Court of King's Bench of Alberta

Citation: Segovia v McCarrick, 2024 ABKB 431

2024 ABKB 431 (CanLII)

Date: 20240716
Docket: 1301 03294
Registry: Calgary

Between:

Myriam Luz Segovia

Plaintiff/Respondent

- and -

Kimberli Dawn McCarrick, Andy McCarrick, Jane Doe I and Jane Doe II

Defendants/Applicants

Reasons for Decision
of the
Honourable Justice R.J. Hall

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[1] The Defendants apply to dismiss the Plaintiff's personal injury action against them for delay, pursuant to Rule 4.31 of the *Alberta Rules of Court*. That Rule provides as follows:

> 4.31(1) If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.

> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.
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> (3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

[2] The action arises from a motor vehicle collision which occurred April 18, 2011. The action was commenced March 15, 2013. A statement of defence was filed March 4, 2015. None of the time from the date of the accident to the date the statement of defence was filed should be considered to be Plaintiff's delay.

[3] This application was filed by the Defendants August 9, 2023.

[4] Therefore the period of time to be considered is from filing of the statement of defence (March 4, 2015) to the date the application was filed (August 9, 2023); a period of 8 years and 5 months.

[5] The matter is complicated by the fact that, since the subject accident, the Plaintiff has been involved in four subsequent automobile accidents, three of which have been litigated. In such circumstances it is an art, rather than strictly science, to determine which injuries were caused, contributed to or exacerbated by each of the five accidents.

[6] Affidavits from each party have been filed in reference to the time which has passed. Questioning in the Action, or cross-examination of the Plaintiff on affidavits, has occurred in this action on four occasions. Responses to Undertakings have been provided, though the Defendants maintain they have been incomplete. A mediation was attempted, but without success. Efforts have been made by the Defendants to schedule Independent Medical Exams of the Plaintiff. Date errors, plus the Plaintiff's position that she cannot be examined for any long duration, have delayed, or frustrated Defendants' attempts to complete those examinations. The parties have detailed the extensive efforts to get this matter to trial, and impediments that have arisen.

[7] While I find little in the Defendants' conduct to have contributed to the delay, there have certainly been weeks and/or months where the Defendants seemed content with delays; at least until the Plaintiff's refusal to attend medical examinations.

[8] The major contributing factor to the delay of this action has been the overlay of the four subsequent collisions and litigation surrounding three of them. Responsibility for such delay does not lie at the feet of either the Plaintiff or the Defendants.

[9] I find that the delay has been inordinate, but that it is not inexcusable.

[10] The Defendants maintain that they have shown that the delay has resulted in significant prejudice to them. They note, the effect of delay on witnesses' memories. However, the Plaintiff's memory of the accident has, no doubt, been questioned upon. The Defendants' memory of the accident was, no doubt, recorded in a statement to the Defendants' insurer. Therefore, in terms of liability evidence, little, if any, will have been lost.

[11] The remaining area of significant prejudice alleged by the Defendants is loss of medical records in respect of the Plaintiff's pre accident medical history. A number of the Plaintiff's pre

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accident physicians responded to undertaking requests that they have no record of this patient at this clinic, notwithstanding that attendances before them are disclosed in the Alberta Health Statement of Benefits Paid.

[12] The answer to this allegation is that, if the records were lost or destroyed in the intervening period, by the time the Defendants requested them they were no longer available. They are "one-off" attendances where, by the time defence counsel requested the charts they were not (and perhaps never) available.

[13] I have no evidence that the appointments before those doctors had any relevance to the subsequent injuries alleged by the Plaintiff.

[14] The Plaintiff did produce records showing diagnostic imaging of the lumbar spine in March of 2007. The Defendants then requested the charts and notes of Dr. Grewal, family physician, whom the Plaintiff saw frequently in or around this time. The Defendants alleged the Plaintiff had failed to produce these documents; however, after a search of emails, Defendants' counsel determined that she had received them November 18, 2019; but because the email had a somewhat misleading subject line, she had not actually seen the records until just before the hearing.

[15] The important thing is, those notes and records had been produced, and not lost; and therefore there is no prejudice from any late production of Dr. Grewal's notes.

[16] In the end result, I conclude that the delay herein, while inordinate, is not inexcusable. I conclude that the Defendants have not suffered prejudice significant enough to justify dismissal of the action.

[17] I will say, however, that my review of the materials and arguments provided has shown the Plaintiff to have been somewhat difficult and uncooperative in the prosecution of her claim. Better cooperation by her is needed to advance the Action.

[18] The application is dismissed. Costs of this application shall be costs in the cause.

[19] As I continue to be the case management judge, I direct the parties to attempt to reach agreement on a Litigation Plan and provide it to me, and to make inquiries of the Trial Coordinator as to acceptable dates for trial. Counsel may make application to me to have the matter set for trial and to set all intervening dates.

[20] If counsel cannot agree, they may each make written submissions to me as to further conduct of the action, or they may schedule a further case conference.

Heard on the 31st day of May, 2024.
Dated at the City of Calgary, Alberta this 16th day of July, 2024.

R.J. Hall
J.C.K.B.A.

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Appearances:

Stephen B. Nelson/Devin Frank
for the Plaintiff/Respondent

Jane Freeman
for the Defendants/Applicants, Kimberli McCarrick and Andy McCarrick

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