CITATION: Cayer v. Arseneau Poulson, 2024 ONSC 4453
COURT FILE NO.: CV-7236-17
DATE: 2024-08-12

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jeannette Cayer, Plaintiff

AND:

Arseneau Poulson, Defendant

BEFORE: The Honourable Madam Justice S.K. Stothart

COUNSEL: D. Derfel, Counsel, for the Plaintiff

L. Rakowski, Counsel, for the Defendant

HEARD: June 14, 2024

ENDORSEMENT

[1] The plaintiff seeks an order extending time for service of the statement of claim in this matter and an order extending the time to set the action for trial pursuant to Rule 3.02 of the *Rules of Civil Procedure,* R.S.O. 1990, Reg. 194.

[2] The defendant opposes the motion on the basis that: (a) the claim is statute-barred; (b) the plaintiff has failed to adequately explain the delay in serving the claim; and (c) the defendant will experience presumed and actual prejudice if the action is allowed to continue.

[3] This action relates to a solicitor's negligence claim against the defendant law firm, Arseneau Poulson. The plaintiff alleges that the law firm was negligent in the manner in which it handled her insurance claim related to the death of her spouse.

[4] In support of this motion, the plaintiff has filed an affidavit from Wendy Cornacchia, who is a paralegal with the law firm Derfel Injury law.

[5] In response to this motion, the defendant has filed an affidavit from Jerome Gardner, who is a lawyer who shared space with Arseneau Poulson. As will be explained later, Leo Arseneau, the lawyer who had carriage of the plaintiff's file, is now deceased. Mr. Gardner's affidavit is based on his review of the plaintiff's file.

History

The underlying insurance claim

[6] The plaintiff retained Arseneau Poulson to bring a claim against Canada Life Assurance Company and TD Canada Trust following the death of her common-law spouse in 2004 (the "insurance claim"). Leo Arseneau, a partner with Arseneau Poulson, had carriage of the file.

[7] On March 22, 2005, a statement of claim was issued with respect to the insurance claim and the defendants were properly served.

[8] Following the exchange of pleadings, Mr. Arseneau advised the plaintiff that the likelihood of success of the underlying litigation depended on the medical records. On September 6, 2005, Mr. Arseneau wrote to the plaintiff confirming their discussions about the need to obtain a specialist report. Mr. Arseneau wrote that once they had the specialist report, he would arrange a meeting to discuss what further action should be taken. Mr. Arseneau advised the plaintiff that if the specialist confirmed the insurance company's analysis of the medical records, it might be necessary to discontinue the action to avoid further costs.

[9] Although other steps were taken on the matter, the action was not set down for trial and the action was administratively dismissed for delay by order of the court registrar on July 2, 2008.

[10] The affidavit of Wendy Cornacchia states that the plaintiff followed up with the defendant regarding her matter multiple times and was never informed that the matter had been dismissed. The affidavit does not set out any further details about this.

Complaint to the Law Society of Upper Canada

[11] On September 21, 2012, the plaintiff complained to the Law Society of Upper Canada about Mr. Arseneau. In her complaint, she advised that she had attempted to contact Mr. Arseneau on multiple occasions about the status of the underlying action and he had not responded to her.

[12] The Law Society wrote to Mr. Arseneau on December 18, 2012, setting out the complaint. On February 7, 2013, Mr. Arseneau responded to the Law Society and advised that he had met with the plaintiff following the examinations for discovery and had advised her that based on the defendant's materials the action would not likely succeed. He advised the plaintiff that he was prepared to attempt to obtain a report adverse to the medical information in the hands of the defendant, but that there would be a significant cost and that unless the firm received a further retainer of $1,000, he would not proceed any further. At that point in time the law firm had received an initial retainer of $1,000 and had incurred disbursements of over $2,000. The law firm had also invested a number of hours towards the file, however Mr. Arseneau acknowledged that he had not sent the plaintiff an account.

[13] Mr. Arseneau advised the Law Society that in 2011 the firm received an additional retainer of $500 however due to an oversight it appeared no one had contacted the plaintiff to seek the further funds required. Mr. Arseneau offered to continue to act on the matter and to waive any fees if they were successful in obtaining a judgment.

[14] On February 19, 2013, the Law Society advised Mr. Arseneau that it had forwarded his letter to the plaintiff for comments. If they did not receive comments from the plaintiff, the matter would be reviewed based on the materials and information in the file.

[15] The record before me is silent with respect to what occurred after this last letter from the Law Society. The plaintiff does not provide any information about what happened after the Law Society provided her with Mr. Arseneau's letter.

Events following Mr. Arseneau's death

[16] On March 17, 2015, Leo Arseneau died unexpectedly as a result of an accident.

[17] Following Mr. Arseneau's death, Jerome Gardner, a lawyer who shared space with Arseneau Poulson, undertook a review of Mr. Arseneau's files.

[18] On May 28, 2015, Mr. Gardner spoke to the plaintiff on the phone, and they had a discussion about her file.

[19] On July 28, 2015, Mr. Gardner wrote to the plaintiff advising her that he had reviewed her file and to his surprise he discovered that the underlying insurance claim had been administratively dismissed on July 2, 2008. Mr. Gardner advised the plaintiff that she should "consult with another lawyer to determine [her] rights".

[20] During the summer of 2015, Mr. Gardner received a call from a lawyer in Sudbury who advised that the plaintiff had consulted with him about the case.

[21] On August 19, 2015, the plaintiff called Poulson Arseneau indicating that she did not understand why Mr. Gardner would not take her case. She was advised that Mr. Gardner was simply reviewing Mr. Arseneau's files and that he did not do litigation work. The plaintiff indicated that she did not understand what was meant by the matter being dismissed and the recommendation that she consult with another lawyer.

[22] On September 3, 2015, the plaintiff spoke to Mr. Gardner on the phone. She advised him that she was having trouble finding a new lawyer. Mr. Gardner referred her to the Girones Law Firm because he felt that they would be willing to sue a Sudbury lawyer given their main office was in Timmins.

[23] On September 8, 2015, the plaintiff left a voicemail message advising that she wanted a copy of her file. On January 4, 2016, the plaintiff was provided with a copy of her file.

The plaintiff retains Andrew Kerr

[24] According to the affidavit of Wendy Cornacchia, the plaintiff retained another lawyer named Andrew Kerr, "sometime in either 2016 or 2017".

[25] On December 27, 2017, a statement of claim was issued as against Arseneau Poulson.

[26] On January 29, 2018, Mr. Kerr sent the plaintiff a copy of the statement of claim and advised her that the claim had been sent out for service upon the defendant. Mr. Kerr wrote that once the claim had been served, and the defendant had served and filed a statement of defence, he would advise the plaintiff further.

Mr. Kerr advises that his license to practice law has been suspended

[27] On May 6, 2019, Mr. Kerr wrote to the plaintiff advising that his office had moved. In the letter, he wrote "Unfortunately, I am still suspended from practice by the Law Society. I hope that this will change in the very near future and I will advise you as soon as it does".

[28] On March 30, 2020, Mr. Kerr wrote and advised the plaintiff that he had been given a further suspension by the Law Society of Ontario and that it would last for six weeks. Mr. Kerr explained that he was unable to complete or advance her file until the suspension was over, which was scheduled to happen on May 11, 2020, subject to any further requirements that the Law Society required him to meet.

[29] In the same letter, Mr. Kerr wrote that if the plaintiff did not want to wait until he was reinstated, she would need to retain another lawyer to work on her file. The letter stated, "If you are unable to obtain a new lawyer or do not wish to do so, but you do not wish to wait for me to be reinstated, you can act for yourself in pursuing the case".

[30] The affidavit of Wendy Cornacchia states that "sometime after May 11, 2020, Mr. Kerr called the plaintiff and advised that his license to practice law was reinstated and he was able to continue to represent her with respect to the claim.

[31] The record before me is silent with respect to what occurred between May 11, 2020 and January 2023.

[32] On January 25, 2023, the plaintiff contacted the Law Society of Ontario advising that Mr. Kerr's phone number was not in service and that she needed help obtaining her file so that she could retain another lawyer to help with her legal matter.

[33] On February 1, 2023, the Law Society wrote to the plaintiff and advised that Mr. Kerr's license to practice law had been revoked and as such the Law Society no longer governed his conduct. It suggested that the plaintiff contact the Law Society's Trustee Services department regarding her file. It also suggested that the plaintiff may wish to consult with another lawyer about any rights are remedies she may have in the matter.

The plaintiff retains Derfel Injury Law

[34] In February, 2023, the plaintiff retained another lawyer, Tijana Potkonjak to move her matter forward.

[35] On May 15, 2023, Ms. Potkonjak wrote to the Sudbury Courthouse asking for a copy of the pleadings. On the same day, a Court Client Representative ("CCR") wrote back advising that the only thing that had been filed was a statement of claim and nothing else. The CCR advised that the matter was set to be dismissed the next month, however due to the *Emergency Management*

and Civil Protection Act order, issued following the COVID pandemic, they had not been given the okay to dismiss any files yet.

[36] Ms. Potkonjak wrote back and asked that the court not take any steps to dismiss the proceedings. She advised that she was retained and would be moving the matter forward.

[37] On May 29, 2023, Ms. Potkonjak wrote to the court to confirm that there was no affidavit of service on file. A CCR responded on May 30th and confirmed that there was no affidavit of service.

[38] On May 30, 2023, Ms. Potkonjak wrote and asked for confirmation that the court would not take steps to dismiss the action for delay. CCR responded the same day advising that the province wide suspension was still in effect.

[39] On May 30, 2023, a notice of change of lawyer was filed and served on the defendant indicating that the plaintiff had retained David M. Derfel Professional Corporation. This was the first time Arseneau Poulson would have been made aware of the statement of claim issued in December 2017.

[40] On June 19, 2023, Lauren Rakowski, counsel for the defendant, wrote to plaintiff's counsel advising that she had been retained and asking if the statement of claim had ever been served.

[41] On July 19, 2023, Ms. Rakowski wrote again, asking whether the statement of claim had ever been served. Ms. Potkonjak responded that they were waiting for Mr. Kerr's file from the Law Society of Ontario.

[42] On September 19, 2023, Ms. Rakowski wrote again, indicating that she did not believe the statement of claim had ever been served and that the claim appeared to be well past the limitation period.

[43] On November 3, 2023, Ms. Rakowski wrote again, confirming that the statement of claim had not been served and outlining the defendant's position.

[44] On December 20, 2023, Ms. Rakowski wrote again, requesting a response and advising that if there was no response, she would assume that the plaintiff had abandoned the litigation.

Notice of recommencement of administrative dismissals

[45] On February 28, 2024, the Ministry of the Attorney General of Ontario informed the public and the legal profession that administrative dismissals of Superior Court civil actions that had not been set down for trial within five years of the date of issuance of the originating process would recommence on May 13, 2024.

[46] On February 28, 2024, Ms. Rakowski wrote to plaintiff's counsel again, requesting a response and advised "[o]ur client does not consent to the pace of litigation and will rely on this correspondence in opposing any motion to extend the time for service of the claim in this action".

[47] On March 28, 2024, the Derfel law firm contacted Ms. Rakowski seeking dates to book a motion to extend time for service of the claim.

[48] On May 17, 2024, the plaintiff served her notice of motion on the defendant with a return date of June 14, 2024, which was the short motions list.

[49] On June 14, 2024, I heard submissions on the motion and reserved my decision.

The Law

Extension of time to serve a statement of claim

[50] Rule 14.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that where an action is commenced by way of a statement of claim, the statement of claim shall be served within six months after it is issued.

[51] Rule 3.02 of the *Rules of Civil Procedure* provides that a court may by order extend or abridge any time prescribed by the rules, or an order, on such terms as are just.

[52] There are no fixed rules or guidelines to be applied in circumstances where a party seeks an extension of time to serve a statement of claim. The basic consideration is whether the extension sought will advance the just resolution of the dispute, without prejudice or unfairness to the parties. Each case is to be decided on its facts, focusing on whether the defence is prejudiced by the delay: *Chiarelli v. Wiens,* [2000] O.J. No. 296 (Ont.C.A.) at paras. 13 and 17.

[53] The plaintiff bears the onus to show that the defendant would not be prejudiced by an extension. However, where the defence is seriously claiming that it will be prejudiced by an extension, it has an evidentiary obligation to provide some details of this prejudice: *Chiarelli v. Wiens*, at para. 14.

[54] The defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done. Further, the prejudice must be caused by the delay itself, rather than other factors: *Chiarelli v. Wiens*, at paras. 15-16.

[55] The expiry of a limitation period gives rise to a presumption of prejudice. This presumption may be rebutted by the party seeking an extension by demonstrating special circumstances that would lead the court to conclude that the presumption of prejudice should not apply: *Frohlick v. Pinkerton Canada Ltd*, 2008 ONCA 3 at para. 17-22.

[56] The absence of actual prejudice does not automatically or inevitably trump the values of timeliness and efficiency. At some point, a party who has failed to respect the rules designed to ensure timely and efficient justice loses the right to have its disputes decided on the merits. If not, the rules and timelines would cease to have any meaning and any hope of ensuring timely and efficient justice would be seriously jeopardized: *1196158 Ontario Inc. v. 6274013 Canada Ltd*., 2012 ONCA 544 at para. 33.

[57] In *Tookenay v. O'Mahony Estate,* 2024 ONSC 709 at para. 32, Justice J. Paul R. Howard set out a non-exhaustive list of factors that are commonly considered in determining whether an extension of time to serve a statement of claim should be granted. These are:

a. The length of the delay;

b. The evidence filed that explains the delay;

c. Whether the evidence regarding the explained delay is sufficient;

d. Whether or not the plaintiff moved promptly for an extension of time after the period expired;

e. Whether or not the delay in serving the claim resulted from the direction, participation, or involvement of the plaintiff personally in the service of the claim;

f. The extent to which the defendant, themselves, bears some or all of the responsibility for the delay;

g. Whether or not it was reasonable for the defendant to infer from all the circumstances that the plaintiff had abandoned his/her claim;

h. Whether the applicable limitation period for the action has expired;

i. Whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against the defendant; and

j. Whether the defendant would suffer prejudice if the motion was granted.

Extension of time to set a matter down for trial

[58] Rule 48.14(1) of the *Rules of Civil Procedure* provides that unless a court orders otherwise, the registrar shall dismiss an action for delay if it has not been set down for trial by the fifth anniversary of its commencement.

[59] If a plaintiff seeks an extension of time to set a matter down for trial, the plaintiff must show why the action should not be dismissed. The plaintiff must establish that: (a) there is an acceptable explanation for the delay; and (b) allowing the action to proceed would not cause the defendant to suffer non-compensable prejudice: *Kara v. Arnold*, 2014 ONCA 871 at para. 8.

[60] Rule 48.14(1) reflects two important principles: (a) the strong public interest in the timely resolution of disputes; and (b) the strong interest in having civil disputes determined on their substantive merits: *Farrage Estate v. D'Andrea*, 2020 ONSC 5200 at para. 1.

[61] Where the parties do not agree to an extension of the time to set an action down for trial, a party may, before the expiration of the time period, move for a status hearing. Rule 48.14(7) provides that at the status hearing, the plaintiff shall show cause why the action should not be dismissed for the delay, and the court may: (a) dismiss the action for delay; or (b) if the court is satisfied that the action should proceed,(i) set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time, (ii) adjourn the status hearing on such terms as are just, (iii) if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or (iv) make such other order as is just.

[62] In considering whether a claim should be dismissed for delay, the court must carefully balance the two competing interests of ensuring the rules are enforced in a way that ensures timely and efficient justice for all parties and society in general, and society's interest in having disputes resolved on their merits. The law provides for some flexibility by providing a party with the opportunity to provide a reasonable explanation for the delay. Ultimately the court must weigh all of the relevant factors and determine what result is just in the circumstances: *Kara v. Arnold*, at paras. 9-13.

[63] In *1196158 Ontario Inc. v. 6274013 Canada* at para. 19, the Ontario Court of Appeal held that failure to enforce the rules regarding timelines undermines public confidence in the capacity of the justice system to process disputes fairly and efficiently. On the other hand, the court must allow some latitude for unexpected or unusual contingencies that make it difficult or impossible for a party to comply with the rules. As such, courts should avoid applying a formalistic or mechanical approach to timelines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits.

Analysis

Should the court grant an extension of time for service of the statement of claim

<u>The length of delay</u>

[64] The statement of claim against the defendant was issued on December 27, 2017. It is agreed that it has never been served on the defendant even to this day. The total delay in serving the statement of claim has been well over six and a half years. It is undisputed that this is a very long period of delay.

<u>The explanation for the delay</u>

[65] The plaintiff does not explain the delay between July 2015 to December 2018, other than to say that sometime in 2016 or 2017 she retained Mr. Kerr.

[66] The plaintiff explains the delay following December 2017, by stating that she relied on her lawyer, Mr. Kerr, to ensure that the statement of claim was served. On January 29, 2018, Mr. Kerr told her that the claim had been sent out for service upon the defendant. Mr. Kerr told her that once it was served, and the defendant had served and filed a statement of defence, he would advise her further.

[67] There is no evidence before me that the plaintiff ever asked or confirmed with Mr. Kerr that the statement of claim had been served or that he had received a statement of defence. The affidavit of Wendy Cornacchia is relatively sparse with respect to what took place between January 2018 and January 2023 when the plaintiff contacted the Law Society. The plaintiff has provided no evidence about the substance of any conversations she had with Mr. Kerr during this period of almost five years.

[68] The correspondence indicates that the plaintiff was aware that Mr. Kerr's license to practice law was suspended at certain points in time. On May 16, 2019, Mr. Kerr wrote to the plaintiff to advise that he was "still suspended" and that he hoped that this would change in the very near future and he would advise her as soon as it did. On March 30, 2020, Mr. Kerr wrote to the plaintiff and advised that he had been given a further suspension for six weeks. He advised that he should be reinstated by May 11, 2020 and would carry on with the file on whatever terms they had previously agreed on. There is no evidence about what, if any, steps the plaintiff took to inquire about the status of her claim or advance it during the time that Mr. Kerr was suspended from the practice of law.

[69] The affidavit of Cornacchia states "sometime after May 11, 2020" Mr. Kerr called the plaintiff and advised that his license to practice law was reinstated and he was able to continue to represent her with respect to this claim. There is no evidence about what communication took place between Mr. Kerr and the plaintiff following this. I do not know if the plaintiff asked Mr. Kerr about the status of her claim against the defendants during this almost three-year period. The next piece of information is that in January 2023, the plaintiff contacted the Law Society because she wished to obtain her file from Mr. Kerr's office because she wanted to retain another lawyer to advance her legal matters. I do not know when Mr. Kerr's license was revoked and when (or whether) the plaintiff was advised of this revocation.

[70] I have received no evidence that the failure to serve the defendant was due to Mr. Kerr's inadvertence or negligence. I have received no evidence from Mr. Kerr regarding this issue. I have received no evidence that the plaintiff made attempts to locate Mr. Kerr to provide evidence on this issue for this motion.

[71] When I consider the evidence that has been provided, particularly the length of time that passed without service of the statement of claim, I find that may be that the failure to serve the statement of claim in this case is due to the negligence of Mr. Kerr as opposed to inadvertence. However, I note that I have no evidence about the substance of any communication between the plaintiff and Mr. Kerr about the claim. I do not know, for example, if there were issues surrounding retainer or what the plaintiff's instructions were to Mr. Kerr about moving the matter forward.

[72] In *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd,* 2007 ONCA 695, at paras. 31-32k the Ontario Court of Appeal noted that the court should not condone circumstances where a lawyer formed a deliberate intent not to advance the litigation and put the file in abeyance as this would risk undermining the integrity and repute of the administration of justice. In my view, this may be such a case. On the evidence before me, no steps were taken to advance the litigation for over three years.

[73] The plaintiff submits that she relied on her former counsel, and she should not be penalized for his failures. I find that two suspensions from the Law Society should have raised some concerns on the plaintiff's part about the status of her claim. There were significant periods of time, possibly years, where the plaintiff knew that Mr. Kerr could not do any work on her claim. Despite this, I have no evidence that the plaintiff took any steps to advance her claim for a period of over five years (from December 2017 to January 2023).

Whether the plaintiff moved promptly for an extension of time after the period expired

[74] On May 30, 2023, newly retained counsel for the plaintiff was advised by court staff that there was no affidavit of service of the statement of claim in the court file. Indeed, the only document contained in the court file was the statement claim.

[75] By June 2023, counsel for the defendant had reached out to counsel for the plaintiff asking if the statement of claim had ever been served. Counsel for the defendant repeated this request in July, September and November 2023, with no response from counsel for the plaintiff. Despite this, no steps were taken to seek an extension of time to serve the statement of claim until March 2024 when plaintiff's counsel was aware that administrative dismissals would resume in May 2024.

[76] Courts were open and operating at the time the plaintiff retained new counsel in February 2023. Counsel could have brought a motion seeking an extension of time to serve the statement of claim as soon as they became aware that there was likely an issue (in May) or when they were advised by counsel for the defendant that they did not believe they had been served (in September).

[77] I find that the plaintiff did not move promptly upon become aware that the statement of claim had not likely been served on the defendant. Instead, the plaintiff waited until the court gave notice that it was resuming administrative dismissals to bring a motion seeking an extension of time.

The extent to which the defendant bears responsibility for delay

[78] There is no evidence before me that the defendant bears any of the responsibility of the delay in this matter. The defendant was not aware of the claim until it was served with the notice of change in solicitor on May 30, 2023. Since that time, counsel the defendant has diligently reached out to counsel for the plaintiff in an effort to move the matter forward, reaching out in June, July, September, November and December 2023 and February 2024, with no response from the plaintiff until March 2024. This period of almost eight months without a response by the plaintiff is unexplained in the materials filed in support of this motion.

[79] The defendant made its position clear in December 2023, when it advised the plaintiff that if there was no response to their correspondence, they would assume the plaintiff had abandoned the litigation. Despite this, the defendant received no response until the plaintiff reached out in March 2024 to schedule this motion.

Whether it was reasonable for the defendant to infer that the plaintiff was not going to bring a claim against it

[80] I find that it likely that the defendant was aware by July 2015 that the plaintiff might have a claim against it as a result of the administrative dismissal of the insurance claim. On July 28, 2015, Mr. Gardner advised the plaintiff that she should seek out legal advice to "determine her rights" with respect to the fact that her claim had been administratively dismissed. During the summer of 2015, Mr. Gardner was aware that the plaintiff had spoken to a lawyer. Mr. Gardner also referred to the plaintiff to another law firm that might be prepared to proceed with an action against a Sudbury law firm.

[81] I find that it would be reasonable for the defendant to assume that no claim against it would be forthcoming given the passage of over seven years and having heard nothing from the plaintiff.

The applicable limitation period for the action

[82] The defendant submits that the applicable limitation period for the action expired prior to the issuance of the statement of claim in December 2017. As such, there is presumed prejudice in this matter.

[83] The defence points to Mr. Gardner's letter dated July 28, 2015 which advises that the claim had been administratively dismissed and that the plaintiff should "consult with another to determine [her] rights".

[84] The evidence before me is that the plaintiff was attempting to speak to counsel about her rights but was having some difficulty. Sometime in the summer of 2015, the plaintiff spoke to a lawyer by the name of Leger. On September 3, 2015, Mr. Gardner suggested an out-of-town law firm. On September 8, the plaintiff requested a copy of her file. On January 4, 2016, the plaintiff received a copy of her file.

[85] In my view the limitation time period for the issuance of a claim against Arseneau Poulson may have commenced on July 28, 2015 when she was put on notice. However, there may be an argument that the limitation period commenced sometime after January 4, 2016 when the complainant received her file. At that point she would have had the opportunity to review the file and determine if she had a valid claim against the defendant. As such, it may be that the statement of claim issued in December, 2017 fell slightly within the two-year limitation period.

[86] For the purposes of this motion, I am considering this factor to be neutral.

Whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against it

[87] There is no evidence that the defendant was made aware that the plaintiff was asserting a claim against it until May 30, 2023, when it was served with the notice of change in counsel.

Whether the defendant would suffer prejudice if the extension is granted

[88] The defendant submits that it will suffer actual and presumed prejudice. With respect to actual prejudice, the defendant submits that material witnesses have died, relevant documents have not been preserved, and the delay is so significant that it is reasonable to assume that the memory of witnesses has faded.

[89] I have received no evidence about whether materials related to the underlying insurance claim have been preserved or if witnesses are still available. I note that these materials relate to events that occurred over 20 years ago.

[90] The plaintiff has not provided any evidence with respect to whether she has preserved materials related to the insurance claim. In addition, I have received no evidence about whether the plaintiff has made inquiries with the defendant in the underlying insurance claim about whether they have preserved their file.

[91] The affidavit of Mr. Gardner indicates neither he or nor Mr. Poulson is aware of the status or whereabouts of any witnesses from the underlying insurance claim. Further, that Mr. Gardner does not know whether documents related to the underlying insurance claim have been preserved.

[92] I find it is reasonable to conclude that there has likely been a loss of evidence, particularly with respect to the ability of witness' to remember pertinent events over 20 years ago.

[93] With respect to the circumstances surrounding the plaintiff's representation by the defendant, the only material witness noted to have died is Mr. Arseneau. He died in March 2015, which would have been before the plaintiff became aware that her action had been administratively dismissed. As such, his unavailability as a witness is not linked to the plaintiff's delay in serving the statement of claim or moving the matter forward.

[94] I am satisfied that given the very significant period of delay, from as early as July 28, 2015 to the hearing of this motion in June 2024, that it is likely that the memories of any witnesses in this matter would be significantly impacted by a delay.

[95] I have not received any evidence that the plaintiff's file with Arseneau Poulson was not preserved. The evidence is that a copy was made and given to the plaintiff in January 2015.

[96] I find, in all of the circumstances in this case, that there has been actual prejudice suffered by the defendant that is directly related to the delay in having the statement of claim served and in moving the matter forward. Specifically, I am satisfied that the defendant's ability to defend the matter has been impacted by the significant delay and its obvious impact on the memory of witnesses.

[97] I am satisfied that the defendant has not created any prejudice by failing to do something that it could reasonably have done. The steps taken by the law firm following Mr. Arseneau's death were reasonable. Mr. Gardner reviewed Mr. Arseneau's files shortly after his death, reached out to the plaintiff to alert her to the fact that there had been an administrative dismissal, urged the plaintiff to seek out legal advice regarding her rights, and arranged to have a copy of the plaintiff's file provided to her upon request.

Conclusion

[98] When I balance all of the factors set out above, I am not satisfied that it would be just or in the interests of justice to extend the period of time for the service of the statement of claim.

[99] The delay in this case is extreme. The explanations provided by the plaintiff fail to address large gaps in time where nothing appears to have been done to advance her claim. While I am sympathetic to the plaintiff's submission that she relied on Mr. Kerr to move the matter forward, the plaintiff has not provided any details with respect to what communication or arrangements she had with Mr. Kerr between 2017 and 2023.

[100] I find that there is obvious prejudice to the defendant due to the passage of such a significant period of time and its impact on the ability of witnesses to remember what happened. Further, I have no evidence that the plaintiff has inquired about whether the defendant in the insurance claim has preserved its file.

[101] I find that this is one of those cases where the delay is so excessive and unexplained that it would bring the repute of the administration of justice into disrepute to allow an extension of time to serve the statement of claim.

Should the court extend the time to set the action for trial

[102] In this case, the plaintiff bears the onus of demonstrating both that there was an acceptable explanation for delay and that if the action were allowed to proceed that the defendant would not suffer any non-compensable prejudice.

[103] I must carefully balance the two competing interests of ensuring the rules are enforced in a way that ensures timely and efficient justice for all parties and society in general, and society's interest in having disputes resolved on their merits.

[104] I have already set out my findings with respect to the plaintiff's explanation for the delay above. Those findings apply equally to my analysis of this issue.

[105] While the law provides for some flexibility by providing a party with the opportunity to provide an explanation for the delay, in this case I find that the plaintiff has not provided a reasonable explanation for the delay.

[106] During the COVID pandemic, administrative dismissals were suspended by the court between March 16, 2020 and September 13, 2020. Following this, the Ministry of the Attorney General advised staff to refrain from issuing administrative dismissals. This practice directive ended on May 13, 2024, with prior notice having been provided to the public on February 28, 2024.

[107] Although the court refrained from issuing administrative dismissals between September 2020 and May, 2024, it is important to note that courts were open and operating after September, 2020 and there were no impediments to moving matters forward.

[108] This is not a case where steps were being taken to advance the claim and due to some unforeseen event or other complicating factors the claim was not set down for trial. In this case, there is no evidence that the plaintiff was taking any steps to advance her claim once it was issued. This is also not a case of technical non-compliance with the rules.

[109] I find that while it was reasonable for the plaintiff to assume that her lawyer was working on her file, this does not adequately explain the entire period between December 2017 and January 2023, a period of over five years. As I have set out above, the plaintiff has provided no evidence about the substance of any conversations she had with her lawyer during this time or about what steps she took to advance the file when she knew her lawyer was suspended.

[110] While the court must allow some latitude for unexpected or unusual contingencies that make it difficult or impossible for a party to comply with the rules, for the reasons set out above I find it unreasonable for the plaintiff to apparently do nothing, for years at a time, to advance her claim or make any inquiries about its status with her lawyer or with the court.

[111] I have already set out above my findings with respect to the prejudice to the defendant in allowing this matter to continue. I find that there is non-compensable prejudice to the defendant due to the extremely long passage of time. It is more than likely that witnesses will have difficulty remembering events from 2004 (when the plaintiff's spouse died), from 2008 (when the plaintiff's insurance claim was administratively dismissed) and 2015 (when the plaintiff was advised that her claim had been dismissed). These are events from 9 to 20 years ago.

[112] At this point in time, nothing has happened with respect to this claim. There has been no exchange of documents, no examinations for discovery, and no steps to retain expert evidence related to negligence. It will likely be years before this matter is even ready to proceed to trial.

[113] When I balance all of the relevant factors in this case, I find that it would not be just to extend the time to set his matter down for trial.

Conclusion

[114] For the reasons set out above, the plaintiff's motion is dismissed.

Costs

[115] If the parties are unable to agree on the issue of costs, the defendant may serve and file written submissions on the issue of costs within 15 days of release of this decision. Those written submissions shall be no more than 2 pages in length, exclusive of any supporting documentation. The plaintiff shall have 15 days, after receipt of the defendant's materials, to serve and file their written submissions on the issue of costs. These shall be no more than 2 pages in length, exclusive of any supporting documentation.

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The Honourable Madam Justice S.K. Stothart

Date: August 12, 2024