IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hiscock v. Pasher, 2008 NSSC 36

Date: 20080204
Docket: SN No. 112927
Registry: Sydney

Between:

Florence M. Hiscock

Applicant/Plaintiff

v.

Mary M. Pasher

Respondent/Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	January 22, 2008, in Sydney, Nova Scotia
Counsel:	Guy LaFosse, Q.C., for the for the Applicant/Plaintiff Clarence A. Beckett, Q.C., for the Defendant/Respondent

By the Court:

[1] ***Introduction:*** This is an application to set aside a Prothonotary's Order to dismiss an action pursuant to CPR 28.11. I have dismissed the application because the delays in question stemmed from the wilful neglect of Plaintiff's Counsel. The Plaintiff will not be left without a remedy; she has an excellent cause of action against the lawyer. the lawyer is solely responsible for what occurred and should therefore bear the consequences.

[2] ***Facts:*** The Plaintiff, Florence M. Hiscock (Hiscock) is now 67 years old (d.o.b. July 24, 1940). She was 57 years old on April 28, 1998 when she was involved in a motor vehicle collision. She was stopped at a stop sign when the Defendant collided with her stopped vehicle. Hiscock says that as a result of the injuries she sustained in the accident (soft tissue injuries affecting her neck, shoulders, arms and hands) she could no longer continue her employment. She had been a medical secretary for 30 years. She continues to be under doctor’s care.

[3] The day after the accident, April 29, 1998, Hiscock retained Neil F. McMahon, Barrister and Solicitor (McMahon) to act on her behalf. She says that she had never been involved in a lawsuit before. She therefore left conduct of the

case to McMahon. She says that "over the years (she had) attempted to contact Neil McMahon to find out the status of my file but he failed to return my calls and did not keep me updated as to what was happening." (Hiscock paragraph 8)

[4] McMahon says that after his retainer he initially dealt with the Defendant's insurance company. He says that for "the first number of years ... there was very little activity on the file as we were waiting to see how the plaintiff would recover from her injuries. Also, the plaintiff unsuccessfully tried returning to work which resulted in me having to deal with her employer over her dismissal." (McMahon paragraph 5)

[5] On April 28, 2000, McMahon filed an Originating Notice (Action) and Statement of Claim "... in order to preserve the limitation period." (McMahon paragraph 4) In this Province, an Originating Notice is valid for a period of six months following which it must be renewed by application to the Court.

[6] On March 15, 2002, Clarence A. Beckett, Q.C. (Beckett) was retained to act on behalf of the Defendant. On March 15, 2002, and April 10, 2002, Beckett wrote to McMahon and advised him that the Originating Notice would have to be

renewed prior to service. Accordingly on the 23rd day of April 2002, McMahon made application to renew the Originating Notice. The Application was granted and the Originating Notice (which had been issued almost two years previously) was renewed for a period of six months. The Defendant was served on August 16, 2002.

[7] On August 27, 2002, Beckett filed a Defence on behalf of Mary M. Pasher, the Defendant. On September 26, 2002, Beckett forwarded a certified copy of the Defence to McMahon and requested acknowledgement. Between September 26, 2002 and February 24, 2003, Beckett attempted to reach McMahon by telephone but his calls were not returned.

[8] On February 24, 2003, Beckett wrote to McMahon again requesting that he acknowledge receipt of the Defence, requesting document exchange and requesting discovery dates. As a result, McMahon filed the Plaintiff's List of Documents on March 7, 2003. Beckett filed the Defendant's List of Documents on March 10, 2003.

[9] Beckett discovered the Plaintiff on March 18, 2003, during which McMahon provided 17 undertakings. Between March 18, 2003 and July 1, 2003, Beckett left a number of telephone messages at McMahon's office requesting the undertakings. On July 9, 2003, McMahon wrote Beckett enclosing a Supplemental List of Documents and agreeing to scheduling the continuation of the discovery examinations. The continuation of the discovery of the Plaintiff took place on August 27, 2003. On that same date, McMahon discovered the Defendant.

[10] On October 10, 2003, Beckett wrote McMahon wherein he reiterated the facts surrounding the Defendant's inevitable accident defence and requested a response from him. After October 10, 2003, Beckett left several telephone messages at McMahon's office requesting a response but none was forthcoming. On December 11, 2003, Beckett again wrote McMahon informing him of "the several telephone messages left at your office ..." and noting that Beckett had no response to his October 10 letter. When McMahon continued to fail to respond to Beckett's telephone messages and correspondence, Beckett again wrote him on June 14, 2004, "informing him that I was under instructions to advance the file and that the Defence was contemplating an application to the court."

[11] McMahon still did not respond. Then on December 14, 2004, Beckett wrote McMahon expressing his frustration and informing him that he, Beckett, was proceeding with a chambers application to be scheduled for January 4, 2005.

[12] Finally, on December 16, 2004, McMahon telephoned Beckett requesting that he forego the court application on the understanding that additional documents and materials would be produced by the end of December 2004. On December 30, 2004, McMahon forwarded Beckett some but not all of the materials undertaken to be produced at the time of the discovery examinations.

[13] On January 6, 2005, Beckett wrote McMahon requesting his immediate attention in providing the outstanding documents which McMahon had undertaken to provide. McMahon did not respond. On April 14, 2005, Beckett again wrote McMahon requesting that he give this matter his immediate attention. On May 26, 2005, Beckett telephoned McMahon's office and left a message for him to which he did not respond.

[14] On September 12, 2005, McMahon received the first notice from the Prothonotary advising him that the action would be dismissed upon the expiration

of 21 days of the date of the Notice. McMahon says he no longer has this notice. In any event, on the last day for the expiration of the Notice, McMahon filed a Notice of Intention to Proceed on October 3, 2005.

[15] When McMahon failed to take any further action, the Prothonotary sent out a second Notice of Order Dismissing Action on April 4, 2006. McMahon says he no longer has this Notice. He says "... because of a mental block on my part I failed to do anything further on the file and as a result on the 25th day of May, 2006, the Prothonotary issued an Order indicating that this action was dismissed". (McMahon paragraph 18)

[16] McMahon continues: "I regretfully failed to notify the Plaintiff and my Insurer about this dismissal. I had planned on making an application to set aside the Dismissal Order. Unfortunately, I was very busy in my property practice, which is the area of law that I mainly practice in and never did make the application to set aside the dismissal order." (McMahon paragraph 19)

[17] In his affidavit, McMahon continues at paragraph 20:

> "Following the discovery hearings in 2003, I acknowledge that I failed to keep the Plaintiff properly informed about the status

> of her file, and furthermore, I neglected to handle this file promptly so as to avoid having the Prothonotary issue the Notice to have the action dismissed."

[18] And at paragraph 21:

> "That the Prothonotary's Order to have the action dismissed was as a result of my failure to act properly on behalf of the Plaintiff. The Order was not issued as a result of any act or neglect on the part of the Plaintiff, whom I failed to keep updated on the status of her file."

[19] Hiscock says that in either December of 2005 or January 2006, "I was told by Neil McMahon that I would see progress on my file within a week or two or he would hire and pay for a new lawyer to represent me." (Hiscock paragraph 9) When Hiscock did not hear anything further from McMahon, she consulted Chris Conohan, another solicitor. Conohan wrote to McMahon indicating he wanted to review the file and that Hiscock no longer wanted McMahon to represent her. Conohan could not get the file from McMahon and advised Hiscock to lay a complaint with the Barristers' Society.

[20] In August 2006, Hiscock contacted the Barristers' Society. Subsequently she was advised by a Society staff member that McMahon would transfer the file the following week. When she still had no contact from McMahon, Hiscock again

contacted the Barristers' Society on September 12, 2006. A staff member later advised Hiscock that McMahon's assistant had told them that McMahon was out of the office until the following week.

[21] On November 12, 2006, Hiscock informed the Barristers' Society that McMahon had contacted her two days earlier. She says McMahon had apologized for the way he had handled the file and asked her if she would reconsider having him finish the case. Hiscock says that as a result of that call she agreed to let him continue on her file and advised the Barristers' Society that she would not be filing a complaint. (It should be noted that this November 2006 telephone conversation between McMahon and Hiscock took place almost six months after McMahon had received the Order of dismissal dated May 25, 2006.)

[22] On January 16, 2007, Hiscock again called the Barristers' Society and advised them that she had not heard anything further from McMahon since November 12, 2006. She then retained a new lawyer, Tony Mozvik (Mozvik). Mozvik sent two letters to McMahon in February 2007 but received no response. On March 5, 2007, Hiscock filed a written complaint against McMahon with the

Barristers' Society. It was not until March 19, 2007, that Hiscock learned from Mozvik's office that the Prothonotary had dismissed her action.

[23] By letter dated March 26, 2007, Mozvik advised the Barristers' Society of the Prothonotary's Dismissal Order. Almost four months later, Guy LaFosse, Q.C. was retained by the Lawyer's Insurance Association of Nova Scotia to make an application to set aside the Prothonotary's Dismissal Order of May 25, 2006. Beckett was advised of the application on July 31, 2007.

[24] ***The Law:*** The Order in question was issued by the Prothonotary pursuant to Rule 28.11 which reads as follows:

> (1) Each prothonotary shall maintain a General List that lists all proceedings in which the pleadings are closed and for which no date of trial has been fixed.
>
> (2) Where a proceeding has been on a General List for a period of three (3) years, the prothonotary shall give the parties notice in Form 28.11A that they have thirty (30) days to file a notice of intention to proceed.
>
> (3) Where the parties do not indicate their intention to proceed within the time set out in subsection 2, the prothonotary shall issue an order in Form 28.11C dismissing the proceeding.
>
> (4) Where the parties do file a notice of intention to proceed, they shall, within six (6) months from the date thereof or such

> further time as ordered by the court, file with the prothonotary a Notice of Trial in accordance with rules 28.08 and 28.10.
>
> (5) Where the parties fail to file a Notice of Trial pursuant to rule 28.11(4) and where no extension of time has been granted by the court, the prothonotary shall give the parties twenty-one (21) days notice in Form 28.11B before issuing an order in Form 28.11C dismissing the proceeding.

[25] Our Court of Appeal has recognized that this Court has the inherent jurisdiction to review and, if appropriate, set aside a Prothonotary's order to dismiss an action [***Goodwin v. Rogerson***, (2002) NSJ No. 469]. The Court stated at paragraph 20:

> "In our view the order of the deputy prothonotary should be set aside pursuant to the exercise of the Supreme Court's inherent jurisdiction to control its own process and to prevent an injustice. It may be suggested that progress in the action has been slow, but it was an active proceeding and through error of the solicitor the proper notice was not filed. The interest of justice requires setting aside the order to correct the non-compliance with procedural requirements. This does no injustice to the defendants."

[26] The Court did say that 28.11 cannot have been intended to be a substitute for an application for dismissal for want of prosecution pursuant to Rule 28.13. However, that statement was made in a case where the primary issue was whether the Court possessed the inherent jurisdiction to review a Prothonotary's Order.

Goodwin's dismissal was the result of one mistake. The Court did not deal with what criteria ought to be applied when such a review is undertaken.

[27] In ***Osborne v. Irving Oil Ltd.*** (2007) NSJ No. 331 (S.C.), LeBlanc J. dealt with an application to set aside a Prothonotary's Order. Justice LeBlanc adopted the four criteria set out in the Ontario case ***Reid v. Dowe Corning Corporation*** (2001) 11 C.P.C. (5th) 80, 2001 (Ont Master). In ***Reid***, the Court held that the Order would stand if the plaintiff did not satisfy ***all*** four criteria;

1. Explanation of the Litigation Delay
2. Inadvertence in Missing the Deadline
3. The Motion is Brought Promptly
4. No Prejudice to the Defendant.

[28] The rigid approach in ***Reid*** was softened by the Ontario Court of Appeal in ***Scaini v. Prochnicki and Winn***, [2007] O.J. No. 299. At paragraphs 23 and 24, the Court said the following:

> "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.
>
> ***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***." (Emphasis added)

[29] In ***Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.***, [2007] O.J. No. 3872 (C.A.), the plaintiff commenced an action in October 1996 but by early 1998 it had stalled. The plaintiff changed lawyers, but its new lawyer failed to file a Notice of Change of Solicitors. Because of this, the new lawyer never received the status notice that was sent by the Registrar, and the matter was dismissed on March 4, 1999. Nothing happened for four years. In June 2003 the respondents' lawyer discovered that the matter had been dismissed, but he did not inform his clients until October 2003. The application to set aside the Registrar's Order was served in December 2003.

[30] The Court applied the Reid factors to determine whether the action should be reinstated. The Respondent summarized these factors as follows:

> 1. Explanation of litigation delay: Although the respondents' lawyer did not receive the status notice, he should have been aware that the matter would expire after two years. There was no reasonable explanation for the litigation delay.
>
> 2. Inadvertence in missing the deadline: It was important to consider that the plaintiffs would not be left without a remedy. At paragraphs 28-29:
>
> > 28 One important consideration is that the plaintiff will not be left without a remedy. I recognize here the need to ensure that adequate remedies are afforded where a right has been infringed. 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: see e.g. Chiarelli v. Wiens (2000), 46 O.R. (3d) at paragraph 9 (C.A.).
> >
> > 29 However, this calculus implicitly assumes that the court is left with a stark choice between defeating the client's rights and forcing the opposite party to defend the case on its merits. That assumption is faulty where, as in this case, the solicitor's conduct is not mere inadvertence, but amounts to conduct very likely to expose the solicitor to liability to the client. When the solicitor is exposed in this way, the choice is different; refusing the client an indulgence for delay will not necessarily deny the client a legal remedy.

[31] Another consideration was the public's confidence in the legal system. There was a concern that reinstating the case would appear to be excusing the lawyer's behaviour and be seen as the legal profession protecting its own.

> 3. The motion is brought promptly – There was not extensive discussion of this factor. Obviously the motion was brought several years after the matter was dismissed.
>
> 4. Prejudice to the defendant – It is desirable to have cases determined on their merits. When, despite delay, there is no prejudice to the defendant, it is generally preferable to have the case heard.

[32] In conclusion, the court found that the delay was inordinate. The respondents did nothing to advance the file for five years, and before that, had proceeded in a "desultory fashion" (paragraph 39). The dismissal was not set aside. At paragraph 41:

> “I conclude that the Master's analysis is appropriate because it takes account of important principles and values of the civil justice system. The solicitor's behaviour resulted in an excessive delay. Delays of this kind are inimical to the important goal of timely justice. The legal system should not condone the solicitor's behaviour as to do so would fail to provide appropriate incentives to those engaged in the justice system and would risk harming the integrity and repute of the administration of justice. Reinstating the action at this point would undermine the finality principle while refusing the reinstate the action does not interfere with the need to ensure adequate remedies.”

[33] In ***Printing Circles v. Compass Group Canada (Beaver Ltd.)***, [2007] O.J. No. 2682 (Sup. Ct. J.), the Statement of Claim was issued in April 2004 and the Defence in June 2004. The court found that matters proceeded with reasonable diligence until February 2005, when the plaintiff's lawyer died. The plaintiff did not discover his death until February 2006, and new counsel was obtained in March 2006. A warning notice that the matter was about to be dismissed for delay was sent to the plaintiff's new counsel on July 17, 2006. However, the court accepted that he never received it. He did receive notice that the matter was dismissed in November 2006. Notice that the plaintiff would be seeking to set aside the Registrar's Order was sent to the defendant on March 11, 2007, and an application was served on May 18, 2007.

[34] The court considered the Reid test as refined by Scaini, set aside the Registrar's Order, and explained at paragraph 30:

> "It was apparent during argument that Printing Circles is not sophisticated in legal matters. Current counsel is junior and perhaps inexperienced in the cut-and-thrust of civil practice. Mr. Haque's death is the obvious explanation for much of the delay. Obviously, Printing Circles should not have its rights terminated for these three reasons. However, the delay in bringing this motion really was excessive and deserves sanction."

[35] The court discussed delay at paragraphs 23-24:

> "23 The pace of the response to the Registrar's Order is entirely unacceptable. A party must treat a Registrar's dismissal Order as a matter requiring urgent attention. Failure to address the issue in a timely fashion will give rise to a further delay in the proceeding that may well cause real prejudice. The longer the delay, the greater the chance that the defendant will close its file, dispose of documents, and thereby prejudice its ability to defend the case. Further, eventually a party should have repose -- a fundamental principle of limitations periods.
>
> 24 One would expect that a party would indicate its intention to move to set aside a judgment within hours or days of receiving notice of the judgment. The timing of the motion, itself, will depend on all of the circumstances of the situation, including scheduling discussions between the parties. As a general rule, it would seem reasonable to await an answer to a request for consent to the Order. If consent is denied, or is not forthcoming within a reasonable period of time, then the motion should be brought promptly."

[36] ***Analysis:*** First, I will apply the ***Reid*** criteria.

[37] ***1. Explanation of the Litigation Delay:*** There is no explanation other than wilful neglect. McMahon does attempt to rationalize his behaviour by saying that he was overwhelmed with his property practice. That is just not good enough. All he had to do was call Hiscock and tell her she would have to retain another lawyer. McMahon could easily have assisted her in finding a new lawyer and then turned

over the file. Why he did not do so defies explanation. Instead, as the factual background indicates, McMahon's conduct is one of neglect for almost six years prior to the Prothonotary's Order on May 25, 2006. (Fair enough that not much occurred in the first two years while Hiscock's condition was being assessed.)

[38] The Plaintiff herself cannot be faulted. She was a novice litigant who felt she could rely on her lawyer to look after her interests. A more experienced litigant would have been expected to jettison the lawyer long since. But that is not the standard that should be applied to Hiscock. She tried repeatedly and unsuccessfully to get updates from McMahon but was no more successful in eliciting a response than was an experienced litigator like Beckett. She did (albeit belatedly) contact other counsel and complain to the Barrister's Society. I would not expect more from her. Clearly, she always wanted the action to proceed. In contrast, McMahon appears to have hoped (if he thought about it at all) that, if he ignored the case long enough, it would simply go away.

[39] ***2. Inadvertence in Missing the Deadline:*** The Applicant's evidence establishes beyond any doubt that the dismissal was not the result of mere inadvertence. The dismissal was the result of wilful neglect by McMahon.

[40] There were two notices from the Prothonotary. As noted, the first was dated September 12, 2005. McMahon filed a Notice of Intention to Proceed on October 3, 2005, the very last day for a response. He then did nothing. The second notice came on April 4, 2006. McMahon ignored it. The Prothonotary issued the Order for Dismissal on May 25, 2006. McMahon's explanation: "... because of a mental block on my part I failed to do anything further on the file ..." (Affidavit paragraph 18). With respect, that is no explanation.

[41] ***3. The Motion is Brought Promptly:*** I agree with Counsel for the Respondent. The motion was not brought promptly. The Prothonotary's Order was issued on May 25, 2006. The Defendant was not advised of the present application to set that Order aside until July 30, 2007. McMahon says he had planned on making an application to set aside the dismissal order. "Unfortunately," he says, "I was very busy in my property practice ..." (Affidavit paragraph 19).

[42] Hiscock found out about the Dismissal Order on March 19, 2007. Her new lawyer advised the Barrister's Society by letter dated March 26, 2007. Still it was

over four months later before the Lawyers' Insurance Association of Nova Scotia retained counsel, Mr. LaFosse (LaFosse), to make this application. To his credit, LaFosse acted promptly but there is no explanation for the delay in retaining him. As Respondent's Counsel noted "there is a far cry from the 'hours or days' contemplated in the ***Printing Circles*** case." In short, this file never got the attention it deserved until LaFosse got his hands on it.

[43] A further aggravating factor relates to the telephone conversation between Hiscock and McMahon on November 10, 2006. This conversation took place over five months after McMahon knew Hiscock's case had been dismissed. He did not tell her. Instead, he persuaded her to let him continue on the file and to withdraw her complaint against him to the Barrister's Society. He put his own self interest ahead of that of his client. Then, instead of being grateful for the reprieve, McMahon reverted to what was by then an established pattern of ignoring her and her case. The long overdue application was delayed yet again.

[44] ***4. Prejudice to the Defendant:*** This is the only area where analysis would favour setting the Order aside. I am not persuaded that the Defendant would suffer prejudice if he had to revive the Defence. Beckett has referenced the health

concerns of his expert witness but that is hardly an insurmountable problem. He has asked me to presume prejudice because of the passage of time but, in the circumstances of this case, I am not prepared to do that. Discoveries have taken place, documents exchanged and mechanical investigation completed (though no formal report was prepared).

[45] As the Court noted in ***Marché***, "it is not enough for the respondents to show that the Appellant could advance it's case despite the delay if the matter were to proceed to trial. There are four branches to the ***Reid*** test, and, according to ***Scaini***, those four factors are not exhaustive." (Paragraph 35)

[46] ***Conclusion:*** What does the interest of justice require in this case? Obviously, allowing the Dismissal Order to stand would be an extreme remedy. But are the circumstances here so egregious that an extreme remedy is appropriate? I believe they are.

[47] I take comfort from the fact that Hiscock will not be left without a remedy. McMahon's conduct exposes him to liability to Hiscock. I am confident she will have no difficulty making a case against him.

[48] Second (to paraphrase ***Marché***), McMahon's conduct amounts to more than that kind of lapse or inadvertent mistake that the legal system can countenance. This type of conduct must be emphatically denounced and discouraged.

[49] Third (again as in ***Marché***), excusing this delay and this conduct risks undermining public confidence in the administration of justice. "... Excusing a delay of this kind would throw into question the willingness of the courts to live up to the stated goal of timely justice." (***Marché*** paragraph 32)

[50] There is no justification for putting this back on the Defendant. Ms. Pasher had this matter hanging over her for eight years prior to the Dismissal Order. Although she was ably represented by Counsel retained by her insurer, she still had to be available to testify at the trial, to meet with Counsel, and, if necessary, undergo further discovery examination. Since the Dismissal Order, she has no doubt experienced a sense of closure and has gotten on with her life without this cloud hanging over her. Litigants are entitled to finality after the passage of a reasonable amount of time. For Ms. Pasher, that time has long since passed.

Neither she nor her Counsel are in any way responsible for the present state of affairs.

[51] There is only one person who is responsible for this situation. I see no reason in logic or in law why he alone should not bear the consequences. Defendant's counsel went out of his way to encourage McMahon to pursue Hiscock's claim. There is no reason to deflect any of the blame from McMahon.

[52] The application is dismissed with costs to the Respondent in the agreed amount of $1,500.00.

Order accordingly.

J.