IN THE SUPREME COURT OF NOVA SCOTIA
Citation: White v. Weeks, 2005 NSSC 65

Date: 20050330
Docket: 115015
Registry: Sydney

Between:

Michael White

Applicant

v.

Robert Weeks, Marjorie Weeks, and Ernest Weeks

Respondents

Judge:	The Honourable Justice Frank Edwards
Heard:	March 29, 2005, in Sydney, Nova Scotia
Counsel:	Christopher Conohan, Esq., for the applicant Lindsay M. MacDonald, for the respondents

By the Court:

[1] The Applicant applies for an Order to renew an Originating Notice and Statement of Claim.

[2] ***Facts:*** The accident giving rise to this action occurred on September 6, 1999. An Originating Notice and Statement of Claim was issued on September 5, 2001. Time for service therefore expired on February 5, 2002. Prior to the issuance of the Originating Notice, Counsel for the Plaintiff had learned that the Defendant had no insurance coverage for this particular incident. Counsel therefore decided that the Plaintiff's claim would have to proceed through the Section D (uninsured motorist) provision of his own automobile policy. Throughout this period, Counsel dealt with an insurance adjuster who at first represented the Defendants' insurer and subsequently the Section D insurer.

[3] Plaintiff's Counsel had written to the Defendants on December 1, 1999, to advise that he represented the Plaintiff and to request insurance particulars. The Defendants deny that they ever received the letter. I heard evidence from Counsel regarding the sending of the letter. I also heard the Defendants acknowledge that the letter contained the correct address. I am satisfied that the letter was mailed to

and received by the Defendants. I am also satisfied that Plaintiff's Counsel tried unsuccessfully to contact the Defendants by telephone.

[4] Plaintiff's Counsel engaged in settlement discussions with the Section D adjuster and subsequently with Counsel for the Section D insurer. Through inadvertence, Counsel did not arrange for service of the Originating Notice and Statement of Claim.

[5] ***Law:*** The Application is brought pursuant to Nova Scotia Civil Procedure Rule 9.07(1) which states:

> "An originating notice is valid for a period of six (6) months beginning with the date of issue of the originating notice, and, when a party has not been served within the period, the court may, for just cause, at any time before or after its expiration, order the originating notice, to be renewed for a period of six (6) months from the date when it would otherwise expire or from such later date as the court may order."

[6] The Application relies on the Court of Appeal decision in ***Minkoff v. Poole and Lambert*** (1991), 101 N.S.R. (2d) 143; 275 A.P.R. 143 and looks for support in ***Gaul v. Pitts Insurance Co.,*** [1977] N.S.J. No. 671 (SC TD).

[7] In ***Minkoff***, supra, Chipman, J.A. described the test in an application under Rule 9.07(1) as follows:

> "The test to be applied ... is whether just cause has been shown. In determining this the Court must, after a careful study and review of all the circumstances, see that justice is done."

[8] And MacLellan, L.J.S.C. in ***Gaul, supra*** proposed that "just cause" in Rule 9.07(1) means "a cause that is morally right or one that is equitable between the parties ... one that is essentially fair."

[9] Chipman, J.A., again in ***Minkoff, supra***, described the court's role as one of weighing injustice to the Plaintiff against potential prejudice to the Defendant and noted that:

> "If, at the end of the day, the scales are evenly balanced, when both the injustice to the plaintiff and the prejudice to the defendant are weighed, then the plaintiff should fail."

[10] ***Analysis:*** The Respondents raise questions about the Plaintiff's ability to recall the accident. Such questions are not relevant to this Application. Those are matters for trial. Similarly, the financial ability of the Respondents to defend the action is not relevant. Even if it were, there is no evidence to suggest that the Defendants were financially better off three years ago than they are today.

[11] The Respondent's best argument is that they have been prejudiced by the passage of time. More than five years have elapsed since the accident. While that argument is not completely without merit, the fact remains that the accident was the subject of an RCMP investigation. An insurance adjuster has also been involved. Witnesses were interviewed and statements taken.

[12] When I weigh injustice to the Plaintiff against potential prejudice to the Defendants, the scale is weighted heavily in the Plaintiff's favour. To grant the Application would be to forever deprive the Plaintiff of his day in court. Despite their denials, I am satisfied that the Defendant's have known of this potential claim at least since December 1, 1999. Though five years have passed, the factual situation is not complex and there is no evidence that evidence has been lost or destroyed.

[13] The Application is granted. The Originating Notice and Statement of Claim are hereby renewed for a further six months. The parties will each bear their respective costs of this Application.

Order accordingly.

J.