Date: 2024 02 22
Docket: S-1-CV-2020-000 235

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CINDY JESKE as ADMINISTRATOR of the Estate of SPENCER JESKE and CINDY JESKE

Plaintiffs

-and-

STANTON TERRITORIAL HOSPITAL, NORTHWEST TERRITORIES HEALTH AND SOCIAL SERVICES AUTHORITY, FIONA AISTON, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3 AND JOHN DOE 4

Defendants

MEMORANDUM OF JUDGMENT

BACKGROUND

[1] The Plaintiffs, Cindy Jeske as administrator of the Estate of Spencer Jeske, and Cindy Jeske (hereafter both referred to as "Jeske") filed a statement of claim on August 28, 2020. The claim is against Dr. Fiona Aiston ("Aiston"), Stanton Territorial Hospital ("Stanton"), Northwest Territories Health and Social Service Authority ("the Authority") and John Doe 1 to 4. Jeske has not served the statement of claim on Aiston and now seeks to renew the statement of claim pursuant to Rule 13 of the *Rules of the Supreme Court of the Northwest Territories*. That application is opposed by Aiston. Stanton and the Authority take no position on the application. For the reasons that follow, Jeske's application is granted.

[2] Spencer Jeske died on August 28, 2018. The statement of claim asserts that his death was due to multiple drug toxicity, being the combined effects of methadone, diazepam and lorazepam. It is alleged that Aiston was one of the doctors involved in treating Spencer Jeske. The other medical personnel were unknown as of the date of the filing of the statement of claim and are referred to as John Doe 1

to 4. It is alleged that Stanton and the Authority are vicariously liable for Aiston's action.

[3] The statement of claim was filed August 28, 2020 and was served on the defendants Stanton and the Authority but has not been served on Aiston. An affidavit of attempted service of a process server reveals that the process server received the statement of claim for service on August 20, 2021, and made an attempt to serve the claim at Aiston's office on August 23, 2021. At that time, he was advised that Aiston was out of town on holidays until November and was therefore not available. No further attempts were made to serve the statement of claim.

[4] On February 3, 2022, counsel for Jeske contacted counsel for Aiston, Jon Rossall. Mr. Rossall was not specifically retained with respect to the statement of claim, however, was taking instructions from Aiston with respect to the issue of a renewal of the statement of claim. On February 16, 2022, Mr. Rossall advised counsel for Jeske that he had received instructions to oppose any application to renew the statement of claim.

[5] The application to renew the statement of claim was filed 16 months later, on June 22, 2023, returnable in court on July 14, 2023. The matter was adjourned to have a special chambers date set. The application was initially set to be heard on November 8, 2023, however, counsel for Jeske advised that she wished to retain an agent to appear on her behalf to make this application and she, therefore, sought an adjournment of the application. The application for a renewal of the statement of claim was heard on February 13th, 2024.

[6] In support of the application, Cindy Jeske filed an affidavit in which the only explanation given for the delay in serving the statement of claim was that her counsel (not the counsel who argued this matter) had personal issues in the fall of 2021 and, upon being advised by Aiston's counsel in February 2022 of Aiston's opposition to the renewal, she developed a "block" regarding this matter and failed to move the matter along.

[7] Aiston filed an affidavit in which she deposed to having lived in Yellowknife since 2013, that she was out of the office for a period of time on maternity leave in the summer and fall of 2021, but was still in Yellowknife, that her home address was a matter of public record, and that she had not attempted to avoid service. She also deposed to her belief that the passage of time would have a negative impact on her memory and force her to rely on her written records. She was also concerned about

staff turnover and the availability of witnesses to testify in relation to this matter given the passage of time.

[8] Neither Cindy Jeske nor Aiston were cross examined on their affidavits.

ANALYSIS

[9] Rule 13(1) provides:

> 13. (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.

[10] Counsel are in agreement that the two leading cases in this jurisdiction considering Rule 13(1) are *Irish Estate v Vinthers*, 1999 CanLII 35021 (NWTSC) and *Pitsiulak v Wooder*, 1999 CanLII 6789 (NWTSC), both cases of Schuler, J. decided in 1999. In both cases, Schuler, J. adopts the test set out in paragraph 5 of *Widdell v Woodman*, 1983 ABCA 97 with respect to the former *Alberta Rules of Court* Rule 11, similar to NWT's Rule 13. That two-prong test is:

(a) Proof of prejudice to the defendants; and
(b) The ends of justice in the individual case.

[11] Schuler, J. notes in *Pitsiulak*, at para 17, that:

> 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. That discretion must, of course, be exercised judicially.

[12] What constitutes sufficient reason will depend on the circumstances of the case: *Pitsiulak* at paragraph 18.

[13] What is clear from a review of the applicable case law is that there are a wide variety of circumstances in each case and that while the cases may be useful as illustrative of the test to be applied, each case must be judged on its own merits in terms of assessing whether "sufficient reason" exists.

[14] With respect to the issue of proof of prejudice, Jeske asserts that Aiston has failed to establish actual prejudice. They note that her affidavit refers to her "belief" that the passage of time between the events of 2018 and July 2023, when the application to renew was brought, "will have a negative impact" on her memory of events and force her to rely on her written records. They note that a "belief" is different from actual evidence of prejudice. They also note that Aiston's assertion that she was "unsure whether some, or all of the staff" who would have been involved are still working for Stanton or the Authority is not sufficient evidence of prejudice; that it was again only Aiston's opinion. They also note that Stanton and the Authority have defended and the availability of witnesses was more an issue for Stanton and the Authority, not for Aiston.

[15] Lastly, Jeske notes that Aiston has had actual knowledge of the claim against her, although not served, and that actual knowledge should mitigate any prejudice that might otherwise be found. Aiston's knowledge is referred to in her affidavit, although the date of her knowledge is far from clear. Having said that, what is clear is that Aiston had legal counsel acting for her as early as February 2022, when Jeske requested that Aiston consent to a renewal of the statement of claim.

[16] In response, Aiston asserts that Jeske is parsing Aiston's language and that the court can infer from the passage of time that Aiston's memory would be affected. Aiston also submits that with the passage of time, the court can also infer that witness availability would become an issue.

[17] Aiston submits that when looking at what is sufficient reason to renew a statement of claim, the court should rely on the principles underlying the rules around dismissal of actions for delay, citing *Cherry v Hurtig*, 1980 CarswellAlta 408, [1980] AJ No 784 (Alta QB) as authority for the proposition that it is appropriate to rely on the principles for delay in prosecution when considering an application to renew a statement of claim.

[18] I agree that the case law, as canvassed in *Cherry v Hurtig*, supports reviewing the principles underlying the rules regarding dismissal for delay when considering whether sufficient reasons exist to support an application to renew a statement of claim. Both rules are focused on the expeditious conduct of litigation. However, even in *Cherry v Hurtig*, which supports turning to these principles to guide the court's discretion on whether to renew, the court states at paragraph 25:

> 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 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. [emphasis added]

[19] Aiston relies on the case of *Jahnke v Thomas*, 2017 SKQB 161 as support for the proposition that prejudice can come in many forms, including long delay, contributing to witnesses' failing memory or disappearance of witnesses. There is no question that it can be challenging to remember facts if the delay is significant. However, in *Jahnk*e, notwithstanding the delay in serving the claim (which was only a matter of months), the court upheld the renewal of the statement of claim, finding that while the defendants had no recollection of the events, there was no evidence that documents had disappeared or been destroyed nor that relevant witnesses had become unavailable due to the passage of time. On the facts of that case, the delay in serving was held to create little or no prejudice. The defendant's lack of recollection of the events was not due to the passage of time.

[20] I find that Aiston has failed to demonstrate proof of actual prejudice. Aiston points to the passage of time as commencing in 2018, when the Plaintiff Spencer Jeske died, however, the plaintiffs had two years to file their statement of claim, and a further one year to serve the claim. While the passage of time since the expiry of the statement of claim has been significant, and is very unfortunate, Aiston has also had actual knowledge of the claim for some time and certainly since February 2022, which was only six months after the claim expired. Given this knowledge, steps could have been taken by Aiston to preserve documents and records which would assist with her recollection of relevant events. Indeed, Aiston's reference in her affidavit to needing to rely on her written records suggests that appropriate documents and records were retained.

[21] Additionally, the fact that relevant witnesses may have moved in the intervening period is not, by itself, sufficient evidence of prejudice. It is not unusual in the NWT for people to change jobs or move out of the territory, even within a much shorter period than the time period in question in this case. Absent specific evidence of the inability to locate a key witness, the mere fact of working in a relatively mobile community and work environment is insufficient evidence of actual prejudice.

[22] In addressing the issue of whether it is in the ends of justice to renew the statement of claim, the delay in the conduct of this litigation is highly concerning.

By all accounts, with the exception of serving Stanton and the Authority, and obtaining medical records (presumably which assist in identifying other defendants), no steps appear to have been taken in this litigation since it was filed in 2020, some 3 ½ year ago. This is unlike the situation in *Pitsiulak* and *Irish Estate*. In both *Pitsiulak* and *Irish Estate*, counsel for the plaintiffs had taken a number of steps to try to advance the litigation. In *Pitsiulak*, three *ex parte* orders had been issued renewing the statement of claim. The defendant sought to set aside two of the orders which would have called into question the validity of the third order. Reasonable explanations were given relating to the need for the additional time, including investigating the feasibility of pursuing a complex medical malpractice case and challenges locating one of the defendants for service. Schuler, J. held that both were sufficient reasons to uphold the renewal orders. In that case, three years had elapsed from the date the claim was filed to the date the application to set aside the renewals was heard.

[23] Similarly, in *Irish Estate,* there was evidence of some activity beyond mere delay. The statement of claim, filed October 24, 1996, had been twice amended and a defendant had been served with either the amended statement of claim or the amended amended statement of claim on May 8, 1998. This was not a situation where the statement of claim was filed and then simply held in abeyance. Additionally, in *Irish Estate*, there was evidence that counsel might have been confused about the effect of the amendments and may have been under the mistaken impression that the amendments accordingly extended the time for service. In that situation, while the court found that there had been neglect or inadvertence in addressing service, they also noted that the defendant was aware that there could be litigation because a fatality inquiry had been held and also because counsel for one of the defendants had referenced his expectation that he would be retained by all three defendant doctors.

[24] Aiston relies on the decision of *Priddis Greens Golf & Country Club v Priddis Creek Developments Ltd,* 1998 ABQB 165 as support for the proposition that a renewal in circumstances where there is significant delay on the part of counsel, such as here, is not in the ends of justice. In particular, they note the comments of Clark, J. at paragraph 9:

> With respect to the ends of justice argument, it is not incumbent upon the courts to save the parties from the results of their own actions. It would be simple for me to take the easy route – to simply say to proceed to trial and deal with the issues on their merits. In this case, I am not prepared to do that. On the facts that have been presented to me that approach does not serve the ends

> of justice and in fact, to my mind at least, results in an abuse of process. As a result, I am striking the renewal of the Statement of claim.

[25] However, I note the *Priddis* decision was overturned by the Alberta Court of Appeal: *Priddis Greens Golf & Country Club v Priddis Creek Developments Ltd.*, 1999 ABCA 91, with the appellate court finding that the delay in serving was because of the hope of settlement and, as such, that was a reason to renew the statement of claim. Given that the underlying decision was overturned, I place less weight on the comments made by Clark, J. in that decision on the issue of the ends of justice argument.

[26] Ultimately, while the delay in this case was significant and concerning, I am mindful of the effect of not renewing the statement of claim on the plaintiffs and on the administration of justice.

[27] With respect to Jeske, not renewing the statement of claim would be essentially punishing Jeske for the inaction of their lawyer. This is not a case where there is any evidence that Jeske acquiesced or consented to the delay in serving Aiston. To quote Miller J. in *Cherry v Hurtig* at paragraph 24:

> I find it very difficult to see that the ends of justice, at least in the minds of the general public, are served by the possibility that the blameless litigant, who has lost his right of action due to the inadvertence or negligence of his solicitor, will be ultimately satisfied by pursuing a claim against his solicitor. Not only is this small comfort to the innocent party, who is compelled to go to the trouble and expense of a brand new lawsuit based on entirely different legal problems, but it will, in my opinion, inevitably lower the public's respect for a system which would cause such a result.

[28] With respect to the administration of justice, Jeske could, if they wished, file a new action against Aiston alleging breach of contract. At the same time, the current action against Stanton and the Authority would still be a live action, resulting in multiple actions involving essentially the same fact pattern. Such a result would not be desirable to the administration of justice.

[29] As such, while the delay is very concerning and falls close to being inordinate delay, I find that given the absence of specific prejudice, when coupled with Aiston's knowledge of the claim well before the date of this application, it would not be in the ends of justice to deny the application to renew the statement of claim. As such, I order the statement of claim renewed for a period of 90 days from the date of the release of this decision.

[30] Costs normally follow the event, however, I deny Jeske their costs of this application. I do so for two reasons. Firstly, it was the conduct of counsel for Jeske (who is not counsel on this application) in their handling of this matter which necessitated this application. Secondly, I do so because of Jeske's failure to file their pre-hearing brief within the time frames set by the *Rules of Court*, specifically Rule 391(2) which requires that the applicant's brief be filed at least 20 days before the hearing. In this case, Jeske's brief was only filed late Friday before the Tuesday when this matter was heard, resulting in Aiston's counsel having only the weekend to prepare his brief and the court having to review the briefs in a compressed time frame. While I appreciate that the failure to comply with Rule 391(2) was because of counsel's misunderstanding of his obligations, this failure inconvenienced opposing counsel as well as the court.

[31] I thank both counsel for their excellent briefs and oral advocacy on the part of their respective clients.

S.M. MacPherson
J.S.C.

Dated at Yellowknife, NT, this
22nd day of February 2024

Counsel for the Plaintiffs:	Kember Handzic
Counsel for the Defendants: Stanton Territorial Hospital, Northwest Territories Health and Social Services	Justine Blanchet
Counsel for the Defendant: Dr. Fiona Aiston	Erik Holmstrom

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