CITATION: Valee-Turgeon v. Personal Insurance, 2019 ONSC 476
COURT FILE NO.: CV-27594/17
DATE: 2019-01-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOSEE VALEE and SYLVAIN TURGEON	)	
	)	*P. Peter Diavolitsis*, Counsel for the Plaintiffs
Plaintiffs	)	
	)	
– and –	)	
	)	
THE PERSONAL INSURANCE COMPANY	)	*Shanti E. Barclay*, Counsel for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** December 6, 2018

RASAIAH J.

REASONS ON MOTION

OVERVIEW

[1] By motion, the plaintiffs seek leave of the court to extend time to serve and file a statement of claim following the issuance of their notice of action dated June 15, 2017, which notice was issued on August 31, 2017 ("June notice of action").

[2] The defendant opposes.

BACKGROUND

[3] On May 11, 2015, the plaintiffs suffered a fire at their residential dwelling located in Kapuskasing, Ontario. At the time, the plaintiffs were insured by the defendant.

[4] The plaintiffs immediately reported the fire to the defendant on the day of the fire, May 11, 2015.

[5] On May 11, 2015, the plaintiffs met with the assigned adjuster, namely ClaimsPro. Thereafter, ClaimsPro began immediately adjusting and investigating the claim.

ClaimsPro obtained estimates for emergency clean up and repair work and obtained same by July of 2015.

[6] The plaintiffs chose to retain their own contractor, to carry out the repairs on the premises.

[7] At some point, it appears a dispute arose between the plaintiffs and defendants regarding repair costs, alternative living expense costs and contents damages. The record provided the following information.

[8] On August 25, 2015, the defendant provided the plaintiffs with a cheque for $36,775.89 for the value of their contents damaged or destroyed by the fire. On September 10, 2015, the plaintiffs submitted an interim proof of loss for the $36,775.89. It was signed by plaintiff, Josee Valee. The plaintiffs retained a lawyer, Antoine-Rene Fabris ("Fabris"). On September 15, 2015, the defendant's adjuster ClaimsPro received a letter from Fabris advising that he had been retained. In this letter Fabris informed the adjuster of additional living expenses incurred by the plaintiffs and expressed that the receipts had been submitted but not paid. The plaintiffs never cashed the said $36,775.89 cheque (and it is now stale dated).

[9] On September 29, 2015, the defendant paid the plaintiffs' contractor $143,378.30 for repairs to the premises. The defendant received a letter from Fabris dated October 7, 2015 acknowledging the payment. In this letter Fabris raised the issue of additional rebuild expenses for the repair related to the garage, and the additional living expenses incurred by the plaintiffs. He asked for reimbursement forthwith, stating the plaintiffs were in dire straits.

[10] On October 15, 2015, ClaimsPro acknowledged the plaintiffs claim for an additional $12,402.62 for the garage rebuild (rebar) and advised that they had requested documentation from the contractor for their experts to review but had not been provided with it. The adjuster further advised that the additional living expenses claim had been presented, and that the adjuster was still waiting for their final decision. ClaimsPro advised that they were looking forward to receiving the requested information for the garage rebuild.

[11] On October 22, 2015, ClaimsPro requested further information, explanations and documentation from the plaintiffs regarding their additional living expenses claim to submit to the insurer for its review.

[12] On November 2, 2015, the plaintiffs submitted an interim proof of loss for the $143,378.30 that the contractors were paid. It was signed by plaintiff Josee Valee.

[13] On November 20, 2015, December 14, 2015 and January 18, 2016, ClaimsPro sent follow- up letters pertaining to their requests for information, explanations and documentation. In the January 18, 2016 letter, ClaimsPro communicated that the defendant would not pay any further funds, without answers to their requests.

[14] On January 19, 2016, by letter, Fabris asserted that there was an outstanding amount of $107,074.36 on the claim for the repairs and pointed out some omissions by Service Master. Fabris asked that the amount be remitted without further delay.

[15] On or about February 19, 2016, by letter, Fabris provided receipts for the additional living expenses claim. He also indicated therein that the Contractor was prepared to proceed with litigation.

[16] In response to Fabris' February 19, 2016 letter, on March 7, 2016, ClaimsPro requested copies of receipts that were legible; and proof of payment for an additional living expenses claimed – the cottage rental.

[17] Several follow-up letters were sent by ClaimsPro thereafter asking for explanations, receipts and better copies of receipts: April 8, 2016, May 11, 2016, June 20, 2016 and July 29, 2016.

[18] On August 11, 2016, by letter, Fabris provided a response regarding what he believed had been provided to date to his understanding; enclosed further information that he asserted should satisfy all inquiries; and sought for full and final payout on the claims.

[19] On or around December 9, 2016, ClaimsPro sent an offer to settle the claim and sent a follow-up letter January 24, 2017.

[20] By letter dated February 9, 2017, among other things, Fabris expressed his clients were frustrated and that they believed that their only satisfaction "lays in litigation"; and that he feared the parties were proceeding to litigation if settlement could not be reached.

[21] Fabris' correspondence with ClaimsPro ended when the defendant retained Thomas J. Hanrahan ("Hanrahan") on or about March 13, 2017.

[22] In a letter dated March 17, 2017, Fabris acknowledged Hanrahan's retainer and wrote therein "… Please note that the limitation period is shortly coming upon us and we will have to act one way or the other". I would appreciate your attention to this matter, with all due haste…"

[23] On May 11, 2017, Fabris' office, by fax sent a letter to Hanrahan wherein Fabris stated that "further to a telephone conversation" that he had with Hanrahan on the same date, he was serving a notice of action, in accordance with the rules to preserve the limitation period ("May notice of action"). In this letter, Fabris expressed an understanding that Hanrahan was in the process of reviewing the file and was going to advise accordingly upon completion. Fabris asked that Hanrahan put his attention to the matter with all due haste.

[24] On June 29, 2017, by fax, Hanrahan's law clerk sent a letter to Fabris which appears to have been sent at approximately 7:51 a.m. ("the first June 29 letter"). The letter asks for a copy of the issued notice of action and the statement of claim. That same day, in the

afternoon, Hanrahan sent a letter by fax to Fabris at approximately 2:43 p.m. advising that all previously made offers to settle were withdrawn ("the second June 29 letter").

[25] At some point between June 29, 2017 and July 27, 2017, there appears to have been a telephone conversation between Fabris and Hanrahan according to a letter sent to Hanrahan by Fabris dated July 27, 2017. In this July 27, 2017 letter, Fabris explained why he was writing the letter, namely, to explain the predicament he found himself in. He explained what he believed to be the history of discussions between them, and his understanding. He set out that he was away until April 26, 2017 and was waiting for an offer to settle. He wrote about his recollection of a conversation nearing what he termed "the second anniversary date of the matter", which he set out as being May 11. During this conversation Fabris stated he told Hanrahan that he needed an answer to the claim or he would have to file a claim. On this topic, Fabris stated that it was discussed (presumably with Hanrahan) that "a notice of action was the route to go". Fabris then explained that he did not know that his assistant had provided Hanrahan with a notice of action that was not filed with the court. He stated that the assistant was no longer employed by him; and expressed his surmise that the former employee allegedly did not file the notice of action as a means of attacking both him and his client; and that she failed to do as instructed. He set out that the employee was under police investigation for criminal activity in his office. Fabris made a statement suggesting that Hanrahan was aware of the limitation period and that he had been served with a notice of action. He asserted a position that the claim was not frivolous and that he had subsequently filed a notice of action and was prepared to provide a statement of claim and provide an explanation as to why it was not filed on time. He asserted it as being clear that notice was given and that the defendant was aware that there would be some litigation occurring if they were not able to settle the claim. Fabris wrote "while I do admit that I was technically in default, I do not believe that your client suffered any prejudice as a result of the filing of the statement of claim, the intention was there…" [presumably he meant the statement of claim not being filed yet]. In this July 27, 2017 letter, Fabris asked for reconsideration before steps were taken to re-open the matter and filing a statement of claim.

[26] The only issued notice of action in the record is the June notice of action. There is no information as to when it was in fact specifically filed with the Court Registrar for issuance but presumably sometime between its noted date of June 15, 2017 and Fabris' July 27, 2017 letter, in which he refers to it. That is yet to be determined. I note that Fabris' office is in Elliot Lake. The issuing Registrar/Court Office having jurisdiction is in Sault Ste. Marie.

[27] Both notices of action have the wrong date for the fire. They list it as being May 11, 2017.

[28] A copy of the policy was filed. It is a multi-peril policy. It is not disputed by the defendant, that the plaintiffs are individual consumers and that the contract is not a business agreement.

[29] The policy in question includes Additional Condition #12, which states,

> *12. Action against the Insurer*
>
> *An action or proceeding against an insurer under a contract must be commenced,*
>
> *(a) In the case of loss or damage to insured property, not later than 2 years after the date the insured knew or ought to have known that the loss or damage occurred…*

[30] The policy in question contains a condition, namely, Statutory Condition 12, that addresses when a loss is payable; which is within 60 days after a proof of loss is completed in accordance with Statutory Condition 6, and delivered to the Insurer.

[31] The within motion was brought approximately thirteen months from the issued June notice of action and sixteen months from the May notice of action prepared in this case. No statement of claim was ever served and filed within 30 days of either.

Positions

[32] The defendant does not consent to the filing of a statement of claim and opposes leave being granted. The defendant submits that the plaintiffs, missed the limitation period for issuing an originating process at all, whether by notice of action or statement of claim - that the law is clear on that; and that the motion before me should be dismissed as an abuse of process. The defendant asserts the limitation period applicable for this case expired on May 11, 2017, the day the insurer was notified of the loss; that the limitation period commences as soon as the insurer knows about it - when the claim for indemnity is made. The defendant argues that the June notice of action accordingly was issued outside of the limitation period; and the failure to file a statement of claim after either the May notice of action and June notice of action is not explained. The defendant concedes that they are not trying to limit the plaintiffs' rights under the Act. The defendant asserts the plaintiffs' former counsel's statements made in exchanged correspondence amount to an admission that the limitation period expired and that the plaintiffs are bound by those admissions. The defendant although agreeing the limitation period is 2 years, takes the position that the claim is out of time by the Act, the policy (arguing that the wording complies with the Act), and Fabris' admissions. The defendant suggests that the plaintiffs' argument on the limitation period would create never ending confusion as to when the limitation period starts to run and makes no sense from a policy perspective; and the policy does not create demand obligations. The defendant argues that plaintiffs' claim is properly a claim against their former counsel for failure to act as he should have in relation to issuing a notice of action and/or serving and filing a statement of claim against the defendant.

[33] In respect of the motion before me, plaintiffs' counsel strongly contests the defendant's said arguments and asserts that the June notice of action was issued within the limitation

period applicable to this case, based on the facts of this case and the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, which the plaintiffs assert applies to this case. The plaintiffs argue that the commencement of the limitation period in this case is informed by Statutory Conditions 12 and 6. The plaintiffs argue that Additional Condition 12 unlawfully purports to change the limitation period contained in the *Limitations Act, 2002* by altering the date that the cause of action arise; the *Limitations Act, 2002* applies unless the Act provides otherwise. The action of the plaintiffs is based on a loss caused by the insurance company in failing to pay the claim submitted to it. The delivery of the proof of loss triggers the defendant's obligation to pay the amount sought – in this case 60 days after the delivery, by the policy terms. The plaintiffs submit that a cause of action does not arise until the insurer breaches their obligations to pay a claim, which only arises after the 60 day period within which an insurer is to pay the claim after receipt of the proof of loss – it does not start on the date of the loss itself or when the plaintiffs notified the insurer (which in this case happened to be the same day); the plaintiffs reported a loss on May 11, 2015; and did not demand indemnification on that date and the two concepts should not be confused. The plaintiffs submit the limitation period commenced at the earliest, September 11, 2015, which is the day after the first proof of loss was filed and up to November 10, 2015 which would have been the 60th day thereafter. As such the plaintiffs assert that the June notice of action was issued within the applicable limitation period. As to admissions, the plaintiffs assert that Fabris did not make any admissions as to the limitation period and that the facts are that both of the previous counsel made a mistake as to the limitation period expiry date – a misapprehension of the law; and further, that the court is not bound whether or not there was an admission, because the court cannot be bound by same on a legal issue – the law is the law and a question of law is open to the court to determine. The plaintiffs submit that based on their position, leave can and ought to be granted on the basis that there would be no prejudice to the defendants.

ANALYSIS

[34] This is a motion for leave to extend time to file and serve a statement of claim.

[35] Where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action that contains a short statement of the nature of the claim, and if used, the statement of claim shall be filed within 30 days after the notice of action is issued. No statement of claim shall be filed thereafter except with the written consent of the defendant or with leave of the court obtained on notice to the defendant: rr. 14.03(2) and (3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[36] The court may abridge or extend any time prescribed by the rules or an order, on such terms as are just on a motion made before or after the expiration of the time prescribed: r. 3.02(1) and r. 3.02(2).

[37] I appreciate that the rules and timelines in them are designed to promote the determination of disputes on the merits in a timely manner; to promote the administration of justice or the fair and just determination of disputes.

[38] The plaintiffs must demonstrate an absence of prejudice to the defendant: *Rafeek*, para. 31; *Ananthamyl v. Szabo*, 2015 ONSC 5824 CanLII, para. 51.

[39] The prejudice asserted by the defendant in the materials is the expiry of the limitation period. At the hearing, the only other prejudice asserted was the defendant having to bring a summary judgment motion if the relief was granted.

[40] In *Rafeek*, at para. 24, the court finds that if a court is willing to make the order extending time to file a statement of claim, it follows that time for service should be extended as well.

[41] In this case the June notice of action was issued, whether arguably outside of the limitation period or not. It survives until such time as it is court ordered as, or administratively, dismissed.

[42] There is no cross-motion filed by the defendant before me to dismiss the June notice of action and/or a proper motion to determine the issue of the applicable limitation period/limitation defence.

[43] The court on its own initiative may dismiss a proceeding if the proceeding on its face appears to be frivolous or vexatious or otherwise an abuse of process of the court: r. 2.1.01(1). Proceeding means an action or application.

[44] I am not satisfied that I should exercise my discretion to dismiss the notice of action filed on my own initiative or the motion on the basis of frivolity, it being vexatious or an abuse of process for reasons set out below.

[45] With respect to the limitation period issue/defence, in my view, based on the law presented to me, the motion before me is one that permits me to consider an applicable limitation period and any limitation period defence in the context of prejudice in determining whether to grant the leave requested, but not necessarily to decide the applicable limitation period. In my respectful view, after hearing the submissions and reviewing the record and cases provided, the determination of the issue of the applicable limitation period in this case in advance of a trial (whether it can or should be so determined) is one that should be dealt with by a proper motion on that issue, not on a motion to extend time for the filing of a statement of claim.

[46] For purposes of this motion and clarification in interpreting my following reasons, I wish to make it clear that I have not decided the limitation period issue and have focussed on whether leave to extend the time for service and filing the statement of claim should be granted in light of the outstanding undecided contested issue – whether or not the limitation period expired May 11, 2017 or on a later date. My reasons are without prejudice to the defendant and the plaintiffs, and not conclusions on the issue of the applicable limitation period. My comments on the limitation period are solely to analyze the prejudice, as the issue and arguments currently stand.

[47] Having said the above, all I do conclude, in term of considering prejudice on this issue is that there arguably is a limitation period issue/defence to be argued.

[48] In particular, in *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, the majority's decision concluded that there was a fact base that included an agreement on the limitation period commencement date (when the cause of action arose) and that there was no issue of a promissory estoppel. In addition, in *Nasr* there was no sixty-day period condition allotted for payment by the insurer after receipt of a proof of loss, as there is in the case at bar (regarding the potential application of s.5 of the Act).

[49] As to admissions of previous counsel, I am of the view that the issue is also one to be dealt with in the context of dealing with the limitation issue when it is properly dealt with, and those arguments can be renewed as to whether or not there were actually admissions made as opposed to mutual mistakes; and what if any binding effect same would have on the determination by the court of the applicable limitation period.

[50] As to the relief requested, and prejudice, on motions to extend time, the expiration of a limitation period creates a presumption of prejudice to defendants but the facts of the case, history of the case and inference of knowledge within the limitation period, of the case and nature of the claims being may be considered in analyzing the prejudice and if the presumption is rebutted: *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.).

[51] Also, a plaintiff's counsel's failure to act as he or she should have in relation to pressing a claim against a defendant does not outright preclude the exercise of the discretion to grant an extension to file a statement of claim: *Saieva v. Schmitt* (1990), 45 C.P.C. (2d) 48 (O.C.J. Gen. Div.) and *Ford v. Ronholm* (1993) O.J. No. 282 (O.C.J. Gen. Div.).

[52] After the May notice of action was sent, Fabris expressed that he essentially understood that the parties would be entertaining/ negotiating settlement, with only a notice of action in place – which notice of action he thought was in order, which was not. I acknowledge that after the June notice of action was issued, the statement of claim was not filed within 30 days either. I accept for purposes of this motion, based on the record before me, that it can be reasonably inferred that counsel for both parties at the time believed the limitation period had lapsed.

[53] In terms of the stage/where this action could be, in the context of prejudice, I considered that if the rules had been complied with, on the May notice of action (had it been issued), a statement of claim would have had to have been filed 30 days thereafter and served within five months thereafter, no later than November 10, 2017 (service is required to be completed within six months following the issuance of the notice of action). Following this, the defendant would have had time per the rules to prepare its statement of defence. On the June notice of action, service of a statement of claim would have been required by February 26, 2018. In terms of "litigation time" and the typical case, in my view, the case is not "too far off its rails".

[54] In this case, the defendant was not deprived of an ability to investigate and was notified promptly of the loss. Estimates were able to be obtained by the defendant between May 19, 2015 and June 22, 2015.

[55] It is not established that there are witnesses that cannot be located and/or whose memories may have faded with respect to this matter. Further, there appears to be sufficient documents available to refresh witnesses' memories on what transpired and to explain what work was done by whom and when and at what cost to appreciate the scope, nature and details of the claims (including but not limited to: statements of the insured; estimates; receipts and proof of loss claims; and the investigation file) and these documents were provided to the defendants by August 11, 2016. The defendants were notified of the plaintiffs' contemplation of/intentions to commence litigation if the losses were not paid in 2017 and albeit not issued, a notice of action was received by the defendant May 11, 2017.

[56] This is not a situation where the plaintiffs ignored the claim for years. Offers were being exchanged and were left out for acceptance until June 29, 2017.

[57] Granting the motion does not circumvent the limitation defence. It will still exist and be available to argue, and I don't see it as wasteful in this case based on the facts of this case. Costs can be claimed on success on any summary judgment motion.

[58] All this being said, at the end of the day, my analysis does not lead me to a level of prejudice to refuse the order.

CONCLUSION

[59] The motion is granted.

[60] The plaintiffs shall serve and file their statement of claim within 30 days of today's date.

[61] If costs cannot be agreed the parties, any party seeking costs shall serve and file written submissions within 2 weeks of the release of these reasons, limited to five pages, plus Costs Outline and any authorities. Any responding party shall have one week thereafter to serve and file responding submissions, limited to five pages, plus Costs Outline and any authorities.

Rasaiah J.

Released: January 17, 2019

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SUPERIOR COURT OF JUSTICE

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