

COURT OF APPEAL FOR ONTARIO

CITATION: Piedrahita v. Costin, 2023 ONCA 404

DATE: 20230606

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Simmons, Harvison Young and George J.J.A.

BETWEEN

Claudia Piedrahita

Plaintiff
(Appellant)

and

Christian Costin and Don Howson Operations Inc.

Defendants
(Respondents)

Martin Forget, for the appellant

Jillian Beaulieu and Devon McIntyre, for the respondents

Heard: May 30, 2023

On appeal from the order of Justice Michael R. Gibson of the Superior Court of Justice, dated March 24, 2022 with reasons reported at 2022 ONSC 1850.

REASONS FOR DECISION

[1] At the conclusion of the appeal hearing, we allowed this appeal for reasons to follow. These are our reasons.

Background

[2] The appellant appealed from an order of a Superior Court judge refusing her request to set aside a registrar's order dismissing her action as abandoned.

[3] The appellant's action arose out of a motor vehicle accident that occurred on May 11, 2012. She alleged that Christian Costin was the driver of a vehicle that rear-ended her vehicle and that Don Howson Operations Inc. was the owner of the vehicle Mr. Costin was operating.

[4] In July 2012, the appellant retained counsel, Mr. Pitcher, to act for her in relation to the accident. He issued a notice of action on May 6, 2014, and a statement of claim on May 27, 2014.

[5] The registrar gave notice of intention to dismiss the action as abandoned in November 2014 and subsequently dismissed the action as abandoned on December 29, 2014. The action was dismissed under former rule 48.15¹ of the

¹ Provided notice of intent to dismiss had been given, rule 48.15 required that the registrar dismiss an action as abandoned where 180 days had passed since the action was commenced, no statement of defence or notice of intent to defend or motion in response had been filed, and the action had not been disposed of or set down for trial.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which was repealed on January 1, 2015.

[6] Mr. Pitcher acknowledged that the notice of intent to dismiss and the order dismissing the action were received by his office. However, he asserted that they did not come to his attention due to clerical error in his office, an extended vacation on his part at the time the action was dismissed, and an ongoing physical disability he suffered as a result of a 2010 bicycle accident. Ultimately, he sought to turn his file relating to this matter over to another lawyer, Robert Plate. Mr. Plate was not able to meet with the appellant until May 29, 2017, but agreed to assume carriage of the file after doing so.

[7] Mr. Plate discovered the dismissal in September 2017² when he tried to file a notice of change of solicitor. The motion to set aside the dismissal was brought in May 2018 but not heard until December 2, 2021.

[8] On a motion to set aside a dismissal order for delay, the following test applies:

- i) have the plaintiffs provided a satisfactory explanation for the litigation delay;

² This date is disputed. The notice of change of solicitor is dated September 2017. However, there is no evidence of when Mr. Plate's office attempted to file it. The appellant maintains that the dismissal was not discovered until later. Mr. Plate informed the respondents' counsel of the dismissal in November 2017. Nothing turns on this difference for the purposes of this appeal.

- ii) have the plaintiffs led satisfactory evidence to explain that they always intended to prosecute the action within the applicable time limits but failed to do so through inadvertence;
- iii) have the plaintiffs demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention; and
- iv) have the plaintiffs convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiffs' delay or as a result of steps taken following the dismissal of the action?

[9] This test is not a rigid one-size fits all test. The court is required to consider and weigh all of the factors to determine the order that is just. The overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes: *Prescott v. Barbon*, 2018 ONCA 504, 141 O.R. (3d) 616, at paras. 14-15.

The motion judge's reasons

[10] The motion judge found that "the recurrent theme throughout this matter has been an inordinate delay on the part of the [appellant] and her counsel." He made specific findings that there was no satisfactory explanation for the litigation delay or the delay in bringing the set aside motion once the dismissal was discovered. He was also not satisfied that the appellant had shown a positive intent to proceed

with the action. He concluded that the appellant had not met her onus to establish no significant actual prejudice to the respondents, noting that locating witnesses would be difficult and perhaps impossible given the eight-year delay from the accident, memories may have deteriorated, a defence medical would be significantly delayed and lack of timely discoveries would hamper the ability to obtain accurate recollections of the parties.

[11] He observed as well that there were considerations of security of legal position and finality.

[12] Taking what he said was the required contextual approach, the motion judge dismissed the appellant's request to set aside a dismissal order.

Discussion

[13] In our view, the motion judge erred by ignoring strong evidence of the absence of any prejudice to the respondents from either the litigation delay or any delay in the appellant bringing the set aside motion in all the circumstances of this case.

[14] While Mr. Pitcher's evidence that he provided verbal agreement to a request for a waiver of defence on June 14, 2014 is disputed, it is undisputed that the respondents' insurer requested such a waiver while the insurer investigated the matter further, first on June 24, 2014, and subsequently on August 18, 2015.

Further, it is undisputed that the respondents served a statement of defence on October 20, 2017, following a demand for the same by the appellant's new counsel.

[15] In his reasons, the motion judge adopted broad assertions of general prejudice advanced through an affidavit filed by a lawyer in counsel for the respondents' office without considering them in the specific context of this case.

[16] Put simply, the respondents' claims of prejudice arising from the passage of time and their resulting inability to mount an effective defence are belied by the fact that they proceeded based on an understanding that the action was ongoing and asked that they not be required to file a defence while they took investigative steps for three years after the action was dismissed. It is difficult to conceive how they suffered any actual prejudice in these circumstances.

[17] Moreover, to the extent that the motion judge found that considerations of security and legal position favoured the respondents, his analysis was flawed. The respondents did not know the action had been dismissed until after they served their defence in October 2017. There is no issue of security of legal position or finality in the circumstances.

[18] Contrary to the motion judge's finding that there was no evidence of the appellant's intention to proceed with the action other than her bald assertion to that effect, in our view, there was evidence of her intention to proceed with the action.

This evidence included steps taken to advance the litigation, particularly after Mr. Plate took over carriage of the file.

[19] However, even accepting that finding and the motion judge's findings that there was no adequate explanation for the appellant's overall delay, we conclude that the absence of prejudice to the respondents and the importance of deciding cases on their merits should take precedence in the particular circumstances of this case.

Disposition

[20] Based on the foregoing reasons, the appeal is allowed, and the motion judge's order dismissing the appellant's motion and the registrar's order dismissing the action are set aside.

[21] Costs of the appeal are to the appellant on a partial indemnity scale fixed in the amount of \$15,000 inclusive of disbursements and HST. If the parties are unable to agree on costs of the motion below, the appellant may file written submissions not to exceed five pages within 10 days of the release of these reasons and the respondents may reply within 10 days thereafter, not to exceed five pages.



A. Harrison Young J.A.



J. George J. Q.