CITATION: Martellacci v. Pitney Bowes of Canada Ltd., 2024 ONSC 320
COURT FILE NO.: CV-16-00552296-0000
DATE: 2024-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARTELLACCI v. PITNEY BOWES OF CANADA LTD.

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: 2023-08-29 (by videoconference)

COUNSEL: A. Huff for the moving party/plaintiff

M. Maimets for responding party/defendant

E N D O R S E M E N T

[1] This is a motion by the plaintiff for an order extending the time to set this action down for trial and setting a litigation timetable for the completion of remaining pre-trial steps. The defendant opposes the motion and seeks a dismissal of the action. For the reasons that follow, the motion is granted.

[2] The plaintiff's statement of claim in this wrongful dismissal action was issued on May 16, 2016. Taking into account the 6-month pause arising from the COVID-19 pandemic, the deadline for setting this action down for trial under Rule 48.14(1) expired on or about November 16, 2021. The action has not been dismissed by the Registrar 48.14(1) because such administrative dismissals have continued to be on hold since the beginning of the pandemic.

[3] The plaintiff commenced this motion on July 27, 2022, seeking the requested relief by way of a status hearing under Rule 48.14(5). This court has held that a status hearing is the proper procedure in these circumstances notwithstanding that the motion is brought after the set-down deadline: see *Yang v. The Christian World Korea Inc.*, 2019 ONSC 6131 (Master) at paras. 4-10, *34366012 Ontario Inc. v. Boudreau et al.*, 2022 ONSC 2527 paras 14-15.

[4] Pursuant to subrule 48.14(7), the plaintiff on a status hearing bears the onus of satisfying a two-part conjunctive test. The plaintiff must demonstrate:

(i) that there is an acceptable explanation for the delay; and

(ii) that if the action is allowed to proceed, the defendant would suffer no non-compensable prejudice because of the plaintiff's delay.

[5] Justice Raikes recently summarized the guiding principles to be considered on the conjunctive test under Rule 48.14(7) in *1682558 Ontario Limited v. Salman*, 2019 ONSC 4120, citing from *Cedrom-SNI Inc. v. Meltwater Holding*, 2017 ONSC 3387 (Master) with approval:

> 1. The onus is on the plaintiff to demonstrate why the action should not be dismissed for delay. The test requires the plaintiff to demonstrate that there was an acceptable explanation for the delay and establish that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice. (See: *Khan v. Sun Life Assurance Co. of Canada*, 2011 ONCA 650, and *Faris v. Eftimovski*, 2013 ONCA 360).
>
> 2. 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 court to dismiss the action even if there is no proof of actual prejudice to the defendant. (See: *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 at para. 33).
>
> 3. The responsibility to move the action along lies chiefly with the plaintiff. (See: Faris, supra, at para. 33) However, the conduct of a defendant is also a factor to be considered in determining whether the action should be dismissed for delay or allowed to proceed. (See: *Carioca's Import & Export Inc. v. Canadian Pacific Railway*, 2015 ONCA 592 at para. 53)
>
> 4. The possible dismissal of an action for delay involves a careful balancing between the interests of the parties and society in timely and efficient justice on the one hand and in the resolution of disputes on their merits on the other. (See: *Kara v. Arnold, 2014 ONCA 871* at para. 9)
>
> 5. There is little to be gained in debating whether there is a bright line between the "contextual approach" applicable to motions to set aside registrar's dismissal orders (per *Scaini v. Prochinicki*, 2007 ONCA 63 at para. 23) and the approach taken in *Faris, supra*, to status hearings. In considering the reasonableness of any explanation for delay, the status hearing court will almost invariably engage in a weighing of all relevant factors in order to reach a just result. (See: *Kara, supra*, at para. 13)
>
> 6. It is reasonable to approach the plaintiff's explanation for the delay in an action on the basis that "the longer the delay, the more cogent the explanation must be". (See: *Kara, supra* at para. 17)

7. Settlement discussions can constitute a reasonable explanation for litigation delay. A party should not be penalized for not pursuing the costly steps of litigation while engaged in the settlement process that was ultimately unsuccessful. (See: *Apotex Inc. v. Relle*, 2012 ONSC 3291 at paras. 7, 50 and 51)

8. The prejudice at issue is to the defendant's ability to defend the action as a result of the plaintiffs delay, not as a result of the sheer passage of time. (See: *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 and Carioca's Import & Export Inc., supra at para. 57)

9. A defendant's lack of display of any sense of urgency undercuts any claim of actual prejudice. (See: *Aguas v. Rivard Estate*, 2011 ONCA 494 at para. 19 and *H.B. Fuller Co. v. Rogers*, 2015 ONCA 173 at para. 42)

Acceptable explanation for the delay

[6] The plaintiff's explanation for the delay need only be "acceptable". An "adequate" or "passable" will suffice. The explanation need not be "perfect" nor even "good": see *Yang, supra*. at para. 35, *3 Dogs Real Estate Corp. v. XCG Consultants Ltd.*, 2014 ONSC 2251, at para 38.

[7] Applying the forgoing principles to the record before me I find that the plaintiff has provided an acceptable explanation for the delay. After the action was commenced, plaintiff's counsel gathered records, prepared an affidavit of documents and proposed a discovery plan. The defendant rejected the proposed discovery plan and declined to produce an affidavit of documents of its own. Instead, the defendant proposed the parties attend mediation before documentary and oral discoveries. The plaintiff accepted the defendant's proposal. The mediation was eventually conducted on November 6, 2018, about 2 ½ years from the commencement of the action. On the record before me I find that this was a reasonable timeframe for the conduct of the mediation in this action. I find that there was no undue delay in the action caused by the plaintiff leading up to the mediation.

[8] Following the mediation, in early 2019 the parties agreed to a discovery plan and scheduled examinations for discovery in April 2019. The examinations for discovery were adjourned to August 2019 when plaintiff's counsel was called to attend on a motion in April on the day scheduled for examinations for discovery. While the plaintiff is responsible for this 4-month delay in the litigation, I find that the plaintiff has provided an acceptable explanation for this delay.

[9] The examinations for discovery were again adjourned in August 2019, this time because the defendant had failed to include a certain key document in its affidavit of documents. I would put the responsibility for the delay caused by this adjournment on the defendant.

[10] In the Fall of 2019, the amendments to the Rules were announced raising the limit on claims brought under the Rule 76 Simplified Rules from $100,000 to $200,000, effective January 1, 2020. In October 2019, the plaintiff proposed amending the statement of claim to bring the action under the Simplified Rules. The examinations for discovery were effectively put into abeyance until the claim could be amended. The plaintiff took no steps to amend the claim until March 2021. The reason for this delay of approximately 17 months is explained in the affidavit of the plaintiff's lawyer. The plaintiff's lawyer deposes that in late 2019 and early 2020 his employment law practice was impacted by a serious personal health matter. He deposes that his law practice was further impacted from March 2020 through early 2021 by the COVID-19 pandemic when he was engrossed by an unusual volume of practice demands relating to the pandemic. The inactivity on this file was the result of the other demands on the lawyer's time and attention, both in his practice and his personal life.

[11] The plaintiff's lawyer finally sent a proposed amended statement of claim to defence counsel in March 2021. In May 2021 the defendant consented to the amendments to the claim and consented further proposed amendments in July 2021. The amended claim was issued on July 31, 2021. On August 20, 2021, the defendant proposed dates for examination for discovery in October and November 2021.

[12] The plaintiff's lawyer did not respond to the defendant's correspondence on discovery dates until March 11, 2022, by way of correspondence attaching the issued amended statement of claim and canvassing availability for examinations for discovery in April and May 2022. In his affidavit, the plaintiff's lawyer attributes this 6-month delay, in part, to the limited availability of his client for discovery during this period, but largely to his own lack of diligence in moving the case forward.

[13] The defendants' lawyer did not respond to the March 11, 2022 correspondence until April 21, 2022. The defendant then advised for the first time that it was no longer agreeable to conducting examinations for discovery and that it would be bringing a motion to dismiss the action for delay. Shortly thereafter, counsel for the plaintiff reported the matter to LawPro, who retained separate counsel for the plaintiff and commenced this motion in July 2022.

[14] I find that the responsibility for the 23 months' total delay from October 2019 to March 2021 and from August 2021 to March 2022 lies with the plaintiff's lawyer, due to the lawyer's personal health issues and the strains on his practice arising from the pandemic as well as to his inadvertence and self-confessed lack of diligence. I would not attribute any of this delay to the plaintiff herself. The plaintiff deposes as follows in her own affidavit:

> I have always intended to pursue this claim to a negotiated resolution or trial. I always believed the action was progressing in the normal course. I have relied on the expertise of my lawyer in moving my claim forward.

[15] The court is generally reluctant to allow an action to be dismissed for delay when the delay is the responsibility of the lawyer and not the client. In *H.B. Fuller Co. v. Rogers*, 2015 ONCA

173, on an appeal of a motion to set aside a Registrar's dismissal under Rule 48, Justice Weiler, speaking for the majority, summarized the law on this point:

> The court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel. As the court stated in *Habib,* at para. 7, "[O]n a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel." In *Marché*, Sharpe J.A. stated, at para. 28, "The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor" (citations omitted).

[16] For the purpose of this motion, I am satisfied that the plaintiff has provided an acceptable explanation for the above-referenced 23-month delay, specifically, that the delay was caused by the conduct of her counsel and not by any lack of intention or failure on her part to prosecute the action with reasonable diligence.

Non-compensable prejudice

[17] I also find that the delay has not caused the defendant non-compensable prejudice. The plaintiff and her lawyer have deposed that they believe that the key witnesses remain available for trial and that they are not aware of any missing witnesses or documents. To the extent the delay in this case gives rise to a rebuttable presumption of prejudice to the defendant, I find that the plaintiff has successfully rebutted that presumption on the evidence before me.

[18] The defendant's only evidence of prejudice from the delay is that five of the potential witnesses for the defence are no longer employees of the defendant. Two of these five former employees left the defendant in 2014, long before the statement of claim was issued. The remaining three employees left the company in May through June of 2019. Leaving aside whether the mere departure of an employee/witness results in any prejudice to the defendant, given the timing of these departures, any associated prejudice would have occurred regardless of the plaintiff's delay.

[19] The defendant has provided no explanation as to why the cessation of these witnesses' employment with the defendant has resulted in non-compensable prejudice. There is no evidence that these witnesses are unavailable for trial, nor is there any evidence that the defendant has encountered any difficulty in speaking these witnesses regarding the case. The three employees who left in 2019 were still with the defendant when the statement of claim was filed and later when the mediation was conducted. If their evidence is important to the case, the defendant could have and should have interviewed them regarding their knowledge of the relevant facts at that time. To the extent that the defendant has failed to conduct such interviews, that failure is unconnected to any delay by the plaintiff. Based on the record before me, I am satisfied that if the action is allowed to proceed, the defendant would suffer no non-compensable prejudice because of the plaintiff's delay.

[20] The plaintiff's motion is granted. The plaintiff in her factum proposed a timetable for the next steps in the action which assumed that the motion would be decided on the day it was heard. In my view the plaintiff's proposed timetable was reasonable, but I would adjust the timetable to reflect that fact that I reserved the decision on the motion until today. The parties shall adhere to the following timetable for the next steps in the litigation:

a) Examinations for discovery shall be completed by March 15, 2024.

b) Answers to undertakings given on examination for discovery shall be provided by June 15, 2024.

c) The action shall be set down for trial by July 15, 2024.

[21] This timetable may be amended on consent of the parties except for the deadline to set the action down for trial, which may only be amended by order of the court.

Costs

[22] In costs submissions at the hearing of the motion, the plaintiff asked for partial indemnity costs of the motion, if successful, in the amount of $15,880.10. The defendant sought partial indemnity costs, if successful, in the amount of $12,772.65. In oral submissions, the defendant argued that it should be entitled to costs even if unsuccessful and relied on *Francis v Leo A. Seydel Limited*, 2015 ONSC 5507 as authority for awarding costs to the unsuccessful defendant on a dismissal for delay motion. In my view, the *Francis* case is distinguishable as it involved an extraordinary delay of almost 15 years from the commencement of the action.

[23] The general rule that costs are awarded to a successful party is not displaced because the plaintiff is seeking relief under Rule 48.14(7); see - *JPW Niagara Limited v. Sullivan Mahoney Lawyers et al.*, 2020 ONSC 6762 at para 10. Is this case there is no reason why costs should not follow the event. The plaintiff was entirely successful on the motion and should have her costs. The costs sought by the plaintiff are in the same range of the costs sought by the defendant and are therefore within the reasonable expectations of the parties. The defendant shall pay to the plaintiff her costs of the motion, fixed at $15,000, inclusive of HST, payable within 30 days.

D. Michael Brown, Associate Judge

DATE: January 15, 2024