

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ruben Bernardo and Estrella Francia v. Zerga Faroqi

BEFORE: MASTER R.A. MUIR

COUNSEL: N. Silverman for the plaintiffs
P. Pollack, student-at law, for the defendant

REASONS FOR DECISION

[1] The plaintiffs bring this motion pursuant to Rule 3.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") for an order extending the time for service of the statement of claim in this action from December 7, 2012 to March 4, 2014.

[2] The defendant is opposed to the relief sought by the plaintiffs.

BACKGROUND

[3] This claim arises from a rear-end motor vehicle accident which took place on June 19, 2010. The statement of claim was issued on June 7, 2012. Pursuant to Rule 14.08(1) the statement of claim should have been served by December 7, 2012. It was not.

[4] It appears that due to inadvertence the plaintiffs' lawyers made no attempt to serve the defendant with the statement of claim before December 7, 2012 or after. It appears that a courtesy copy of the statement of claim was provided to the defendant's insurer in June 2013 and the defendant was advised of the claim by her insurer in August 2013.

[5] It also appears that the plaintiffs' lawyers encountered significant difficulty in bringing this motion in a timely fashion. The plaintiffs' lawyers apparently discovered the lack of service issue shortly after the deadline had expired. In January 2013 a motion date seeking an order to extend time was booked for June 19, 2013. The lawyer with carriage of this matter on behalf of the plaintiffs was unable to attend on that date. This motion was then rescheduled for December 11, 2013. Unfortunately, the December date was not confirmed and as a result this motion was once again rescheduled, this time to January 16, 2014.

PRELIMINARY ISSUE

[6] At the beginning of his argument, counsel for the plaintiffs sought to make reference to a notice letter sent to the defendant, and perhaps her insurer, prior to the commencement of this action. This letter was not included in the plaintiffs' evidence. At the beginning of court on the morning of January 16, 2014, I asked the plaintiffs' lawyer if he had any further material he wished to file. He advised the court that he did not. As a result, I declined to allow the plaintiffs' counsel to make reference to the notice letter and did not consider the letter as part of the evidence on this motion. I also refused to grant a further adjournment of this motion, given the late request and the history of delay to date.¹

ANALYSIS

[7] Rule 3.02 provides, in part, as follows:

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

[8] Rules 1.04 and 2.01 are also applicable to this motion. They read as follows:

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

...

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute;

or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

¹ The hearing of this motion had been put over from the morning and argument did not commence until 2:15 p.m.

[9] The decision of the Court of Appeal in *Chiarelli v. Weins*, [2000] O.J. No. 296 (C.A.) is the leading authority on motions to extend the time for service of a statement of claim. The principles to be considered are set out at paragraphs 14 to 17 of that decision and can be summarized as follows:

- a) the court should not extend the time for service if to do so would prejudice the defendant;
- b) the plaintiff bears the onus of demonstrating that the defendant would not be prejudiced by the extension;
- c) the defendant has an evidentiary obligation to provide some details of prejudice to him or her which would flow from an extension of time for service;
- d) the defendant cannot create prejudice by the failure to do something that he or she reasonably could have or ought to have done; and,
- e) prejudice that will defeat an extension of time for service must be caused by the delay.

[10] Ultimately, the role of the court on a motion of this nature is to exercise its discretion on the facts of each particular case focusing on whether the defendant has been prejudiced by the plaintiff's delay. See *Chiarelli* at paragraph 17. The Rules and the relevant authorities favour the just determination of civil proceedings on their merits. Relief from strict compliance with the Rules should be granted where it can be done without prejudicing a party's ability to advance its claim or to defend itself.²

[11] In my view, the facts of this case justify the granting of the relief sought by the plaintiffs.

[12] I certainly agree with the defendant that the plaintiffs have failed to provide an acceptable explanation for their failure to serve the statement of claim in a timely fashion and their failure to bring this motion promptly. It appears that personnel changes and administrative errors resulted in this matter simply falling through the cracks. If this were the only consideration on a motion of this nature, the plaintiffs would not succeed.

[13] However, the Court of Appeal has mandated that the court's analysis on motions such as this must focus on prejudice. This is a rear-end accident. It is unlikely that liability will be in issue. The action will mostly involve an assessment of the plaintiffs' damages. There is no suggestion that any of the records necessary to support the damages claim are unavailable. I note that OHIP records dating back to 2007 (three years pre-accident) will be available. The

² The defendant referred the court to the decision of Justice Price in *Beg v. Sedore*, 2009 CanLII 38784 (ON SC) at paragraph 17 as setting out the test to be applied. However, the test found in that decision appears to be somewhat different than *Chiarelli*. Given that *Chiarelli* is a decision of the Court of Appeal, I feel bound to apply that decision in determining the issues on this motion.

defendant's insurer was aware of this claim approximately six months after the time for service expired.

[14] In addition, the relevant prejudice must arise as a result of the delay in serving the statement of claim. See *Chiarelli* at paragraph 16. The defendant has provided no specific evidence of prejudice, let alone any evidence of prejudice arising from the delay in service of the statement of claim. The defendant's evidence simply makes vague references to the passage of time and the possibility of missing documents.

[15] The defendant argues that the plaintiffs' evidence in relation to the issue of prejudice is vague and insufficient and does not satisfy the onus placed upon them on this motion. In support of that argument, counsel referred the court to the decision of this court in *Noori v. Grewal*, 2011 ONSC 5213 and the Court of Appeal decision in *Nugent v. Crook*, 1969 CarswellOnt 951 (C.A.). I agree that more detail would have been helpful. However, I cannot ignore the requirement that the defendant provide specific evidence of prejudice as set out in the Court of Appeal's more recent decision in *Chiarelli*. As the court stated at paragraph 14 of *Chiarelli*:

Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension, in the face of such a general allegation, the plaintiffs cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details. The defence did not do that in this case.

[16] In my view, the same observations are applicable to the facts before me on this motion.

CONCLUSION

[17] For these reasons, it is my view that the plaintiffs have met the onus placed upon them on this motion. I have therefore concluded that it is just in the circumstances of this motion to grant the relief requested by the plaintiffs.

COSTS

[18] Ordinarily a successful party is entitled to costs. I have concluded, however, that it is fair and reasonable on the facts of this motion that there be no order as to costs. The plaintiffs are seeking an indulgence from the court. The plaintiffs made no effort to serve the statement of claim within the time permitted under the Rules. This motion was not brought promptly. It was reasonable for the defendant to have opposed this motion. However, I do not view the issues

surrounding the adjournment of the motion in December 2013 as a sufficient basis for awarding costs to the unsuccessful defendant, as was requested.

ORDER

[19] I therefore order as follows:

- (a) the time for service of the statement of claim on the defendant is hereby extended to March 4, 2014;
- (b) the defendant shall deliver a statement of defence by no later than April 30, 2014;
- (c) the registrar shall not dismiss this action pursuant to Rule 48.15 before May 30, 2014; and,
- (d) there shall be no order as to the costs of this motion.

Master R.A. Muir

DATE: January 17, 2014