

CITATION: Mitchinson v. International Brotherhood of Electrical Workers (District 1),
2014 ONSC 168
COURT FILE NO.: 52643/10
DATE: 2014/01/09

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Tim Mitchinson

Plaintiff

- and -

Peter Wall, Terry Filipetti, Jim Hutcheson,
Bill Daniels, Charles McKenzie, Phil
Flemming, and the International
Brotherhood of Electrical Workers, District
1, Canada

Defendants

)
)
) Peter A. Vita, Q.C., for the Plaintiff
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)
)
)

) Demetrios Yiokaris, for the Defendants
) Peter Wall, Terry Filipetti and Jim
) Hutcheson
)

) Douglas John Wray, for the Defendants
) Charles McKenzie, Phil Fleming, and
) the International Brotherhood of
) Electrical Workers District 1, Canada
)

) **HEARD at St. Catharines, Ontario:**
) December 3, 2013

THE HONOURABLE JUSTICE C. A. TUCKER

DECISION

Issue

[1] Should the plaintiff's action be dismissed for delay?

Positions of the Parties

[2] This is a contested status hearing. The plaintiff is required to show cause why his action should not be dismissed for delay. The defendants argue that not only is there no reasonable explanation for the delay but also they would suffer from non-compensable prejudice, both presumed and actual, given the effluxion of time and the death of a party said to be a material witness at trial. It is the plaintiff's position that the delay was solely a result of his previous counsel's inaction and that no prejudice is suffered by the defendants by the length of time the case has taken.

[3] The defendants further argue that other breaches of the Rules should also lead the court to dismiss the action against which the plaintiff points out that the same Rules do not prescribe that remedy for any such breach and I agree. The plaintiff also argues that the test is not to be strictly applied but that I can weigh other considerations in determining whether "justice requires the lawsuit in all the circumstances to continue". The defendants argue that the plaintiff is wrong in law on this point given the current case law.

Background

[4] The plaintiff Tim Mitchinson was a member of the defendant International Brotherhood of Electrical Workers District 1, Canada ("the Association") who was charged under its constitution and was found guilty of those charges in or about 2009. He began the within action to sue the Association and a number of its members as a result of what he believed was unfair treatment. He retained a lawyer, Mr. Paul Marshall, to commence the action. His lawyer, he alleges, failed to respond to the defendants on a timely basis, missing deadlines under the *Simplified Procedure Rules* while he responded quickly for the most part to his lawyer's inquires and continually asked Mr. Marshall about the progress of the claim.

[5] In June 2013 he dismissed Mr. Marshall and retained his present lawyer who argued this motion on his behalf. It is clear from the record that the defendants did not "wait in the bushes" for a chance to defeat the plaintiff's claim. Rather, the defendants, particularly those represented by the law firm of Koskie Minsky, wrote many letters to Mr. Marshall trying to move the action along without either a timely response or, in fact, any response. No affidavit of Mr. Marshall was filed on this hearing by the plaintiff to explain his inaction.

[6] The Statement of Claim was issued December 15, 2010. The Plaintiff claims \$100,000.00 per defendant for libel and slander and conspiracy to injure. The Statements of Defence were filed by July 5, 2011. Accordingly the plaintiff was required to provide his Affidavit of Documents by July 25, 2011 and failed to do so and, as a result, is in breach of *Rule 76.03*. He has also failed to serve a notice of readiness for pre-trial conference which is also a breach of *Rule 76.09*. As noted above, I agree with the plaintiff that these breaches do not provide a reason or a legal basis to dismiss the

action. Discoveries were not set, nor did Mr. Marshall provide an affidavit of documents until after the status hearing was set and even then only a draft of such document was given to the defendants. The defendants provided their Affidavits of Documents and production brief two years ago. The alleged events in the Statement of Claim occurred between 2004 and 2009. Accordingly, given the lapse of time that has passed, there is a presumption of prejudice.

[7] The actual complaint arises from a decision-making process that was released in December 2008 and January 2009. I find that even with the most recent date of 2009 applied there would be a presumption of prejudice at a hearing in 2013 some four years later and where the limitation period has now expired. The defendants' factum details the numerous request for particulars of the defamation claim, the affidavit of documents and discovery dates, to which there was no or inadequate response from Mr. Marshall.

[8] In his factum and the material filed on the hearing the plaintiff provides a lengthy series of emails from himself to his lawyer inquiring about the status of the matter and urging action and response. It appears that in response to the status hearing, Mr. Marshall suggested laying the blame at the feet of his client to explain the delay in the progress of the litigation, a suggestion rejected by the plaintiff who then retained new counsel. The plaintiff acknowledges his responsibility for a short three-month period of delay while his attention was taken elsewhere due to his wife's termination of employment. Other than this short time period, his position is that he was always responsive to his lawyer and had done everything he could to provide requested material and to encourage his lawyer to move the matter forward.

[9] The plaintiff also argues that the death of the defendant Mr. Hutcheson does not prejudice the defendants although he wrote the two decisions that are at the heart of Mr. Mitchinson's claims. It is his position that the decision was not based upon any independent fact-finding of Mr. Hutcheson or even upon a credibility assessment done by him but was based solely upon reports done by the other defendants that he used in reaching his decision. Therefore, he argues, this defendant's death is not critical to the lawsuit. The defendants dispute this, pointing out that the plaintiff's claim focuses on the decisions and is centered in conspiracy and that one of the alleged co-conspirators is dead, rendering great prejudice to their defence of such an allegation. In any event, the plaintiff states that if I accept the defendants' position that there is prejudice in relation to the conspiracy claims that I could strike those allegations while allowing the defamation claim to proceed.

[10] The status hearing notice was issued on April 15, 2013. Mr. Hutcheson died May 25, 2013.

The Law

[11] The plaintiff has the onus to show cause why his action should not be dismissed for delay. The reason for the rule is obvious. Justice delayed is not justice.

The defendants cannot have their day in court, nor can the plaintiff, if the matter takes years to resolve. As is often stated, over time memories fade and documentation is lost, which can have a negative effect upon reaching a just resolution.

[12] The onus is on the plaintiff to show on a balance of probabilities that (a) he has a reasonable explanation for the delay which will satisfy the court and (b) there would be no actual or presumed prejudice to the defendants as a result of such. I note the onus is on the plaintiff to deal with presumed prejudice while the onus is on the defendant to show actual prejudice, again, on a balance of probabilities.

[13] I quote from Justice Glithero's decision in *Riggitano v. Standard Life Assurance Co.*, 2009 CanLII 23892, [2009] O.J. No. 1997, at para. 45, "If the common submission, as made here, to the effect that a dismissal would be unfair to the plaintiff is permitted to always trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions, then the rule would be effectively gutted."

[14] The plaintiff's only explanation for delay is the failure of his lawyer to act in compliance with the Rules but he fails to explain why this inaction occurred. As noted, no affidavit of the previous lawyer was filed by the plaintiff, nor do I find that a solicitor's neglect to act in an expeditious manner a defence to an action to dismiss for delay in law.

[15] I agree with the defendants' argument. There is no satisfactory explanation for the failure to move the matter along on a timely basis. The plaintiff was aware of the status notice, albeit no doubt comforted by his lawyer's explanations, but took no steps to advance the matter by retaining other counsel or taking any other action. The defendants should not be held to account for the plaintiff's own inaction. I find, therefore, on this branch of the conjunctive analysis the plaintiff has failed to explain the delay and, as such, the action must be dismissed. In the event I am incorrect in my conclusion I turn to the analysis of the question of prejudice to the defendants both presumed and actual.

[16] I turn first to the presumption of prejudice. As noted, here the allegations go back many years and time under the *Limitation Act* has expired. There is not only presumed prejudice here I find given the effluxion of time but actual prejudice. I note there was a trend in the courts not to dismiss a matter at the first status hearing, but instead to set a short time schedule and only failure to comply with that schedule led to dismissal of the action. However, it is clear from the recent case law from the Court of Appeal, as set out in *Faris v. Eftimovski*, 2012 ONSC 2227, affirmed 2013 ONCA 360, [2013] O.J. No. 2551, the dismissal of an action by Justice Healey at first instance was upheld by the Court. The principle was established there that no longer are status hearings a method whereby the court tries to get an action back on track, but rather a forum where the dilatory party must adequately explain the delay or risk having his case dismissed.

[17] On May 25, 2013 Mr. Hutcheson died and, given the nature of the action which is framed in defamation and conspiracy, I agree with the defence's assertion that his evidence would have been relevant to a number of the defences raised by them. The decision which is allegedly defamatory was written by the deceased defendant and he is alleged to be one of the conspirators. I find the claims cannot be severed given the importance of Mr. Hutcheson to all of the types of issues raised by the plaintiff.

[18] I find in all the circumstances that the plaintiff has not shown cause and that, accordingly, the action shall be dismissed for delay pursuant to Rule 48.14(13)(b).

[19] If the parties are unable to agree upon costs, I may be spoken to.


Tucker J.

Released: January 9, 2014

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