COURT FILE NO.: CV-10-401740
MOTION HEARD: 131017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ramazan Batgi and Ayhan Batgi, Plaintiff/Moving Party

AND:

Senem Koku and Salman Koku, Defendants/Responding Parties

BEFORE: Master P. T. Sugunasiri

COUNSEL: Epstein, I. & Rakowski, L., Counsel, for the Plaintiff/Moving Party

Amourgis, J., Counsel, for the Defendants/Responding Parties

HEARD: October 13, 2017

ENDORSEMENT

Overview:

[1] The Plaintiffs brings a motion to set aside the administrative dismissal of March 14, 2014 such that they may place this matter on the trial list. I allow the motion. I am satisfied that the Plaintiffs and their counsel have adequately explained the delays, and continuously took steps to move this action along such that it should be heard on its merits.

[2] Counsel on both sides proceeded as if the action had not been dismissed, including obtaining a consent order from Master Wiebe in 2015. There is no doubt that the parties intended to bring the action to completion, but for the administrative dismissal order that was overlooked by both sides.

Chronology of Litigation

[3] The Plaintiffs and the Defendants are members of the Kurdish community. The Plaintiffs allege that they sought the help of the Defendants to secure financing for their home. As their immigration status was not settled, the Defendants put the home in their name and later transferred it to the Plaintiffs. After the transfer of title and mortgage, the Plaintiffs claim that they discovered an additional line of credit secured against the equity of the house and $10,000 in unpaid taxes.

[4] The Statement of Claim ("SoC") was issued on April 23, 2010 under the Simplified Procedure Rules.

[5] By this time Plaintiffs' counsel, Mr. Meisels had already obtained three witness statements.

[6] On May 10, 2010 the Defendants delivered a defence. The Plaintiffs served their Reply on June 18, 2010.

[7] On October 27, 2010, Mr. Meisels wrote to counsel for the Defendants, Mr. Weisdorf to remind him to file the defence. Mr. Meisels had received a notice from the court that a dismissal of the action was pending because the defence had not been filed.

[8] The steps from October 27, 2010 to March 11, 2013 are not relevant. On March 11, 2013 Mr. Meisels attended a status hearing before Master Brott. As such, any delay would have been explained then.

[9] Master Brott ordered the action to be set down for trial by March 1, 2014.

[10] On March 11, 2013, Mr. Meisels informed Mr.Weisdorf of the new set down date and discussed mediation.

[11] The parties attended mediation on March 21, 2013 but the case did not settle.

[12] From 2011 to the end of 2015, Mr. Meisels was struggling with significant issues in his personal and professional life that caused him to neglect his files. I need not repeat the details here.

[13] On the record before me, I have no evidence on what was happening with the defence from Mar 21, 2013 to October of 2014 when new counsel for the Defendants, Ms. Amourgis, was retained. Both parties appeared to have missed the set down date ordered by Master Brott.

[14] On October 28, 2014, Mr. Meisels received a Notice of Change of Solicitors sent by Ms. Amourgis. Ms. Amourgis reached out to Mr. Meisels' former firm to reach Mr. Meisels. She was informed that he had changed firms.

[15] Counsel met in February of 2015.

[16] Ms. Amourgis wrote to Mr. Meisels in March and May to obtain the Plaintiffs' affidavit of documents.

[17] Mr. Meisels indicates that the various and significant personal and professional issues were taking up his time throughout 2015 and takes full responsibility for any delays.

[18] Ms. Amourgis then brought a motion to compel the Affidavit of Documents. The Plaintiffs delivered the same on August 31, 2015 and Mr. Meisels personally paid the costs thrown away of the motion.

[19] On September 10, 2015, the Plaintiffs were discovered and some answers to undertakings were addressed.

[20] The resolution of the Defendants' motion and payment of costs thrown away was codified in an order made by Master Wiebe on September 17, 2015.

[21] On February 29, 2016 Mr. Meisels provided the Plaintiffs' answers to undertakings and sought discovery dates for the Defendants.

[22] After this, Mr. Meisels states that his assistant followed up by telephone, with no response from Ms. Amourgis. Both agree that no correspondence was sent.

[23] On July 13, 2016 Mr. Meisels emailed the court requesting motion dates for a motion to strike the Statement of Defence on the basis that the Defendants' were refusing to be discovered. Mr. Batgi swore an affidavit in support of that motion on July 14, 2016, demonstrating that it was not just Mr. Meisels but also at least one of the Plaintiffs that was engaged with the litigation, however slow the pace.

[24] Ultimately, the Plaintiffs decided not to pursue discovery and Mr. Meisels delivered outstanding answers to undertakings and a Trial Record on November 7, 2016. The Defendants corroborate this timing in their materials.

[25] It was not until November 15, 2016 that anyone discovered that the action had been marked inactive. This occurred when the Plaintiffs' process server attempted to file the Trial Record.

[26] On December 15, 2016 Mr. Meisels wrote to Ms. Amourgis advising her that he needed to bring a motion to "restore the action to the trial list" in this matter and in the companion action, Centinkaya.

[27] On December 20, 2016 Mr. Meisels received a case history report from the Court which confirmed that the action had been administratively dismissed on March 7, 2014.

[28] Two days later, Mr. Meisels brought a motion returnable in March of 2016 to set aside the administrative dismissal. Mr. Meisels then reported to LawPRO and the motion was adjourned in consent to July of 2017.

[29] In July of 2017 the parties adjourned the motion to September 12, 2017. On that date, LawPRO counsel acting as agent for Mr. Meisels sought an adjournment because Ms. Amourgis served a factum and transcript on the day of the hearing. That motion was then adjourned to October 13, 2017, before me.

Brief Analysis:

[30] In determining motions to set aside administrative dismissals, the Court must balance two policy thrusts: First, civil actions should be decided on their merits. Second, the aim in litigation is to have the matter decided in a timely and efficient manner.[1]

[31] Since 2001, our courts have consistently applied what has come to be known as the *Reid* factors to assist the Court in weighing and balancing these two policy thrusts. To set aside an administrative dismissal, the Plaintiff must:

a. Provide an adequate explanation of the litigation delay;

b. Lead evidence to establish inadvertence in missing the deadline;

c. Demonstrate that the motion was brought promptly; and

d. Establish that there is no prejudice to the Defendants if the action is restored.[2]

[32] The Defendants argue that Mr. Meisels' explanation is not inadvertent but rather contumelious and should not be excused to the detriment of the Defendants. I agree that being distracted from files due to personal challenges is not inadvertence. It is more akin to being in quick sand and choosing to save one's own life before turning to assisting others. In this sense, his conduct could be considered deliberate and distinguishable from the line of cases that affirm that solicitor inadvertence cannot be borne on a plaintiff.

[33] However, as I found in the associated file of *Batgi v. Centinkaya*, Mr. Meisels' defaults were surprisingly few given his challenges. Overall, I find that he and the Plaintiffs did move the litigation along. The only periods of delay that required an explanation are those that occurred after March 11, 2013 when the Plaintiffs had a status hearing before Master Brott and satisfied her that the action should continue. Any delays up to that point would have been explained to Master Brott's satisfaction.

[34] After that time, the only significant period of delay is between Mar 21, 2013 and February of 2015. The only explanation for this delay comes from Mr. Meisels who revealed the personal problems that caused him to turn his attention elsewhere. There was no evidence on the record from the Defendants nor their counsel as to what was happening in that period other than Ms. Amourgis being retained in October of 2014. Even though the prosecution of an action is the responsibility of the Plaintiffs, the Defendants' conduct is relevant.[3] A defendant cannot lie in the weeds and then complain about delay later.[4] In *London*, the

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[1] *H.B. Fuller Co. v. Rogers,* 2015 ONCA 173 at para. 25 ("*Fuller*").
[2] *Reid v. Dow Corning Corp.*, [2001] OJ No 2365 (SCJ); reversed on other grounds in [2002] OJ No 3414 (DivCt) ("*Reid*"). I reject the Defendants' proposition that I should look to default judgment cases to decide this case. There is no need to draw analogies to that jurisprudence given that there are cases on point.
[3] *London (City) v. Osler Hoskin & Harcourt LLP*, 2016 ONSC 2853 at para. 22 ("*London*");
[4] *Fuller*, *supra* at para. 42; *Carioca's Import & Export Inc. v. Canadian Pacific Railway*, 2015 ONCA 592 at paras. 53-54 ("*Carioca's*").

court noted that the Defendant's failure to demand answers to undertakings or move the matter forward suggested they were content with the slow pace of litigation.[5]

[35] Of even greater significance is the fact that the parties proceeded along, even after Ms. Amourgis was retained, to bring the action to trial without any mention of a dismissal. It appears to have been a surprise to both sides when Mr. Meisels found out in late 2016 that the action had been dismissed. Once he found out about the Registrar's order, he moved quickly to address it.

[36] This fact ties into the issue of prejudice. I agree with the Plaintiffs' submissions that the Defendants cannot say they were prejudiced when in their own minds they believed the action was moving towards trial, and the matter is otherwise ready for trial. On cross-examination of Mr. Salman Koku, he agreed that as late as November of 2016, the Defendants were under the impression that the action was going to trial.

[37] If this is the case, the Defendants ought to have been doing what they needed to do to prepare for trial including the preservation of documents. I do not find it persuasive, therefore, when the Defendants argue that the delays have caused them prejudice because they have lost a number of cancelled cheques relating to a loan from them for the subject property. That prejudice cannot be blamed on the delay of the Plaintiffs.

[38] Similarly, if the Defendants did not take witness statements, then that also cannot be blamed on any delay caused by the Plaintiffs. Mr. Meisels had the where with all to obtain witness statements early in the proceeding to preserve evidence. In any event, Mr. Koku confirmed on cross-examination that there are several witnesses who know about the issue that he is comfortable contacting.

[39] The *Reid* factors are neither exhaustive nor individually determinative. They are factors that the Court should consider, along with all other circumstances of the case. In other words, the Plaintiff does not need to forensically meet each and every factor for each and every gap of time, failing which his motion fails.

[40] In so considering the overall circumstances of this case including the detail with which Plaintiff's counsel explains the chronology of the case, the relatively small delays attributable solely to Plaintiffs' counsel, the unusually detailed chronicling of counsel's personal issues, and the paucity of evidence from the Defendants on any real prejudice or objection to the pace of litigation, I find it fair and just to set aside the administrative dismissal. I do not accept the Defendants' evidence that the Plaintiff is judgment proof and therefore should not be permitted to proceed. Even if he is, there are other ways to address the risk that the Plaintiff may not be able to pay costs.

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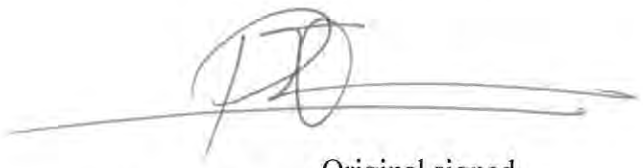
[5] *London, supra.* at paras. 25-27.

[41] To the extent that there remain any outstanding undertakings, which appears to be in dispute, I urge the parties to resolve this issue between themselves, keeping in mind that this is a simplified procedure action that is intended to be summary in nature.

Costs:

[42] The Plaintiffs were successful in this motion. Unlike in the companion action, I do not view this motion as requiring an indulgence such that costs should not follow the event. There was only one notable period of delay in this case and neither party acted during that time. Both parties assumed the action was proceeding and acted accordingly at a pace that seemed to suit both. As late as November of 2016, both parties wanted to, and intended to, proceed to trial. It is in the interest of both sides to set aside the Registrar's order. On that basis, the Defendants should not have opposed this motion.

[43] I was provided with costs outlines by both parties. They are similar in quantum which assists in considering the expectations of the parties. There is, however, duplication in the facta for this matter and *Centinkaya*. I took that time into account when quantifying the amount payable by the Plaintiffs in *Centinkaya*. Therefore I discount considerable time allotted to both the preparation of the factum and preparation for oral argument. I was advised that of the 74 hours logged by Ms. Rakowski, approximately one third was spent on going through boxes of documents, no doubt to reconstruct the chronology. In consideration of the factors in Rule 57.01 and the Court's broad discretion in awarding costs, I order the Defendants to pay costs to the Plaintiffs in the amount of $12,000 inclusive of disbursements and HST, payable within 60 days from the date of this endorsement.



Original signed
"Master P. Tamara Sugunasiri"

Date: January 25, 2018