Endorsement of Justice Sproat
June 15, 2017 for motion heard June 7, 2017

For the Plaintiff – D. Silver

For the Defendants – M. Karabus

This is a motion to restore the action to the trial list. For reasons not entirely clear, this case was struck from the trial list at assignment court on December 15, 2014 although Mr. Stark from Gowlings, representing the defendants, attended that day and understood that the matter had been adjourned to be spoken to court on May 25, 2015.

As of May 25 the defendants were prepared to consent to the action being restored but unfortunately Mr. Katzman, then representing the plaintiff, arrived late. RSJ Daley no longer had the file in court and so he suggested the parties send in a consent so that the matter could be restored.

Katzman had a series of personal and family health issues (see plaintiff's factum para 37) and did not send a letter, on consent, to RSJ Daley to have the action restored until October 1, 2014. Due to Mr. Katzman's inadvertence he had neglected to file a Notice of Appointment and when he began representing the plaintiff. For that reason RSJ Daley refused to restore the action based on the consent and instructed counsel to attend to be spoken to court on December 14, 2015.

On December 14, 2015 counsel advised that the defendants would not consent to the action being restored. RSJ Daley advised Mr. Katzman to bring a motion.

Mr. Katzman, a sole practitioner, did not bring the motion and on August 11, 2016 reported the matter to LawPRO which led to the motion being brought. Mr. Silver acted promptly but there was a court delay of approximately 8 months to have a long motion heard.

In late 2015 Mr. Katzman was dealing with the aftermath of an October 4, 2015 house fire, a cancer diagnosis, 2 cancer surgeries, depression and anxiety.

I do not accept the defendants' argument that I should completely ignore these personal problems because the defendants adduced evidence that Mr. Katzman was able to appear on some motions and do legal work for other clients. The logic of the argument that because a sole practitioner with a multitude of problems can do some things, he should have been able to do all things, escapes me.

The action was commenced on April 19, 2010. I am satisfied that at all times the plaintiff intended to proceed but he had a series of financial problems summarized at para 18-23 of the plaintiff's factum. He couldn't pay his original counsel, and for a time was self-represented.

From the cases cited in the plaintiff's factum, I take the following:

1. Marché – the law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor.

2. Cariocas – para 54.

   A. To keep an action off the trial list that is ready for trial is punative rather than efficient.

B. It is relevant to consider that the defendant did not indicate any serious concern about the pace of the litigation until it opposed the motion to restore.

3. 3 Dogs para 38 – An explanation for delay must be acceptable – not necessarily a good explanation.

4. Cariocas para 50 – The court is entitled to consider the conduct of the defendant in light of its assertions of prejudice. Para 52 – Motions culture should be discouraged.

5. HB (*sic* Fuller) para 26 – There is a bias in favour of deciding cases on the merits.

I agree with para 20 of the plaintiff's factum that this is an action that is ready for trial at the next sitting which is January 2018.

In accordance with HB (*sic* Fuller) para 20 – 29 – Neither the 4 part or 2 part tests are exhaustive. In any event I find that:

1. There is an acceptable explanation for the overall litigation delay given the personal difficulties of Mr. Katzman and the plaintiff.

2. The failure to proceed in a timely manner was due to inadvertence, related to those same personal difficulties.

3. The motion was certainly brought promptly by Koskie Minsky. Obviously Mr. Katzman did not bring it promptly by reason of his personal problems. I find however that this is a situation in which, as in Marché, the court will not allow the plaintiff to lose his claim because of the lawyer's inadvertence.

4. While there is a presumption that delay causes prejudice, the inference to draw from the fact the defendants were prepared to consent in September but not December 2015 (considered in light of the nature of the case, and the fact that e/d (examinations for discovery) were held early on, therefore recording the evidence is that the delay has not prejudiced the defendants.

I also factor in to my consideration that the defendants never expressed serious concern at the pace of the litigation.

While I am mindful of the interest of the defendants and the interest in actions proceeding in a timely manner, I have no hesitation in concluding that the plaintiff has met his onus and that the interests of justice require that the case be restored to the trial list.

Costs

The plaintiff is entitled to costs (*sic*). On May 2, 2017 the plaintiff offered to settle on the basis that the action be restored and no costs be payable. The plaintiff is therefore entitled to partial indemnity costs to May 2 and substantial indemnity after. On this basis the plaintiff's costs outline seeks costs of $22,280.92 inclusive of HST and $889.93 (*sic* for) disbursements.

For comparative purposes I requested the defendants' Costs Outline which was strictly partial indemnity and amounted to $19,270 plus 13% HST - $21,775.

The defendants' Costs Outline confirms my view that the total hours claimed by the plaintiff is reasonable as is the hourly rate.

I allowed counsel to make supplementary written submissions as to whether there is any reason to discount what would otherwise be the appropriate costs award on account of the fact that default by the plaintiff – and most importantly his lawyer – necessitated the bringing of the motion.

The defendants have cited cases standing for the proposition that the price of being granted an indulgence is to pay the costs of the party who opposed it.

This case is distinguishable in that the defendants were consenting in September yet opposing in December – for no reason having to do with prejudice.

Having said that I find that the most appropriate result is no order as to costs as in Pongracz v. Loblaw [2011] O.J. No. 5860.

Sproat J.

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