Court of Appeal Confirms Test for Motions to Set Aside Orders Dismissing Actions for Delay

January 20, 2017

Jadid v. Toronto Transit Commission, 2016 ONCA 936

In February 2016, the Superior Court of Justice dismissed a plaintiff's motion to set aside a registrar's dismissal order. That decision was recently upheld by the Ontario Court of Appeal in *Jadid v. Toronto Transit Commission*, 2016 ONCA 936.

In 2006, a woman allegedly got caught between the closing doors of a TTC bus. She commenced an action for the injuries she suffered as a result of the accident. Her action was dismissed for delay by registrar's order on August 9, 2011. The plaintiff requested that the order dismissing the action for delay be set aside and proposed to set the matter down for trial within 60 days. The court granted that order on February 17, 2012.

For more than two years afterwards, the matter remained stagnant. Eventually, counsel for the plaintiff was alerted to the fact that the order had never been issued and entered. Because the 60 day period had passed and the matter had not been set down for trial, the plaintiff brought a motion to vary the terms of the order.

The plaintiff's motion was heard on February 10, 2016[1]. The defendant did not oppose the motion. In determining whether to set aside the order, the court contemplated the test for setting aside an order made under Rule 48.14(3) as set out in *Reid v. Dow Corning Corp.,* 2002 CarswellOnt 5899:

1. The plaintiff must explain the delay in the progress of the litigation, satisfying the court that steps were being taken to advance the litigation;
2. The plaintiff must illustrate that they always intended on setting the action down for trial within the time limit set out in the status notice and failed to do so through inadvertence;
3. The plaintiff must demonstrate that the motion to set aside the dismissal order was brought promptly;
4. The plaintiff must prove that the defendant has not demonstrated any significant prejudice as a result of the plaintiff's delay.

The motion judge held that the plaintiff failed to explain the reason for the delay, failed to show any diligence in dealing with the action at any stage in the proceeding and

failed to bring the motion promptly or discharge the presumption of prejudice that the delay gave rise to.

The motion judge dismissed the plaintiff's motion, stating in no uncertain terms:

At what point does the desultory prosecution of an action become so egregious and abusively glacial as to cross the line from merely inexcusable negligence to contempt of an order of the court? In my view, this case has crossed the line to the latter or come so close to it as not to matter. It would be an abuse of process to sanction this blatant disregard of an express order of the court. If the line is not to be drawn here, I can think of no credible place to draw the line and retain any credibility as a court seeking to control the integrity of its own process.

This court is not to be mistaken for a rubber stamp and its orders are not to be treated as mere suggestions to be followed or ignored as the mood or whim may suggest. If a party cares so little for a claim as to fail to advance it diligently or even to make a show of abiding by the orders of the court she has sought, there can be no prejudice in putting an end to the sorry spectacle before it consumes further resources of the court and of the innocent defendant.

The plaintiff appealed the motion judge's decision to the Court of Appeal, arguing that the motion judge: 1) misapprehended the governing legal principles; 2) erred in finding that the respondent suffered actual prejudice as a result of the delay and 3) erred in finding that the litigation and motion delay were not explained. The Court of Appeal dismissed the plaintiff's appeal, concluding that the motion judge made no errors in reasoning in this regard.

Rule 48.14, which was recently amended, indicates that the Registrar will automatically dismiss an action for delay where the action has not been set down for trial or terminated **within five years** from the commencement of the action. The Registrar will no longer send status hearing notices to alert counsel that this deadline is approaching. The above noted decision emphasizes the importance that counsel and parties be astute to this Rule.

[1] *Jadid v. Toronto Commission*, 2016 ONSC 1176

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