Case Name:

Riggitano v. Standard Life Assurance Co.

Between
Rosa Riggitano, Plaintiff, and
The Standard Life Assurance Company and Standard Life,
Defendants

[2009] O.J. No. 1997

177 A.C.W.S. (3d) 364

Court File No. 04/11560

Ontario Superior Court of Justice

C.S. Glithero J.

Heard: October 14, 2008 and March 3, 2009.
Judgment: May 11, 2009.

(47 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Delay or failure to prosecute -- Plaintiff's action dismissed for delay -- Plaintiff claimed $500,000 in disability benefits and $500,000 in exemplary damages from the defendant -- More than five years had passed since the statement of claim was filed -- No notice of examination had been served by the plaintiff -- Despite repeated requests from counsel for the defence no affidavit of documents had been delivered on behalf of the plaintiff.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 48.14(1), Rule 48.14(8)

Counsel:

Paul Sweeny, for the Plaintiff.

Danielle Young, for the Defendants.

RULING ON STATUS HEARING

1 **C.S. GLITHERO J.**:-- This ruling deals with two issues arising during the status hearing before me.

2 Firstly, counsel for the defendants alleged that counsel for the plaintiff had attended prior status hearings and misrepresented that the status hearing be adjourned on consent so as to permit certain steps to be completed, when in fact no consent had been given.

3 Secondly, I am required to decide whether in all of the circumstances of this case the plaintiff has shown cause why the action should not be dismissed for delay, as required by Rule 48.14 (8).

4 The first issue arose when the matter was before me on a status hearing in October 14, 2008. On that occasion counsel for the defendants submitted that counsel for the defendants had never been contacted by counsel for the plaintiff in respect of the status hearings or what representations should be made to the court at such hearings. She further alleged that on prior status hearing attendances counsel for the plaintiff had misrepresented that certain steps within the action had been agreed upon and that the status hearing ought to be adjourned on consent.

5 On October 14, 2008, I endorsed the status hearing endorsement sheet as follows:

> "The defendants alleges that the plaintiff has attended prior status hearings and misrepresented that steps were requested to be done on consent when in fact they were not on consent. This is a serious allegation. I am ordering transcripts of the status hearings held on July 27, 2006, December 14, 2006, April 19, 2007, October 9, 2007, February 28, 2008 and June 26, 2208. Without prejudice to the defendants's request that the action be dismissed for lack of action, I am adjourning this status hearing to be heard before me on a date to be arranged through the Trial Coordinator once the transcripts are available. Copies of transcripts of status hearings to be forwarded by court reporter to both counsel as they are ready. Any other information that counsel wish to rely on when this matter returns before me is to be put forward in sworn affidavit form."

6 The date arranged for this matter to come back before me was March 3, 2009. On that date I had before me the affidavit of Elisabeth Bennett-Martin, the counsel who appeared for the defendants on October 14, 2008, the affidavit of Reno Berlingieri, counsel of record for the plaintiff, and a reply affidavit from Ms. Bennett-Martin.

7 The history of the status hearing appearances, as reflected by the endorsements made, and such transcripts as are available is as follows:

> July 27, 2006 - endorsement reads "R. Berlingieri for plaintiff, defendants not appearing, status hearing adjourned to December 14, 2006." There is no transcript available as the presiding judge indicated that a court reporter was not required.

December 14, 2006 - endorsement reads "Discoveries are scheduled for end of March. Adjourned to April 19, 2007." There is no transcript available as the presiding judge indicated that a court reporter was not required.

April 19, 2007 - endorsement reads "on consent status hearing adjourned to October 9, 2007." - There is no transcript available as the presiding judge indicated that a court reporter was not required.

October 9, 2007 - endorsement reads "on consent adjourned to February 28, 2008 to permit completion of discoveries." The transcript indicates that after the case was called Mr. Johnston for the plaintiff indicated "this matter is progressing, there is still outstanding discoveries to be conducted of the defendants; and to finish any final transfers of documentation to set the matter down. Could I ask this be adjourned to the 21st or the 28th of February?" and that the court (which happened to be me) replied "on consent adjourned to February 28, 2008 to permit completion of discoveries."

February 28, 2008 - endorsement reads "adjourned to October 14, 2008. Plaintiff has been discovered. Defendants discovery to take place in Montreal in September, 2008." There is no transcript of that hearing as the presiding judge indicated that a court reporter was not required.

The date of June 26, 2008 also appears - the endorsement reads "defendants not discovered; resides in Montreal. Adjourned to December 23, 2008, at request of plaintiff." The transcript of that appearance indicates that Mr. Greer, for the plaintiff, indicated "for the record Greer, N for the plaintiff. You might have been advised this matter was originally traversed to October 14, 2008, but apparent ...". The court: "Sir, I have no endorsements on this one."

Mr. Greer: "Well, we had been before the court previously on February 28th, 2008 so there should have been an endorsement - ok. Either I guess - we have had the plaintiff discovered, however, the defendant hasn't been discovered yet and they're out of Montreal, so that's the reason why. So, we're requesting six months for us to get an opportunity to get to Montreal and discover the defendants."

8 Thereafter the matter next appeared before me on October 14, 2008 and I have already indicated the endorsement made.

9 The status notice was issued March 27, 2006 to counsel for the plaintiff. By requisition dated June 7, 2006 plaintiff's counsel requested a status hearing. The notice of status hearing issued returnable on July 27, 2006. Through administrative error, the notice of the July 27, 2006 status hearing was not sent by the court to counsel for the defendants, despite the fact that counsel for the defendants had filed a Notice of Change of Solicitors a year earlier.

10 Counsel for the defendants only learned that status hearings had been held, and that a continuation was scheduled on October 14, 2008, as a result of inquiries by counsel for the defendants to the court office in Hamilton requesting that a status notice issue.

11 On learning from the Hamilton court office that a continuation of the status hearing was scheduled for October 14, 2008, counsel for the defendants sought and obtained photocopies of the endorsements made on the prior appearances. Thereafter counsel for the defendants requested in writing an explanation from plaintiff's counsel as to why the defendants was not advised of any of the status hearing attendances, and why counsel for the plaintiff misrepresented to the court that the status hearing was adjourned from time to time on consent when that was not true. That letter was dated July 17, 2008, and follow up letters were sent on July 31 and August 21, 2008. Counsel for the defendants has yet to receive an explanation from counsel for the plaintiff.

12 The plaintiff has still not produced a sworn affidavit of documents, despite numerous and repeated requests to do so. The plaintiff's failure in that regard led to a cancellation of one of the appointments for discovery of the plaintiff, as defence counsel refused to proceed without having the necessary productions.

13 This action is a claim for disability benefits in the amount of $500,000 plus exemplary damages in the amount of $500,000 plus interest and costs. The statement of defence denies liability on the basis that the plaintiff is not disabled, did not make a claim within the time period stipulated in the contract of insurance, and has failed to provide adequate medical documentation.

14 The statement of claim was filed February 2, 2004, the statement of defence was served March 22, 2004 and on May 7, 2004 the defendants served its affidavit of documents.

15 Between April 2, 2004 and August 5, 2004 counsel for the defendants made ten telephone calls to plaintiff's counsel trying to arrange a date for the examination for discovery of the plaintiff - without success, and finally served a notice of examination returnable November 23, 2004. The plaintiff requested a re-scheduling of that appointment and counsel for the defendants telephoned three times trying to arrange a new date, and never even received a reply telephone call. The defence served another notice of examination returnable November 29, 2004, and again plaintiff's counsel sought a cancellation. The defendants served yet another notice of examination for August 3 and 4, 2005 for the examination of both parties, but had to cancel as a result of defence counsel being called to a trial on the scheduled dates. Another date was set for discovery and six days before plaintiff's counsel again cancelled. The defence served a notice of examination for March 29, 2006 and the plaintiff cancelled. Discoveries were re-scheduled for May 10, 2006 and two days before the plaintiff cancelled again.

16 Defence counsel arranged discoveries yet again but finally cancelled them by reason of the failure of counsel for the plaintiff to produce the required documentation.

17 Examinations for discovery were again set up for March 27, 2007 and counsel for the defendants offered to produce its client from Montreal to be discovered in Hamilton, which offer the plaintiff refused. Thereafter counsel for the defence took the position that the discovery of the representative of the defendants would have to be in Montreal.

18 The affidavit of Mr. Berlingieri offers a number of excuses as to why there has been a lack of progress in this file, and contains denials of the claimed lack of cooperation on his part. His affidavit asserts that counsel for the defendants changed once, and has moved offices two or three times. He also asserts that he has had to deal with a number of different lawyers and law clerks within the office of counsel for the defendants. I cannot see how a change of address should serve to slow down an action, in circumstances where the party opposite is advised of that change of address through the numerous letters sent requesting some action in the matter. As to the complaint that Mr.

Berlingieri has had to deal with different lawyers and clerks within the office of counsel for the defendants, that is common practice in modern times. Indeed it is obvious from Mr. Berlingieri's own affidavit that several people from his office have dealt with the file at different times as well.

19 He asserts that there are two tort actions existing arising out of the two accidents that the plaintiff was allegedly involved in, which are said to be the cause of her disability and hence the foundation for the claim in this action. While there would obviously be medical evidence common and germane to the tort actions and the disability action, there are many features within the two actions that are not common. More importantly, the plaintiff does not have the right to unilaterally insist that all the actions proceed together. Notably, the plaintiff has not sought an order that the actions be tried together or one after the other. Whatever the preferences of the plaintiff may be, the fact of the matter in this case, as clearly established by the materials filed, is that in this disability action counsel for these defendants has repeatedly and persistently sought to have steps taken so as to have this action determined in a timely manner.

20 Mr. Berlingieri asserts that neither he nor others in his office kept notes of the various conversations they had with representatives of the defendants with respect to discoveries and productions, but asserts that his request for postponements were for valid reasons, and in part rested on his belief that discoveries in all the actions should be held at once.

21 Mr. Berlingieri appeared personally at the first status hearing on July 27, 2006. He asserts that he did not know the defendants had not received notice of the hearing, and was not surprised that no one was there as he thinks it usual for defendants to fail to appear at status hearings. While the rule does not require that counsel consult with one another with respect to an upcoming status hearing, in my opinion it is disappointing in circumstances such as these that counsel would not consult, try and agree as to the steps remaining to be done and the timing for the taking of such steps, and then present to the court a coordinated plan for the completion of remaining procedural steps. The rule does not require them to do so.

22 He asserts that "someone" from his office attended at the December 14, 2006 continuation of the status hearing and asked for an adjournment to April, 2007 because discoveries were scheduled for the end of March, 2007. Discoveries had been scheduled for December 11 and 12, 2006. While Mr. Berlingieri swears in paragraph 33 of his affidavit that those discoveries were cancelled because defence counsel advised they were not prepared to proceed, even though the plaintiff had provided "many documents", the records suggest otherwise. Mr. Berlingieri says he provided most of those documents by letter dated December 1, 2006. Counsel for the defendants denies receiving any such letter, but points out that they did receive a letter dated April 19, 2007 which is in identical form and content to the December 1, 2006 letter, except for the date. Both recite the same records as enclosures. Both purport to enclose an account for photocopying in the amount of $1,011.65. The defence position is that the only letter sent and received was the one dated April 19, 2007, and the suggestion is that it is at least suspicious that plaintiff's counsel would send the identical letter twice, or purport to bill twice for the same amount. I agree. Furthermore, Mr. Berlingieri claims he sent the additional needed information to counsel for the defendants by letter dated December 6, 2006. While that is the date appearing on a photocopy of the file copy of the letter, the sworn evidence of Ms. Bennett-Martin is that the letter and enclosures were sent by regular mail and not received at her office until December 14, 2006, after the examinations were scheduled to have taken place. Her copy of the letter is date stamped by her office. She further swears that two days after the examina-

tions were to have taken place, on December 13, 2006, Mr. Berlingieri advised that the documents were in the mail.

23 While Mr. Berlingieri swears that "someone" from his office attended on December 14, 2006 to indicate that discoveries were scheduled for the end of March, 2007, and for that reason requested an adjournment to April, 2007, photocopies of letters signed by Ms. Bennett-Martin at Tab D of her reply affidavit show that as a result of the lack of any cooperation on the part of counsel for the plaintiff in re-scheduling discoveries, by letter dated January 17, 2007, Ms. Bennett-Martin served a notice of examination of the plaintiff for March 27, 2007. Her letter of December 15, 2006, found at the same tab, states her position that suggested February dates are not suitable for the defendants. This correspondence suggests that "someone" misadvised the court at the December 14, 2006, status hearing appearance by indicating that discoveries were scheduled for the end of March, 2007, when it appears that as of December 14, 2006, there was no such agreement to a discovery near the end of March, on consent, and one only came about as a result of defendants' counsel's service of the notice of examination returnable on that date, by letter dated a month after the status hearing appearance in question. Exhibit I to the affidavit of Mr. Berlingieri is a partial transcript of the examination for discovery of the plaintiff. It reflects an undertaking by Mr. Berlingieri to provide a signed affidavit of documents, but no such sworn affidavit has been produced despite the passage of more than two years since that undertaking.

24 Since at least the status hearing appearance on October 9, 2007, the plaintiff has sought adjournments of the status hearing based on the need to conduct examination for discovery of the defendants. No such discovery has been conducted. On the one occasion it could have been conducted on the same date as that of the plaintiff, the plaintiff chose not to do so. The next effort on behalf of the plaintiff to arrange any such discovery took place on the morning of October 14, 2008. In my assessment that was a rather transparent attempt to get something organized in light of the fact that counsel for the plaintiff wanted something to report to the court later that morning so as to justify another adjournment.

25 Mr. Berlingieri asserts his belief that an articling student attended on April 19, 2007 but said student has no recollection of doing so. Mr. Berlingieri swears he knew there was no consent to an adjournment, and if the court was so advised it was in error. The court was so advised, as the endorsement clearly indicates. In my opinion, it is disturbing that apparently within Mr. Berlingieri's office there is no documentation indicating what instructions were given to a law student to attend a status hearing and to speak as to the status of the matter, not only on behalf of the plaintiff, but purportedly on behalf of the defendants. I am not unmindful that Rule 48.14(6) requires that the solicitors of record attend the status hearing. Given that pursuant to sub-rule (8) the plaintiff has the onus of showing cause why the action should not be dismissed for delay, in my opinion, it is sloppy at best to send a student, without any written record of the instructions given to the student as to the information to be given to the court.

26 Mr. Berlingieri acknowledges that at the October 9, 2007 appearance, when I erroneously assumed that the adjournment was "on consent", I should have been corrected. The transcript makes it clear that I was not told that the adjournment was on consent. It was my error to have assumed that it was on consent, although I am not sure I wouldn't make the same assumption again given the advice that "this matter is progressing, there is still outstanding discoveries to be conducted of the defendants." To me that suggests some degree of consultation, if not cooperation as between counsel for the parties. In any event, clearly I should have been advised of my erroneous assumption.

27 With respect to the February 28, 2008, appearance he asserts that it was his intention to discover the defendants in Montreal in September, 2008, but he admits that no discovery had been scheduled. Given the history of this case, an after the fact stated intention to discover the representative of the defendants in Montreal in September, 2008 falls a little short compared to the advice to the court that the discovery was to take place then.

28 Mr. Berlingieri's affidavit swears to many "beliefs" and "intentions" on his behalf, but is devoid of much detail or written substantiation. This is to be contrasted with the affidavit material filed on behalf of the defendants, which provides a much more solid foundation for accepting the defendants' version of the matters in dispute. In my opinion, the defendants' materials provide a much more balanced and accurate account of what has transpired, or not transpired, in the history of this action. For instance, while Mr. Berlingieri seeks to justify the many cancellations of discoveries arranged by service of a notice of examination by the defendants, his affidavit fails to recognize the numerous efforts made on behalf of counsel for the defendants to arrange discoveries consensually, all of which went unanswered.

29 In respect of the December 14, 2006 status hearing appearance, the endorsement indicates that the court was told that discoveries were scheduled for the end of March, 2007. The reply affidavit of Ms. Bennett-Martin swears to the fact that the March 27, 2007 examination of the plaintiff was a date scheduled by the defendants, unilaterally and that it was not done until a month after a representative of the plaintiff's office had advised the court on December 14, 2006 that the discovery was so scheduled.

30 With respect to the October 9, 2007 status hearing date, Mr. Johnston for the plaintiff indicated "this matter is progressing, there are still outstanding discoveries to be conducted of the defendants ...". In fact, according to the affidavit of counsel for the defendants there had been no effort on the part of the plaintiff to schedule an examination for discovery of the defendants between the status hearings of April 19 and October 9, 2007. In fact, the matter was not progressing.

Discussion:

31 Rule 48.14(1) requires that the Registrar serve a Status Notice where an action has not been set down for trial or otherwise terminated within two years after the filing of a Statement of Defence. Here the statement of defence was served on March 22, 2004 - in excess of five years ago.

32 Sub-section 2(2) requires a lawyer who receives a Status Notice to forthwith give a copy of the Notice to his or her client. There is no evidence before me as to whether such notice was given, but in the absence of evidence to the contrary, it seems to me that I have to assume the Rule was complied with. If that is so, then the client would be aware of the danger of her action being dismissed by reason of delay. Presumably such client would require the lawyer to keep her advised of the outcome of the status hearing, and in this case, of the many adjournments of that hearing. This raises concerns as to whether or not plaintiff's counsel was acting on her instructions in adopting the course of action (or inaction) followed in this case, or consideration of whether the plaintiff was complacent in the process, and has no one to blame but herself if the action is dismissed. I make these observations in that it seems to me they go a long way to answer the contention advanced on her behalf by counsel who appeared on March 3, 2009 to the affect that the shortcomings of the lawyer ought not to be visited on the client. As was observed by J.W.Quinn J in *Sepehr Industrial Mineral Exports Co. v. Alternative Marketing Bridge Enterprises Inc.* (2007), 86 OR (3d) 550:

> Rule 48.14(8) does not suggest any criteria for a judge to consider in deciding whether a plaintiff has successfully shown cause. The only guidance given is that the judge either is to be "satisfied that the action should proceed". I take this to mean, therefore, that the criteria will come from the circumstances of each case, with the only rules-based guidance, perhaps, being Rule 1.04(1): "These rules shall be liberally construed to secure the just, most expeditious determination of every civil proceeding on its merits."

33 As explained in footnotes to the preceding portion of Justice Quinn's remarks, the oft referred to criteria established in *Reid v Dow Corning Corp.* (2001), 11 C.P.C.(5th) 80 are not directly applicable in that *Reid* was a case involving a motion to set aside a registrars order dismissing an action for delay, and not a determination under Rule 48.14(1).

34 As clearly stated by the rule, and as supported by the decision in *Savundranayagam v. SunLife Assurance Co.*, [2007] O.J. No. 5111, 2007 CarswellOnt 8523, the onus is clearly that of the plaintiff. In that case, Master Sproat held at paragraph 7 that the test on a status hearing is whether there is an explanation for the delay such as to satisfy the court that the action should be proceed, and secondly whether there is prejudice to the defendants. That latter aspect of the test seems to be derived from *Currie v. Toronto* (1992), 7 O.R.(3d) 796; appeal dismissed (1995), [1995] O.J. No. 219 (C.A.), but that case involved a motion to set aside a dismissal order made at a status hearing, as opposed to involving a ruling made at the status hearing. In my opinion, there is no legal onus on the defendants to demonstrate prejudice. That is not to say that on a hearing of this type there may well be a practical advantage to the defendants to show actual prejudice as a relevant factor.

35 In *Nicholson v. SunLife Assurance Co. of Canada* (2007), 45 C.P.C. (6th) 13, Henderson J observed that "if the defendants is serious about suggesting prejudice, there is an evidentiary burden on the defendants to provide the specific details of the prejudice." But that observation was made on a motion to set aside a status hearing order of dismissal, and accordingly the *Reid* factors were directly operable.

36 While Mr. Berlingieri asserts that scheduling was complicated by virtue of the defence letter of April 13, 2007 indicating the defendants would be available for discovery in Montreal, the reply affidavit on behalf of the defendants asserts that in fact there had been no reply at all from the plaintiff to that April 13, 2007 defence letter. It further asserts that it was not until the morning of October 14, 2008 (the date this present status hearing came before me) that plaintiff's counsel contacted defence counsel's office with respect to an examination of the defendants. Moreover, the defence affidavit asserts that despite the fact that Mr. Berlingieri spoke with defence counsel's office on the morning of October 14, 2008, he did not advise that there was a status hearing scheduled for later that morning, and defence counsel denies that Mr. Berlingieri was told that the defence would not consent to an examination for discovery "because of the status hearing" as claimed in paragraph 12 of the Berlingieri affidavit.

37 In terms of alleged prejudiced flowing from the delay, defendants counsel asserts that some of the plaintiff's medical treatment providers no longer practice, and "the numerous outstanding medical records may no longer be available".

38 I am satisfied on the material before me that the plaintiff has done very little to move this action along. Such steps as have been accomplished have largely been the result of a persistent effort on the part of the defendants to move the matter along.

39 During the period of more than five years since the statement of defence was filed, no substantial effort has been made to discover the defendants. No notice of examination for that discovery has been served by the plaintiff. No signed affidavit of documents on behalf of the plaintiff has been delivered, despite repeated requests for such document from counsel for the defence.

40 While Mr. Berlingieri's affidavit asserts his preference that this action proceed along with the tort actions, in terms of various steps being taken, defence counsel made it clear that it did not accept that way of proceeding. There has been no order sought by the plaintiff that this action be tried together with the other actions, or that they be tried one after the other.

41 While Mr. Berlingieri has set up a mediation to take place in June, 2009, Ms. Bennett-Martin's affidavit asserts that this was arranged without her agreement or consent, and that she has no instructions to participate.

42 While Ms. Bennett-Martin's reply affidavit at paragraph 33 asserts prejudice to the defendants, it is of a speculative nature. Regardless, as indicated earlier, in my opinion there is no onus on the defence to prove prejudice on an application of this type.

43 As to the first issue referred to in paragraph 2, the absence of a transcript for some of the status hearing appearances deprives me of the best evidence of what was actually said. On the basis of the evidence which is available, it appears to me that the court was not always given an accurate account of the progress, or lack of progress, in the prosecution of the action.

44 In my assessment, the outcome of that issue should be considered irrelevant to the outcome on the second issue, namely whether the action should be dismissed. The impropriety of any inaccurate representations to the court by counsel should not be considered on the Rule 48.14 (8) issue.

45 It is never pleasant to dismiss a plaintiff's action for delay. Nevertheless, Rule 48.14 clearly contemplates that two years following the filing of a statement of defence is viewed as being ample time to complete remaining steps and have a matter set down for trial, absent some satisfactory explanation. Where a contest arises, sub-rule (8) squarely puts the onus on plaintiff to show cause why the action should not be dismissed for delay. Here more than five years, and hence more than twice the normal time period contemplated by the rule, has gone by and in my assessment the plaintiff has done very little to move the matter along. In my opinion, the materials do not disclose any satisfactory explanation for the delay. If the common submission, as made here, to the effect that a dismissal would be unfair to the plaintiff is permitted to always trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions, then the rule would be effectively gutted. I also refer back to my previous comments in which I noted the requirement that the plaintiff be notified of the status notice, and the absence of material from the plaintiff personally during the period of time elapsed since the status notice issued on March 27, 2006, and particularly during the period since October 14, 2008.

Result:

46 For these reasons, I conclude that the plaintiff has not shown cause why this action should not be dismissed for delay. Pursuant to Rule 48.14 (8)(b) I order that the action be dismissed for delay.

47 If the parties cannot agree on the issue of costs, written submissions may be made with those of the defendants to be received within twenty-one days of the release of this ruling, and those of the plaintiff within fourteen days thereafter.

C.S. GLITHERO J.

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