SUPREME COURT OF NOVA SCOTIA
Citation: *Creswell v. Murphy* 2018 NSSC 11

Date: 20180119
Docket: Hfx No. 230470
Registry: Halifax

Between:

William Creswell and Helen Creswell

- Plaintiffs

v.

Keith Murphy and Marjorie Whynot

- Defendants

Judge: The Honourable Justice Jamie Campbell

Heard: December 19, 2017, in Halifax, Nova Scotia

Counsel: John Rafferty, Q.C., for the plaintiffs
Sheree Conlon, Q.C., for the defendants

By the Court:

[1] William and Helen Creswell were injured in a motor vehicle accident in Maine, in September 1999. In 2004, they sued the driver of the car in Nova Scotia. Now, more than 18 years after the accident very little has been done to move the matter forward. The case has turned on itself so that most of the little activity on it has been about its own inactivity.

Rule 82.18

[2] This is a motion to have the case dismissed for want of prosecution. The court has authority to do that under Rule 82.18. The rule is simply stated. A judge can dismiss a proceeding that is not brought to a trial or hearing within a reasonable time. It is not a summary judgment motion but involves a very different test.

[3] There must first be inordinate delay. That delay must have been inexcusable. And the delay must give rise to a likelihood that the defendant will be seriously prejudiced by that inordinate and inexcusable delay.[1] There must be a causal link between the delay and prejudice to the party claiming that prejudice.[2] Finally, the prejudice to the plaintiff of dismissing the action must be weighed against the prejudice to the defendant in having the matter proceed.[3]

Is This Delay of 18 Years Inordinate?

[4] The accident happened 18 years ago. The action was filed 5 years later in 2004. The action expired after a year, in March 2005. It was renewed for 6 months. It expired again in November 2007. In October 2008, an application to renew was made but it was adjourned without day at the plaintiffs' request.

[5] Nothing happened. In September 2009, the Prothonotary brought a motion to dismiss the action. That motion was dismissed and the matter was set over for another motion to renew. That motion was heard in March 2010. Chief Justice Kennedy granted "one last renewal" for six months and said that no more renewals should be anticipated.

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[1] *Clarke v. Ismaily* 2002 NSCA 64
[2] *Ross v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 377 (NSCA)
[3] *Braithwaite v. Bacich* 2011 NSSC 176, *Brogan v. RBC Dominion Securities Inc.* 2009 NSSC 351

[6] The action was renewed but it wasn't served.

[7] In October 2010, the plaintiffs filed another motion to renew along with a motion for substituted service. The motion was granted in February 2011. That order was never taken out.

[8] Rather than spending time and effort in keeping the action alive, it might have been more efficient to have done something to move it toward a conclusion. That was the plaintiffs' obligation.

[9] The plaintiffs filed an affidavit disclosing documents about 7 years after the claim was filed, or 12 years after the accident. That is really the first and only thing they did apart from getting renewals. The discoveries were held at the defendants' request in 2011 and the defendants' counsel reserved the right to have further discoveries because of the late filing of the affidavit disclosing documents.

[10] When the discovery of Mrs. Creswell was done in October 2011, that was the last action taken to move the file forward.

[11] Prior to this motion, the defendants had not even heard from the plaintiffs or their counsel for 6 years. That's 6 full years of silence. The defendants are not obliged to come back periodically to remind the plaintiffs that they have sued them and haven't done anything about it. Of course, defendants should not be allowed to pounce on delay in a case where there has been no discussion about that issue. Here, if the plaintiffs, or at least their counsel were aware of the concern about delay after the Prothonotary's motion and after Chief Justice Kennedy's admonition that after 10 years they were getting their last renewal.

[12] There is no question that the delay in this case has been inordinate.

Is the Delay of 18 Years Inexcusable?

[13] The plaintiffs have not given any reason why they have been essentially silent for so long, other than loyalty to their legal counsel. This is a sad case in the sense that William and Helen Creswell themselves were aware of the concerns about delay and expressed those concerns to their lawyer. They expressed those concerns in a way that was so polite and understanding that one cannot help but have sympathy for their plight.

[14] In August 2004 Mr. Creswell wrote an email saying it had been some time since he had heard from their lawyer John McKiggan. He asked for an update. Mrs.

Creswell wrote in October of that year, once again expressing the hope that the case can be "done and over with as soon as possible". Mr. Creswell wrote in April 2005 asking for an update, closing with "Appreciate your expertise & efforts and waiting your reply and action." In July 2005 Mrs. Creswell wrote asking if Mr. McKiggan had forgotten about them. Mr. McKiggan responded that he was speaking with the other lawyers and hoped to have discoveries scheduled for the fall.

[15] In September 2005 Mrs. Creswell wrote to Mr. McKiggan. "Willie and I would like to move forward with this case because the 8th of this month was the six year anniversary of the first accident. Quite a bit of time has passed." She wrote again in November, clearly having her patience tested, and asking what was taking so long. Mr. Creswell wrote in February 2006 and in November 2006. In November 2008 Mrs. Creswell wrote, "I totally understand that you are a busy man but a quick reply letting me know that you have received my email and will correspond with me at a later date would be quite nice."

[16] The Creswells wrote Mr. McKiggan and his associates in January 2011, March 2011, July 2011, and March 2012. In April 2012, Mr. Creswell wrote to Mr. Pizzo, the lawyer then handling the file, "13 years has passed and we want settlement."

[17] In June 2012, the Creswells wrote to Mr. Pizzo and Mr. McKiggan.

> Can you folks let us know how close we are to finalize (sic) these claims? After 12 years we would like to close these files as soon as possible with a settlement.
>
> I have left a couple of voice messages on Ron's message service, but have not heard anything back.
>
> Sorry, to keep bothering you folks, but a few weeks ago we were told you folks were finalizing everything and we haven't heard of anything further.

[18] Once again, the Creswells' polite and patient requests for information suggest that both they and their lawyers knew that things were going on far too long.

[19] There was some further correspondence around the time of the discoveries in 2012.

[20] In March 2013, nothing further had taken place. Mr. Creswell wrote asking what was preventing the case from being settled. Mrs. Creswell asked the same

thing in September of that year. In November 2013, Mr. Creswell noted that it had been 14 years since the accident and said that the time lag was getting ridiculous. "Please don't take offence but I am very concerned that because of this time delay, we are going to be 'SOL' with regards to any claim or settlement with AllState." He asked Mr. McKiggan that if he has lost interest in the case he should pass it along to another lawyer who would take an interest in it. That was 4 years ago. Mr. Creswell was concerned not only at the delay in getting a settlement but at the potential that it might be too late anyway. "We came to you with complete trust and faith that you would do the right thing by us so please let me know what you have decided to do so we may make our decision on how to proceed from here."

[21] The Creswells were still writing in March 2014 though. In June 2014, they were again asking what was going on and why it had taken 15 years. In September 2015, they were coming up to the 15th anniversary of the accident. "I am very concerned that we have fallen through the cracks of the legal system and with the passage of so much time that we will be denied any sort of settlement by the courts." The Creswells knew that this case couldn't just go on forever. In September 2015, no motion had been filed by the defendants seeking to have the case dismissed.

[22] In March 2016, August 2016, and March 2017 the Creswells wrote again, expressing concerns with the delay. Their patience is commendable in some sense and their loyalty to their lawyer is remarkable. Clearly they knew that the delay could result in their claim being dismissed.

[23] There has been no reason put forward to explain or justify the delay. There was no discrete incident that contributed to a substantial delay and there was no suggestion that the case was so complex that it required such an extraordinary amount of time. There was no strategic or tactic purpose suggested for the delay. The reason put forward by the Creswells was that their lawyers did not move the case forward.

[24] This was not a case in which a lawyer has made a single mistake or even a series of mistakes for which a client is being required take the loss. It is not a case in which a number of lawyers have been involved each contributing only partially to the delay.

[25] In *Clarke* the litigation spanned 13 years. Justice Saunders found that Mr. Clarke was not personally to blame for the delay. He said that it would be "unjust

to visit upon the appellant consequences that were not of his own making."[4] Much of the delay in that case was attributable to Mr. Clarke's lawyers and not to him personally. That should be considered when deciding whether he should be deprived of his day in court.

[26] The client can be protected from the actions or non-actions of the lawyer, as against the other party. But the consequences of a lawyer's inaction cannot always be visited on the opposing side in the litigation. The risks arising from that inaction should not necessarily be borne by the opponent rather than by the client. When the client is aware of the delay and is aware of potential consequences of the delay, the client has some responsibility to either goad his lawyer into action or to get another lawyer. Plaintiffs must take responsibility for their cases when they have been warned that the inaction by legal counsel puts them at risk of having their cases dismissed. If the Creswells were unaware of Chief Justice Kennedy's warning that is troubling on another level and for other reasons. If that were the case, it is still clear that they sensed the problem themselves long ago. There were more than enough warnings fired across the bow here to tell any reasonable person that the long delay was jeopardizing this case. In November 2013 Mr. Creswell noted his concern that they might be "SOL" with regard to their claim because of the delay. Either the lawyers should have move it along or the Creswells should have retained new lawyers. The situation was not of the Creswells' making but they were aware that the delay had become inordinate, that there might be consequences arising from that, and that their failure to act could result in their claim being compromised.

[27] The delay of 18 years here is both inordinate and inexcusable.

Has the Delay of 18 Years Caused Prejudice to the Defendant?

[28] Prejudice can be inferred after a period of 18 years. Memories fade. There is no way to know how much unless a trial happens. The Creswells argued that liability is unlikely to be a serious issue in this case. There will be no requirement for anyone to reconstruct the incident that took place in Maine. The case will be focused on the extent of their damages. Unlike many cases in which the court is left to make some kind of prediction about a plaintiff's future medical condition arising from an accident, here the future, or at least a full 18 years of it is known.

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[4] *Clarke v. Ismaily*, at para. 21

[29] There is a problem with that argument. There has been an intervening accident. Even without that second accident, it would be very difficult to separate health issues that have occurred over the last 18 years from what may have been the result of this accident. The condition of the plaintiffs in the months and years immediately after the accident would have to be reconstructed from the medical records. The ability of the defendants to defend the claim has been prejudiced by the delay so that the fairness of a trial 20 years after the fact would be seriously compromised.

[30] The prejudice to the defendants can be both inferred, given the extraordinary delay, and can be specifically identified given the requirement to reconstruct their medical conditions.

Balancing the Prejudice

[31] If the case is dismissed for want of prosecution, the Creswells' will have lost their claim against Mr. Murphy arising from the accident that happened in Maine in the fall of 1999. Their recourse will be against their lawyer, based on his alleged failures to respond to them in a meaningful way and to move their case forward at all. Their recovery would not be as complete as it might have been had their case been resolved in anything like a timely way. That recovery is neither certain nor conveniently obtained.

[32] The Creswells argue that the dismissal of their case would give Mr. Murphy and his insurers a windfall. They would not be required to defend the claim or face the risk of a judgment at trial. True as that is, it is also true that Mr. Murphy has faced the prospect of a judgment against him since 1999. And if the matter were to come to trial, it would be almost 20 years from the date of the accident and would involve reconstructing the situation in 1999 and disentangling the consequences of that from the events of the intervening two decades. Accomplishing that would be so difficult that it is likely that the right to a reasonably fair trial would have been lost.

[33] The prejudice to plaintiffs of having their cases dismissed for want of prosecution will almost always be significant. Sometimes plaintiffs will have other recourses and sometimes not. And defendants will almost always receive "windfalls" if the cases against them are dismissed. The balancing of prejudice should consider the potential risk to the defendants of being exposed to liability in a trial 20 years after the fact, only because the plaintiffs, in the face of repeated and pointed warnings, have allowed the case to languish. The prejudice to the

defendants of having such a trial outweighs the prejudice to the plaintiffs of having the case dismissed and seeking at best imperfect recourse against their lawyer.

Conclusion

[34] In criminal cases, people have a right to have their matters heard within a reasonable time. Defendants in civil matters do not have the same constitutionally based right to be protected again a "culture of delay". But they should not be forced to wait almost 2 decades with the uncertainty of a civil claim hanging over their heads only to face a trial in which their ability to defend against the claim has been compromised.

[35] In this case that is especially true, when there were so many stages at which the problem could have been easily resolved by just doing anything. The Creswells themselves knew that there could be consequences to them arising from continuing with the delay. Their own good sense and intuition told them that if something were not done their case could be dismissed. Rather than doing something, they placed their loyalty to their lawyer above their interest in moving the case forward. The opposing party should not be required to accept the consequences of that choice.

[36] The defendants' motion for dismissal of the claim is granted with costs.

Campbell, J.