

SUPREME COURT OF NOVA SCOTIA
Citation: *Murphy v. GMCC*, 2024 NSSC 122

Date: 20240411
Docket: 497285
Registry: Sydney

Between:

Marilyn Murphy

v.

General Motors of Canada Company

Judge: The Honourable Justice Patrick J. Murray
Heard: September 21, 2023 in Sydney, Nova Scotia
Written Decision: April 11, 2024
Counsel: Robert Carter, K.C., for Marilyn Muphy
Ian Dunbar for General Motors of Canada Company

By the Court:

Introduction

[1] This is a motion made by the Plaintiff, Marilyn Murphy, seeking an Order pursuant to Civil Procedure Rule 4.04(5) renewing the Notice of Action and Statement of Claim (the action). A Notice of Action expires within one (1) year after the day it is filed unless a Defendant is notified in accordance with Rule 31.

[2] Typically, this means that a Defendant must be served with the action within a year in the manner set out in Rule 31. The basic requirement calls for the Defendant or its recognized agent to be served personally with the Plaintiff's claim.

[3] The motion is being made outside the time period set out in the rules that would permit a renewal application if filed within 14 months of the date of filing of the action. (Rule 4.04(1))

[4] The Defendant, General Motors of Canada Company (GMCC), contests the motion stating approximately five (5) years have passed since the motor vehicle collision giving rise to the claim (in 2018) and the Motion to Renew the proceeding (filed in 2023). If granted, this would effectively extend the limitation period to five (5) years, submits GMCC.

Background

[5] The relevant facts and background information are set out in the Notice of Motion and the following Affidavits filed with in support of this motion:

- Affidavit of Harvey McPhee, KC, sworn on January 16, 2023.
- Affidavit of Emma Adlakha, sworn June 26, 2023.

[6] The Plaintiff alleges she was involved in a single motor vehicle collision on March 9, 2018 on Grand Lake Road in Sydney River, Nova Scotia, where her vehicle struck a pole and a fence and caused the airbags to deploy. Ms. Murphy sustained an injury from the airbags and pursued a claim against the manufacturer, the Defendant, GMCC.

[7] The Plaintiff retained Ms. Emma Adlakha at Crosby Burke on July 16, 2018 to represent her in her personal injury claim. Ms. Adlkaha collected medical information on behalf of Ms. Murphy and wrote to Ms. Murphy's insurer, Aviva, to advise of the claim. The Plaintiff received letters from the insurer for the Defendant, GMCC, advising they were investigating the claim.

[8] Ms. Adlakha filed a Notice of Action and Statement of Claim on the Plaintiff's behalf on March 9, 2020. This action was due to be served by March 9, 2021. Unfortunately, the action was not served in time.

[9] Therefore, the Plaintiff seeks an Order renewing the Notice of Action and Statement of Claim for another year pursuant to *Civil Procedure Rule 4.04(6)*.

[10] At the motion hearing on February 13, 2023, Mr. Carter, KC, an officer of the Court, informed the Court as follows:

We had put the Defendant on notice of this, they have acknowledged this now, they had not when we were before Justice Gogan two weeks ago. But they have now acknowledged it, they acknowledged receipt of the Order that Justice Gogan had issued on the heels of the last one and I've heard nothing since.

[11] In the affidavit of Harvey McPhee, KC, sworn January 16, 2023, he confirms (at paragraph 8) that the Plaintiff spoke with and received a follow up letter from the representative of the Defendant, Susan Braun of Chubb Insurance, informing him that they would be investigating the matter and contacting the Plaintiff's insurer.

[12] In a letter dated April 12, 2018 Ms. Braun confirmed that Chubb Insurance provides claims handling services to GMCC, in connection with product liability claims. The Notice of Action, on its face, asserts in the Statement of Claim, a product liability claim.

[13] In his affidavit Mr. McPhee refers to an additional letter that was received from the Defendant's representative dated June 29, 2028, in which she states, referring to GMCC, "They have referred your claim to our office for handling".

[14] In a third letter dated October 12, 2018, GMCC's administrator acknowledged that it would be necessary for the Plaintiff to provide medical records in order for Chubb Insurance to be able "to take further action" in the matter.

[15] The motion documents in this matter refer to the “renewal” of the Statement of Claim. Whether this is a matter upon which “claims handling services” would be provided is arguably an open question.

[16] In any event, in his letter of March 3, 2023 Mr. Dunbar indicates the Defendant did not determine the position it would take on the motion until February 15, 2023.

[17] Service of the motion was an issue for the Court in Chambers on February 13, 2023. The Court was ultimately satisfied that GMCC had received notice of the motion, through its representative Ms. Braun, while pointing out that Chubb Insurance (and Ms. Braun) are “not obviously GM”.

Issue

[18] Should the Motion to Renew the Plaintiff’s action, that expired on March 9, 2021, be granted?

Analysis

[19] The burden to show that the criteria set forth in Rule 4.06(b) has been met rests with the Plaintiff on a balance of probabilities.

[20] The Plaintiff must demonstrate that through inadvertence it will suffer serious prejudice if the action is not renewed and the Defendant, GMCC, will not suffer serious prejudice that cannot be compensated in costs.

[21] It is not for the Defendant to show: 1) that the Plaintiff will not suffer serious prejudice, or 2) that it will suffer serious prejudice that cannot be compensated in costs.

[22] In *Minkoff v. Poole*, [1991] 101 N.S.R. (2d) 143, Chipman, JA, held that the overarching principle is that justice be done. If, after consideration of the matter, the scales are evenly balanced then the Plaintiff will not have met their burden.

[23] In this case, the Defendant acknowledges that it was because of inadvertence of the Plaintiff’s solicitor that the Notice of Action and Statement of Claim was not served within one (1) year after it was issued on March 9, 2020.

[24] Under the rules of procedure, the Plaintiff runs the risk of a claim being dismissed if service is not effected and notice of the claim is not given to the

Defendant. A motion to renew made within 14 months of the claim being issued, will result in the claim being renewed for a second year.

[25] In the present case there were exceptional circumstances that occurred, within the period (almost exactly within) during which the Plaintiff ought to have notified the Defendant of the Action under Rule 31.

[26] On January 30, 2020, the World Health Organization (WHO) declared the Covid Coronavirus (Covid-19) a public health emergency, and on March 11, 2020 WHO declared the outbreak to be a worldwide pandemic.

[27] In her affidavit Ms. Adlakha stated this was one factor, among others that caused her to be overwhelmed with practice issues and contributed to her failure to provide the required notice.

[28] In her affidavit Ms. Adlakha stated she became aware of the expired claim in January of 2022:

12. Upon reviewing my files when I retired in January 2022, I noticed the Action has not been served.

[29] To its credit, the Defendant has acknowledged that it was inadvertence that led to the expiry of the Plaintiff's claim, up to the point it was realized. After that time (January, 2022), the Defendant submits the motion to renew was still not made until a year later. This was beyond the 14 month period in Rule 4.04(2).

[30] Consequently, this leaves for consideration, principally the issue of prejudice to the Plaintiff and Defendant under the latter part of the test e.g. Rule 6.02(6)(b).

Prejudice to the Plaintiff

[31] On the issue of prejudice, generally the Plaintiff is seeking damages for injuries due to the motor vehicle collision, the action was commenced within the limitation period of 2 years, albeit on the last day of such period.

[32] In addition, the Plaintiff was herself in direct communication with the designated representative of GMCC, very early in this proceeding and exchanged conversations and correspondence concerning the incident of March 9, 2018 and the allegations arising from it.

[33] Ms. Adlakha stated in her affidavit, that she gathered medical information during the years 2018 and 2019. This is confirmed by Harvey McPhee, KC, in his affidavit at paragraph 11 in which he states:

11. From my review of the file, I can confirm that Ms. Adlakha collected medical records for the matter throughout 2018 and 2019. The file currently contains the following medical records which have been preserved:

- a. Dr. Eugene E. Ignacio's clinical notes and records;
- b. CBI Health Centre clinical notes and records;
- c. New Waterford Consolidated Hospital records;
- d. Cape Breton Regional Hospital records;
- e. Pharmasave records.

[34] In a letter forwarded by Ms. Adlakha to the Plaintiff's insurer Aviva on July 17, 2018, she enclosed photographs of her client's injuries.

[35] From the evidence provided on behalf of the Plaintiff, there can be little doubt that she will suffer serious prejudice if her claim for compensation is declared to be at an end, by the motion being denied.

[36] The case law has commonly discussed the extent of the prejudice to a plaintiff, who is denied his/her right of action. In most cases, dismissal is the ultimate prejudice that a party to legal proceedings can suffer.

[37] In *Creswell v. Murphy*, 2010 NSSC 190, Chief Justice Kennedy noted, while allowing a renewal for a third time:

31. I am going to permit one more renewal of this matter. A prejudice to the Defendant Murphy is presumed given the significant delay in bringing this matter to trial. However, when I balance the prejudice to the Defendant against the dramatic prejudice to the Plaintiffs should the action be ended, I conclude that the Plaintiffs will be given one further opportunity to over the matter forward.

[38] The allegations in the Statement of Claim centre around the deployment of the air bag in the Plaintiff's vehicle. Among other things, the Defendant's representative, through Ms. Braun undertook to complete an investigation into the single vehicle collision, including collecting data from the vehicle's operating system, which would she said would provide critical information as to the crash.

[39] That said, there can be no question there was a failure to provide the further information requested by Chubb and delay in bringing the renewal motion. The delay from the time the Notice of Action first expired on March 9, 2021 to the filing of the renewal motion on January 30, 2023, was 22 months.

Prejudice to the Defendant

[40] In its brief GMCC acknowledged some of the basic facts in relation to the Plaintiff's claim. In its summary of the facts GMCC states:

1. The Plaintiff was a passenger in a vehicle that struck a pole.
2. The vehicle was driven by a Mr. Michael Melnick.
3. The Plaintiff alleged the collision caused the air bag to deploy, resulting in injuries to her.
4. The driver Mr. Melnick had not been named as a Defendant.
5. The Plaintiff had been in contact with Ms. Susan Braun of Chubb Insurance, who informed her in writing that "they (GMCC) have referred to the matter to us".
6. The Plaintiff had an opportunity to continue with the claim by providing GMCC's claim's handler with further information within thirty (30) days of its letter of October 12, 2018. But did not.

[41] The Defendant submits the Plaintiff had an entire year to serve the claim upon the Defendant, and a 14 month window to file a Motion to Renew. It submits even after Mr. McPhee was retained, it was approximately one year before the Motion to Renew was filed. (February 8, 2022 to January 30, 2023)

[42] The Defendant's primary argument is that the lengthy delay (5 years in total) has lead to a presumption of prejudice, which presumption has not been rebutted by the Plaintiff in this motion.

[43] In *Thornton v. RBC General Insurance Co.*, 2014 NSSC 215, Wood, J. (as he then was), discussed the test on a renewal motion, as requiring the court to conduct an analysis of the respective prejudice between the parties.

[44] In *Grosse v. White*, 2010 NSSC 10, McDougall, J. confirmed that a long delay will give rise to an inference of prejudice stating, "the strength of the inference will depend on the particular circumstances".

[45] In *Gale v. Morash*, 2015 NSSC 316, the Court noted “the burden remains on the applicant in the first instance to show a lack of significant prejudice to the Defendant”. It was observed by the Court in *Minkoff* that the burden on the Plaintiff to show this was, “to the extent possible”. In addition, there is no onus on the Defendant to establish it has suffered actual prejudice, failing which the motion will be granted.

[46] The Defendant correctly points out that the Plaintiff ought to provide all the evidence it has that would show a lack of potential prejudice to the Defendant as a result of the delay in renewing the original pleadings. (*Thornton* at paras.34 & 37)

[47] The Applicant submits if the motion is not granted and the Plaintiff’s action is not renewed, she would not be able to seek compensation for the injuries she alleges she suffered in the collision. This would be through no fault of her own.

Caselaw

[48] The following is some but not all of the factors taken into consideration in determining whether an expired notice of action should be reviewed under Rule 4.04(6) (including the previous Rule 9 of the *Civil Procedure Rules*).¹

- i. The length of the delay between the action expiring and the notice of motion to renew.
- ii. Whether there was early contact with the Defendant or its insurers, i.e. when the insurer first received notice of the potential claim.
- iii. Whether there is evidence of the Defendant’s ability to undertake an investigation and follow up, near the time of the alleged events.
- iv. Whether there is evidence that the Plaintiff contributed personally to the delay.
- v. Whether any of the parties or witnesses were deceased at the time of expiry or at the time of the motion to renew.

¹ *Minkoff v. Poole*, [1991] 101 N.S.R. (2d) 143; *Chaisson v. MacMaster Estate*, [1996] 154 N.S.R. (2d) 153; *Turner v. Belitsky*, [2003] 216 NSR (2d) 64; *Grosse v. White*, 2010 NSSC 10; *Cresswell v. Murphy*, 2010 NSSC 190; *Thornton v. RBC General Insurance Co.*, 2014 NSSC 215; *Gale v. Morash*, 2015 NSSC 316; *Langdale v. Register.com Inc.*, 2016 NSSC 171

- vi. Whether the Plaintiff's counsel was responsible for the delay and the number of renewals, if any, that had been granted.
- vii. Whether the Plaintiff has given an explanation for the failure to serve the Defendant personally.
- viii. Whether reasonable efforts had been made to effect personal service on the Defendant.
- ix. What prejudice has been shown to exist by affidavit evidence and to whom.
- x. Whether a limitation period has expired.

[49] In *Minkoff v. Poole*, [1991] 101 N.S.R. (2d) 143, the previous rules (pre-2009), Chipman, J.A., held that the “overarching consideration should be that justice be done”.

[50] Notwithstanding the non-exhaustive factors listed above, the Civil Procedure Rule, set out the criteria that must be met. (Rule 4.04(6)(a)(b)). The onus is on the party seeking to renew the action to satisfy the Court, that the test has been met.

[51] Under 4.04(6)(b) the Court must consider whether inadvertence led to expiry, whether the Plaintiff will suffer serious prejudice if the proceeding is terminated, and whether a defendant will suffer serious prejudice that cannot be compensated in costs, as a result of the delay in notification. Rule 4.04(1) states notification is notice of the action (“service”) in accordance with Rule 31:

31.02 Notifying party of proceeding

A party who starts a proceeding, or makes a third party claim in an action, may notify the party against whom the proceeding is started, or the third party, by causing a certified copy of the originating document to be served personally in accordance with Rules 31.03 to 31.05, or by giving notice by an alternative method in accordance with Rules 31.06 to 31.10.

[52] In *Grosse*, an accident occurred in May 2004. The action was renewed several times in November 2004, June 2006, and finally in June 2007 for six (6) months. The court noted that the Defendant's insurer of a potential claim in November 2003 which was 18 months post accident.

[53] The driver of the second vehicle died prior to the action being renewed in 2004. McDougall, J., granted a renewal of the action for one last time. The court

noted there had been problems tracking down a representative for the estate of the deceased White. His Lordship acknowledged there could be problems tracking down witnesses, but found this prejudice was not as serious as that to the Plaintiff if the action was terminated.

[54] It should be noted that the current Rule 4.04(5) states that when a proceeding expires, a notice advising of the expiry must be sent to a party at their designated address by ordinary mail. In the present case a Notice of Expiry was delivered by the Prothonotary to counsel for the Plaintiff at her law firm address, on November 23, 2021. The current Rule 4.04(5) was added as a new rule in January, 2020.

Decision

[55] The test to be applied is clear, it is a balancing of prejudice with the overriding consideration being that justice be done. The Defendant has made valid points in its submission namely, the memory of witnesses will be impacted, GMCC would not have expected to be sued five (5) years after the fact, and that evidence of actual prejudice to the Plaintiff on the motion is lacking.

[56] On the other hand, the prejudice that can result from an action be ended has been described as dramatic, and has resulted in plaintiffs being given a further opportunity by courts to move a case forward.

[57] Examples of prejudice that cannot be compensated in costs include evidence that has been lost or destroyed, witnesses that are no longer available or are of ill health or deceased. The expiry of a limitation period has been held to be a further circumstances that may give rise to prejudice to a defendant.

[58] The evidence contained in Ms. Adlakha's affidavit is that she collected medical information in relation to the matter in 2018 and 2019. (Paragraph 10)

[59] Mr. McPhee confirms in his affidavit that the medical records remain available, and there are none that are unavailable (Paragraph 12):

12. To my knowledge, there are no medical records that are unavailable.

[60] The correspondences from the Defendant's claims representative on April 12, and June 29, 2018 are quite detailed in stating that an investigation would be concluded and an inspection of the vehicle would be completed.

[61] It was Ms. Braun, who confirmed that the Sensing and Diagnostic Module (SDM) records would show pre-crash data (on the air bag system) and once downloaded, a copy would be provided to the Plaintiff. Further information was requested from the Plaintiff to assist in the investigation and upon receipt a technical review would be completed.

[62] The Defendant submits there is no evidence of further contact for a period of several years after 2018 until 2022. GMCC notes the February 8, 2022 correspondence from Mr. MacPhee is not in evidence. Further, they have argued medical records alone are insufficient to address all of the issues.

[63] The Defendant further submits the evidence provided by the Plaintiff does not address whether a third party claim can still be pursued following the accident. There is a lack of evidence, they say, in witnesses, details of the accident, and information concerning Mr. Melnick.

[64] GMCC states there is little disclosure on liability, such as witness statements, police reports and mechanical records.

[65] Presumably, it was the Plaintiff that informed Chubb Insurance that the driver was Mr. Melnick and the basis of the action centered around the air bag system, of which the Defendant is the manufacturer.

[66] In her April 12 letter, Ms. Braun stated she had contacted Aviva, the Plaintiff's insurer to request the location of the vehicle and permission to complete an inspection. In her affidavit, Ms. Adlakha attached her correspondence to Aviva on July 17, 2018 to advise of her representation of the Plaintiff and requested that further correspondence be forwarded to her attention.

[67] The Defendant has been aware that this matter involved a single vehicle accident and that the Plaintiff's claim was based almost entirely on the deployment of the air bag. They were aware of the mechanism within the vehicle that would provide technical information, and how to go about retrieving it. They were aware of her claim that she had suffered injuries and photos of them were sent by her counsel. Further, they were informed that medical evidence was being gathered, which evidence is currently intact.

[68] While there is a five (5) year period between the accident and the date of the motion, the delay between the date of expiry in March of 2021 to the date of the motion in January of 2023 was much less than that at 22 months.

[69] There have been renewals granted in much lengthier situations and where, unlike here, no prior notice has been given to the Defendant. In some cases, there has been a deliberate intention not to effect service upon the Defendant.

[70] In the totality of the circumstances, I am satisfied that the Plaintiff will suffer serious prejudice if the renewal is not granted and while GMCC will suffer prejudice, the Defendant will not suffer serious prejudice that cannot be compensated in costs.

[71] I am further satisfied that the Plaintiff has met her burden to show that inadvertence led to the expiry of the action and that the Plaintiff will suffer the greater prejudice if the action is not renewed.

Conclusion

[72] The Plaintiff's motion pursuant to Rule 4.04(6)(b) is granted, without costs.

Murray, J.