering, loss of enjoyment of life and loss of amenities. The Plaintiff is unable to participate in those recreational, social, personal care and household activities to the extent to which he participated in such activities prior to the collision. His injuries continuously prevent him from engaging in substantially all of the activities in which he would normally engage.

8. The Plaintiff has sustained past loss of income and will continue to suffer loss of income and/or a loss of competitive advantage in his employment, a loss of income earning potential, and a diminution of income earning capacity into the future as a result of the injuries suffered from the collision.

9. As a further result of the motor vehicle collision, the Plaintiff has and will continue to suffer monetarily and therefore claims special damages, the full particulars of which the Plaintiff undertakes to provide to the Defendant prior to the trial of this action.

CHRONOLOGY OF EVENTS

Date	Event	Evidence	Tab	Para	Exhibit
Mar 20, 2012	Motor vehicle accident	Affidavit of Ian Furlong	3	2	A
May 9, 2012	Pace Law firm sends a prejudgment interest letter to the defendant [first lawyer]	Affidavit of Ian Furlong	3	5	C
Mar 19, 2014	SOC issued by George Bekiaris of Bekiaris Law Firm [second lawyer]	Appeal Record	4		
Apr 21, 2014	First and only attempt at service	Affidavit of Ian Furlong	3	12	G
Sept 19, 2014	6 month deadline for serving SOC expires	Affidavit of Ian Furlong	3	7	
2014	No further attempts at service / no searches	No explanation provided			
2015	No attempts at service / no searches	No explanation provided			
2016	No attempts at service / no searches	No explanation provided			
2017	No attempts at service / no searches	No explanation provided			
2018	No attempts at service / no searches	No explanation provided			
Sept 6, 2018	Ian Furlong of Thomson Rogers retained on or about this date [third lawyer]	Affidavit of Ian Furlong	3	8	
Dec 6, 2018	Counsel obtains previous lawyer's file and discovers that the Statement of Claim was never served on the defendant	Affidavit of Ian Furlong	3	10-11	
Feb 26, 2019	Motion to extend time for service. Order granted by	Affidavit of Ian Furlong	2		

	Master Wiebe				
Mar 26, 2019	Rule 48.14 – action to be dismissed for delay without notice				
	Time between the last and only attempt at service (April 21, 2014) and Feb 26, 2019	4 years 10 months			
	Time between the expiry of time for service (Sept 19, 2014) and Feb 26, 2019	4 years 5 months			

STANDARD OF REVIEW

[5] There is no dispute that when a Master is alleged to have made an error of law the standard of review is correctness. An exercise of discretion is reviewable on the basis of palpable and overriding error.

POSITION OF THE DEFENDANT

[6] The defendant submits that Master Wiebe erred in both fact and law. Relying on *Chiarelli v. Weins*, [2000] O.J. No. 296 (CA), the defendant points to the following principles as set out in para. 12:

1. The Court should not extend the time for service if to do so would prejudice the defendant.
2. The plaintiff bears the onus of demonstrating that the defendant would not be prejudiced by an extension.
3. The defendant has at least an evidentiary obligation to provide some details of prejudice to it which would flow from an extension of the time for service. In the face of a general allegation of prejudice, the plaintiff cannot be expected to speculate on what witnesses or records might be relevant to the

defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice.

4. The defendant cannot create prejudice by its failure to do something that it reasonably could have or ought to have done.
5. Prejudice that will defeat an extension of time for service must be caused by the delay.

[7] The defendant argues that the plaintiff's motion materials were deficient in the following areas:

- There was no evidence of the plaintiff's current medical condition and the objective seriousness of his injuries (the only report attached was dated September 4, 2012);
- There was no evidence as to the status of medical and other documents in his possession that had been preserved or destroyed with the passage of time (such as family doctor records or the accident benefits file);
- No explanation was provided as to why there were no further attempts at service in the nearly 5 years between April 22, 2014 and February 26, 2019;
- There was no evidence as to the defendant's current whereabouts as of the date of the motion;
- There was no attempt made to serve the defendant with proper notice of the motion.

[8] The defendant submits that Master Wiebe reversed the burden of proof by requiring the defendant to prove prejudice.

[9] Finally, the defendant submits that pursuant to Rule 48.14 of the *Rules of Civil Procedure*, the registrar would have been required to dismiss the action for delay on March 14, 2019, unless the action had been set down for trial. The five

year dismissal date was March 19, 2019. The Master granted the extension order on February 26, 2019. The defendant submits that this timeline was not given sufficient weight in assessing the delay.

POSITION OF THE PLAINTIFF

[10] The plaintiff submits that an underlying principle of the *Rules of Civil Procedure* is that the Rules must be “liberally construed to secure a just, most expeditious and least expensive determination of every civil proceedings on the its merits”.

[11] Rule 2 states in part:

EFFECT OF NON-COMPLIANCE

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 (1).

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

[12] The plaintiff argues that in making the order the Master in fact promoted an expeditious and inexpensive resolution of the real matters in dispute. The plaintiff also argues that Master Wiebe was cognizant of the possible prejudice to the defendant and permitted, in his order, that the defendant could return before Master Wiebe to move to set aside the order on proof that the defendant had in fact been prejudiced.

[13] The plaintiff points out that the defendant did not move to set aside the order and should have if he was prejudiced rather than proceed with this appeal.

[14] The plaintiff also submits that once his current lawyers, Thomson Rogers, received the file they moved promptly. The plaintiff should not be forced to bear the consequences of a dismissal of his action by the conduct of his previous counsel.

ANALYSIS & CONCLUSION

[15] A review of the relevant legal principles as set out in the relevant jurisprudence is informative.

[16] In *Chiarelli v. Weins*, [2000] O.J. No. 296 ONCA, the Court set out the following at para. 12:

On appeal the Divisional Court divided. O'Leary J., dissenting, would have dismissed the appeal largely for the reasons of Taliano J. supplemented by his

own brief reasons. Rosenberg and Ferguson JJ. allowed the appeal. Ferguson J., who wrote the majority reasons, discussed at great length the case law under both the current rules for extending the time for service and under former Rule 8. In my view, although the wording of the former and current rules differs, the guiding principles remain the same. As Lacourcière J.A. said in *Laurin v. Foldesi*: "The basic consideration . . . is whether the [extension of time for service] will advance the just resolution of the dispute, without prejudice or unfairness to the parties." And, the plaintiff has the onus to prove that extending the time for service will not prejudice the defence.

[17] At para. 14 the Court dealt with the issue surrounding who bears the onus as follows:

I make three observations in response to the Divisional Court's finding. First, the passages from the reasons of the motions judge have to be considered in their context. The motions judge was obviously unimpressed, as am I, with the defence's assertion of prejudice. The only allegation of prejudice in the material filed by the defence on the motion is the following very general statement in the affidavit of State Farm's claims adjuster:

It is my belief that the defence of this action has been seriously prejudiced due to the passage of time and the strong possibility that pre-accident and post-accident records and witnesses may not be available or that their recollections may not be accurate.

Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension, in the face of such a general allegation, the plaintiffs cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details. The defence did not do that in this case.

[18] It is important to note that the Court places an evidentiary obligation on the defendant to provide some details if the defence is seriously claiming prejudice. I find it significant that despite being given an opportunity to set Master

Wiebe's order aside on proof that he had been prejudiced, those steps were not taken.

[19] I am not satisfied that Master Wiebe reversed the burden in para. 2 of his order. Rather I find that Master Wiebe, in following what is set out in *Chiarelli*, placed an evidentiary obligation on the defendant.

[20] In *Heaps Estate v. Jesson*, [2007] O.J. No. 1478 S.C.O., Dunn J. noted the following at para. 10:

The test for an extension of time for service has been reviewed in many cases. I believe the principles are well stated by Mr. Justice Fedak in the case of *Lico v. Griffiths* (1996), 28 O.R. (3rd) 688. He states as follows at page 699-700.

In reviewing the case-law I derive the following propositions that are applicable to the present case. Firstly, the court may order time for filing a statement of claim be extended where it will advance the just resolution of the dispute, without prejudice or unfairness to one or both of the parties. Secondly, the assessment of whether an extension of time is appropriate on this principle will turn on the facts of each individual case. Thirdly, a plaintiff's solicitors inadvertence in not issuing or serving the statement of claim, should not undermine the just resolution of the dispute on its merits, where the defendant's ability to defend the proceeding has not been jeopardized by the delay caused by the plaintiff's solicitor.

See also *Chiarelli et al. v. Wiens* (2000), 46 O.R. (3d) 780 (Ont. C.A.).

[21] In reviewing the chronology chart there is no doubt that there is an evidentiary gap as to what was done by counsel handling the file before Thomson Rogers took over carriage of this action. However, I agree with the proposition that a plaintiff's solicitors' inadvertence should not undermine the just

resolution of the dispute on its merits as noted in para. 10 of the *Heaps Estate* decision.

[22] I am not satisfied that Master Wiebe erred in both fact and law. I am satisfied that his order falls within the relevant jurisprudence and the underlying principles of the *Rules of Civil Procedure*.

[23] I do not find that he reversed the burden to the defendant in para. 2 of his order but rather placed on the defendant an evidentiary obligation as articulated at para. 14 in *Chiarelli*.

[24] In all of the circumstances the defendant's appeal is dismissed.

[25] The parties shall file written submissions on costs within 20 days if the parties cannot resolve the issue of costs.

Fragomeni J.

Released: October 18, 2019

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