

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Creswell v. Murphy, 2010 NSSC 190

**Date:** 20100510

**Docket:** Hfx No. 230470

**Registry:** Halifax

**Between:**

William Creswell and Helen Creswell

Plaintiffs

v.

Keith Murphy and Marjorie Whynott

Defendants

**Judge:**

The Honourable Chief Justice Joseph P. Kennedy

**Heard:**

March 8, 2010 in Halifax, Nova Scotia (Chambers)

**Written Decision:**

May 10, 2010

**Counsel:**

John McKiggan and Ron Pizzo for the Plaintiffs  
Sheree Conlon for the Defendant Murphy

**By the Court:**

[1] This matter came before me in Chambers on March 4, 2010.

[2] The Plaintiffs brings a motion to renew the Originating Notice and Statement of Claim. The motion was opposed by the Defendants.

[3] After the hearing, but before this decision (April 6, 2010), the action against the Defendant Marjorie Whynott was dismissed by Consent Order. I am therefore dealing with the Plaintiffs' action against Murphy only.

**Background**

[4] An Originating Notice (Action) and Statement of Claim in the within proceeding was filed by the Plaintiffs on September 10, 2004 (the "Action"), wherein the Plaintiffs allege they suffered personal injury in two separate motor vehicle accidents including:

- September 8, 1999: the Plaintiffs allege they were involved in a motor vehicle accident with the Defendant, Keith Murphy, which occurred in Calais, Maine, U.S.A.

[5] The Action expired on or about March 10, 2005 as it was not served upon either of the Defendants within the required six month period following the issuance of the Action.

[6] Approximately 26 months after the Action had expired, the Plaintiffs obtained an order from Justice Coady of this Court, dated May 28, 2007, renewing the Action for a period of six months.

[7] On November 28, 2007 the Action once again expired due to the failure of the Plaintiffs to serve the Action upon the Defendants.

[8] On October 9, 2008 counsel was retained by the insurer for the Defendant, Murphy and so informed the Plaintiffs.

[9] On October 22, 2008 an application to renew the Action was scheduled but adjourned without date at the request of the Plaintiffs.

[10] On September 18, 2009 the Prothonotary issued an Appearance Day notice seeking an order to dismiss the Action on the basis that five years had passed since the Action was commenced and no trial date had been set.

[11] That motion was subsequently adjourned until December 22, 2009. On December 22, 2009 the hearing of the motion resulted in an order issued by Justice Bryson dismissing the Prothonotary's motion and scheduling a motion for renewal of the Action in Special Chambers on March 4, 2010 granting the Defendants leave to intervene in the renewal motion.

### **Issue**

[12] Should the Action be renewed as against the Defendant Murphy pursuant to *Civil Procedure Rule (1972) 9.07*?

### **The Applicable Civil Procedure Rule**

[13] The Interlocutory Application (Ex Parte) by which the Plaintiffs are seeking to renew the Action was originally filed on October 9, 2008.

[14] Pursuant to *Civil Procedure Rule* 92.04(b) an Interlocutory Application that is outstanding in an action on January 1, 2009 must be completed under *Civil Procedure Rules* (1972). Therefore the applicable *Rule* for the Application is *Civil Procedure Rule* (1972) 9.07, which states:

9.07 (1) 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 with the period, the court may, for the 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.

### **The Law**

[15] The test used to determine whether the renewal of the Action is warranted in this matter is outlined in the oft-cited decision of the Nova Scotia Court of Appeal in *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (N.S.C.A.). In *Minkoff*, the Court provided the following at para. 23:

It will be seen therefore that the overriding consideration on an application to renew an originating notice should be that justice be done and that in determining this, the injustice to the plaintiff in terminating the proceedings will be balanced against the prejudice to the defendant that may result from permitting them to continue. In stating the test to be applied in the broad term "for just cause", the rule has conferred upon the court a wide and largely unfettered discretion.

[16] The Court in *Minkoff* went on to say, at para. 24, that:

In all cases, the particular circumstances will govern. It is recognized that long delay of itself gives rise to an inference of prejudice. The strength of the inference depends, again, on all the circumstances. ...

[17] With respect to the burden of proof in an application to renew an action, the Court in *Minkoff* provided the following at para. 25:

... Clearly, the plaintiff has in the first instance, the burden of showing the court circumstances which warrant the discretion to be exercised in the plaintiff's favour including, to the extent that it is within the plaintiff's power to do so, circumstances negating the conclusion that the defendant was prejudiced. The defendant is also in a position to offer evidence on this issue and 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.

### **What the Defendant Murphy Submits**

[18] The Plaintiffs did not take any steps to renew the Action until May 2007, when the Plaintiffs obtained an order renewing the Action for a period of six months.

[19] The next step taken by the Plaintiffs with respect to the service of the Action was to file this application on October 9, 2008.

[20] At no point has the Originating Notice (Action) and Statement of Claim been served on the Defendant, Murphy.

[21] There has never been an application for substituted service.

[22] The Defendant points out that no explanation has been given as to why Murphy has not been served and has no knowledge as to the current circumstances of the Plaintiffs. No Defence has ever been filed, there have been no discovered examination and the last information was provided in January 2008, over two years ago, which was medical information contained in the Plaintiffs' employment file.

**What the Plaintiffs Submit**

[23] The Plaintiffs submit that they will suffer far greater prejudice upon the rejection of the relief sought herein than the Defendant in this proceeding will suffer if the Application is renewed.

[24] They say there has been no destruction of records or loss of evidence which might prejudice the Defendant.

[25] The insurer for the Defendant Murphy was put on notice as to the Plaintiffs' claims within months of the motor vehicle accident giving rise to the claims. The Defendant has had ongoing medical disclosure and has had opportunity to interview the Plaintiffs. The Defendant's insurance company has known of the claims for years and have had time to investigate the claims and prepare to defend the claims.

[26] The insurer for the Defendant was served with the Originating Notice and Statement of Claim shortly after it was issued. A settlement proposal has been provided to the Defendant's insurer.



[27] The Plaintiffs suggest that the Plaintiff William Creswell's career prospects may have been significantly diminished as a result of his injuries. Significant disclosure has been provided to the Defendant to document the Plaintiff's claim.

[28] The Plaintiffs submit there would be no prejudice to the Defendant in this matter if the Originating Notice and Statement of Claim were to be renewed.

[29] The Plaintiffs cite *Grosse v. White* [2010] N.S.J. No. 7, where the delay between issuing a notice of action and the application to renew before the Court was seven years. The Plaintiff had applied to renew the action three times before. After the action was commenced, the Defendant, White, passed away. For the first 18 months after the accident, Plaintiff's counsel only had sporadic contact with the insurer. No settlement proposal had ever been forwarded by the Plaintiff to the insurer.

[30] In granting the order to renew, Justice McDougall held, at paras. 36 and 37:

**36** Efforts to track down potential witnesses who are still living and have some recollection of the accident have not yet been fully exhausted. Hopefully they can still be found. Even though the defendants have not been properly served their insurers have known of the plaintiff's intended action since at least November of

2003. They have had time to investigate the claim and to prepare to defend against it.

**37** I therefore order that the Originating Notice (Action) and Statement of Claim be renewed for a one year period commencing on today's date. It will expire, unless the defendants are served personally or by way of service on a representative in the case of the defendant, "White", no later than January 8, 2011. Given that the action has already been renewed three times before there should be no need for any further renewals.

### **Decision**

[31] I am going to permit one more renewal of this matter. A prejudice to the Defendant Murphy is presumed given the significant delay in bringing this matter to trial. However, when I balance the prejudice to the Defendant against the dramatic prejudice to the Plaintiffs should the action be ended, I conclude that the Plaintiffs will be given one further opportunity to move the matter forward.

[32] I so conclude mindful that the insurer for Murphy has been aware of the suit from the filing of the Originating Notice and has been in a position to react accordingly.

[33] I adopt the position taken by Justice McDougall in *Grosse* that service is to be accomplished on the Defendant Murphy within the six month period set out in the order and that given the history of this Action, no further renewal can be anticipated.

[34] I award costs to the Defendant Murphy in the amount of \$1,000.00.

Joseph P. Kennedy  
Chief Justice