CITATION: Loukas v. Imperial Oil Limited 2021 ONSC 1944
COURT FILE NO.: CV-05-300883PD1
MOTION HEARD: 20210311

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Asterios Loukas, Vaia Loukas, George Asimakis, Zoe Asimakis, Billy Rombis and Peter Asimakis, by his litigation guardian, The Public Guardian and Trustee, Plaintiffs

AND:

Imperial Oil Ltd. Jack Doe, Thermoshell Inc., John Doe, XYZ Corporation, Joshua Doe and Jacob Doe and R.B. & R. Cartage Inc., Defendants

BEFORE: Master Jolley

COUNSEL: Neil Colville-Reeves, Counsel for the Moving Party Defendant R.B. & R. Cartage

Amber Herman, Counsel for the Responding Party Zoe Asimakis

Harjot Dosanjh, Counsel for the Responding Party Peter Asimakis through the Office of the Public Guardian and Trustee

HEARD: 11 March 2021

REASONS FOR DECISION

[1] The defendant R.B. & R. Cartage Inc. ("RB&R"), the sole remaining defendant in this action, brings this motion to dismiss the action for delay and for the failure of George and Zoe Asimakis to comply a 2018 court order. It has settled its motion as against Peter Asimakis and I have signed a separate consent order setting out those terms.

[2] George Asimakis did not participate in the motion, although he was given the telephone dial-in details a number of times prior to the commencement of the motion. Sarah, a friend of George's, did appear by video conference and advised that she was listening for George but did not intend to speak. The court waited until roughly 10:20 to see if George would dial in but proceeded at that time, satisfied he had the information should he wish to participate.

Brief History

[3] This 2005 action arose from an oil spill that occurred in January 2004, some 17 years ago. RB&R was added as a defendant in December 2006. Various components of the litigation were settled or discontinued in the intervening years. The subrogated portion of the claim

was settled at a pre-trial conference in September 2012. What remains are the plaintiffs' general damages claims.

[4] Discoveries took place on those issues in August 2015 and a mediation occurred in December 2016.

Dismissal for Delay

[5] In 2018 RB&R brought a motion to dismiss the action for delay. Mullins, J. adjourned the motion but imposed a litigation timetable peremptory to the then remaining plaintiffs George, Zoe and Peter. She provided that RB&R could renew the motion to dismiss if the plaintiffs did not comply with the timetable that she imposed. Over the last 2.5 years, the plaintiffs have not satisfied any of the steps set out in the timetable. The plaintiffs were to obtain any experts' reports by 10 January 2019, to bring any motion to compel production of documents by 11 November 2018, i.e. within 60 days of 12 September 2018 and the matter was to be set down for trial by 10 January 2019.

[6] Zoe filed an affidavit setting out what steps occurred after September 2018 and putting the plaintiffs' failure to move the matter forward on the defendants. I do not accept that any failure can be attributed to RB&R as each of these steps in this timetable was entirely in the hands of the plaintiffs.

[7] The plaintiffs had multiple reminders since September 2018 that these steps were outstanding. Zoe's materials do not address why she and George did not obtain their experts' reports by the deadline or did not bring their productions motion (it could have been because RB&R contends that it has produced all of its documents).

[8] However, in my view, the order of Mullins, J. contains its own remedies for those defaults, short of dismissing the action. While RB&R moves under Rule 60.12 to strike the action as a result of the plaintiffs' failure to comply with the order of Mullins, J., the first two provisions of that order are not mandatory – they provide that if the plaintiffs intended to bring a motion concerning productions, they had to do so within 60 days; if they intended to serve experts' reports, they had to do so within 120 days. Their action would not be struck if they did not bring such a motion or serve a report but they are precluded from taking these steps later as the order was peremptory against them. There is nothing unfair about that result as they have had 2 ½ years since the order to do so (not to mention the 13 years prior to the order).

[9] What they have not done which was required is set the action down for trial. Having reviewed the case history report, it is unclear why this order was made as a trial record had already been filed in November 2010. Unfortunately, it seems that neither plaintiffs' counsel nor defendant's counsel (neither of whom was the same counsel who appeared on this motion) remembered that the matter had already been set down or brought that to the attention of Her Honour.

[10] It does seem from the record that setting down the action had been raised in advance of the motion before Mullins, J. Prior to that attendance, the plaintiffs emailed their then lawyer

and instructed him to ensure the matter was placed on the trial list. When the plaintiffs believed that was not done, George wrote to their lawyer days before the motion stating "But most importantly, Zoi and I have both requested that you place our court file on the trial list so the judge can see we are making an effort to be in compliance with the Rules of Civil Procedure. Barnet, you have not followed our directions to do so? … Please remove yourself from our file for not following our directions to place our file on the trial list." The lawyer argued the motion before Mullins, J. but shortly thereafter was suspended by the Law Society.

[11] Thereafter the plaintiffs met with a lawyer in November 2018 who was interested in acting for them. In March 2019 that lawyer advised the plaintiffs that he was too busy to be able to properly represent them. However, he did confirm to the plaintiffs that their matter *had* been placed on the trial list and they were not in default of Mullins, J.'s order.

[12] Zoe deposed in paragraph 61 of her affidavit as follows:

> 61. My counsel has contacted the Court multiple times with regards to the new procedures of setting this matter down for Trial and has been informed that due to the Trial Record having been filed on November 25, 2010, the passing of a new Trial Record will not be accepted without a Court Order from a Judge and the matter cannot be placed on the Trial List while there are pending motions.

[13] While it is unclear why the order was made, what is clear is that matter was already on the trial list, so I do not find that the plaintiffs are in breach of the order to set it down. I further find that their failure to serve experts' reports or bring a productions motion has its own consequences and does not warrant the action being dismissed.

[14] RB&R also moves to dismiss the action for delay pursuant to Rule 24.01. In order to succeed on such a motion, the moving party must establish that the delay has been inordinate and inexcusable, is something for which the plaintiffs or their lawyers are responsible and must be such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay.

[15] The courts have considered this test on numerous occasions. In considering the type of delay required, the court in *Langenecker v. Sauve* 2011 ONCA 803 held that it must be delay caused by the intentional conduct of the plaintiff or his counsel that demonstrates a disdain or disrespect for the court process. The onus is on the plaintiffs to explain the delay and show it was not intentional. The plaintiff must also rebut the presumption of prejudice by showing that documents have been preserved, that witnesses are available and continue to have detailed recollections of events. In effect, the plaintiff must demonstrate that there is no substantial risk that a fair trial is not possible.

[16] This test was set out and applied by Mullins, J. on the motion to dismiss in 2018, who held:

> The moving party is correct that there is inherent prejudice in inordinate delay. The plaintiff bears an evidentiary burden to satisfy the Court of the absence of

> prejudice and to explain the delay. There is however, no evidence here of actual prejudice or deliberate delay by the plaintiffs. At worst, there has been ineffectual advancement of the claims in circumstances that they find to be overwhelming. There will be a trial of the claims of the plaintiff who is under disability, according to the submissions of the PGOT. It would appear that there was opportunity for the defendant to capture the evidence of the parties by examination for discovery and there are medical reports and records available. Under the circumstances, it does not appear to this court that the delay to date gives rise to prejudice.

[17] As noted, the plaintiffs have the onus to rebut the presumption of prejudice. On these facts, the prejudice is more likely to their detriment, although of their own creation, as they are precluded from obtaining any further expert evidence for trial. Mullins, J. did note that medical reports and records are available, so the plaintiffs will not be without relevant medical evidence. Further, as liability has been admitted, the memories of fact witnesses concerning the events of the spill some 17 years ago are less critical. The case will centre on what personal damages the plaintiffs allege they suffered as a result of the spill, on which they have been examined.

Conclusion

[18] It would not be appropriate to dismiss this action either pursuant to Rule 60.12 or for delay. While the plaintiffs have not proceeded expeditiously, they have also been caught in an administrative circle of being ordered to file a trial record and then having that record rejected because one was already filed.

[19] While the plaintiffs believe, correctly, that they had already filed a trial record, they have indicated that they are willing to file whatever needs to be filed so that they can get to trial.

[20] To ensure this matter proceeds, I direct that the plaintiffs are to file an amended trial record with the court no later than 7 April 2021. They are to ensure the record is labelled Amended Trial Record and note on the cover that it is being filed pursuant to the Order of Master Jolley made 15 March 2021. Pursuant to Rule 48.03, the amended record must contain all the evidence and orders relating to any discontinuances or dismissals that impact any plaintiff or defendant in the style of cause, as well as the order appointing the Public Guardian and Trustee for Peter Asimakis. The record is to be filed with the trial coordinator by email to Theodora.Apstopoulos@ontario.ca, copy to Janice.Dickie@ontario.ca. If there are any issues with having the record accepted, plaintiffs' counsel is to notify me via my assistant trial coordinator at Christine.Meditskos@ontario.ca.

[21] Once the amended trial record has been filed, the plaintiffs are to contact the trial coordinator to obtain a pretrial and trial dates. Again, reference is to be made to this decision in the event the parties encounter any issue in this regard.

[22] I have reserved the issue of costs as I understand there were some offers to settle. While I will still receive costs submissions if the issue cannot be resolved, I wish the parties to

consider that, while RB&R was not successful on the motion, I have found that the plaintiffs did not comply with the bulk of the order of Mullins, J. With respect to the trial

record, the plaintiffs should have been sorting out this issue with the trial office and bringing a motion themselves to solve this issue, if necessary.

Master Jolley

Date: 15 March 2021