COURT OF APPEAL FOR ONTARIO

CITATION: Habib v. Mucaj, 2012 ONCA 880
DATE: 20121214
DOCKET: C55652

LaForme and Watt JJ.A. and Lederman J. (*ad hoc*)

BETWEEN

Salman Habib

Plaintiff (Appellant)

and

Kloreta Mucaj and Leviq Tunaj

Defendants (Respondents)

Ken Singh, for the appellant

Josephine Stark, for the respondents

Heard: December 10, 2012

On appeal from the orders of Justice Brian P. O'Marra of the Superior Court of Justice, dated May 29, 2012 and June 15, 2012.

ENDORSEMENT

Overview

[1] The Master set aside the Registrar's order of dismissal of the plaintiff's action and found that: (i) plaintiff's counsel provided a weak explanation for the delay, but there was no intentional delay; (ii) the delay was inadvertent; (iii) plaintiff's counsel moved promptly upon learning of the dismissal; and (iv) there was no evidence of actual prejudice to the defendants.

[2] However, the appeal to the Superior Court of Justice was allowed and the order of the Registrar was reinstated. This is because, according to the appeal judge, the Master:

> 1. Misapprehended the totality of the evidence: first, in regard to the explanation of the litigation delay, and second, when he characterized the missing of crucial deadlines by counsel for the plaintiff as mere sloppiness or inadvertence.
>
> 2. He failed to factor in the significant public interest in finality of proceedings.

[3] The appeal judge in this case rested his decision principally on the explanation for the delay. He identified the Master's error in this regard as misapprehending the evidence on delay causing him to wrongly find it "mere sloppiness or inadvertence". His opinion was that the evidence of delay amounted to conduct that was either "negligent" or "bordering on negligent". The plaintiff appeals this decision.

Analysis

[4] It is well settled that a misapprehension of evidence may involve a failure to take into account an item or items of evidence relevant to a material issue, or it may have to do with a mistake about the substance of the evidence. A misapprehension of evidence may also reflect a failure to give proper effect to evidence: *R. v. Mahmood*, 2011 ONCA 693, at para. 46. The appeal judge in

this case appears to suggest that the Master did not appreciate, or did not give proper effect to the evidence about the delay. We disagree.

[5] There are four well established factors to consider when deciding to set aside an order to dismiss an action: (i) *explanation of the litigation delay* – a deliberate decision not to advance the litigation will usually be fatal; (ii) *inadvertence in missing the deadline* – the intention always was to set the action down within the time limit; (iii) *the motion is brought promptly* – as soon as possible after the order came to the party's attention; and (iv) *no prejudice to the defendant* – the prejudice must be significant and arise out of the delay: *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80 (Ont. Div. Crt.).

[6] No one factor is necessarily decisive of the issue. Rather, a "contextual" approach is required where the court weighs all relevant considerations to determine the result that is just. Here, the Master specifically referenced the proper test and engaged in the weighing exercise. He found that, after the weighing exercise, the just result was to set aside the dismissal order. The Master's order was discretionary and was made as part of his duty to manage the trial list. The decision, therefore, attracts significant deference from a reviewing court: *Finlay v. Paassen*, 2010 ONCA 204.

[7] Furthermore, on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their

counsel. However, where the lawyer's conduct is not inadvertent but deliberate, this may be different: *Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 (O.C.A.), at para. 28. Here, the plaintiff lawyers' conduct was found by the Master not to be deliberate. Simply because the appeal judge's view is that the conduct was "negligent" or "bordering on negligent", does not mean the Master was not entitled to find the conduct not to be deliberate or not intentional.

[8] In assessing the Master's findings of fact under the *Reid* factors, the appeal judge was required to decide whether the findings were unreasonable or unsupported by the evidence. He was not entitled to replace one reasonable inference for another, merely because he disagreed with the decision under review.

[9] The inference drawn by the Master – that the delay was mere sloppiness or inadvertence – is a reasonable one based on the evidence. The fact that the inference of the appeal judge - that the delay was caused by negligence – is also reasonable does not amount to reversible error on the part of the Master. The Master's decision was entitled to significant deference and the appeal judge was in error in failing to accord it.

[10] Finally, the Master's reasons reflect an understanding of the "significant public interest in finality of proceedings" factor, which he properly considered

along with the *Reid* factors, and not as a stand-alone one. The Master recognized that the dismissal of the action more than two years following the expiry of the limitation period gave rise to a presumption of prejudice. However, he found that the plaintiff had rebutted the presumption and that the defendants failed to show any actual prejudice to them. The Master noted that the key independent witness was still available and had a clear recollection of the accident. As well he observed that documentary evidence in the form of clinical notes, medical records, and the plaintiff's family physician's notes were also available. Given this, the significant public interest factor alone is not a reason to interfere with the Master's decision.

[11] In the end, the Master considered and balanced all the appropriate factors. His conclusion based on the evidence was reasonable and there is no basis to interfere with it.

Disposition

[12] For these reasons, the appeal is allowed and the decision of the Master is ordered reinstated. The appellant is awarded his costs of the appeal fixed in the amount of $10,000 inclusive of disbursements and HST. He is also awarded his costs in the Superior Court of Justice fixed at $7,500, also inclusive of disbursements and HST.

"H.S. LaForme J.A."
"David Watt J.A."
"S. Lederman J. (*ad hoc*)"