Soldatova v. Bruno

105 O.R. (3d) 468

2011 ONSC 2003

Ontario Superior Court of Justice,
Cavarzan J.
March 30, 2011

Civil procedure -- Dismissal for delay -- Setting aside -- Action dismissed for delay after plaintiff's solicitor's staff failed to follow up on status notice -- Plaintiff moving two and a half years later to set aside order dismissing action -- Motion granted -- Action at advanced stage when dismissed -- Handling of file reflecting administrative chaos bordering on negligence but ultimately plaintiff's solicitor inadvertent rather than negligent -- Motion not brought promptly -- Delay causing no prejudice to defendant's ability to defend action -- Justice requiring that action be permitted to continue.

The plaintiff's action for damages arising out of a motor vehicle accident was dismissed for delay after her solicitor's staff failed to follow up on a status notice. Two and a half years later, the plaintiff moved to set aside that order.

Held, the motion should be granted. [page469]

The action was at an advanced stage when it was dismissed. The administrative chaos reflected in the handling of the file bordered on negligence. Ultimately, however, the plaintiff's solicitor was inadvertent rather than negligent. The motion was not brought promptly. The delay caused no prejudice to the

defendant's ability to defend the action. Justice required that the action be permitted to continue.

Cases referred to

Scaini v. Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299, 2007 ONCA 63, 219 O.A.C. 317, 39 C.P.C. (6th) 1, 154 A.C.W.S. (3d) 1075, apld

Other cases referred to

Finlay v. Van Paassen (2010), 101 O.R. (3d) 390, [2010] O.J. No. 1097, 2010 ONCA 204, 266 O.A.C. 239, 318 D.L.R. (4th) 686, 188 A.C.W.S. (3d) 675; March D'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872, 2007 ONCA 695, 47 C.P.C. (6th) 233, 286 D.L.R. (4th) 487, 247 O.A.C. 22; Reid v. Dow Corning Corp., [2002] O.J. No. 3414, 48 C.P.C. (5th) 93, 134 A.C.W.S. (3d) 751 (Div. Ct.), revg [2001] O.J. No. 2365, [2001] O.T.C. 459, 11 C.P.C. (5th) 80, 105 A.C.W.S. (3d) 649 (S.C.J.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.14, (1)(c), 48.14

MOTION to set aside an order dismissing an action for delay.

William G. Scott, for plaintiff/moving party.

Robert H. Rogers, for defendant/responding party.

[1] CAVARZAN J.: -- This is a motion pursuant to rule 37.14(1)(c) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for an order setting aside the order of the registrar dated June 2, 2008 dismissing the plaintiff's action for delay. The plaintiff had failed to place her action on the trial list within two years after the statement of defence had been filed.

[2] A rear-end collision on October 18, 2004 is alleged to have caused physical injuries to the plaintiff. She retained Ferro & Company, Traffic Injury Lawyer (also styled on some letterhead as Lou Anthony Ferro, Personal Injury Lawyer) to

institute legal proceedings to recover damages arising out of the motor vehicle accident.

[3] A chronology of events attached as a Schedule to these reasons [Schedule omitted] documents the advanced stage reached in the pre-trial proceedings. Affidavits of documents and Schedule A productions were exchanged. The plaintiff and the defendant driver were examined for discovery. The plaintiff answered the undertakings given on her examination for discovery, albeit only laconically and under persistent pressure from the defendant's counsel.

[4] The plaintiff attended a defence medical examination on June 11, 2008, some nine days after the June 2, 2008 order dismissing the action. [page470]

[5] The lapses which occurred on the dates marked with an asterisk on the attached Schedule are explained as follows in Mr. Ferro's affidavit and in the following paragraphs in the factum of the plaintiff:

> 37. The Status Notice dated February 22, 2008 was received by Mr. Ferro's office on or about February 25, 2008. A former member of his staff prepared the materials requisitioning a Status Hearing for May 20, 2008. However, due to inadvertence, the Requisition was not filed with the Court and the file was not diarized for follow up.
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> 38. On June 2, 2008, the Court issued an Order Dismissing Action. The Dismissal Order did come to the attention of the law clerk in Mr. Ferro's office handling this file who drafted a motion in June of 2008 to set the Order aside. However, the Dismissal Order was not brought to Mr. Ferro's attention at the time.
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> 41. On January 26, 2009, Mr. Ferro's office received a letter in response to the requests for a settlement meeting [which] confirmed that the action had been dismissed on June 2, 2008 and that they had [been] advised of this fact on July 18, 2008. Mr. Ferro's office has no record of receiving Evans Philips [sic] letter of July 18, 2008. The letter of January

26, 2009 was not brought to Mr. Ferro's attention at that time, because it was not properly entered into their document management system.

42. In or around February of 2010, Mr. Ferro's office changed its document management software and the Dismissal Order was discovered on or about February 11, 2010. On April 7, 2010, the law clerk in Mr. Ferro's office handling the file requested a copy of the Status Notice and prepared motion materials. She then went on maternity leave. The motion materials were brought to the attention of one of Mr. Ferro's associate lawyers on August 20, 2010. Thereafter, Mr. Ferro reported this mater to LawPro who [sic] appointed counsel to assist him in the bringing of this motion.

[6] The processing of claims is delegated to members of Mr. Ferro's staff, including law clerks, case managers and associate lawyers. The status notice was received in February 2008, and a staff member prepared materials requisitioning a status hearing for May 20, 2008. The requisition was not filed with the court "due to inadvertence", and the file was not diarized for follow-up.

[7] One of Mr. Ferro's law clerks, aware of the dismissal order of June 2, 2008, drafted a motion in the same month to set aside that order. No explanation is given for the failure to pursue that motion. Seven months later, an associate lawyer in Mr. Ferro's firm writes proposing the holding of a settlement meeting.

[8] Mr. Ferro's office has "no record" of having received a letter of July 18, 2008 advising it of the dismissal order. Yet, in June 2008, his office had prepared a motion to set aside that order.

[9] Problems with the firm's document management system are blamed for the failure to bring to Mr. Ferro's attention the letter of January 26, 2009. The firm's document management [page471] software was changed and the dismissal order is "discovered" on or about February 11, 2010.

[10] It took until April 2010 for "the law clerk in Mr. Ferro's office handling the file" to request a copy of the status notice and to prepare motion materials. Again, nothing is done. The law clerk takes maternity leave. One of Mr. Ferro's associate lawyers learns of the motion materials on August 20, 2010.

[11] The motion is heard on March 21, 2011.

[12] The delay in bringing the requisite motion in this case was two and one-half years. The plaintiff relies on the authority of the Court of Appeal decision in Finlay v. Van Paassen (2010), 101 O.R. (3d) 390, [2010] O.J. No. 1097 (C.A.), in which a delay of two years was found to be tolerable.

[13] In the Finlay case, as well, motion materials were drafted but never served, and Mr. Ferro's staff members handling the file (a lawyer and a law clerk) left the firm. No one in the law firm reviewed the departing lawyer's file. Letters from the defendant's lawyer went unanswered.

[14] The Court of Appeal concluded, at para. 29, that

[a]s the motion judge found, and contrary to what occurred in March, Finlay's law firm did not deliberately decide not to move the litigation forward. The failure to do so was attributable to a slip-up, or at worst to sloppiness, in the law office during and after the time the lawyer in charge of the file left[.]

[15] As one who presides in Motions Court in Hamilton from time to time, I am painfully aware that a significant portion of the motions list is comprised often of motions against Mr. Ferro's clients for failure to fulfill undertakings. The pattern which emerges is one of chaos in the administration of files, rather than the mere "sloppiness" referred to by the Court of Appeal.

[16] The issue in this motion is whether or not the consequences of that chaos should be visited upon the client.

The Law

[17] Rule 48.14 deals with the status notice and the status hearing in a civil action:

> 48.14(1) Where an action in which a statement of defence has been filed has not been placed on a trial list or terminated by any means within two years after the filing of the statement of defence, the registrar shall serve on the parties a status notice (Form 48C) that the action will be dismissed for delay unless it is set down for trial or terminated within ninety days after service of the notice.
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> . . . . .
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> (3) The registrar shall dismiss the action for delay, with costs, ninety days after service of the status notice, unless, [page472]
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> (a) the action has been set down for trial;
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> (b) the action has been terminated by any means; or
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> (c) a judge presiding at a status hearing has ordered otherwise.
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> (4) Where an action is not set down for trial or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs.
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> (11) An order under this rule dismissing an action may be set aside under rule 37.14.

[18] The relevant portions of rule 37.14 are the following:

> 37.14(1) A party or other person who,
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> (c) is affected by an order of a registrar,
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> may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[19] In Scaini v. Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.), the court commented on the four criteria identified in Reid v. Dow Corning Corp., [2001] O.J. No. 2365, 11 C.P.C. (5th) 80 (S.C.J.), revd [2002] O.J. No. 3414, 48 C.P.C. (5th) 93 (Div. Ct.), which constitute the applicable test under rule 37.14 [at para. 12]:
(1) explanation of the litigation delay;
(2) inadvertence in missing the deadline;
(3) the motion is brought promptly; and
(4) no prejudice to the defendant.

[20] The Court of Appeal rejected the notion that all four criteria must be satisfied in order to entitle one to the order setting aside the registrar's order. Goudge J.A. stated the following on behalf of the court, at para. 23:

In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay [page473] engages rule 37.14(1)(c) and (2). The latter invites the court to make the order that is just in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the result contemplated by the rules.

[21] Having taken reasonable steps to ensure that plaintiff's firm was aware of the order of June 2, 2008, defendant's lawyers confirmed with their client that the action had been dismissed and on April 1, 2009 (ten months after dismissal) closed their file. At the law firm representing the defendant, the lawyer in charge of the file left on November 28, 2008 in order to open his own law practice.

[22] It appears obvious that, should the action be revived,

added expense will be incurred bringing new counsel up to speed on the file.

[23] Defendant invokes the principle of finality articulated by the Court of Appeal in March D'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.), at paras. 37 and 38:

> Finality, like the avoidance of unnecessary delay, is a central principle in the administration of justice. "The law rightly seeks a finality to litigation" and finality is "a compelling consideration": Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460 at paras. 18 and 19.
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> When an action has been disposed of in favour of a party, that party's entitlement to rely on the finality principle grows stronger as the years pass. Even when the order dismissing the action was made for delay or default and not on the merits, and even when the party relying on the order could still defend itself despite the delay, it seems to me that at some point the interest in finality must trump the opposite party's plea for an indulgence. This is especially true where, as in the present case, the opposing party appears to have another remedy available.

[24] The court restored the dismissal order made by the master on the grounds that the delay had been inordinate, the plaintiff's solicitor having done nothing to move the file forward for five years. It accepted the characterization of the solicitor's conduct as negligent rather than amounting to inadvertence. The court agreed that the plaintiff was not left without a remedy in that it was open to sue the solicitor for negligence.

Explanation of the Delay

[25] Although the progress of the litigation could have been much more rapid, most significant procedural steps had been completed before June 2, 2008. The defence medical occurred on June 11, 2008. Had the matter been taken to a status hearing, this motion would not have been necessary. It is clear in this case, however, that but for the pressure exerted by defendant's

counsel, matters would have proceeded even more slowly.
[page474]
Inadvertence in Missing the Deadline

[26] Mr. Ferro ought not to be permitted to claim no knowledge of key events because of a breakdown of communication between him and his agents who were assigned to act in his stead. The administrative chaos reflected in the handling of this file borders on negligence. It is a major irritant and a source of frustration to opposing counsel, not to mention justice delayed to their clients. Mr. Ferro, in effect, sets a leisurely pace to suit his own convenience. I conclude, reluctantly however, that the claim of inadvertence has been made out. "Inadvertent" is defined in the Concise Oxford English Dictionary as "not resulting from or achieved through deliberate planning". "Inadvertence" has a corresponding meaning, i.e., "the fact or habit of being inadvertent; failure to observe or pay attention; inattention" (from the Shorter Oxford English Dictionary). Mr. Ferro should not expect to receive similar consideration and indulgences in the future.
The Motion is Brought Promptly

[27] It cannot be said, in the circumstances here, that the motion was brought promptly.
No Prejudice to the Defendant

[28] I am satisfied that it has been shown that the defendant will suffer no prejudice in the sense that she is not hampered by the delay in defending this action.
Conclusion

[29] The plaintiff/moving party has failed to meet the third criterion and, in my view, has barely made it over the threshold on the second criterion.

[30] Viewed contextually, however, I am persuaded that justice requires that this action be permitted to continue.

[31] The relief sought in the notion of motion is granted. The dismissal order of the registrar of June 2, 2008 is set aside on condition that the plaintiff set the action down for

trial within the next 30 days.

[32] Because the plaintiff is seeking an indulgence, I would order no costs of the motion.

Motion granted.