Date: 19990310
Docket: CV 06366

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SIMATA PITSIULAK

Plaintiff

- and -

J. WOODER, MARK HANSON, PAUL STUBBING, GEORGE BORCHERT, L. DIBDEN, ERIC HOOD, TREVOR YOUNG, BAFFIN REGIONAL HOSPITAL, BAFFIN REGIONAL HEALTH BOARD, THE GOVERNMENT OF THE NORTHWEST TERRITORIES, COMMISSIONER OF THE NORTHWEST TERRITORIES and CLARKE INSTITUTE OF PSYCHIATRY

Defendants

Application by certain Defendants to set aside orders renewing the Statement of Claim; cross applications by Plaintiff.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on February 10, 1999

Reasons filed: March 10, 1999

Counsel for the Plaintiff: Sheldon Toner

Counsel for the Defendants
J. Wooder, Mark Hanson,
Paul Stubbing, George Borchert,
L. Dibden, Eric Hood, Trevor Young: Kelly A. Payne

Counsel for the Defendant
Clarke Institute of Psychiatry: Sarah A.E. Kay

Counsel for the Defendants
Baffin Regional Health Board and

Baffin Regional Hospital: Garth E. Malakoe

No one appearing for the Defendants The Government of the Northwest Territories and Commissioner of the Northwest Territories.

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Defendants

REASONS FOR JUDGMENT

[1] This is a medical malpractice suit, in which the following applications came before me in Chambers:

1. application by the Defendant physicians to set aside two orders which renewed the Statement of Claim. The other Defendants who appeared by counsel in Chambers supported the application as to the first renewal order. Trevor Young is the only Defendant affected by the second renewal order;

2. application by the Plaintiff to discontinue the action as against The Government of the Northwest Territories and the Commissioner of the Northwest Territories; and

3. application by the Plaintiff to amend the Statement of Claim to provide details as to when the Plaintiff discovered certain conditions alleged to be the result of the actions of the Defendants and to add a claim for breach of contract.

Background

[2] The Statement of Claim was issued on March 29, 1996. Briefly stated, the Plaintiff alleges that as a result of the Defendant physicians treating him with various neuroleptic drugs, he has suffered from certain physical disorders. He claims that they were negligent in prescribing and administering the drugs to him. The proposed amendments to the Statement of Claim allege that the Plaintiff discovered in 1994 that the disorders were caused or contributed to by the treatment he received from the Defendants.

[3] An ex parte order was granted on March 25, 1997 (the "first order"), giving the Plaintiff a further six months from that date to serve the Defendants with the Statement of Claim. A further ex parte order was granted on October 28, 1997 (the "second order"). That order gave the Plaintiff an extension of six months from September 24, 1997, to serve the Statement of Claim on the Defendant Trevor Young, all other Defendants having been served by then.

[4] A third order, providing a six month extension from March 24, 1998 to serve Dr. Young, was granted March 12, 1998.

[5] Dr. Young was served with the Statement of Claim on May 20, 1998 in Hamilton, Ontario.

[6] Only the first and second orders are at issue. If they are set aside, the status of the Statement of Claim and the validity of the third order will come into question.

Preliminary issue

A preliminary issue arose because I made only the second order, not the first. Rule 399 provides as follows:

> 399. (1) An order may be set aside, varied or discharged on notice by the judge who granted it.

> (2) On consent of all interested parties, the Court may set aside, vary or discharge an order.
>
> (3) Where an order specifically provides that a party may apply to set aside, vary or discharge the order, with or without conditions, any judge of the Court may set aside, vary or discharge it.

[7] Reference should also be made to Rule 398(4), which provides:

> 398. (4) A person affected by an *ex parte* order may apply to set it aside on notice to the party to whom the order was granted.

[8] Although none of the counsel who appeared on this application took the position that I could not hear the application to set aside the first order, it was brought to my attention that Rule 399 appears to require that unless an order specifically provides that a party may apply for variation, any contested application for variation should be heard by the judge who granted the order. In this case, the judge who granted the first order was not available when this application came on for hearing.

[9] There is authority, however, supporting the power of a judge to deal with another judge's ex parte order where the exigencies of court administration make it impractical to apply for a review to the same judge who made the order: *Wilson v. R.*, [1983] 2 S.C.R. 594.

[10] Accordingly, I am satisfied that I can hear the application with respect to the first order as well as the second.

Rule 13

[11] Rule 13, under which the first and second orders were granted, provides as follows:

> l3. (1) A statement of claim is in force for 12 months beginning on the date of its issue, but if for any sufficient reason a defendant has not been served, the statement of claim may, before or after its expiration, be renewed by order for six months and may, before or after the expiration of the renewed statement of claim, be further renewed from time to time as the Court may order.

> (2) On the filing of an order made under subrule (1), the Clerk shall mark the statement of claim with a memorandum, signed by the Clerk and sealed with the seal of the Court, stating:
>
> "Renewed for the period of six months beginning on (month, day, year) by order of .....".
>
> (3) A statement of claim renewed under this rule remains in force and may be relied on to prevent the operation of any statute limiting the time for commencement of an action and for all other purposes from the date the original statement of claim was issued.
>
> (4) All copies of a renewed statement of claim for service after the renewal must bear a copy of the memorandum made under subrule (2).

[12] Rule 13(1) is similar to the former Alberta Rule 11(1), prior to the amendment of the latter in 1991:

> A Statement of Claim is in force for 12 months from the date thereof, including the day of that date, but if for any sufficient reason any defendant has not been served, the statement of claim may at any time before or after its expiration, by order, be renewed for three months and so from time to time, during the currency of the renewed statement of claim.

[13] Rule 11 as amended in 1991 provides that a statement of claim is in force for a period of 12 months commencing on the day it is issued, that the Court may grant an order renewing it for a further period not exceeding 3 months, that an application for such renewal must be brought during the initial 12 month period and not after, and that only one such renewal may be made.

[14] Because of the significant differences between the former and current Rule 11, cases under the current Rule may not be particularly helpful in dealing with applications in this jurisdiction under Rule 13. Cases which interpreted the former Rule 11 are of more assistance.

[15] In *Widdell and K.M. Porta-Services Ltd. v. Woodman*, [1983] 4 W.W.R. 20 (Alta. C.A.), it was held that there are two ultimate considerations for a chambers judge on an application under former Rule 11: proof of prejudice to the defendants and the ends of justice in the individual case.

[16] Counsel for the Defendant physicians made the argument that it must be shown by a plaintiff who seeks renewal of a statement of claim that some effort to serve the defendants has been made unless there has been an express or implied waiver of service

by the defendants. However, Rule 13 contains no such requirement. In that respect, it is unlike the rule in British Columbia which was under consideration in *Watters v. Preston* (1969), 71 W.W.R. 369 (B.C.C.A.), a case cited by counsel. The rule in that case specifically required that a court in granting a renewal be satisfied that reasonable efforts had been made to serve the defendant, although it also allowed the court to grant a renewal "for other good reason".

[17] Under our Rule 13, the Plaintiff must simply satisfy the court that there is sufficient reason why a defendant has not been served within the relevant time limits. What constitutes sufficient reason is for the court to determine in each case. The court's discretion must, of course, be exercised judicially.

[18] What constitutes sufficient reason will depend on the circumstances of the case. This was explained by Master Bessemer in *Newman v. Dawson et al*. (1977), 76 D.L.R. (3d)118 (Alta. S.C.):

> ... it would seem to me that the importation of the words "for any sufficient reason" into our Rule 11 ... must have had an enlarging effect upon the scope of the Court's discretion, since upon a logical and fair interpretation of the same these words can only mean "for any reason which will suffice the Court to grant indulgence". Given such a reason, then it surely matters not whether the circumstances thereof be "special", "very special", or by whatever other adjectival embellishment adorned. It is still sufficient.

<u>The first order</u>

[19] The reason put forward at the time of the application for the first order for renewal is contained in the affidavit of Keri L. Barringer, a student-at-law in the offices of counsel for the Plaintiff. That affidavit, sworn almost a year after the Statement of Claim was filed, says that since that filing, "we have been investigating and considering the feasibility of this action. The statement of claim was filed to protect the limitation period as best we could determine". Ms. Berringer also deposes that the Statement of Claim has not yet been served but that she intends to do so promptly.

[20] Ms. Barringer's reference to considering the feasibility of the action should be read in the context of the action as described in the Statement of Claim. The Plaintiff pleads that he was the patient of the various physicians and health facilities named as Defendants in the action commencing in about 1984 and that he was prescribed and administered certain neuroleptic drugs. He pleads further that starting in 1990, he suffered from various disorders which were caused or contributed to by the negligence

of the Defendants in prescribing or administering or allowing to be prescribed or administered the drugs in question.

[21] The action is one that is, therefore, potentially complex. It is not a simple, straightforward action in debt.

[22] Counsel for the physicians argued that investigating and considering the feasibility of an action does not amount to sufficient reason for not serving the Statement of Claim. She relied on *Newman v. Dawson* for the proposition that there is a very heavy onus on a plaintiff to demonstrate credible excuse or sufficient reason for not having served the statement of claim. The ruling in that case must, however, be considered in context. First, the Master in that case was comparing the test for renewal of a statement of claim to the test for taking the next step in an action. Second, he was speaking of the onus where there has been inordinate delay on the part of the plaintiff. In the case before him, neither solicitor nor client had done anything for two years following issuance of the statement of claim and that was held to justify dismissal of the application for renewal despite what the Master held was the initially credible excuse that the plaintiff's solicitor had been waiting for the plaintiff's physical condition to stabilize before proceeding with an action or settlement negotiations.

[23] In this case, the delay is not clearly inordinate. In any event, there was sufficient information before the judge who heard the application for the first renewal to form the opinion that, in this medical malpractice action, it was reasonable for counsel for the Plaintiff to take the time to investigate the matter and determine whether the action had merit, prior to attending to service on the Defendants. The judge clearly found that there was sufficient reason within Rule 13.

[24] The case of *General Leasing Corporation Ltd. et al. v. Trouton* (1967), 63 D.L.R. (2d) 64 (B.C.S.C.), referred to by counsel for the physicians, must be distinguished as it was decided on the basis of the rule in force at that time in British Columbia, as interpreted by the case law there, which required that the plaintiff establish "very special circumstances" rather than the sufficient reason required by our Rule 13. As stated in *Newman*, sufficient reason does not require very special circumstances. *General Leasing* can also be distinguished because there no reason at all was shown for failure to serve the defendant, whose whereabouts were readily ascertainable.

[25] In my view, it cannot be said to be unreasonable for a plaintiff's counsel to delay service of a statement of claim for a period of time in a complicated case in order to determine whether the action will in fact proceed. The alternative would be that service

is effected and the wheels set in motion and costs incurred, which may turn out to be unnecessary should the plaintiff decide not to pursue the case. What length of time will be reasonable in order for the plaintiff to make that determination will vary according to the circumstances of the case.

[26] It was argued on behalf of the physicians that deprivation of the defence of expiry of a limitation period which might have been available to them had the renewal not been granted, results in prejudice to them. On that issue, Miller J. had the following to say in *Cherry and Cherry v. Hurtig; Herman and Herman v. Toenders* (1980), 26 A.R. 483 (Q.B.) at 494:

> In my view, the key test, when these situations arise, is for the court to determine whether the defendant has been seriously prejudiced by the delay in the conduct of his defence. With respect, I do not consider that the loss of a right to claim a limitation period as a defence, by itself, to be prejudice. If a defendant can show special prejudice in conducting his defence caused by the delay, then I would have no hesitation in denying leave to extend the Statement of Claim and leave a plaintiff to seek his remedies against his solicitor.

[27] The latter part of the quote from Miller J. is obviously aimed at situations where service has not been effected due to a solicitor's inadvertence or negligence.

[28] No evidence was presented on behalf of any of the physicians or the other Defendants which would establish specific or special prejudice. I would agree with Miller J. that the loss of a right to claim a limitation period as a defence is not, by itself, prejudice. Even if it could be viewed as prejudice, in this case I take into account the fact that although the limitation period for actions for injury to the person arising out of negligence is two years, the limitation for an action for breach of contract is six years (*Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8).

[29] Referring, therefore, to the test in *Widdell*, I find that no prejudice to any of the Defendants has been shown. The ends of justice would not be served by granting the application to set aside the renewal order in these circumstances.

[30] Accordingly, I deny the application to set aside the first order of March 25, 1997.

<u>The second order</u>

[31] The second order, that of October 28, 1997, was made by me on evidence contained in the affidavit of Catherine Stark, a solicitor in the offices of counsel for the Plaintiff.

[32] Ms. Stark's affidavit poses a problem in that it appears to contradict what was said in Ms. Barringer's affidavit filed in support of the first renewal application. In her affidavit, Ms. Stark says that the first order was sought and granted, "due to the fact that we had some difficulty locating some of the individual defendants". No such representation was made in the affidavit of Ms. Barringer and clearly the first order was not granted on the basis of difficulty in locating anyone.

[33] I do not know, of course, what information was available to Ms. Stark when she swore her affidavit. It may be that Ms. Barringer had made attempts to locate the defendants but did not refer to those attempts in her affidavit. Neither Ms. Stark nor Ms. Barringer were cross-examined on their affidavits as might have been done.

[34] Had Ms. Barringer's affidavit or the conflict between her affidavit and that of Ms. Stark been brought to my attention when I was dealing with the second application for renewal, I might have referred the matter back to counsel for the Plaintiff for clarification. As that was not done, the question I should now ask is whether Ms. Stark's reference to the earlier order necessarily affects the grounds she put forward for seeking the second order. I have come to the conclusion that it does not. There was no suggestion that the problems in the affidavits reflected an attempt to mislead the Court as to the true situation.

[35] By the time the second application was made, all of the Defendants save for Dr. Young had been served with the Statement of Claim. Ms. Stark deposed that contact had been made with various Colleges of Physicians and Surgeons in Canada to determine where Dr. Young was practising medicine but these attempts were unsuccessful due to the name "Trevor Young" or "T. Young" being very common. She deposed that further time was required to locate the correct Dr. Young.

[36] In my view the issue is simply whether that circumstance was sufficient reason within Rule 13 why Dr. Young had not yet been served at that point.

[37] Counsel for Dr. Young argued that Ms. Stark's affidavit is defective in that it fails to give any detail about when efforts were made to locate Dr. Young and the extent of those efforts. I agree that the affidavit could be more detailed. On the other hand, there is no evidence from Dr. Young, as there was from the defendant in the *General Leasing*

case, that he could easily have been located. There is accordingly no basis upon which to conclude that the Plaintiff was not making sufficient efforts to locate Dr. Young.

[38] The argument was also put forward that the second order should be set aside and the Statement of Claim declared a nullity because the application for that order was not brought until approximately one month after the first renewal order had expired.

[39] Rule 13 by its wording allows a renewal order to be made after the expiration of a renewed statement of claim. That being the case, this Statement of Claim cannot be a nullity. In the absence of a renewal order, it is not in force as against any defendant not served; the wording of Rule 13 suggests that is its status. And while the failure to bring an application for a renewal order until after the previous renewal has expired may well reflect a lack of diligence, that can be only one factor for the court to consider, the ultimate question being whether sufficient reason for the further renewal has been shown.

[40] Considering again the test in *Widdell*, the absence of any specific prejudice, along with the ends of justice, I conclude that there are no grounds to set aside the second order. There being no evidence to contradict the assertion that the Plaintiff's solicitors had trouble locating Dr. Young, I consider that assertion sufficient reason for renewing the Statement of Claim.

[41] The application to set aside the order of October 28, 1997, is therefore dismissed.

The Plaintiff's application to discontinue the action as against certain Defendants

[42] No party took issue with the Plaintiff's application to discontinue the action as against the Government of the Northwest Territories and the Commissioner of the Northwest Territories. That application is granted.

The Plaintiff's application to amend the Statement of Claim

[43] The Plaintiff applied to amend the Statement of Claim to specify the date when he discovered that his disorders were caused by the actions of the Defendants and to add a claim in breach of contract. Again, no party took issue with the proposed amendments. It would appear that the Plaintiff is still within the six year statutory limitation period for an action for breach of contract. In any event, any issues or defences relating to the

limitation period, in either the tort or the contract action, can and should be dealt with at trial: *Norn v. Stanton Regional Hospital*, [1998] N.W.T.R. 355 (S.C.).

[44] The Plaintiff is therefore at liberty to file an amended Statement of Claim as proposed in the revised Schedule A to the Plaintiff's Notice of Motion and which is attached to the letter dated February 8, 1999 from counsel for the Plaintiff to the clerk of the court.

[45] The Amended Statement of Claim shall be filed and served within 30 days of the date these Reasons for Judgment issue. The Defendants shall have 30 days from the date of service upon them within which to file a Statement of Defence or Amended Statement of Defence as the case may be.

Costs

[46] Costs normally follow the event. I am of the view, having heard the submissions, that the application to set aside the two renewal orders might not have been brought had the Plaintiff's affidavit material filed in support of the applications for the renewals been more detailed and consistent. Accordingly, I order that each party bear their own costs.

[47] There is a final point I wish to address. All three of the renewal orders requested and granted in this case are worded such that they purport to extend the time for service of the Statement of Claim. Rule 13 refers, however, to renewal of the Statement of Claim. In future, counsel should ensure that Rule 13 orders reflect the wording of the Rule so as to provide that the Statement of Claim is renewed for a period of six months commencing on a date specified in the order.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 10th day of March, 1999

Counsel for the Plaintiff: Sheldon Toner

Counsel for the Defendants
J. Wooder, Mark Hanson,
Paul Stubbing, George Borchert,
L. Dibden, Eric Hood, Trevor Young: Kelly A. Payne

Counsel for the Defendant
Clarke Institute of Psychiatry: Sarah A.E. Kay

Counsel for the Defendants
Baffin Regional Health Board and
Baffin Regional Hospital: Garth E. Malakoe

No one appearing for the Defendants The Government of the Northwest Territories and Commissioner of the Northwest Territories.

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