COURT FILE NO.: C42087/97
DATE: 2009-07-21
AMENDED: 2009-07-22

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JUNE OKAFOR AND ANTHONY OKAFOR	)	*Richard Parker*, Q.C. for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
MARKEL INSURANCE COMPANY OF CANADA and JAN KRODKA	)	*Jane Cvijan*, for the Defendant Markel Insurance Company
	)	*Joseph J. Masterson*, for the Defendant Jan Krodka
Defendants	)	
	)	**HEARD: July 21**, 2009, at Brampton, Ontario

D.G. Price J

Reasons For Order

[1] Markel Insurance Company and Jan Kropka, improperly named Krodka in the pleadings, move for an order dismissing this action, now

almost twelve years old, on the ground of delay as well as because the plaintiffs have failed to comply with undertakings, failed to set the action down for trial within the required time and failed to comply with the orders of two judges of this Court who tried to move the action toward trial.

[2] This action arises from a motor vehicle collision that occurred on October 9, 1996 when a car driven by Anthony Okafor and owned by June Okafor was struck by a car whose driver lost control while exiting from the Highway 403 ramp onto Winston Churchill Boulevard in Mississauga. The Notice of Action was issued on October 6, 1997 against Jan Kropka for damages and against the Okafor's insurer Markel Insurance for statutory accident benefits.

[3] The Okafors issued an Amended Statement of Claim on January 22, 1998. Markel delivered its Statement of Defence on July 20 and noted pleadings closed on July 30, 2000. They delivered their Affidavit of Documents on May 16, 2002 and the plaintiffs delivered theirs on November 19, 2002.

[4] Examinations for discovery of all parties were scheduled to take place on October 25, 2000 but were adjourned because Mr. Okafor was out of the country due to a death in the family. The examinations were re-scheduled to take place on March 6 and 7, 2001. On March 1, the examinations were again postponed at Mr. Okafor's request, this time because he was not well enough to attend due to continuing back problems. He later supplied a letter from a Dr. Gulefor which simply stated that he was "presently very sick and therefore unfit to attend court." The

examinations were later re-scheduled to take place October 22, 2002. The Okafors failed to attend on that date and a Certificate of Non-Attendance was issued. On that date, Mr. Okafor attended at the examiner's office but said that he was ill and refused to be examined.

[5] The examinations of the plaintiffs proceeded on August 27 and 28, 2003 but were not completed at that time. The examinations continued on May 18, 2004. The Okafors gave a number of undertakings during their examinations. Markel's lawyers wrote on June 7 and 15 and July 20, 2004 and again on May 12, 2009 asking the Okafors to comply with their undertakings but they still have not done so fully. The still unanswered undertakings are set out in Exhibit K of the affidavit Markel Insurance had filed in support of its motion.

[6] The defendants brought a motion to dismiss the action for delay which was heard by Justice Snowie on August 22, 2002. Justice Snowie set a timetable requiring the plaintiffs to deliver a sworn affidavit of documents by November 22, 2002, requiring that examinations be completed by December 31, 2002 and that motions arising from examinations be heard by February 28, 2003 and requiring the Okafors to deliver their Trial Record by May 31, 2003. Justice Snowie directed that if the Okafors failed to comply with any of those terms, the defendants would be entitled to move with notice to dismiss their action with costs.

[7] The defendants brought a second motion to dismiss the action for delay, which was heard by Justice T. Marshall on May 7, 2003. Justice Marshall ordered that examinations be completed by August 29, 2003, that

undertakings be complied with thirty days later and that the plaintiffs deliver their trial record by January 30, 2004. Justice Marshall also directed that if the Okafors failed to comply with the terms of the order, the defendants would be entitled to move to dismiss the action.

[8] The Okafors have not delivered a trial record and have not answered all the undertakings they gave at their examinations.

[9] The Okafors have been represented by a number of different lawyers in the course of the present action. They were first represented by Benjamin D. Eisner. They changed solicitors and appointed Mark Baker on June 10, 1999. On September 21, 2001, Mr. Baker advised that he was no longer representing the Okafors, who had given him a direction in July, 2001 authorizing him to transfer the file to Joseph Raimondo. On January 9, 2002, Mr. Baker's office advised that on their motion, they had been removed as solicitors of record by an order of Master Peterson on January 7, 2002. On January 10, 2002, Mr. Raimondo advised the defendants that he had not been retained.

[10] When the Okafors took the position that they had not been properly served with Mr. Baker's motion to be removed from the record, he returned his motion and Master Peterson made a further order on May 15, 2002, ordering that his firm be removed as the solicitors for Mr. Okafors. As a result of Mr. Baker's firm being removed, the defendant's first motion to dismiss the action for delay was adjourned from May 23 to June 28, 2008 to permit Mr. Okafor to obtain new counsel.

[11] On May 29, 2002, Brian M. Cameron of Oatley, Vigmond advised that he was reviewing the file to make a determination as to whether he would agree to act for the Okafors. On June 24th, he wrote to the defendants advising that he had not received a copy of the Okafors' file from their previous solicitors. The motion to dismiss the action for delay was adjourned to August 22, 2002, peremptory to the Okafors. On August 19, 2002, Leanne Rapley of Trebuss Rapley LLP advised that the Okafors had retained her and that she understood there was a motion returnable on August 22, 2002. It later developed that Ms. Rapley had a limited retainer only to negotiate the terms of the settlement of the motion. It was based on the negotiation between her and the defendants' lawyer that the timetable ordered by Justice Snowie on August 22, 2002, was agreed to.

[12] On October 16, 2002, Mr. Okafor wrote to the defendants saying that the examinations for discovery, which the parties had agreed and Justice Snowie had ordered were to be completed by December 31, 2002, had been scheduled to take place on October 22, 2002 without his input and must be cancelled because he had no income to engage counsel. He demanded that the defendant Markel pay him benefits immediately so that he could retain counsel and alleged that the defendants were "in cahoots" with the Crown Attorney, who was "dragging me in and out of court despite my bad health."

[13] The Okafors did not attend the examinations on October 22, 2002 and a certificate of non-attendance was obtained. The defendants then arranged with June Okafor for examinations to take place on December 30

and 31, 2002, which Mrs. Okafor advised were the only dates when the plaintiffs would be available.

[14] On December 30, 2002, Mr. Okafor appeared late for the discovery and stated that he would proceed with the discovery but was rely on a medical note from Dr. Wong to support his position that his health prevented him from proceeding. The defendant Kropka's counsel states in her affidavit of April 24, 2009, that it was evident that Mr. Okafor would disavow any of his answers in reliance on the medical note. Mr. Okafor also stated that he was not able to go through a discovery without a lawyer and he refused to proceed without June Okafor being present. He also refused to answer questions relating to his receipt of Worker's Compensation and Welfare Benefits as there were outstanding criminal fraud charges arising from his claim for those benefits.

[15] Following the unsatisfactory attendance for examinations in December, the defendant Ms. Kropka brought another motion in February to dismiss for delay which was eventually heard by Justice T. Marshall on May 7, 2003. Justice Marshall directed that Mr. Okafor was to attend examinations on his own and that they were to be completed by August 29, 2009. He also directed Mr. Okafor to provide a proper Affidavit of Documents, answer his undertakings within sixty days after discovery and deliver a Trial Record by January 30, 2004.

[16] The examinations of the Okafors were conducted on August 27 and 28, 2003 but were not completed and were scheduled to continue on October 15, 2003. The October 15, 2003 examination was then postponed

pending a meeting between the Okafors and a London solicitor, David Miller regarding a possible retainer.

[17] Mr. Miller delivered a Notice of Change of Solicitors confirming his retainer on February 25, 2004. The examinations of the Okafors resumed on May 19, 2004.

[18] On December 21, 2007, Mr. Miller delivered an Order of Justice Kruzick dated December 18, 2007 removing him from the record as the Okafor's solicitors. As of April 24, 2009, when Ms. Kropka's lawyer swore her affidavit, her lawyers had had no contact from either of the Okafors.

[19] The evidence before me discloses that Mr. Okafor was convicted of fraud by Justice Hambly of this Court on August 22, 2007. In the course of a 70 page judgment, Justice Hambly found that Mr. Okafor had received over $318,000 in Worker's Compensation benefits from January 27, 1982 to November, 1997 for an injury to his left shoulder on January 26, 1982. Justice Hambly concluded:

> If he had presented his claim honestly he may well have received substantial benefits. However he presented his claim dishonestly. He received over 16 years $318,000 based largely on dishonest representations. The amount of benefits that he received as a result of his dishonest representations as compared to what he would have received if he had presented his claim honestly is impossible to say. I find, however, beyond a reasonable doubt that as a result of his dishonest representations the Board paid benefits to him for many years that amounted to well over $5,000. The accused is convicted.

[20] The defendant Kropka has been advised by the Crown Attorney's Office on January 14, 2008 that Mr. Okafor was sentenced to nine months

in jail and had bail pending appeal. The Okafors delivered a Notice of Intent to Act in Person on February 14, 2008.

[21] At the hearing today, the plaintiffs are represented by Richard Parker, Q.C. who indicates that he was retained about a month and a half ago. He says that he asked the plaintiffs when they retained him to obtain their file from Mr. Miller. Mr. Parker's information is that Mr. Miller may be exercising a solicitor's lien yet his information is that Mr. Miller had taken the file "on spec.". In any event, Mr. Parker has not yet received the file from his clients nor apparently has he been given instructions to take steps through the Court to obtain it.

[22] Mr. Parker informs the Court that Mr. Okafor informed him that the defendants told him or led him to believe that they did not want to proceed further with the action until the criminal charge against him was resolved. There is no evidence to that effect before me and the defendants deny it. I find this explanation implausible in the extreme and reject it.

[23] Thirteen of the Okafors' undertakings remained unanswered, namely the following:

1. To advise defence counsel if there are any fees associated with obtaining any of the documents that are subject to an undertaking;
2. To produce Mr. Okafors' Workers Compensation Board file;
3. To request Mr. Okafors' social assistance file from Waterloo and Peel Region;
4. To produce the file of the chiropractor the plaintiff attended in or around October, 2000;

5. To provide confirmation from the chiropractor attended by the plaintiff in and around October, 2000 that she does not have a file for the plaintiff;

6. To produce the clinical notes and records of the specialists Mr. Okafor attended for headaches and dizziness;

7. To produce the file of the physician who treated Mr. Okafor for his sleeping problem;

8. To request Mr. Okafor's file from Dr. Ogilvie-Harris;

9. To produce Dr. Hodgin's file in relation to Mr. Okafor;

10. To produce Dr. Jeremias' file in relation to Mr. Okafor;

11. To produce Dr. Stanley's file in relation to Mr. Okafor;

12. To produce Gage Street Physiotherapy's file for Mr. Okafor;

13. To provide an up-date of Mr. Okafor's treatment provider's records;

14. To advise what degree was obtained at the University of Waterloo.

[24] With regard to the last of these undertakings, I note that Justice Hambly, at page 69 of his reasons for judgment on August 22, 2007, stated:

> … The Crown conceded that [Mr. Okafor] had a B.A. in psychology from the University of Waterloo. This was not a concession that I would have made without seeing certified transcripts and interviewing the professors who marked his examinations.

[25] The plaintiffs did not deliver a Trial Record in the present proceeding until the defendants brought the present motion. Justice Snowie, it will be remembered, ordered them to deliver the trial record on or before May 31, 2003, more than six years ago.

[26] The defendants have suffered actual prejudice from the delay in this case. The defendant Jan Kropka, obviously a key witness in the proceeding, died sometime in 2002 at the age of 74. He was never examined for discovery.

The Law

[27] A defendant who is not in default under the Rules may move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within 6 months of the close of pleadings:

> Rule 24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,
>
> (c) to set the action down for trial within six months after the close of pleadings.

[28] In considering this rule, Justice Wilkins, in *Standard Trust Co. v. Jackson*[1], has observed:

> [15] …Under Rule 24, the responsibility for the action to be progressed, is a burden that is borne by the plaintiff. This burden is not the responsibility of the defendant, although it may be open to a defendant to progress the litigation, as I find the defendant attempted to do in this case….
>
> [16] Having pointed out that Rule 24 imposes a positive duty upon the plaintiff to progress the lawsuit, I must hasten to add that the test to be applied as to whether or not the plaintiff has complied with Rule 24, is the test that is set out so succinctly in the cases that I have referred to above. In the case at bar, the plaintiff's conduct is virtually tantamount to an abandonment of any serious attempt to progress the litigation….
>
> [18] In the case at bar, I find there is grossly undue delay and *defacto* prejudice as well as the presumption of prejudice. I find that the delay is attributable to the plaintiff who, in my opinion, is subject to the duty imposed by Rule 24.

[1] *Standard Trust Co. v. Jackson* (1993), O.J. 2764 (Gen. Div.)

[29] Similarly, in the present case, I find that the plaintiffs' conduct amounts to an abandonment of any serious attempt to progress the litigation. I also find that in this case, there has been grossly undue delay on the part of the plaintiffs which has caused both actual and presumed prejudice to the defendants.

[30] The defendants must satisfy a two-part test on a motion to have the action dismissed for delay. The test was described by Justice Borins in *Belanger v. Southwestern Insulation Contractors Ltd*.[2]: (1) the defendant must establish that the plaintiff's delay has been unreasonable in the sense that it is inordinate and inexcusable; and (2) that there is a substantial risk that a fair trial will not be possible for the defendant at the time the action is tried if it is allowed to continue. At paragraph 34, Justice Borins held:

> [34] …The second part of this proposition is often expressed as the likelihood of prejudice to the defendant giving rise to a substantial risk that a fair trial will not be possible when the case is actually tried. Examples of prejudice are the death of witnesses, the inability to locate a witness, the inability of a witness to recall important facts or the loss of important evidence. In determining whether the delay has been unreasonable, the court should consider the issues raised by the case, the complexity of the issues, the explanation for the delay and all relevant surrounding circumstances….Prejudice to the defendant is to be considered relative to the time the case will likely be reached for trial if permitted to proceed. The court will then balance the right of the plaintiff to proceed to trial with the defendant's right to a fair trial and make its decision.

[31] In the present case, I conclude that, having regard to Mr. Kropka's death and the likely effect of the inordinate delay on the memory of other witnesses, a fair trial will not be possible. The issues in the case are not extremely complex and the plaintiffs have not offered any satisfactory explanation for the delay. In balancing the right of the plaintiff to proceed to

[2] *Belanger v. Southwestern Insulatin Contractors Ltd.* 1993 CanLII 5503 (Ont. S.C.J.)

trial with the defendant's right to a fair trial, I conclude that the action should be dismissed.

[32] While the plaintiffs have the right to have their action heard at a trial, this right comes with certain responsibilities. As Master Albert stated in *Madonia v. Mulder*[3]:

> [53] Where a litigant has failed so completely to meet his pre-trial responsibilities as in this case, and where that failure has resulted in actual or potential prejudice to the opposing party, then the litigant has forfeited his right to a day in court.

[33] If a party fails to comply with an interlocutory order the Court may dismiss the party's claim. Rule 60.12 provides in this regard:

> 60.12 Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,
>
> (a) stay the party's proceeding;
>
> (b) dismiss the party's proceeding or strike out the party's defence; or
>
> (c) make such other order as is just.

[34] In *1066087 Ontario Inc. v. Church of the First Born Apostolic Inc*.[4], the Divisional Court upheld the decision of a Master dismissing an action pursuant to Rule 60.12 because the numerous breaches of the plaintiff were keeping the action from progressing. The Divisional Court held that the plaintiff had shown an "utter disregard" for the Orders of the Court and that it would be unfair to require the defendant to continue to incur the costs of defending the action.

---

[3] *Madonia v. Mulder* [2001] O.J. No. 1326 (Ont. S.C.J., Master)
[4] *1066087 Ontario Inc. v. Church of the First Born Apostolic Inc*. [2004] O.J. 3068 (Ont. Div.Ct.)

[35] Where a plaintiff fails to produce documents in compliance with the Rules, the court may also dismissed its action on this basis. Rule 30.08 provides in this regard:

> 30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,
>
> (b) if the document is not favourable to the party's case, the court may make such order as is just.

[36] I find, particularly in relation to Mr. Okafor's Worker's Compensation file, that, having regard to the fact that the period of time for which Mr. Okafor seeks compensation in the present case overlaps with the period for which he was compensated by the Workman's Compensation Board and having regard to his conviction of defrauding the Board in relation to his claim to them, that the documents are not likely to be favourable to his case. Without it, the defendants could not effectively defend themselves from the plaintiffs' claim.

[37] For all of the foregoing reasons, the cumulative delay of almost thirteen years from the date of the accident, the breach of the orders of Justices Snowie and Marshall, and the plaintiffs' failure to comply with their undertakings and produce the documents necessary for the defence of the action, it is ordered that the action is dismissed.

[38] The defendants may made written submissions to me regarding costs by August 15, 2009. The plaintiffs may make their written response by August 31, 2009.

_____
D.G. Price J.

Released: July 21, 2009

COURT FILE NO.: C42087/97
DATE: 2009-07-21
AMENDED: 2009-07-22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JUNE OKAFOR AND ANTHONY OKAFOR

Plaintiffs

- and –

MARKEL INSURANCE COMPANY OF CANADA and JAN KRODKA

Defendants

REASONS FOR JUDGMENT

D.G. Price J

Released: July 21, 2009