CITATION: Ralph v. Primmum, 2015 ONSC 872
COURT FILE NO.: 04-14875
DATE: 2015/02/09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
AMY RALPH	)	J. Waxman, for the Plaintiff
	)	
	)	
	)	
Plaintiff	)	
- and -	)	
	)	
PRIMMUM INSURANCE COMPANY, DAVID ROBERT FINDLAY and FINDLAY ATTORNEYS	)	D. Rosenkrantz, for the Defendants David Robert Findlay and Findlay Attorneys
	)	
	)	
Defendants	)	
	)	
	)	**HEARD:** September 8, 2014

REASONS FOR JUDGMENT

[1] According to the plaintiff's notice of motion, she seeks an order: 1) restoring the action to an assignment court (together with an action which has been ordered tried together with this one); and 2) requiring that a third action be tried together with the other two.

[2] In its factum, the defendants Findlay and Findlay Attorneys opposed the restoration of the present matter to a trial list. No mention is made of the other relief claimed. I assume that it is not opposed. Counsel for the plaintiff asserts that the parties in the other two actions either consent or do not oppose the relief being sought.

[3] The history of this action is tortured, to say the least. It flows, initially at least, from a motor vehicle accident involving the plaintiff which occurred on January 15th, 2002. In February of 2003, the plaintiff settled her accident benefits claim with her own insurer, the defendant Primmum Insurance Company. She later decided that the settlement was an improvident one, and she commenced the present action against her former lawyers and Primmum. In August of 2007, the action against Primmum was dismissed. On September 4th, 2007, the action was dismissed administratively by the Registrar. That order was set aside. The plaintiff passed the trial record on January 11th, 2008. There was an assignment court appearance on April 11th, 2008, at which time the matter was placed on a trial list scheduled to commence on November

6th, 2009. On October 1st, 2008, the present action was ordered to be tried together with a 2004 action against the alleged tortfeasor in the motor vehicle accident.

[4] On August 2nd, 2009, the matter was struck from the November, 2009 list, on consent. The apparent reason was that the plaintiff wished to commence a separate action against the alleged motor vehicle accident tortfeasor on behalf of her children. The statement of claim in that action was issued on August 24th, 2009.

[5] The present matter was restored to the trial list on January 15th, 2013, apparently with an assignment court date of February 15th, 2013 being set. At that assignment court appearance, the matter was adjourned, on consent, to the assignment court list of June 21st, 2013. At that appearance, the matter was adjourned, again on consent, to the assignment court list of September 20th, 2013. The reason for that adjournment seems to be that the parties wanted the matter placed on the long trial list. On September 19th, 2013, the plaintiff sent a draft long trial intake form to counsel for the defendants Findlay and Findlay Attorneys. At the September 20th, 2013 assignment court list, the matter was once again struck from the list. On October 7th, 2013, counsel for the defendants Findlay and Findlay Attorneys approved of the long trial intake form that had been presented to him on September 19th, 2013. On December 23rd, 2013, counsel for Findlay and Findlay Attorneys advised counsel for the plaintiff that this motion would be necessary as the former were not prepared to consent to the matter being restored to a trial list.

[6] The case law provided indicates that the test to restore a matter to a trial list involves consideration of the following:

> 1) is the delay intentional and contumelious?;
>
> 2) if not, is there an inordinate and inexcusable delay in the litigation for which the plaintiff or his solicitors are responsible, such as would give rise to a presumption of prejudice;
>
> 3) if so, has the plaintiff provided evidence to rebut the presumption of prejudice arising from the delays; and
>
> 4) if so, have the defendants provided evidence of actual prejudice? (see *1351428 Ontario Ltd. v. 1037598 Ontario Ltd.*, reported at 2011 ONSC 4767, a decision of this court).

[7] Clearly, there has been an extraordinary delay in getting this 2004 action to trial. At the same time, I note the following:

> 1) there is a 2009 action relating to the claims of infants which deals with injuries allegedly sustained by them in the same motor vehicle accident which underlies the present action;
>
> 2) the defendants Findlay and Findlay Attorneys through their counsel, apparently consented to the matter being struck from a list in August of 2009, consented to an adjournment of the assignment court appearance of February 15th, 2013 to June 21st of that year, and consented

> to an adjournment of that appearance to the September 20th, 2013 list so that the matter might be considered by the Regional Senior Justice for placement on the long trial list. Further, those same counsel approved of a draft long trial intake form apparently some two weeks after this matter was struck from the list on September 20th, 2013.

[8] I am satisfied that the responding defendants have been willing participants in at least some of the delay present before me. In my view, not all of the blame for that can fairly or accurately be said to rest upon the plaintiff.

[9] Regardless of whether prejudice ought to be presumed in first instance, or which party has the evidentiary burden of addressing it, ultimately there has to be evidence of real, non-compensable prejudice in order to rationalize condemning the plaintiff's action to the state of legal limbo that affixes to matters that are struck from a list and are not restored.

[10] In their factum, the defendants Findlay and Findlay Attorneys allege that they have suffered meaningful prejudice on two bases. Neither is compelling.

[11] Firstly, those defendants allege an almost complete memory loss by "the only witness to the underlying transaction between the parties", that being a clerk at the law firm. I reject this for the following reasons:

> a) It would have been negligence *per se* for the defendant lawyer and his firm to have delegated to a clerk the entire settlement of an accident benefits claim being advanced by a client. That either was, or should have been, handled by a lawyer. In their statement of defence, these defendants deny negligence, so I can only assume that there was a lawyer directly involved. Accordingly, I do not accept that the clerk is the "only" available or relevant witness;
>
> b) similarly, it would have been negligence *per se* for an accident benefits claim to have been settled without appropriate medical opinions and medical documentation. There is no plausible explanation as to why the clerk cannot refresh her fading memory by means of reviewing that medical evidence;
>
> c) if the clerk really was as important a witness as is suggested, then no doubt she was thoroughly interviewed when defence of this action was commenced. Again, there is no plausible explanation as to why she cannot refresh her memory by reviewing the notes made in the course of that interview;
>
> d) the clerk admits that she has her own file notes made during the course of her involvement with the plaintiff. No plausible explanation exists as to why the clerk cannot review her own notes to refresh her memory; and

e) there is no suggestion in the evidence presented that the clerk's memory loss was sudden. Accordingly, the loss reasonably ought to have been noted over time and steps taken to preserve her evidence by, for example, the taking of evidence pursuant to Rule 36.01.

[12] The second basis is that the plaintiff has not disclosed any damage documentation in the last seven, or now eight, years. The responding defendants pose the following hypothetical scenario as part of their factum: "If...the plaintiff were to produce a housekeeping receipt for an expense occurred six years ago, how could the defendants reasonably test the voracity of that claim or the capacity of the plaintiff to have provided the housekeeping services herself?" I reject this convoluted train of thought as proof of real prejudice for the following reasons:

a) the lack of current damage documentation is a problem for the plaintiff, not the defendant;

b) the suggested prejudice is hypothetical rather than real; and

c) I have faith that the trial judge will be capable of understanding timely disclosure obligations, and that he or she will deal with any effort to ambush the defendants appropriately.

[13] I similarly reject the responding defendants afterthought allegation of prejudice based upon the fact that the plaintiff has only presented a "preliminary opinion" regarding the issue of solicitor's negligence. It is plain to me that this is a problem for the plaintiff, rather than these defendants. The Rules adequately address the issue of late service of any expert report.

[14] The motion is granted. This action and the two "tort" actions described above shall be tried together with this action, or one following the others in the discretion of the trial judge. All three matters are to be placed on the assignment court list of March 18th 2015, at which time the issue of referral to the Regional Senior Justice for possible placement on the long trial list is to be revisited.

[15] If the parties cannot agree upon costs of this motion, they may make very brief written submissions to me in that regard. Each set of submissions, if any, shall be no more than three typewritten pages in length, not including a costs outline and any relevant offers to settle. The plaintiff has until March 13th, 2015 to make her submissions. The responding defendants have until March 27th, 2015 to reply. The costs submissions shall be sent to my attention at the John Sopinka Court House in Hamilton.

Parayeski J.

Released: February 9th, 2015

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B E T W E E N:

AMY RALPH

Plaintiff

- and –

PRIMMUM INSURANCE COMPANY, DAVID ROBERT FINDLAY and FINDLAY ATTORNEYS

Defendants

REASONS FOR JUDGMENT

MDP:mw

Released: February 9th, 2015