CITATION: Scaini v. Prochnicki, 2007 ONCA 63
DATE: 20070131
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COURT OF APPEAL FOR ONTARIO

GOUDGE, SIMMONS AND LANG JJ.A.

B E T W E E N :	)	
	)	
BRYAN SCAINI	)	**Paul R. Sweeny**
	)	**for the appellant**
	)	
Plaintiff/Appellant	)	
	)	**H. Wayne Snyder**
	)	**for the respondent Winn**
- and -	)	
	)	
STANLEY PROCHNICKI AND COLLEEN J. WINN	)	**No one appearing for the respondent, respondent Prochnicki**
	)	
Defendants/Respondents	)	
	)	
	)	**Heard: October 19, 2006**

On appeal from the order of Justice P.B. Hambly of the Superior Court of Justice dated March 15, 2006, with reasons reported at [2006] O.J. No. 1185 (Q.L.).

GOUDGE J.A.:

[1] On January 7, 2005, the registrar dismissed the appellant's action because he failed to respond within ninety days of service on him of the status notice served on him pursuant to rule 48.14(1). The notice required that within ninety days the action be set down for trial or an order obtained from a judge at a status hearing relieving against this.

[2] On March 15, 2006, Hambly J. dismissed the appellant's motion to set aside the registrar's order, brought pursuant to rule 48.14(11) and rule 37.14(1)(c). The motion judge required the appellant to satisfy each of four criteria in order to succeed. Since the appellant fell short on one, the motion failed, even though he met the other three. This is the appeal from that order.

[3] For the reasons that follow, I conclude that the motion judge erred in principle in taking this approach rather than considering all the relevant factors in order to determine the just order in the circumstances.

[4] There were two affidavits before the motion judge, the first from the appellant's solicitor at the time and the second from the appellant himself which, while filed late, was admitted over the respondent's objection. These affidavits reveal the following facts, all of which are uncontested.

[5] The statement of claim was filed in April 2002, claiming damages and specific performance in relation to certain real property in Waterloo, Ontario. Statements of defence were delivered by the end of September 2002.

[6] The appellant agreed with his then solicitor that all legal fees would be paid to the solicitor after the trial of this matter. However, after doing the initial work, the solicitor sought payment and refused to work on the case further until that happened. This caused a breakdown in his relationship with the appellant.

[7] In June 2003, the appellant contacted a second law firm, which required to see the file before proceeding. However, the appellant's first solicitor would not release it until his account was paid.

[8] Then in September 2004, the appellant retained the second law firm. It served a notice of change of solicitors on September 6, 2004. The appellant's new solicitors finally received parts of the appellant's file from the first solicitor in December 2004.

[9] The appellant stated that at all material times it was, and still is, his intention to proceed with the lawsuit and that he is eager to get results and go to trial.

[10] The new law firm received the status notice from the registrar on October 7, 2004. It stated in part:

> MORE THAN TWO YEARS HAVE PASSED since a statement of defence in this action was filed. According to the records in the court office, this action has not been placed on the trial list or terminated.
>
> THIS ACTION WILL BE DISMISSED FOR DELAY unless within ninety days after the service of this notice: (a) it is set

> down for trial; (b) it is terminated; or (c) a judge presiding at a status hearing orders otherwise.
>
> A party may request the registrar to arrange a status hearing.

[11] The junior lawyer with the appellant's new firm who was to deal with the status notice expected that she would be advised of a date for a status hearing, so did nothing. The registrar dismissed the action with costs on January 7, 2005. When the firm received a copy of this order on January 12, Mr. Sweeny's office was retained and on February 1, 2005, he brought the motion to set aside the registrar's order.

[12] On March 15, 2006, the motion judge dismissed the motion. He set out his view of the applicable test at para. 13 as follows:

> In *Reid v. Dow Corning Corp*. (2001), 11 C.P.C. (5th) 80 (affirmed as to the four-pronged test (2002) 48 C.P.C. (5th) 93 (Ont. Div. Ct.)), Master Dash stated that the plaintiff must satisfy four criteria to obtain an order setting aside a registrar's order dismissing an action pursuant to [r]ule 48.14(13). The four criteria are as follows:
>
> (1) explanation of the litigation delay;
>
> (2) inadvertence in missing the deadline;
>
> (3) the motion is brought promptly; and,
>
> (4) no prejudice to the defendant.

[13] The motion judge determined that the appellant satisfied the last three criteria. That conclusion is not contested in this court.

[14] However, the motion judge found that the appellant did not provide a satisfactory explanation for the delay in pursuing the action from the filing of defences in September 2002 to the registrar's order in January 2005. He held that the explanation was deficient because it did not provide particulars about such things as when the appellant reached the agreement with his first solicitor that payment await the end of the trial; what that solicitor's assessment of the merits of the case was; what the charge would be and whether it would depend on the result; how much the solicitor subsequently required to

be paid and whether the appellant could have paid it; and why the action was not pursued after the filing of the notice of change of solicitors.

[15] Because of the appellant's insufficient explanation for the delay, the motion judge dismissed the motion because the appellant failed to satisfy one of the four requirements set out in *Reid, supra*.

ANALYSIS

[16] Rule 48.14 regulates the status notice and the status hearing in a civil action. Subsection (1) provides for the status notice. Subsection (3) requires that the registrar dismiss the action for delay with costs, where, as here, nothing happens in response to the notice. Its companion piece, subsection (4), requires the registrar to do the same where the action is not set down within the time specified in an order made at a status hearing. Subsection (11) provides that these orders may be set aside under rule 37.14. These subsections of Rule 48 read as follows:

> **48.14**(1) Where an action in which a statement of defence has been filed has not been placed on a trial list or terminated by any means within two years after the filing of a statement of defence, the registrar shall serve on the parties a status notice (Form 48C) that the action will be dismissed for delay unless it is set down for trial or terminated within ninety days after service of the notice.
>
> …
>
> (3) The registrar shall dismiss the action for delay, with costs, ninety days after service of the status notice, unless,
>
> (a) the action has been set down for trial;
>
> (a.1) in an action under Rule 78, documents have been filed in accordance with rule 78.08;
>
> (b) the action has been terminated by any means; or
>
> (c) a judge presiding at a status hearing has ordered otherwise.

…

> (4) Where an action is not set down for trial or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs.
>
> …
>
> (11) An order under this rule dismissing an action may be set aside under rule 37.14.

[17] The provisions of rule 37.14 relevant to this appeal are subsections (1)(c) and (2). They read:

> 37.14(1) A party or other person who,
>
> …
>
> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.
>
> (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[18] The issue is what these rules require the appellant to show to have the registrar's order of January 7, 2005, set aside. In particular, did the motion judge err by requiring the appellant to meet each of four criteria in order to succeed?

[19] In coming to his view the motion judge relied on the decision of Master Dash in *Reid*, supra, which sets out the four criteria and the appellant's obligation to meet each one separately. It was put this way in that decision at para. 40:

> While I agree there must be some balancing of interests, I find, upon review of the caselaw presented to me, that in

> determining whether to set aside a registrar's order dismissing an action made under rule 48.14(3), a plaintiff must satisfy four criteria. If the plaintiff fails to satisfy any one of these criteria, the registrar's order will stand.

[20] The motion judge went on to find that this approach had been upheld by the Divisional Court in that case. With respect, I do not agree. Writing for the Divisional Court, Then J. simply recited the criteria used by the master in his description of the decision appealed from. He did so without approval, before going on to allow the appeal on other grounds, without commenting on the criteria or the proposed requirement that each one must be met.

[21] More importantly, I do not agree that the case law reviewed in *Reid*, *supra*, yields the proposition that an appellant must satisfy each relevant criterion in order to have the registrar's order set aside. None of the cases referred to say so expressly and several proceed on a more contextual basis. For example, in *Steele v. Ottawa-Carleton (Regional Municipality)*, [1998] O.J. No. 3154 (Gen. Div.) Master Beaudoin, at para. 17, described the guiding principle in deciding whether to set aside a Rule 48.14 dismissal by the registrar as follows:

> … Ultimately, the Court will exercise its discretion upon a consideration of the relevant factors and will attempt to balance the interests of the parties.

[22] I agree with Master Beaudoin.

[23] In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1)(c) and (2). The latter invites the court to make the order that is just in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.

[24] That is not to say that there are no criteria to guide the court. Indeed I view the criteria used by the motion judge as likely to be of central importance in most cases. While there may be other relevant factors in any particular case, these will be the main ones. The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[25] It may be that in a particular case, one factor on which the appellant comes up short is of such importance that, taken together with the other factors, the appellant must fail. What is important is that the analysis be contextual to permit the court to make the order that is just.

[26] Thus, in my view, the motion judge erred in principle by requiring the appellant to satisfy each of the four criteria separately in order to succeed in setting aside the registrar's order, without considering and weighing all the relevant factors. I would therefore set aside his order.

[27] I conclude that a contextual approach leads to the opposite result. There is no doubt that the appellant missed the 90-day deadline set out in rule 48.14(1) because of the inadvertence of his lawyer. The motion to set aside the registrar's order was brought promptly. And the respondent can point to no prejudice. Importantly, no limitation period has passed. Finally, while it would have been preferable if the appellant had provided more details, he did provide an explanation of the litigation delay. Moreover, his assertion that he always intended to proceed with the lawsuit and is eager to go to trial is unchallenged.

[28] In this case, I do not think that the shortage of detail in the appellant's explanation of delay is determinative, given the inadvertence of the appellant's solicitor, the prompt motion to set aside the order, and, particularly, the complete absence of prejudice. Taking these factors together, I conclude that the just order is to set aside the registrar's order on terms that the appellant either set the action down for trial or arrange a status hearing within 60 days of this decision.

[29] I would therefore allow the appeal, set aside the order appealed from and the order of the registrar dated January 7, 2005 and substitute the order described above.

[30] Because the appellant is seeking an indulgence I would order no costs here or for the motion before Hambly J.

RELEASED: January 31, 2007 "STG"

"S. T. Goudge J.A."
"I agree Janet Simmons J.A."
"I agree Susan E. Lang J.A."