SUPREME COURT OF NOVA SCOTIA
Citation: *Gale v. Morash*, 2015 NSSC 316

Date: 20151109
Docket: Hfx No. 316717
Registry: Halifax

Between:

Angela Marie Gale

Plaintiff

v.

Devon David Morash and Larry David Morash

Defendants

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	September 29, 2015, in Halifax, Nova Scotia
Counsel:	David W. Richey, for the Plaintiff Cameron Foster, for the Defendants

By the Court:

[1] The matter before the court is *Gale v. Morash*, Hfx No. 316717. The Notice of Action and Statement of Claim in this matter is presently expired. It would have expired some five years ago. Plaintiff's counsel, Mr. Richey, has made a motion to renew the Notice of Action and Statement of Claim. This motion is opposed by the insurer for the intended defendants, Intact Insurance, who were represented by Mr. Foster.

[2] The facts are as follows: a car accident occurred in September 2006. The plaintiff, Angela Gale, was involved in that accident. She filed a Notice of Action and Statement of Claim in relation to that accident with the Nova Scotia Supreme Court on September 11, 2009. This was effectively three days before the expiry of the three year limitation period.

[3] The named defendants were Devon David Morash and Larry David Morash. Neither of these defendants have ever been served with this claim. Prior to the filing of the action, and afterwards, plaintiff's counsel was engaged in discussion with adjusters for Intact insurance.

[4] The evidence before the court in support of the motion was in the form of affidavits; I note one affidavit from Constance Oliver and a second affidavit from Mr. Richey himself. This evidence reveals the events from 2007 to 2011. Intact was first contacted in June 2007. In March 2008, an adjuster took a statement from Ms. Gale.

[5] In November 2008, Mr. Richey sent medical information, and other information about the plaintiff, to Intact. I have been provided with an index of the information that was sent at that time. The first documents are dated September 2006; the last are dated October 2008. I am told that, in total, Mr. Richey sent some 600 pages at that time. The information includes, according to the index, information from doctors, physical trainers, physiotherapists, neurologists, MRI reports, massage therapists, experts in physical medicine, rehabilitation, chiropractors, allergists, occupational therapists; a great variety of treatment providers.

[6] In September 2009, the Notice of Action and Statement of Claim was filed. In 2011, Mr. Richey forwarded this Notice of Action to Intact, but specifically stated that his delivery did not constitute service of that notice, and that a formal defence was not being requested at that time. By then, of course, the Notice had already expired, as per Rule 4.04 of the Civil Procedure Rules.

[7] The adjuster requested a renewed notice from Mr. Richey; that did not come. In November of 2011, the adjuster contacted the prothonotary's office and requested that he be notified of any renewal application being made by the plaintiff.

[8] It would appear that plaintiff's counsel did attempt to renew the Notice of Action, in the fall of 2011. The documentation was simply sent into the prothonotary. The prothonotary responded and correctly advised Mr. Richey that, given the expiry of the Notice, such a request would require an application to a judge. No such application was made. Nothing further was done in respect of a renewal.

[9] It should also be noted that, in 2010, the plaintiff Ms. Gale was involved in another motor vehicle accident. This was brought to the attention of Intact by way of a draft Amended Notice of Action, which was sent to Intact by Mr. Richey in August of 2011.

[10] In the summer of 2012, Mr. Richey contacted the adjuster by email, and advised that he hoped to have a settlement proposal in to her by the end of the summer. Nothing further came as a result of that either.

[11] According to the evidence before me, nothing further happened after that until the fall of 2014. At that time, the prothonotary brought this file forward at an appearance day motion, seeking that the action be dismissed on the basis that it had been dormant for five years. I note specifically this was not brought forward by Mr. Richey or the plaintiff; it was brought forward in 2014, by the prothonotary.

[12] The prothonotary's application did result, however, in Mr. Richey coming forward and seeking the renewal of this action. He was given filing dates in early 2015 to make the motion. For a variety of reasons, the motion was not scheduled to be heard until July 2015; it was then adjourned at Mr. Richey's request. An August date was scheduled, which could not go forward because of a court scheduling difficulty, which was not the fault of either party. The hearing was then scheduled for September of 2015, and heard by me last week.

[13] This proceeding was formally commenced approximately six years ago. It expired five years ago. It relates to an event from approximately nine years ago.

[14] The Rule governing applications to renew an originating notice in these types of circumstances is Rule 4.04. Rule 4.04(1) indicates:

> A notice of action, including a notice of action for debt, expires one year after the day it is filed, unless a defendant is notified of the action in accordance with Rule 31 – Notice.

[15] Specifically the events before the court would fall within ss. 5 of that Rule:

> **(5)** A judge may renew an expired notice of action more than fourteen months after the day the notice of action is filed only if the plaintiff satisfies the judge on either of the following:
>
> (a) reasonable efforts were made to notify the defendant of the action by effecting personal service, service could not be effected personally, and the plaintiff will make a motion for a substituted method of giving notice as soon as possible;
>
> (b) inadvertence led to the expiry, the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

[16] In the case before me, I have heard no evidence of any attempts to serve the defendants. Rule 4.04 (5) (a) is not available to the plaintiff in this case. Rule 4.04(5) (b) is the section that provides the only possible route for the plaintiff to seek renewal of this particular Notice.

[17] The case law is clear, that an application to renew a Notice of Action pursuant to Rule 4.04(5), that is to say later than 14 months after the Notice of Action was filed, imposes a heavier burden on an applicant than one who is seeking renewal pursuant to Rule 4.04 (2) (within 14 months of the filing of the Notice).

[18] The threshold requirement in Rule 4.04(5) (b) is "inadvertence (which) led to the expiry". That is a requirement that must be shown first, following which the court will then consider prejudice to each of the parties.

[19] In the affidavit of Mr. Richey, para. 12 of his affidavit, sworn July 27, 2015, he indicates:

> 12. As to all of the Affidavit of Tanya Godin sworn July 15, 2015, I was in error in assuming that the Defendants as represented by Intact Insurance were content to await the opportunity to attempt a negotiated settlement before incurring litigation costs, and in failing to provide a settlement proposal to Ms. Godin in 2012, or subsequently. As a result of this erroneous belief, I neglected to apply earlier for renewal of the writ.

[20] This paragraph speaks only of renewal. It does not provide any evidence as to the reasons for the failure to meet the original deadline for service, which is truly the fundamental question here.

[21] In Mr. Richey's written submissions, provided to the court in advance of the hearing, he advises that this was also, in fact, the reason for his failure to serve. I quote from page 7 of his most recent brief to the court:

> Para. 12 of my affidavit acknowledges my error in assuming that the defendants as represented by Intact Insurance were content to await negotiations rather than incurring litigation costs and my consequent failure to either serve the writ or to bring this renewal motion earlier. This we submit is inadvertence.

[22] Mr. Richey also confirmed (during his oral submissions) that para. 12 of his affidavit can be understood to mean that the nonservice of the defendants was a conscious choice on his part. He chose to make contact directly, and only, with the insurance company. He indicates that that is a practice that he commonly uses.

[23] I have reviewed cases that explain the concept of inadvertence, and the result of a failure to show inadvertence in particular cases. I refer to the case of *Gross v. White*, 2010 NSSC 10. In that particular case, the court referenced Black's Law Dictionary where inadvertence was defined as "an accidental oversight or a result of carelessness".

[24] The court in *Gross* also referred to the Random House Dictionary, where inadvertence is defined as:

> The quality or condition of being inadvertent; heedlessness.
> Act or effect of inattention; an oversight.

[25] I also note the case of *Thornton v. RBC*, 2014 NSSC 215. In that particular case, it was held that the failure to provide evidence to substantiate inadvertence was fatal to an application to renew.

[26] It is clear to me that the word "inadvertence", as it is found in Rule 4.04, is meant to capture accidental or careless acts. It is not meant to capture intentional acts. Mr. Richey chose this course of action. He also chose to devote much time and energy, as I understand it, to a Human Rights complaint that also involved Ms. Gale.

[27] I fail to see how this meets the definition of inadvertence. I do not see this as an accident. This was simply a choice: to pursue the matter in this way, and to give priority to other things.

[28] As described by Justice Wood in the *Thornton* decision:

> The requirement to show inadvertence is not a heavy burden, but it is real. The words are used in the Rule and they have to mean something.

[29] It may be Mr. Richey's practice to deal entirely with insurance companies and adjusters in order to negotiate settlements for personal injury clients. However, Ms. Gale and Mr. Richey filed a Notice of Action; that is a very important fact, and makes this matter the court's business. This action has brought them into the jurisdiction of the Supreme Court. Having filed an originating notice, it is not open to a litigant to then ignore the court process entirely, to pursue other issues or other priorities. In my view, to do so constitutes a disrespect to this court and to its processes, even if that is not the intent.

[30] The rules of court are, as to these issues, very simple and very clear. They are widely available to the public and should certainly be very familiar to counsel who practice in this court. Mr. Richey is counsel of many years experience; he is very much aware of how this process works.

[31] When an originating notice is filed with the court, according to Rule 4 it expires in 12 months, unless service is effected as provided for in Rule 31. That second Rule explicitly speaks of personal service to the defendant. These are simple rules, easy to understand and, in most cases, easy to follow. If personal service cannot be effected, there are alternatives.

[32] This Notice of Action was filed to preserve this action, with a few days left before a limitation period expired. After that, it appears that the court process was ignored. That is unacceptable.

[33] I do note, and have already mentioned, the attempt to renew the expired Notice of Action in 2011. However, anyone, and certainly counsel of many years experience, would see by reading the Rule that the notice was expired, and that an application to a judge was required.

[34] Rule 4.04 (5) (b) requires the court to be satisfied that inadvertence led to the expiry of the Notice of Action. I find that the evidence before me does not show inadvertence, but shows rather a conscious choice.

[35] As I have already said, this is a threshold requirement in Rule 4.04(5)(b). I find it has not been met, or, to put it another way, I am not satisfied that it has been

met. As a result I do not grant the plaintiff's motion to renew her Notice of Action and Statement of Claim.

[36] Having said that, in the event that I am incorrect in my conclusion relating to inadvertence, I have gone on to consider the rest of Rule 4.04 (5)(b), which refers to prejudice to the parties.

[37] There can be no doubt that the plaintiff will suffer prejudice if this proceeding is terminated. She will not be able to seek compensation through the courts from the defendants for injuries suffered. There was a discussion during this hearing about possible alternatives for her. In my view, those are speculative. I do not believe that it is necessary to consider those alternatives in detail here. Rule 4.04 (5)(b) asks if serious prejudice to the plaintiff can be shown and, whether there are alternatives or not, I find that is the case here.

[38] In regard to the question of whether the defendant has suffered serious prejudice that cannot be compensated in costs, the case law shows that the burden remains on the applicant, in the first instance, to show a lack of any significant prejudice to the defence. I'm speaking about the cases I have already mentioned, *Gross v. White,* and *Thornton v. RBC*. I also note the case of *Minkoff v. Poole,* 98 N.S.R. (2d) 398.

[39] As described by the Court in the *Thornton* decision, this type of prejudice is typically evidentiary in nature; it requires a consideration of whether documents and witnesses have been lost due to the passage of time.

[40] This case is a personal injury case, within which the plaintiff sought general damages for pain and suffering, loss of future income, as well as special damages for past loss of income. Obviously the state of her health throughout the entire period since the accident, as well as her ability to work during the entire period, is relevant.

[41] As I have already mentioned, plaintiff's counsel sent voluminous medical records to Intact during the fall of 2008. However, there is no evidence before me as to whether any of the professionals who treated the plaintiff, and whose records are contained therein, are still available to be interviewed, discovered, or subpoenaed. None have been so far.

[42] Plaintiff's counsel acknowledges that no further documentation was sent to Intact after the fall of 2008, until July of 2015. At that time, the present motion was before the court. Plaintiff's counsel sent a new Affidavit of documents, with more medical records, to Intact. These records' dates started in 2008 and ran to September 2011. I have the index with respect to that affidavit; some of the records

seem to be the same professionals as were mentioned in the 2008 documents, but some seem to be different.

[43] There is no evidence before me as to any documentation from 2011 to 2015, in respect of the plaintiff's health/employment situation, or her treatment providers. One presumes that all of this information is within the ability of the plaintiff to obtain; but it has not been provided to me in support of the present application. In my view, this is a significant deficiency in the plaintiff's submission that the defence has suffered no prejudice. There is a complete lack of evidence for that very significant period of time. How could a court be satisfied that there is no prejudice to the defence, in those circumstances?

[44] I would also note that all of this is further complicated by the second accident that was suffered by the plaintiff, in the spring of 2010. I noted this to counsel during the hearing, and I repeat it here. It is difficult to say that this complication can be directly linked to any delay on behalf of the plaintiff, because even if this Notice has been served as required by the Rules, it is possible that the second accident would already have occurred. If not, it might also have occurred before any significant work was undertaken by the defendants. In other words, this is a complication which might likely have been faced by all parties in any event.

[45] However, in the context of the application before the court today, this complication creates many additional difficulties for the defence, given the passage of time. I repeat that we are now nine years after the accident, and five years after a second (unrelated) accident. Precious little has been done to advance or defend this claim as of yet; and I have nothing before me from 2011 onwards.

[46] I was provided with an affidavit from Tanya Godin, Senior Claims Representative with Intact, in response to this application. Ms. Godin stated that their normal practice when served with a Notice of Action is to refer the matter to counsel, so that a number of steps can be taken. These include assessing the damage to the vehicles, arranging discovery of the plaintiff or plaintiffs, obtaining independent medical examinations, obtaining functional capacity assessments, arranging for surveillance, and establishing accurate reserves. In this case, the notice was never served; therefore, defence counsel was not retained, and none of these steps were ever taken.

[47] Ms. Godin was not cross-examined. I accept her evidence. Mr. Richey seems to be disagreeing with her in his submissions, but I have no reason to doubt her evidence. These steps were not taken, and are normally done by or in conjunction with defence counsel.

[48] In conclusion, the plaintiff's burden was to satisfy me that the defendant would not suffer substantial prejudice (that could not be compensated in costs). I am not so satisfied.

[49] As a result of all of my conclusions as outlined here, the plaintiff's application to renew her Originating Notice and Statement of Claim is denied. I would ask that defence counsel draft the order.

[50] On the issue of costs, I have heard no detailed submissions, although the defence did request costs in their written submissions. I will leave that to counsel to discuss. If the parties wish to refer that issue to me, please provide me with written submissions within 30 days of today's date.

Boudreau, J.