

Monday, June 2, 2014

Service of Statement of Claim 6 Years After Burlington Highway MVA: Relief Denied

The Issue: With multiple defendants, one of whom was not easy to locate and was not served, the lawsuit moved forward.

Then with further developments, it became important to locate and serve the 'missing' defendant, 6 years after the car accident.

Can a plaintiff obtain an extension of time (from the usual 6 months) to serve the Statement of Claim, to 4 years after the Statement of Claim was issued?

This Case Situation

A pedestrian died after being hit multiple times by various motor vehicles on the QEW near the City of Burlington. Multiple defendants were named in this action: ***Malatesta v. 2088675 Ontario Inc., 2014 ONSC 1793 (CanLII)***

An issue was the failure to serve one defendant the Statement of Claim until 4 years after the Statement of Claim was issued (and 6 years after the motor vehicle accident). This was a motion to extend the time for service of the Statement of Claim.

The defendant opposed the extension of time on the basis of prejudice to their defence - including the inability to find three liability witnesses known at the time of the accident, as well as a lack of explanation for the delay in service.

Judge Wright reviewed the matter and found that the plaintiff failed to adequately explain the reasons for the delay and that there was prejudice to the defendant in allowing an extension of time to serve in this case.

The motion was denied.

As stated by Wright, J:

Analysis

[10] *The leading case for an extension of time for service is Chiarelli v. Weins, [2000] O.J. No. 296 (C.A.).*

[11] *In Chiarelli, the Court of Appeal confirmed that the basic consideration on a motion for extension of time for service of the statement of claim is whether granting the extension will advance the just resolution of the dispute without prejudice and unfairness to the parties. The plaintiff has the onus to prove that extending the time for service will not prejudice the defence.*

[12] *In the case at bar, I find that granting the extension will not advance the just resolution of the dispute without prejudice or unfairness to the parties. I find that granting an extension of time or service of the statement of claim would result in unfairness and prejudice to the defendants, and here is why.*

[13] *Up until November 8, 2013, some 4 years after the accident, the defendant, Gabriel Uribe-Valez had no knowledge that the plaintiffs were asserting a claim against him. This of course falls well outside of the parameters of Rule 14.08(1) of the Rules that requires that a statement of claim be served within 6 months after it is issued.*

[14] *The plaintiffs offer almost no explanation for the delay, except that they were unable to locate the defendant Gabriel Uribe-Valez, which is the basis for the motion for substitute service. There was one unsuccessful attempt to serve the defendant on August 31, 2011 at his Burlington address two years after the accident. Following that, there was a driver's licence/address search on July 30, 2013, almost 4 years after the accident. I am mindful that Gabriel Uribe-Valez has, since the time of the accident, resided at the Burlington address. I find that the defendant could have, if any real effort had been made, been notified, and served with the statement of claim. There seems to have been no effort or steps taken to advance the plaintiffs' claim for at the very least almost two full years after it was issued. I do not know what they were doing because there is no affidavit evidence filed, nor were there any arguments made orally.*

[15] *In relation to the defendant, Xu Zhang, there was one unsuccessful attempt at service on September 27, 2011, two years after the accident and no steps taken since to locate the defendant.*

[16] *Finally I have turned my mind to the issue of prejudice, and to whether this lack of service or untimely service has prejudiced the defendants. I find that it has. And here is why.*

[17] *The starting point for this analysis is set out by the Court of Appeal in Frohlick v. Pinkerton Canada Ltd. [2008] O.J. No. 17 (C.A.), where the court states that the expiry of the limitation period for service gives rise to a presumption of prejudice. The longer the delay, the stronger the presumption of prejudice flowing from it.*

[18] *This case, however, is not limited to presumption of prejudice. There is a demonstration of real prejudice that flows directly from the delay. Three key witnesses, critical to the defence can now not be located. I find that if the defendant had been given prompt notice they could have located and secured*

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those material witnesses. Although I have not had the benefit of evidence of submissions from Xu Zhang, the only logical inference, given that the action arises from the same circumstance is that he/she would also want to rely on the same witnesses if the matter were to proceed.

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[19] *I further find that the defendants ability to bring claims against potentially liable non-parties has been comprised and prejudiced. I find this to be a live issue given the circumstances under which the accident took place.*

[20] *I am also mindful that the onus remains on the plaintiffs to prove the lack of prejudice and rebut allegations of prejudice as put forth by the defendants. A bald statement that there is no prejudice falls short of meeting that onus: Noori v. Grewal, 2011 ONSC 5213 (CanLII), 2011 ONSC 5213.*

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