Enough is Enough: When Will Plaintiff's Case Be Dismissed For Delay, A Case Comment on the Court of Appeals' Decision in *Riggitano v. Standard Life Assurance Co.*[1]

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In some circumstances, a plaintiff will initiate an action against a defendant and then fail to take the necessary steps to move this action towards a trial.

Rule 48.01 states that after the close of pleadings, any party to an action who is not in default and who is ready for trial may set the action down for trial together with any counterclaim or crossclaim. Rule 48.14(1) states that "unless the court orders otherwise, if an action in which a statement of defence has been filed has not been placed on a trial list or terminated by any means within 2 years after the filing of a statement of defence, the registrar shall serve on the parties a status notice that the action will be dismissed for delay unless, within 90 days after the service of the notice, the action is set down for trial or terminated".

The purpose behind Rule 48 is to prevent plaintiffs from initiating claims that hang over a defendant causing them to incur costs and threatening their reputation and not diligently proceeding with them by moving them to trial.

When a plaintiff initiates an action, they are making serious allegations against another individual. In initiating an action, the plaintiff forces the defendant to incur the cost of defence including both financial and non-economic costs such as damage to reputation of having a claim hang over them as well as the cost of time and energy in assisting in their defence.

In *Riggitano v. Standard Life Assurance Co.*, the Superior Court and the Court of Appeal clearly articulated that where a plaintiff fails to demonstrate initiative in moving their action forward towards trial that would allow the defendant an opportunity to confront their accuser, the court has the discretion to and will exercise its discretion to dismiss the plaintiff's claim for delay.

This article provides a detailed analysis of that decision and comments on its implications

Issues At the Superior Court

In Riggiatono, the court considered two issues. First, defendants said that counsel for plaintiff had attended prior status hearings and misrepresented that the status hearing was being adjourned on consent to permit certain steps to be completed, when in fact no consent was given. Secondly, the court considered whether the plaintiff had shown cause why the action should not be dismissed for delay, as required by Rule 48.14.

The Plaintiff's Misrepresentation

1 [2009] O.J. No. 1997 upheld at [2010] O.J. No. 292

The defendants said that the plaintiff had made several misrepresentations during prior status hearings and that the defendants had never been contacted by counsel for the plaintiff in respect of status hearings or what representation should be made to the court at such hearings. The defendants also alleged that on prior status hearing attendances, counsel for the plaintiff had misrepresented that certain steps within the action had been agreed upon and that the status hearing ought to be adjourned on consent.

The history of status hearing appearances, as reflected by the endorsements made and the very limited transcripts that were available were as follows:

> July 27, 2006 – endorsement read "R. Berlingieri for plaintiff, defendants not appearing, status hearing adjourned to December 14, 2006." There is no transcript available as the presiding judge indicated that a court reporter was not required.
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> December 14, 2006 – endorsement reads "Discoveries are scheduled for end of March. Adjourned to April 19, 2007." There is no transcript available as the presiding judge indicated that a court reporter was not required.
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> April 19, 2007 – endorsement reads "on consent status hearing adjourned to October 9, 2007." – There is no transcript available as the presiding judge indicated that a court reporter was not required.
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> October 9, 2007 – endorsement reads "on consent adjourned to February 28, 2008 to permit completion of discoveries." The transcript indicates that after the case was called Mr. Johnston for the plaintiff indicated "this matter is progressing, there is still outstanding discoveries to be conducted of the defendants; and to finish any final transfers of documentation to set the matter down. Could I ask this be adjourned to the 21st or the 28th of February?" and that the court (which happened to be me replied "on consent adjourned to February 28, 2008 to permit completion of discoveries."
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> February 28, 2008 – endorsement reads "adjourned to October 14, 2008. Plaintiff has been discovered. Defendants discovery to take place in Montreal in September, 2008." There is not transcript of that hearing as the presiding judge indicated that a court reporter was not required.
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> The date of June 26, 2008 also appears – the endorsement reads "defendants not discovered; resides in Montreal. Adjourned to December 23, 2008, at request of plaintiff." The transcript of that appearance indicates that Mr. Greer for the plaintiff, indicated "for the record Greer, N for the plaintiff. You might have been advised this matter was originally traversed to October 14, 2008, but apparent…". The court: "Sir, I have no endorsements on this one."
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> Mr. Greer: "Well, we had been before the court previously on February 28th, 2008 so there should have been an endorsement – ok. Either I guess – we have had the plaintiff discovered, however, the defendant hasn't been discovered yet and they're out of Montreal, so that's the reason why. So, we're requesting six months for us to get an opportunity to get to Montreal and discover the defendants."

> On October 14, 2008, [the court] endorsed the status hearing endorsement sheet as follows:
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> "The defendants alleges that the plaintiff has attended prior status hearings and misrepresented that steps were requested to be done on consent when in fact they were not on consent. This is a serious allegation. I am ordering transcripts of the status hearings held on July 27, 2006, December 14, 2006, April 19, 2007, October 9, 2007, February 28, 2008 and June 26, 2008. Without prejudice to the defendants' request that action be dismissed for lack of action, I am adjourning this status hearing to be heard before me on a date to be arranged through the Trial Coordinator once the transcripts are available. Copies of transcripts of status hearings to be forwarded by court reporter to both counsel as they are ready. Any other information that counsel wish to rely on when this matter returns before me is to be put forward in sworn affidavit form."

The initial status notice up to July 27, 2006 status hearing was not sent by the court to counsel for the defendants due to an administrative error. Counsel for the defendants only learned of the series of status hearing that had been held and that a continuation was schedule for October 14, 2008 as a result of inquiries by counsel for the defendant to the court requesting that a status notice be issued.

When the defendants learned that a continuation of the status hearing was scheduled for October 14, 2008, counsel for the defendant obtained photocopies of the prior endorsements. Counsel for the defendants then requested in writing an explanation from the plaintiff's counsel as to why the defendants were not advised of any of the status hearing attendances, and why counsel for the plaintiff misrepresented to the court that the status hearing was adjourned from time to time on consent when that was not true. Neither the defendants' original request nor follow up letters were answered by the plaintiff.

At the time of the motion in this matter, the plaintiff had failed to provide a sworn affidavit of documents despite numerous and repeated requests to do so. Plaintiff's failure in that regard had caused cancellation of an appointment for discovery. The Plaintiff served an affidavit with a number of weak excuses as to why there was a lack of progress on the file including that counsel for the defendants had changed and moved offices. The court criticised the weakness of these excuses stating that it could not see how a change of address could slow down an action where the party opposite is advised of that change of address. The Plaintiff's affidavit was vague about the identity of individuals from his office who attended the status hearings. The plaintiff's counsel's affidavit swore to many beliefs and intentions but was devoid of specific corroboration. The plaintiff did not produce notes or records of his communications with defence counsel and he even went so far as to blame one of the adjournments on consent on an articling student misunderstanding his instructions. The court refused to accept any of these excuses.

The court held that it was satisfied on the material that the plaintiff had done very little to move the action along. The court noted that any steps that had been accomplished were largely the result of the persistent effort on part of the defendants to move the matter along.

Motion Status Hearing Decision

Rule 48.14(1) requires that the registrar serve a status notice where an action is not being set down for a trial or otherwise terminated within two years after the filing of the statement of defence. The court noted that in the case at bar, a statement of defence had been filed an excessive five years prior to the date of the status hearing.

The court also noted that subsection 2(2) requires the lawyer who receives the status notice to forthwith give the copy of the notice to his or her client. There is no evidence whether plaintiff's counsel had complied with this rule but absent of evidence to the contrary; the court assumed the rule was complied with. If the rule was complied with, then the plaintiff would have been aware of the danger of her action being dismissed by reason of delay. In these circumstances, a client would require their lawyer to keep then advised of the outcome of the status hearing, and, in this case, the many adjournments of that hearing. The court held that this raised concerns as to whether or not the plaintiff's counsel was acting on the plaintiff's instructions in adopting the course of action or inaction that was followed in this case, or consideration of whether the plaintiff was complacent in the process, and has no one to blame but himself if the action is dismissed. The court made this observation to address the contention advanced on behalf of plaintiff's counsel who stated that the shortcomings of the lawyer ought not be visited on the client. The court cited Justice Quinn's comments in *Sepehr Industrial Mineral Exports Co. v. Alternate Marketing Bridge Enterprises Inc.*[2] which were:

> Rule 48.14(8) does not suggest any criteria for a judge to consider in deciding whether a plaintiff has successfully shown case. The only guidance given is that the judge either is to be "satisfied that the action should proceed". I take this to mean, therefore, that the criteria will come from the circumstances of each case, with the only rules based guidance, perhaps, being Rule 1.04(1): "These rules shall be liberally construed to secure the just, most expeditious determination of every civil proceeding on its merits."

The court stated that the onus is on the plaintiff and the test on a status hearing is whether there is an explanation for the delay such as to satisfy the court that the action should proceed and secondly, whether there is prejudice to the defendants. There is no legal onus on the defendants to demonstrate prejudice. The court noted, however, that if the defendant was serious about suggesting prejudice, there is an evidentiary burden on the defendant to provide some evidence.

The court stated that on the basis of the evidence which was available, it appeared that the court was not always given an accurate account of the progress, or lack of progress, in the prosecution of the action.

The court held that the impropriety of any inaccurate representations to the court by counsel should not be considered on Rule 48.14(8) issue.

The court noted that while it is not pleasant to dismiss a plaintiff's action for delay, Rule 48.14 clearly stated that 2 years following the filing of the statement of defence is viewed as being ample time to complete remaining steps and have a matter set down for trial, absence some satisfactory explanation.

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2 (2007), 86 O.R. (3d) 550

48.14(8) squarely puts the onus on the plaintiff to show cause why the action should not be dismissed for delay. The court held that more than 5 years, and hence more than twice the normal time contemplated by the rule, had gone by and that the plaintiff had done very little to move the matter along. The court noted that the materials did not disclose any satisfactory explanation for this delay.

It is important to note that the court responded to the submission that the effect of a dismissal would be unfair to the plaintiff is always permitted to trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions.

The plaintiff is deemed to accept her lawyer's inactivity unless there is evidence to the contrary.

The court stated that if the submission that the effect that a dismissal would be unfair to the plaintiff is permitted to always trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions, then the rule would be effectively gutted.

The effective dismissal of an action on a plaintiff must not be a reason to follow rule 48.

The Court of Appeal Decision

The Court of Appeal held that the affidavit material for the defendants was detailed and set out the complete history of the action. The status hearing judge was entitled to exercise his discretion and the Court of Appeal deferred to the status hearing judge's view of the facts. Consequently, the Court of Appeal accepted the status hearing's view of the facts and held that the order dismissing the action was justified. The Court of Appeal dismissed the plaintiff's appeal.

Discussion

When a plaintiff initiates a legal proceeding, it puts a spectre of the potential consequences of judgement and cost over the defendant. It also exposes the defendant to the burden of defending such an action. The effect of a legal proceeding should not be taken lightly. Frivolous actions and actions not pursued with proper diligence should not be tolerated. It is not fair for a plaintiff to place a prospect of judgement, costs and cost of defending an action on a defendant and then fail to be diligent or even honest. It is the defendant's right to confront his accuser and as such it is the defendant's right to a fair trial in a timely manner. *Riggitano* illustrates the court's discretion to deal with such actions and the willingness to exercise that discretion where appropriate. Moreover, the Court of Appeal's decision in this case very clearly demonstrates that the Court of Appeal exercised proper deference to the lower court when they make such a decision.