Court File No. CV-20-00637081-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TRUIST BANK, AS AGENT

Applicant

- and-

KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

BOOK OF AUTHORITIES OF ALEX KAN AND STUART RATH
(Motion Returnable: January 18, 2021)

January 15, 2021

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LIST OF AUTHORITIES

1.	*Chiarelli et al. v. Wiens,* [2000] O.J. No. 296

Tab 1

Chiarelli et al. v. Wiens

[Indexed as: Chiarelli v. Wiens]

46 O.R. (3d) 780
[2000] O.J. No. 296
2000 CanLII 3904
No. C32602

Court of Appeal for Ontario
Catzman, Laskin and Rosenberg JJ.A.
February 9, 2000

Civil procedure -- Commencement of proceedings -- Service -- Extension of time for service of statement of claim -- Statement of claim issued within limitation period but not served before time for service expired -- Key issue on motion to extend being whether defendant prejudiced by delay -- Onus on plaintiff to show that defendant would not be prejudiced -- Defendant having evidentiary burden to provide some details of prejudice -- Defendant cannot create prejudice by failure to do something that defendant reasonably could have done -- Substantial delay before motion brought to extend time for service -- Motions judge making no reviewable error in extending time for service.

On October 26, 1988, CC was injured in a car accident, and she suffered a severe whiplash injury. The only witnesses were CC and EW, the other driver. The day following the accident, its occurrence was reported to State Farm, EW's insurer, whose adjuster then obtained a police report and statements from CC and EW. In November 1988, CC's lawyer put State Farm on notice of a claim. Thereafter, CC's condition deteriorated and, between December 1988 and November 1992, CC's lawyer forwarded medical information to State Farm as it became available. During this period, State Farm never indicated that it was

disputing liability. On October 24, 1990, just within the two-year limitation period, the statement of claim was issued. However, it was not served because of incomplete information about EW's address and because of State Farm's refusal to accept service. The six-month period for service expired and, in October 1991, State Farm wrote CC's lawyer to say that it assumed that CC had abandoned her claim. The lawyer wrote back to say that this was not the case and that he would move for an order extending the time for service. However, succumbing to work pressure, depression and embarrassment from his negligence, the lawyer took no action. State Farm closed its file in February 1994. In the fall of 1996, CC retained a new lawyer, who obtained the file in February 1997. In May 1997, CC's new lawyer moved for an order extending the time for service of the statement of claim. Taliano J. granted the motion. His order was reversed on appeal to the Divisional Court (Ferguson and Rosenberg JJ. concurring; O'Leary J. dissenting) and CC appealed.

Held, the appeal should be allowed.

Despite the long delay from the date when the time for service expired, Taliano J. did not make any reviewable error in the exercise of his discretion. The majority of the Divisional Court was incorrect in concluding that he had made four errors in principle. Taliano J. correctly stated that on a motion to extend the time for service, the court should be concerned mainly with the rights of litigants, not with the conduct of counsel. The key issue on the motion was that of prejudice, and he recognized that the court should not extend the time for service if to do so would prejudice the defendant and that the plaintiffs bore the onus to show that the defendant would not be prejudiced by an extension. Save for prejudice arising from the delay in a medical defence, which, in the circumstances of this case, was slight, Taliano J. considered in detail the possible areas of prejudice. Contrary to the conclusion of the Divisional Court, Taliano J. did not reverse the onus of proof about prejudice. Although the onus remains on the plaintiff to show that the defendant will not be prejudiced by an extension, the plaintiffs cannot be expected to speculate on which witnesses and records might be relevant

to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. If the defence is serious about claiming prejudice, it has at least an evidentiary obligation to provide some details. Further, the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done. Moreover, prejudice that will defeat an extension of time for service must be caused by the delay. Prejudice to the defence that exists independently of whether service is delayed is not relevant on a motion to extend the time for service. There was no merit in the Divisional Court's criticism that Taliano J. erred by focusing on what the defendant's insurer could have done to preserve evidence rather than on what prejudice had probably been caused by the delay. The insurer's failure to act when it knew CC's injury was serious was not caused by any delay in serving the statement of claim. Further, it was unwarranted for the Divisional Court to find that there had been deliberate delay by CC's lawyer; this finding was contrary to the unchallenged evidence of why the lawyer failed to act. Finally, there was no rational basis for refusing to extend for service simply because the delay in this case was longer than the applicable limitation period. The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided on its facts, focusing on whether the defence is prejudiced by the delay.

Cases referred to

Laurin v. Foldesi (1979), 23 O.R. (2d) 331, 96 D.L.R. (3d) 503, 10 C.P.C. 144 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 105

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04, 2.01, 3.02, 14.08(1)

APPEAL from a judgment of the Divisional Court ((1999), 34 C.P.C. (4th) 227) setting aside an order of Taliano J. extending the time for service of a statement of claim.

Janet E. Gross, for appellants.
John B. Graham, for respondent.

The judgment of the court was delivered by

[1] LASKIN J.A.: -- The general issue on this appeal is whether the majority of the Divisional Court erred in holding that the motions judge had improperly exercised his discretion in extending the time for service of the statement of claim. In my view, the Divisional Court did err. I would therefore allow the appeal and restore the order of the motions judge.

A. Background

[2] The main facts giving rise to the motion were not disputed. The plaintiff Cathy Chiarelli was injured in a car accident in a parking lot on October 26, 1988. She suffered a very severe whiplash injury. Only the parties witnessed the accident. A police report was prepared but there were no independent witnesses. The day after the accident occurred, it was reported to the defendant's insurer State Farm. State Farm's claims adjuster promptly took a statement from Ms. Chiarelli and from the defendant, had the plaintiffs' car appraised, and obtained a copy of the police report. From Ms. Chiarelli's statement, State Farm learned that she complained of pain in her neck, shoulders and back.

[3] The plaintiffs retained a lawyer soon after the accident and by the end of November 1988 he had put State Farm on notice of a claim. Meanwhile, Ms. Chiarelli's condition deteriorated. She experienced numbness in her right arm and was diagnosed with disc damage in her lower back. Between December 1988 and November 1992 the plaintiffs' lawyer forwarded medical information -- including 12 medical reports -- to State Farm as

the information became available. State Farm paid for the medical reports and never once indicated to the plaintiffs' lawyer that it was disputing liability. Medical reports in 1988 and 1989, which State Farm received, showed that Ms. Chiarelli's injury was much more serious than had originally been thought. She was diagnosed as having a severe long term back injury with permanent partial disability.

[4] The statement of claim was issued on October 24, 1990 within the two-year limitation period under the Highway Traffic Act, R.S.O. 1990, c. H.8. The dollar amount of the claim was well within the defendant's policy limits. The plaintiffs' lawyer gave the claim to the sheriff to serve on the defendant. Until this time the lawyer's handling of the claim on behalf of his clients was commendable.

[5] Unfortunately the sheriff could not locate the defendant to serve her. She lived in the country, outside Niagara-on-the-Lake, and the address shown on the police report and at the Ministry of Transportation did not include the number of the street on which she lived. The plaintiffs' lawyer sent a copy of the statement of claim to State Farm and asked if it would accept service. State Farm refused to do so, and indeed did not even offer to seek instructions from its insured to accept service.

[6] The six-month period for serving the statement of claim expired on April 24, 1991, without the defendant having been served and without the plaintiffs' lawyer having moved to extend the time for service. In October 1991 State Farm wrote the plaintiffs' lawyer to say that its insured had not been served and that it assumed the claim had been abandoned. The plaintiffs' lawyer wrote back to say that he could not find the insured and that he would seek an order to extend the time for service unless State Farm admitted service. State Farm would not admit service and the lawyer never moved to extend the time. In his affidavit, which was uncontradicted, the lawyer, a sole practitioner, said that he succumbed to the pressure of work, that he became embarrassed and depressed by his negligence, and that instead of bringing a motion he "froze". State Farm closed its file in February 1994.

[7] The plaintiffs, unhappy with the delay, retained a new lawyer in the fall of 1996. The file was transferred in February 1997. The motion was launched in May 1997 and was served on the defendant (at her corrected address) in August 1997.

B. The Decision of the Motions Judge to Extend the Time for Service of the Statement of Claim

[8] The motions judge, Taliano J. gave lengthy reasons for exercising his discretion to extend the time for service of the statement of claim. I am not persuaded that the motions judge made any reviewable error in the exercise of that discretion, despite the long delay from the date the time for service expired.

[9] After referring to the applicable Rules of Civil Procedure -- rules 1.04, 2.01, 3.02 and 14.08(1), R.R.O. 1990, Reg. 194 -- the motions judge correctly stated that, on a motion to extend the time for service, the court should be concerned mainly with the rights of litigants, not with the conduct of counsel. He then took into account that the defendant had notice of the claim, that the defendant's address was inadequate for service, that the plaintiffs moved reasonably promptly once they learned the claim had expired, and that until then they had no knowledge of their lawyer's negligence.

[10] Finally, the motions judge turned to the issue of prejudice, the key issue on the motion. He recognized that the court should not extend the time for service if to do so would prejudice the defendant, and that the plaintiffs bore the onus to show that the defendant would not be prejudiced by an extension. The motions judge canvassed in detail all possible areas of prejudice caused by the delay, but one. He considered the unavailability of witnesses, the eroding memory of the available witnesses, the failure of the defence to conduct neighbourhood interviews or surveillance on Ms. Chiarelli, the failure of the defence to interview the police officer, the lost documents of the appraiser, the difficulties in dealing

with Ms. Chiarelli's pre-existing injury, the missing records and documents, the allegedly inaccurate productions, and the fact of the "inordinate delay". He made findings on each of these areas of possible prejudice and concluded generally that the defendant would not be prejudiced by the adm ittedly very long delay.

[11] The one area not addressed by the motions judge was the possible prejudice arising from a delayed defence medical. State Farm had requested an independent medical assessment of Ms. Chiarelli in July 1989, not, however, to be considered its defence medical. The plaintiffs' lawyer refused saying there was not yet enough medical information. State Farm never renewed its request. Still, the defence was entitled to a defence medical and is still entitled to one if the action proceeds. [See Note 1 at end of document] However, I consider any prejudice caused by a delayed defence medical to be slight. Because the defence typically is only entitled to one medical examination of the plaintiff, usually that examination takes place shortly before the trial when the most up-to-date medical information has been obtained. Thus, even if the statement of claim had been served on time, the defence medical would likely still have taken place several years after the accident. The added years caused by the delay in service will not appreciably affect the defence's position, especially considering the voluminous medical information on Ms. Chiarelli now available to State Farm. Therefore, in my view, a delayed defence medical provides no basis for interfering with the motions judge's order.

C. The Decision of the Divisional Court

[12] On appeal the Divisional Court divided. O'Leary J., dissenting, would have dismissed the appeal largely for the reasons of Taliano J. supplemented by his own brief reasons. Rosenberg and Ferguson JJ. allowed the appeal. Ferguson J., who wrote the majority reasons, discussed at great length the case law under both the current rules for extending the time for service and under former Rule 8. In my view, although the wording of the former and current rules differs, the guiding principles remain the same. As Lacourcire J.A. said in Laurin v. Foldesi (1979), 23 O.R. (2d) 331, 96 D.L.R. (3d) 503 (C.A.):

"The basic consideration . . . is whether the [extension of time for service] will advance the just resolution of the dispute, without prejudice or unfairness to the parties." And, the plaintiff has the onus to prove that extending the time for service will not prejudice the defence.

[13] Taliano J. applied these guiding principles in extending the time for service. Nonetheless, the majority of the Divisional Court concluded that Taliano J. committed four errors in principle. Having so concluded, the majority made its own determination of prejudice, and decided that the defence would be prejudiced by extending the time for service. In my view, Taliano J. did not commit any error in principle and thus the Divisional Court should not have made its own determination of prejudice. I will briefly address the four errors found by the Divisional Court.

(i) The Divisional Court found that the motions judge had reversed the burden of proof on prejudice by requiring the defence to show that it would be prejudiced by the delay in service. In support of this finding Ferguson J. referred to several passages from the motions judge's reasons, in which the motions judge noted the defence's inability to specify, for example, what witnesses might not be available to testify or what doctors could no longer be found. I do not consider that these passages reflect any shift of the burden of proof on prejudice.

[14] I make three observations in response to the Divisional Court's finding. First, the passages from the reasons of the motions judge have to be considered in their context. The motions judge was obviously unimpressed, as am I, with the defence's assertion of prejudice. The only allegation of prejudice in the material filed by the defence on the motion is the following very general statement in the affidavit of State Farm's claims adjuster:

> It is my belief that the defence of this action has been seriously prejudiced due to the passage of time and the strong possibility that pre-accident and post-accident records and witnesses may not be available or that their

recollections may not be accurate.

Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension, in the face of such a general allegation, the plaintiffs cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details. The defence did not do that in this case.

[15] Second, the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done. For example, the defence cannot complain about the lost opportunity to interview the police officer or to conduct surveillance on Ms. Chiarelli or to obtain the no-fault insurer's file. If, as the defence now maintains, it is contesting liability, then it should have interviewed the police officer at the time and cannot blame its failure to do so on the plaintiffs' delay. Similarly, the defence knew in 1989 that Ms. Chiarelli's injury was serious and if surveillance on her was appropriate, that surveillance should have been undertaken at the time. The defence also had all the particulars of the file maintained by Ms. Chiarelli's no-fault insurer and could have requested it at any time.

[16] Third, prejudice that will defeat an extension of time for service must be caused by the delay. Prejudice to the defence that exists whether or not service is delayed ordinarily is not relevant on a motion to extend the time for service. In this case the defence complains that the police officer's notes have been destroyed. However, they were destroyed within two years of the accident under a local police policy. Thus, the notes would have been unavailable to the defence even if the statement of claim had been served on time.

(ii) The Divisional Court found that the motions judge erred by "focusing on what the defendant's insurer could have done to preserve evidence rather than on what prejudice had probably

been caused by the delay." Ferguson J. held that the insurer's investigation, including, for example, its decision not to conduct surveillance, was reasonable. I see no merit in this criticism of the motions judge's reasons by the Divisional Court. Even if the insurer's decision not to conduct surveillance was reasonable, as the motions judge pointed out, the insurer could have undertaken surveillance for several years after the accident. Its failure to do so when it knew Ms. Chiarelli's injury was serious was not caused by any delay in serving the statement of claim.

(iii) The Divisional Court found that the plaintiffs' lawyer "deliberately" did not move to extend the time for service after he realized the time had expired, and that the motions judge erred by giving no weight to this fact. Moreover, Ferguson J. relied heavily on the lawyer's "deliberate delay" when considering whether an extension should be granted. In my view, the Divisional Court's finding is unwarranted. There is no evidence to support a finding that the lawyer acted deliberately. His evidence, unchallenged by the defence, was simply that he "froze".

(iv) Finally, the Divisional Court found that the motions judge erred in "not considering the factors relating to the policy of repose." Although Ferguson J. stated that the court should not set a fixed time limit beyond which an extension should be refused, he nonetheless was "inclined to think it would not be appropriate to grant an extension if after the deadline for service expires, there is absolute silence for a period longer than the limitation period." The limitation period in this case is two years. Therefore, if Ferguson J.'s suggestion were followed the plaintiffs could not obtain an extension after April 1993. However, I see no rational basis for refusing to extend the time for service simply because the delay is longer than the applicable limitation period.

[17] The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided on its facts, focusing as the motions judge did in this case, on whether the defence is prejudiced by the delay. Undoubtedly the delay in this case -- over six years from the

expiry date for serving the claim -- was significant, much longer than in most if not all of the decided cases where an extension has been granted. However, the motions judge recognized this delay and still found no prejudice. As I have already said, I am not persuaded that he erred in making that finding. Thus, the motions judge did not err in principle by granting an extension though the length of the delay exceeded the two-year limitation period under the Highway Traffic Act.

[18] I therefore conclude that the majority of the Divisional Court was wrong in holding that Taliano J. erred in principle in exercising his discretion to extend the time for service. I add one final observation. In refusing to grant an extension, Ferguson J. found it "very significant" that the defendant herself never knew that a statement of claim had been issued. I would give no weight to this consideration. State Farm took a statement from its insured and then negotiated on her behalf with the plantiffs' lawyer for nearly three years. The plaintiffs cannot be held accountable if, for tactical reasons, State Farm chose not to tell its own insured that an action had been started, and refused to accept service of the statement of claim for her or even seek instructions from her to accept service.

D. Conclusion

[19] I would allow the appeal, set aside the order of the Divisional Court and in its place dismiss the appeal from the order of Taliano J. The plaintiffs are entitled to their costs of the appeal in the Divisional Court and in this court, including the costs of the motion for leave to appeal.

Order accordingly.

Notes

Note 1: Courts of Justice Act, R.S.O. 1990, c. C.43, s. 105.

TRUIST BANK, AS AGENT Applicant -and- KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC. Respondents	Court File No: CV-20-00637081-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding Commenced at TORONTO

BOOK OF AUTHORITIES
(Extending Time for Service of the Statement of Claim and Removing Thornton Grout Finnigan as Class Counsel)

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