



SUPERIOR COURT OF JUSTICE – ONTARIO

Short Title: *Campbell v. Primmum Insurance Company, et al.*

Court File No.: 04-CV-276909CM 1

In attendance:

Mark Koskie

Fax no.: 650-1350

P. Ho

Fax no.: 868-1806

MOTION—heard October 28/08

By the court:

The claim herein¹ was issued by the plaintiff in early October 2004, with the assistance of a paralegal firm: R.E.C. Paralegal. The principal of this firm was Mr. Bob Crosbie. Also associated with the firm (variously as a person who worked on matters relating to Mr. Campbell's accident and as an assistant to Mr. Crosbie) was Ms. Olga Leyenson. Both Mr. Crosbie and Ms. Leyenson have had continuing involvement in this action, from their days at R.E.C. Paralegal to their days at Goldentuler & Associates to their days at KLC Law Firm, the plaintiff's present solicitors. Their continuing involvement is relevant and will be addressed below.

On or about April 26/05, and after two separate letters from the defendant Primmum to Mr. Crosbie seeking a waiver of defence, this action was dismissed as abandoned pursuant to R. 77.08. Primmum first learned of the dismissal in May of 2005 when it attempted to file a notice of intent to defend with the court. In a letter dated September 15/05, Mr. Crosbie (then employed by Goldentuler & Associates) advised Primmum that the action had been transferred to the Goldentuler firm and acknowledged that an "...order to dismiss was given on April 26/05". He suggested that a motion to set aside the dismissal would be brought. Notably, he made no comment as to why nothing was done in respect of the dismissal from April 26/05 until September 15/05.

Ms. Leyenson deposes that the firm of Goldentuler & Associates prepared a motion to have the dismissal of the action set aside (this, in February 2006—some 5 months after Mr. Crosbie's September 15/05 letter). The motion date was said to be April 25/06 but, she deposes, was adjourned on consent to June 7/06. Primmum denies having been served with motion materials or having been consulted about the fact of the motion or appropriate dates for the return of the motion. I favour the evidence of Ms. Ng, over that of Ms. Leyenson, in this regard. With no affidavit of service of the underlying motion before me, with no inquiries having been made by Ms. Leyenson of Mr. Consky² (or anyone else from the Goldentuler firm) and having regard to the evidence given by Ms. Leyenson at qq. 137-150 of her cross-examination, the confirmation form filed does not satisfy me that the discussions that Ms. Leyenson says took place with Primmum's solicitors did indeed take place.

Ms. Leyenson deposes that in February 2007, some 8 months after the June/06 date for which Ms. Leyenson says Primmum gave its consent, the Goldentuler firm again prepared a motion to set aside the dismissal. This time, Primmum was consulted about potential dates, with dates in March, April and May/07 proposed. When, on March 23/07, counsel for Primmum contacted the Goldentuler firm to settle on a date, he was advised that the file was or would be transferred to another firm; and, indeed, it was. That said and that notwithstanding, I cannot but ask: What happened to the June 7/06 date?

It was not until August 2007 at the earliest, or December 18/07 at the latest, that Primmum learned that KLC Law Firm had been retained. And, though it seems that there may have been some issues with respect to the release of the plaintiff's file to KLC Law Firm, the firm had the file in hand at least as early as August 30/07. *Quaere* why the plaintiff then waited until February/08 to serve his motion materials. Ms. Leyenson

¹ The claim arises out of a 2003 motor vehicle accident between the plaintiff and Mr. Tindall, an uninsured or underinsured driver. The claims made against the defendant Primmum are made pursuant to the uninsured coverage provisions of the plaintiff's motor vehicle liability policy.

² Mr. Consky's name appears on the confirmation form.

deposes that it was upon review and organization of the file by her that the administrative dismissal came to KLC Law Firm's attention. Her evidence in this regard defies credulity. Mr. Crosbie as an employee of KLC Law Firm wrote to Mr. Goldentuler as early as June 16/07 referencing the "...upcoming motion to dismiss for delay". Both he and Ms. Leyenson were involved with this file and/or matters relating to the prosecution of claims relating to the plaintiff's accident from the date that the claim was issued. There was continuity in the plaintiff's representation and, as such, there can be no disavowal of knowledge as to the status of his action. The one exception that I make in this regard is this. I accept that it was not until some time after August 30/07 that Mr. Koskie, himself, learned of the dismissal (as is stated at paragraph 17 of Ms. Leyenson's affidavit).

I have considered all of the evidence adduced on this motion and the tests that I must apply in deciding whether to set aside the dismissal order. The plaintiff has failed to credibly explain the delays herein, delays which I say are inordinate and pervasive. There are large gaps of time³, gaps that are unexplained. Why Mr. Crosbie and Ms. Leyenson did not address or direct counsel to address the dismissal order with greater alacrity is not known. Their involvement throughout makes the delays all the more egregious. Though Ms. Leyenson attempts to visit the blame on Goldentuler & Associates, she does so without explaining how or why or having even investigated this matter with the Goldentuler firm (see qq. 146-150 of Mr. Leyenson's cross-examination). In this regard, and in any event, where is Henry Goldentuler's February 7/07 affidavit (to which reference is made in the motion materials)?

And while it is not known whether the plaintiff himself was aware of the dismissal order, it is clear that he was conscious of the delays in his file at least as late as the end of 2006. And, yet, nothing was done to advance this case in all of 2007 (and there is no evidence before me to suggest that the plaintiff instructed his solicitors to advance his claims).

³ As at the time that Ms. Ng swore her affidavit, 4 ½ years had elapsed from the date of the accident and 3 years from the date of the dismissal.

I agree with Mr. Ho when he says that the lengthy delays herein have been contumelious and inexcusable—at least until Mr. Koskie served his motion materials. The evidence of Ms. Leyenson that attributes the delays to inadvertence on the part of the Goldentuler firm is not persuasive. With no evidence from the plaintiff, a lawyer from the Goldentuler firm or, even, Mr. Crosbie (given his familiarity with this action and knowledge of the dismissal, throughout), I do not accept that the delays have been satisfactorily explained and/or ought to be excused.

That being so, prejudice to the defendants is thus presumed (see *Kassam v. Sitzer*, [2004] O.J. No. 3431 (S.C.J.) at para. 53, affirmed at [2005] O.J. 3431). The presumed prejudice, argued by Mr. Ho, is the passage of a limitation period and the fading of memories. Neither that prejudice, nor the prejudice specific to Primum set out at paragraphs 32-34 of Ms. Ng's affidavit, has been negated. Ms. Leyenson's affidavit speaks only of the condition of the plaintiff remaining stable and his expenses remaining constant—assuming, incorrectly, that liability is certain. There is more to satisfying the court that a fair trial would indeed here be possible.

For all of these reasons, the motion is dismissed with costs. Unless counsel choose to supplement their costs outlines with submissions in writing, which they may do by February 9/09, I will rule on the issue of costs on the basis of the costs outlines now filed—without more.

January 26/09



Master Abrams

The Order endorsed above is effective without further formality.