Case Name:

Careleton v. Beaverton

RE: Careleton, and Beaverton

[2007] O.J. No. 5020

88 O.R. (3d) 792

163 A.C.W.S. (3d) 228

Court File No. 23745/03

Ontario Superior Court of Justice

D.S. Ferguson J.

December 20, 2007.

(27 paras.)

Civil litigation -- Civil procedure -- Trials -- Jury trials -- Right to jury -- Jury notice -- Setting aside or striking out -- Application by the plaintiff for an order striking the jury notice dismissed -- Fact that jury notice was delivered after time prescribed by Rule 47.01 was not by itself sufficient reason to strike it -- No evidence of prejudice to the plaintiff -- Nothing in the material before the court which could justify striking the jury notice on the ground of complexity.

Application by the plaintiff for an order striking the jury notice -- Plaintiff contended that the jury notice was delivered out of time; the plaintiff would be prejudiced if the trial were by jury; defendant Davis had not established why there should be a trial by jury -- HELD: Application dismissed -- Fact that jury notice was delivered after time prescribed by Rule 47.01 was not by itself sufficient reason to strike it -- There was no evidence in this case of any prejudice occurring before the delivery of the jury notice -- Examination of the plaintiff had commenced but there was no evidence that anything was done or omitted in relation to that discovery which would cause prejudice if the matter were to be tried by jury -- There was nothing in the material before the court which could justify striking the jury notice on the ground of complexity -- Defendant delivered a jury notice at the first opportunity.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 47.01

Counsel:

Rehan Khalil, for the Plaintiffs.

Martin Forget, for the Defendant, Robert James Davis.

ENDORSEMENT

1 **D.S. FERGUSON J.**:-- At the beginning of the hearing today I explained to counsel on the record the reasons why this matter must be dealt with more expeditiously. In addition to those reasons I note that the underlying occurrence happened in 2003 and that this matter has already been adjourned from one trial sitting.

2 These reasons deal with the issue of the jury notice.

3 There is a lack of formal material bringing on the issue by either party - either to strike or to validate retrospectively - and counsel agreed that I would hear both sides and make a decision today on the material filed.

4 I heard extensive submissions and read all the material referred to.

5 The basic chronology is this:

(a) The action was commenced June 24, 2003.
(b) At the commencement the defendants included a municipality.
(c) The first discovery of the plaintiffs was an examination of Mr. Carleton on November 9, 2005. That was an examination only by counsel for ReMax. The continued discovery did not take place until May 2007.
(d) In September 2006 at the discovery of Mr. Davis, counsel for the municipality raised the issue of letting the municipality out.
(e) There was an agreement on November 8, 2006 to let the municipality out on consent.
(f) A jury notice was filed by Davis on December 13, 2006.
(g) The FLA claimants were examined for discovery on December 18 and 19, 2006.

6 There is uncontradicted evidence that the counsel for Davis' insurer had been instructed from the outset to have a jury trial if possible and that no jury notice was served earlier because the fact that a municipality was a defendant precluded a trial by jury.

7 There is a dispute about when the plaintiff's counsel learned that a jury notice was filed or intended to be filed.

8 The jury notice was served by Davis' counsel on December 11, 2006 on all parties by fax. The fax number used for the plaintiff's counsel was not correct and so it did not reach the plaintiff's counsel. The use of the wrong fax number was inadvertent.

9 There was a series of correspondence by mail, e-mail and fax before and following the filing of the jury notice between counsel including the plaintiff's counsel. I am satisfied that the plaintiff's counsel received that correspondence. It is in his motion material. The fact that he may not have read it is in my view irrelevant.

10 I am satisfied that the plaintiff's counsel should have known of Davis' intention to file a jury notice by December 11, 2006 by which time he had been so informed on December 6 and 11. He was informed specifically again on January 11, 2007 in the letter from Mr. Seiler. I feel compelled to infer that the counsel handling the plaintiff's file was not paying attention to the e-mail and letters received or chose to not make inquiries to see if a jury notice had been filed.

11 The plaintiff's counsel contends that the jury notice should be struck for these reasons;

(h) It was delivered out of time.
(i) The plaintiff would be prejudiced if the trial were by jury.
(j) The defendant Davis has not established why there should be a trial by jury.

12 I shall deal with each.

13 The fact that a jury notice is delivered after the time prescribed by Rule 47.01 is not by itself sufficient reason to strike it. A judge is given a discretion by Rule 47.02.

14 Contrary to the submissions, the case law does not set out a list of discrete rules about how a motion to strike must be decided. The judge hearing a motion to strike must consider and balance all the relevant factors including the lateness of delivery, the importance of a party's right to choose a jury trial and the existence of any prejudice arising from late service.

15 The decision must be based on the circumstances of the specific case.

16 In my view the law is set out correctly in Ferguson, *Ontario Courtroom Procedure,* LexisNexis, 2007 at p. 427 ff.

17 The issue of prejudice is relevant. There are two possible kinds of relevant prejudice. First, where the jury notice is delivered late, any prejudice which may have arisen before the jury notice was served. Second, prejudice which may arise from complexity or the possibility of potential evidence unfairly impacting on the verdict of a jury.

18 There is no evidence in this case of any prejudice occurring before the delivery of the jury notice. The examination of the plaintiff had commenced but there is no evidence that anything was done or omitted in relation to that discovery which would cause prejudice if the matter were to be tried by a jury.

19 The plaintiff's counsel also relies on complexity. In my view the law on that subject is correctly summarized in *Ontario Courtroom Procedure* at p. 427 ff. and p. 708 ff.

20 There is nothing in the material before me which could justify striking the jury notice on the ground of complexity. The case is still evolving and the plaintiff is entitled to review this issue by motion to the trial judge if the situation changes.

21 The plaintiff's counsel also relied on the possibility that evidence would unfairly influence the verdict if trial were by jury. He relied on the evidence indicating the failure of the plaintiff to keep

proper records as potentially adversely affecting the jury's assessment of his credibility or reliability - he used the term "trustworthiness".

22 There is established case law that in a civil or criminal case the trial judge may exclude evidence for which the potential for prejudice outweighs the probative value. There is also case law recognizing that a judge may strike a jury if potential evidence will distort a jury's assessment of evidence. Again, I believe the law is correctly summarized at p. 748 and p. 430 of *Ontario Courtroom Procedure*. As the case law in the criminal jury cases has well established, the issue is not whether the evidence if heard by a jury would cause harm to the plaintiff's case but whether admissible evidence will be misused by the jury.

23 The evidence of the plaintiff's bookkeeping practices is directly relevant to his claim for damages and any effect of that evidence on his credibility and reliability is clearly a relevant factor which the jury may consider.

24 Finally, the plaintiff's counsel contended that Davis has not established why the trial should be heard by a jury. There is no burden on the defendant to show that.

25 Counsel did not refer me to any case where an action had been commenced against several parties including a defendant for whom there cannot be a jury trial and then that defendant was let out and another defendant delivered a jury notice. In this case Davis delivered his jury notice quite promptly after the rules permitted a jury trial.

26 In summary, Davis delivered a jury notice at the first opportunity, there is no evidence that anything before that date - or before the date when the plaintiff should have been aware of the notice - has caused any prejudice to the plaintiff and there is no basis to strike the jury at this time on the ground of potential prejudice or complexity.

27 For these reasons I shall not strike the jury notice and the trial shall be by jury subject to a further motion brought to the trial judge.

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