

SUPREME COURT OF NOVA SCOTIA

Citation: Grosse v. White, 2010 NSSC 10

Date: 20100108

Docket: Hfx No. 221568

Registry: Halifax

Between:

David Bruce Grosse, of the Regional Municipality
of Halifax County, Province of Nova Scotia

Plaintiff

v.

Andrew White, of the Regional Municipality
of Halifax County, Province of Nova Scotia

First Defendant

v.

Leon Johnston, of the Regional Municipality
of Halifax County, Province of Nova Scotia

Second Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: December 30, 2009, in Halifax, Nova Scotia

Written Decision: January 12, 2010

Counsel: Brian J. Hebert, for the plaintiff
Robert Purdy, Q.C., for the first defendant
Connie F. Morrissey, for the second defendant

By the Court:

[1] The plaintiff, David Bruce Grosse, (henceforth the “plaintiff”) seeks the following relief by way of Motion:

- (1) an order renewing the Originating Notice (Action) and Statement of Claim in accordance with Civil Procedure Rule 4.04(5)(b);
- (2) an order appointing Nicole Smith (nee Brunette), or such other person as this Court deems fit to represent the estate of Andrew White pursuant to Civil Procedure Rule 36.12(1); and
- (3) an order for substituted service on the representative of the estate of Andrew White should the Court allow the appointment of Nicole Smith (nee Brunette) as provided for in Civil Procedure Rule 31.10(1).

[2] These latter two motions were not fully argued pending the Court’s ruling on the motion to renew. Counsel for the plaintiff was encouraged to contact the office of the Public Trustee to explore the possibility of obtaining the Public Trustee’s consent to being appointed representative of the estate for purposes of advancing the litigation.

MOTION FOR RENEWAL:

[3] The plaintiff’s action arises out of a motor vehicle accident that occurred on May 16, 2002.

[4] The plaintiff was a passenger in a vehicle driven by the second defendant – Leon Johnston. The Johnston vehicle collided with another vehicle being driven by the first defendant – Andrew White (now deceased).

[5] The Originating Notice (Action) and Statement of Claim was filed on May 17, 2004. The defendant White had already passed away by then for reasons that had nothing to do with the accident which the plaintiff claims caused his injuries.

[6] Under the Civil Procedure Rules (1972) the plaintiff had six months from the date of filing to personally serve the defendants with the Notice and Statement of

Claim. Failure to effect service within the six-month period would require an application for renewal.

[7] Counsel for the plaintiff has already applied to have the action renewed on three separate occasions. The last renewal was granted on June 19, 2007 for a period of six months. It would have expired on December 19, 2007. Neither defendant was served within that time period. In the meantime, the rules of procedure have been completely over-hauled. Effective January 1, 2009 the rule pertaining to renewal of a Notice of Action – the new term for an Originating Notice (Action) is governed by Rule 4.04.

[8] Rule 4.04, in its entirety, reads as follows:

Expiry and renewal of a notice of action

4.04 (1) A notice of action, including a notice of action for debt, expires one year after the day it is filed, unless a defendant is notified of the action in accordance with Rule 31- Notice.

(2) A plaintiff may make a motion to renew a notice of action for a second year by filing a notice of motion no more than fourteen months after the day the notice of action is filed.

(3) The motion may be made ex parte, unless a judge orders otherwise.

(4) A notice of action that is renewed for a second year expires two years after the day it is filed.

(5) A judge may renew an expired notice of action more than fourteen months after the day the notice of action is filed only if the plaintiff satisfies the judge on either of the following:

(a) reasonable efforts were made to notify the defendant of the action by effecting personal service, service could not be effected personally, and the plaintiff will make a motion for a substituted method of giving notice as soon as possible;

(b) inadvertence led to the expiry, the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

[9] When compared with the 1972 rule pertaining to renewals the intent of the new rule is clear. A plaintiff who is required to renew for failure to have the defendant properly served (in accordance with Rule 31 – Notice) within one year of first filing can apply to renew for a further one year period provided the motion is brought no more than fourteen months after the day the notice of action is filed. Sub-section (4) states that the renewed Notice of Action expires two years after the day it is filed.

[10] If you start an action it should not take more than two years to serve the defendant or defendants, as the case may be. Problems with service due to a defendant's whereabouts being unknown or if a defendant is evading service can be addressed by way of an order for substituted service.

[11] If a Notice of Action has to be renewed but more than 14 months have elapsed since it was originally filed sub-section (5) of Rule 4.04 comes into play.

[12] There is a heavier burden placed on the plaintiff to satisfy the judge on either of the following:

- (a) reasonable efforts were made to notify the defendant of the action by effecting personal service, service could not be effected personally, and the plaintiff will make a motion for a substituted method of giving notice as soon as possible;
- (b) inadvertence led to the expiry, the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

[13] In the motion that is before me counsel for the plaintiff is basing his request for a renewal on paragraph (b) suggesting that inadvertence led to the failure to serve the defendants.

[14] Before getting into the arguments for and against granting the relief sought, I must first deal with an objection raised by counsel for Mr. Johnston regarding some of the contents of the supplemental affidavit filed by counsel for the plaintiff. Although styled as a "supplementary affidavit", I accepted it even though Rule 23 does not allow for the filing of supplementary affidavits but does contemplate the filing of rebuttal affidavits. I did so based on counsel's submission that it was intended to rebut matters raised in the affidavits filed by opposing counsel.

[15] I was also prepared to overlook the fact that it was filed late. Rule 23.11(1) provides a chart that sets deadlines for filing documents for a motion on notice in chambers. For a matter scheduled for one-half day or less the rebuttal affidavit should have been filed no later than three days before the hearing.

[16] The plaintiff's rebuttal affidavit was filed the day before the hearing. Counsel for the opposing parties were aware that an additional affidavit was going to be filed and advised counsel for the plaintiff that they would not be objecting to its late filing. Accordingly, I allowed it in.

[17] However, counsel for Mr. Johnston objected to paragraphs 3 to 26 inclusive on the grounds that they either attempt to provide information that is irrelevant to the motion or do not contain true rebuttal evidence.

[18] It should be noted that counsel for the defendant Andrew White withdrew his objection to the relief sought by the plaintiff at the commencement of the hearing. Consequently, any materials filed on behalf of this defendant will not be considered by me in arriving at my decision.

[19] In reviewing the impugned paragraphs of the rebuttal affidavit it appears that a number of them pertain to the claim against Andrew White. Since this defendant's opposition to the motion has been withdrawn the information contained in paragraphs 19, 25 and 26 of the rebuttal affidavit pertaining solely to the claim against Mr. White is irrelevant and need not be considered.

[20] Certain other paragraphs specifically paragraphs 3, 4, 5, 18 and 23 also do not provide any relevant information and will therefore be disregarded.

[21] The remaining portions of the rebuttal affidavit as well as the affidavit initially filed in support of the motion have been considered in reaching my decision.

[22] The affidavit of Gail Warnell filed by counsel for Leon Johnston has also been considered.

[23] The evidence establishes that Mr. Johnston's insurers first received notice of a potential claim against their insured on November 10, 2003. This was almost 18

months after the accident happened. It was, however, within the limitation period of two years. As indicated earlier the plaintiff's action was commenced on May 17, 2004.

[24] After the initial contact was made, counsel for the plaintiff maintained fairly regular contact with Mr. Johnston's insurers for approximately one year. Beginning in 2005, however, contact became more sporadic. For approximately 3 ½ years after August 8, 2005 there were no attempts by plaintiff's counsel to contact the insurers until he sent them a letter dated February 27, 2009.

[25] We do know, however, that plaintiff's counsel was aware that the Originating Notice (Action) and Statement of Claim had expired since on three occasions he made application to have them renewed. He sought and obtained renewal orders first on November 15, 2004, then again on June 23, 2006 and finally on June 19, 2007.

[26] According to the time records of plaintiff's counsel attached to his rebuttal affidavit most of the activity on the file after the last renewal was directed towards tracking down a representative of the estate of Andrew White in order to effect service. There was very little, if any, mention of having Mr. Johnston served until the letter of February 27, 2009 was sent to his insurers asking if they would appoint a lawyer to accept service on his behalf. This request was turned down. Eventually, on September 5, 2009, Mr. Johnston was personally served but only after the documents had ceased to be valid.

[27] Counsel for the plaintiff blames the failure to serve the two defendants on inadvertence. He submits that he is prepared to advance his client's action without further delay. He further submits that if the Court denies the motion his client would suffer severe prejudice. It is interesting to note that in his brief filed with the motion on November 6, 2009 plaintiff's counsel argued that reasonable efforts had been made to serve the defendants and suggested that Rule 4.04(5)(a) applied.

[28] His oral argument however suggested that inadvertence had led to the expiry of the Originating Notice (Action) and Statement of Claim. Based on my review of his firm's time records this appears to have been the case. There can be no denying that there was inadvertence. According to Black's Law Dictionary, Eighth Edition "inadvertence" is defined as:

An accidental oversight; a result of carelessness.

[29] The Random House Dictionary of the English Language defines it as:

1. the quality or condition of being inadvertent; heedlessness.
2. act or effect of inattention; an oversight.

[30] Counsel's lack of attention led to this apparent oversight. If the motion is denied there would be severe repercussions for the plaintiff. His claim for damages for injuries alleged to have been caused by the negligence of the two defendants would come to an end. He would have no further recourse against them.

[31] However, according to Rule 4.04(5)(b) the Court must not only consider the serious prejudice that the plaintiff would suffer if the proceeding is terminated but it must also be satisfied that no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

[32] Although the rule pertaining to expiry and renewal of a notice of action has changed, the test if inadvertence is being relied upon has not changed appreciably. As such the decision of the Nova Scotia Court of Appeal in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 remains applicable. In delivering the decision for the panel which included Chief Justice Clarke and Justice Matthews, Chipman, J.A., stated the following at paras 22 - 24:

[22] It will be seen therefore that the overriding consideration on an application to renew an originating notice should be that justice be done and that in determining this, the injustice to the plaintiff in terminating the proceedings will be balanced against the prejudice to the defendant that may result from permitting them to continue. In stating the test to be applied in the broad term "for just cause", the rule has conferred upon the court a wide and largely unfettered discretion.

[23] In all cases, the particular circumstances will govern. It is recognized that long delay of itself gives rise to an inference of prejudice. The strength of the inference depends, again, on all the circumstances. The intervention of a limitation period is another circumstance to be considered in exercising discretion and renewal may well be granted after the expiry of limitation: **Moffat v. Rawding**, supra, at p. 898. The significance of the expiration of the limitation period is to alert the court that the case is likely to be one in which the delay may have resulted in prejudice to the defendant: **Simpson**, supra, p. 332. The issue of prejudice in reviving a matter after the expiry of a limitation period was addressed in the context of an application to disallow a limitation defence in **Greene v. Hines** (1985), 67 N.S.R. (2d) 296 at

298. See also **Deaville v. Boegeman** (1984), 47 C.P.C. 285, **Aliferis v. Parfenuik** (1985), 1 C.P.C. (2d) 41, decisions of the Ontario Court of Appeal.

[24] A word should be said about on whom the onus lies in an application of this sort. Mr. Justice Boudreau considered it lay on the applicant to show just cause and I agree. Clearly, the plaintiff has in the first instance, the burden of showing the court circumstances which warrant the discretion to be exercised in the plaintiff's favour including, to the extent that it is within the plaintiff's power to do so, circumstances negating the conclusion that the defendant was prejudiced. The defendant is also in a position to offer evidence on this issue and if, at the end of the day, the scales are evenly balanced when both the injustice to the plaintiff and the prejudice to the defendant are weighed, then the plaintiff should fail.

[33] Counsel for the defendant "Johnston" has filed an affidavit providing a complete chronology of events from the time the claim was first brought to the attention of Mr. Johnston's insurers. She has argued that the 18-month delay in making the initial contact coupled with the significant delays in moving this claim forward has resulted in prejudice to her client which cannot be compensated in costs.

[34] When weighing the prejudice that might be suffered by the defendants because of the delays in moving this matter forward against the serious prejudice that the plaintiff would suffer as a result of the termination of the proceeding, I am satisfied that the motion to renew should be granted. This would allow justice to be done.

[35] There may be some problems tracking down some witnesses and in the case of Mr. Andrews an impossibility since he has passed away but I do not see that as being as serious a problem for the defendants as the serious prejudice the plaintiff would suffer if his action is terminated.

[36] Efforts to track down potential witnesses who are still living and have some recollection of the accident have not yet been fully exhausted. Hopefully they can still be found. Even though the defendants have not been properly served their insurers have known of the Plaintiff's intended action since at least November of 2003. They have had time to investigate the claim and to prepare to defend against it.

[37] I therefore order that the Originating Notice (Action) and Statement of Claim be renewed for a one year period commencing on today's date. It will expire, unless the defendants are served personally or by way of service on a representative in the case of the defendant, "White", no later than January 8, 2011. Given that the action

has already been renewed three times before there should be no need for any further renewals.

[38] Counsel for the plaintiff should take immediate steps to have a representative appointed to accept service on behalf of the estate of Andrew White and to serve both defendants in compliance with Rule 31 – Notice.

[39] After hearing from counsel regarding the appointment of a representative of the Estate of Andrew White I will await the results of his conversation with the Public Trustee. I will retain the file in the meantime. If necessary I am prepared to reconvene to hear submissions on this aspect of the plaintiff’s original motion.

[40] On the issue of costs counsel for Andrew White indicated that his client is not seeking costs. After hearing the submissions of counsel for the defendant “Johnston” and counsel for the plaintiff I award costs of \$750.00 to the second defendant payable when the matter is finally determined regardless of its outcome.

Justice Glen G. McDougall