CITATION: George v. Alemu, 2023 ONSC 3644
COURT FILE NO.: CV-16-69285
DATE: 2023/06/16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Diane George	)	Colleen Burn for the Plaintiff
Plaintiff	)	
– and –	)	
Netsanet Alemu, Wondwossen Assalahun, RBC General Insurance Company and Aviva General Insurance Company	)	Matthew G.T. Glass for the Defendants RBC General Insurance Company and Aviva General Insurance Company
Defendants	)	Taayo Simmonds for the Defendants Netsanet Alemu and Wondwossen Assalahun
	)	**HEARD:** June 8, 2023

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] This action was commenced under the simplified procedure of Rule 76 of the *Rules of Civil Procedure*.[1] RBC General Insurance Company and Aviva General Insurance Company served a jury notice in July 2018. The action has been set down for trial.

[2] Ms. George now moves for an order striking the jury notice. As a preliminary matter, she also seeks leave under r. 48.04(1) to bring the motion. I note, however, that Ms. George's notice of motion does not refer to r. 48.04(1) and does not request an order for leave.

[1] R.R.O. 1990, Reg. 194.

[3] RBC and Aviva say that leave should not be granted and, if leave is granted, the jury notice should not be struck. The individual defendants take no position on Ms. George's motion.

[4] These reasons explain why I am denying Ms. George leave to bring her motion and why, even if I had not denied Ms. George leave, I would not have struck the jury notice. The matter will continue under the ordinary procedure.

Background

[5] This action arises out of a motor vehicle accident that occurred on July 19, 2014. Ms. George alleges she sustained injuries as a result of the rear-end collision. The action was commenced under the simplified procedure on July 13, 2016.

[6] The action was amended on May 25, 2017 to add RBC and Aviva as defendants pursuant to the uninsured motorist coverage provisions of Ms. George's policy. RBC and Aviva delivered a statement of defence and crossclaim. Their jury notice dated July 6, 2018 was filed July 30, 2018.

[7] In July 2021, Ms. George further amended her claim to increase the amount claimed to $200,000.

[8] Examinations for discovery were completed in October 2018. Mediation was conducted in May 2019. Ms. George sought to have the matter listed for trial on August 19, 2021.

[9] A one-week trial was originally scheduled to proceed on March 13, 2023. The trial dates were then moved to the week of June 14, 2023. Those dates were then vacated at a case conference held in February 2023 so as to give time to Ms. George to bring this motion. The trial is now scheduled to commence on June 17, 2024.

Leave under r. 48.04 (1) is not granted

[10] Rule 48.04(1) provides that a party who has set an action down for trial shall not initiate or continue any motion or discovery without leave of the court.

[11] In *Horani v. Manulife Financial Corporation*, the Court of Appeal for Ontario discussed the two lines of authority as to the proper test for granting leave to bring a motion under r. 48.04(1) after an action has been set down for trial and a third approach followed by some courts:

> 17. Some courts have required the moving party to show "a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust": see, *Hill v. Ortho Pharmaceutical (Canada) Ltd*., [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Gen. Div.); for cases adopting *Hill*, see *LML Investments Inc. v Choi* (2007), 2007 CanLII 8926 (ON SC), 85 O.R. (3d) 351 (S.C.), at para. 10; *Jetport v Jones Brown Inc.*, 2013 ONSC 2740, 115 O.R. (3d) 772, at paras. 68, 70 and 71; *Lugen Corporation v Starbucks Coffee Canada Inc*., 2014 ONSC 7141, at paras. 12, 30, 31; *Denis v*

> *Lalonde*, 2016 ONSC 5960, at para. 11; *Secure Solutions Inc. v. Smiths Detection Toronto Ltd*., 2017 ONSC 2401, at paras. 42-46.
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> 18. Others have determined that leave be granted if the moving party can demonstrate that "the interlocutory step is necessary in the interests of justice" even in the absence of a substantial or unexpected change in circumstances: see, *A.G.C. Mechanical Structural Security Inc. v. Rizzo*, 2013 ONSC 1316 (CanLII), at paras. 21-23; *BNL Entertainment Inc. v. Ricketts*, 2015 ONSC 1737, 126, O.R. (3d) 154 (Mast.), at paras. 12, 14; *Fruitland Juices Inc. v. Custom Farm Service Inc. et al*., 2012 ONSC 4902, at para. 28; and *Cromb v. Bouwmeester*, 2014 ONSC 5318, at para. 35.
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> 19. In yet other cases, courts have considered both tests and determined that they need not weigh in on the prevailing approach as the moving party could not meet the bar even under the broader "interest of justice" test: see for instance, *Alofs v. Blake, Cassels & Graydon LLP*, 2017 ONSC 950, at paras. 22-23; *Chokler v. FCA Canada Inc. 2017*, ONSC 4494, at para. 13.[2]

[12] The Court of Appeal found that it was not necessary to determine the appropriate test under r. 48.04(1) on that appeal: *Horani*, at para. 38.

[13] This case falls within the third group of cases discussed by the Court of Appeal. That is, I need not weigh in on the prevailing approach as to the proper test for granting leave to bring a motion under r. 48.04(1) after an action has been set down for trial because Ms. George is unable to meet the bar even under the broader "interest of justice" test. There is no evidence whatsoever in the record to explain the delay in failing to bring the motion much earlier. The only evidence filed by Ms. George on the motion is an affidavit of an articling student. Nothing in that affidavit provides evidentiary support for Ms. George's motion for leave under r. 48.01(1). I have disregarded the submission made by counsel in reply that she thought the jury notice had been "dismissed administratively." There is no foundation for this submission in the evidentiary record.

Jury notice is not struck

[14] Even if I had granted leave to Ms. George under r. 48.04(1), I would not have struck the jury notice.

[15] The "new" Rule 76 that came into force on January 1, 2020 restricts simplified procedure cases to a summary mode of trial and removes the option to trial by jury: r. 76.02.1(1). Rule 76.02.1(2) allows certain types of actions proceeding under Rule 76 to proceed before a jury, but where a jury notice is delivered under r. 76.02.1(2), the action will be continued as an ordinary action: r. 76.02.1(3). Rule 76.14 states that r. 76.02.1 does not apply to an action in respect of which a jury notice was delivered before January 1, 2020.

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[2] 2023 ONCA 51.

[16] Section 108(2) of the *Courts of Justice Act* prohibits a jury trial in actions governed by Rule 76. However, s. 108(2.1) expressly provides that the prohibition does not apply to simplified procedure actions in which a party served a jury notice prior to January 1, 2020. In this case, the jury notice was served by RBC and Aviva in July 2018.

[17] RBC and Aviva therefore had a vested substantive legal right to a civil jury trial: *Thomas v. Aviva*, at paras. 32-34.[3] I agree with the observations of Master Suganasiri, as she then was, in *Joseph v. Budgell*, that the purpose of the exemptions is to recognize the right to a jury trial for those who so opted before the reforms to Rule 76 came into effect, but they must now proceed under the ordinary procedure rules.[4]

[18] In *Louis v. Poitras*, at para. 17, the Court of Appeal confirmed that "[w]hile a court should not interfere with the right to a jury trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has broad discretion to determine the mode of trial."[5] The Court of Appeal then cited the earlier decision in *Cowles v. Balac*, describing the role of the court:

> 38. While that test confers a rather broad discretion on a court confronted with such a motion, it is nonetheless a sensible test. After all, the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.
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> 39. The application of this test should not diminish the important role that juries play in the administration of civil justice. Experience shows that juries are able to deal with a wide variety of cases and to render fair and just results. The test, however, recognizes that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible.[6]

[19] The onus is on the moving party to satisfy the motion judge that a jury notice should be struck. The moving party should point to legal or factual issues or the conduct of the trial which merit the discharge of the jury: *Graham v. Rourke*.[7]

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[3] 2022 ONSC 1728.
[4] 2020 ONSC 6526, at paras. 8-10. See also *Lightfoot v. Hodgins et al.*, 2021 ONSC 1950, at para. 43.
[5] 2021 ONCA 49.
[6] (2006) 83 O.R. (3d) 660 (C.A.), 2006 CanLII 34916 (ON CA), leave to appeal refused, [2006] S.C.C.A. No. 496.
[7] 1990 Can LII 7005 (ON CA).

[20] Ms. George submits that the additional costs of preparing for and completing a jury trial in this action would be disproportionate, unjustified, and a drain on limited judicial resources. The costs associated with a jury trial would, potentially, exceed the maximum damages that could be awarded under Rule 76. Proceeding to trial by judge alone would, she says, be in keeping with the concept of proportionality and would be consistent with securing the "just, most expeditious and least expensive determination" of the proceeding: rr. 1.04(1) and (1.1).

[21] Ms. George further submits that RBC and Aviva have not shown they will suffer any prejudice by having the case adjudicated in a 5-day judge alone trial. Ms. George suggests that the individual defendants would appear to be "best served" by a summary trial given the limits on trial time and costs, and says that RBC and Aviva are "less concerned with the economics of the litigation" given their crossclaim against the individual defendants.

[22] With respect, the onus rests on Ms. George to show that justice to the parties will be better served by the striking of the jury notice. As for the submission by Ms. George regarding the individual defendants, it bears repeating that they took no position on the motion.

[23] Ms. George relies heavily on the decision of Muszynski J. in *Lightfoot v. Hodgins*. In that case, the action was commenced under the ordinary procedure and a trial was scheduled to proceed for three weeks with a judge and jury. The plaintiff moved to amend the statement of claim to continue the action within the jurisdiction of Rule 76 and for an order striking the defendants' jury notice. In granting the plaintiff's motion to strike the jury notice, Muszynski J. found it would be contrary to the interests of justice and the principles of proportionality to require that the action continue to a three-week jury trial in ordinary procedure rather than a 5-day, non-jury summary trial under Rule 76: *Lightfoot*, at para. 70.

[24] *Lightfoot* is easily distinguishable from the case before me. First, Muszynski J. found "the most compelling" factor to be the admission by both parties that the action was "well suited" for the simplified procedure, including the summary trial process, under Rule 76. There was evidence before the court that the parties had considered the efficiencies that could be gained by proceeding under the simplified procedure: *Lightfoot*, at para. 68. There is no similar evidentiary record in this case and no admissions by RBC and Aviva akin to those in *Lightfoot*.

[25] Second, Muszynski J. referred to the "current challenges with the justice system more broadly as a result of the pandemic": *Lightfoot*, at paras. 69-70. At the time *Lightfoot* was decided, the pandemic was at the one-year mark. In this case, Ms. George does not advance an argument based on delay; rather, her argument is based, more generally, on limited judicial resources.

[26] In determining that the jury notice should be struck, Muszynski J. emphasized, "I should not be taken as saying that efficiency and reduced trial time alone should justify striking a jury notice. It is no secret that jury trials are more time consuming and more expensive than non-jury trials": *Lightfoot*, at para. 73.

[27] I agree. Ms. George has advanced arguments based on efficiency, reduced trial time and reduced costs, but more is required to take away RBC and Aviva's substantive right to a jury trial, preserved under the *Courts of Justice Act* and Rule 76 because they delivered a jury notice prior to January 1, 2020. Ms. George has failed to advance a compelling reason for the jury notice to be struck and I would decline to do so.

Conclusion

[28] Ms. George's motion is dismissed. The matter will continue under the ordinary procedure.

[29] As the successful parties, RBC and Aviva are presumptively entitled to their costs of the motion. In the event the parties are unable to agree on costs, they may provide me with written submissions (not to exceed three pages) on the following timetable: RBC and Aviva to provide their submissions by June 30, 2023; Ms. George to provide her submissions by July 14, 2023. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

Madam Justice Robyn M. Ryan Bell

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Plaintiff

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Defendants

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