

CITATION: Kiani v. Balinon et al, 2014 ONSC 3525
COURT FILE NO.: 08-2517
DATE: 2014-06-13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Imtiaz Kiani, Plaintiff

AND:

Scott Balinon and Allstate Insurance Company, Defendants

BEFORE: The Honourable Mr. Justice D.J. Gordon

COUNSEL: F. Siddiqui, Counsel for the Plaintiff/Responding Party

S. Handler, Counsel for the Defendant/Moving Party

HEARD: June 6, 2014

ENDORSEMENT

[1] The defendant, Scott Balinon, seeks leave to appeal to the Divisional Court from the order granted December 16, 2013 dismissing his motion for a defence neuropsychological examination of the plaintiff, Imtiaz Kiani.

Background

[2] The parties were involved in a motor vehicle accident in Hamilton in April 2006.

[3] The initial statement of defence was issued in April 2008. In October 2008, Mr. Balinon admitted liability in his response to Mr. Kiani's request to admit. The statement of defence of Mr. Balinon was served in February 2009. The claim against Allstate Insurance was discontinued in March 2009. Of some interest, there is a limitations period defence that has not yet been addressed.

[4] It appears the action was dormant for a period of time. Mr. Kiani then retained his present counsel, Mr. Siddiqui.

[5] Given the delay in the action, a status notice was issued in February 2011. Subsequent discussions involving Mr. Siddiqui and the defendant's then counsel, Mr. Ryan, resulted in an agreed timetable in May 2011. A consent order was subsequently granted approving the timetable. Of interest in this motion are two provisions, namely:

- (a) defence medical examinations by July 31, 2012; and
- (b) action to be set down for trial by October 31, 2012.

[6] The defence medical examinations were not arranged on a timely basis. In April 2012, Mr. Siddiqui reminded Mr. Ryan of this matter, indicating he would oppose any motion to amend the timetable.

[7] The statement of claim was amended in August 2012 pursuant to a consent court order. The consent was the result of further discussions between Mr. Siddiqui and Mr. Ryan over several months. Part of their agreement was the scheduling of defence medical examinations.

[8] The amendments involved two matters:

- (a) increasing the claim from \$1.725 million to \$15 million; and
- (b) providing greater detail as to the nature of the impairments suffered by the plaintiff.

[9] In September 2012, Mr. Osterberg was retained on behalf of Mr. Balinson, replacing Mr. Ryan. Mr. Osterberg would expeditiously arrange for defence medical examinations with the co-operation of Mr. Siddiqui, including assessments by a psychiatrist, a physiatrist and a

neurologist. Disagreement regarding an assessment by a neuropsychologist lead to the original motion herein.

[10] Mr. Siddiqui set the action down for trial by serving the trial record on October 29, 2012. Neither party had sought to amend the timetable. The case was addressed in assignment court, with the trial ultimately scheduled for the November 2014 sittings.

[11] The defence medical examinations of Mr. Kiani were completed in the early months of 2013. Mr. Osterberg served the medical reports over several months, the last one being with the notice of motion. Mr. Siddiqui served the plaintiff's medical reports in February 2013. Mediation also took place that month.

[12] The original motion seeking the defence neuropsychological examination of Mr. Kiani was served in April 2013. For various reasons, scheduling a hearing for this long motion was delayed. Such occurred in December 2013. As previously mentioned, the motion was dismissed.

[13] The within motion seeking leave to appeal to Divisional Court was immediately served thereafter. On January 14, 2014 it was adjourned to a long motion list and was ultimately heard on June 6, 2014.

[14] If leave is granted, the next sittings of Divisional Court are in September 2014. The trial would have to be adjourned to 2015 if the appeal is successful.

Issues

[15] Three issues are raised by the defendant on this motion and, if leave is granted, on appeal, namely:

- (i) whether the defendant required leave for a motion requesting a defence medical examination as a result of the action being set down for trial;
- (ii) if so, should leave have been granted; and
- (iii) on the substantive matter, whether the defendant was entitled to a neuropsychological assessment of the plaintiff.

Decision of the Motions Judge

[16] Following the submissions of counsel on December 16, 2013 the motions judge delivered oral reasons dismissing the request for the defence neuropsychological examination. My review of her reasons will focus on the aforementioned issues.

[17] In determining leave was required for the motion, the motions judge referred to Rule 48.04(1) pertaining to a party who has “consented to the action being placed on a trial list”. She determined leave was required as a result of the timetable agreed to by counsel previously, specifically with respect to setting the action down for trial.

[18] As to denying leave, the motions judge simply said “on the facts of this case I would ordinarily deny leave for this application, but in the event I am wrong, I am going to go through the substantive issues ...”

[19] In considering the substantive issues, the motions judge referred to a number of factors, including:

- (a) the defence had three defence examinations to date by a psychiatrist, a physiatrist and a neurologist;
- (b) the proposed neuropsychological examination by Dr. Kiss was more extensive than previously indicated by Dr. Snow, the original proposed assessor;
- (c) the onus was on the defendant to show a fourth medical examination was warranted, such not being an unfettered right;
- (d) none of the defence medical reports suggest neuropsychological testing was warranted;
- (e) the original statement of claim suggested head injury sequelae, more refined in the amended pleading, with original counsel for the defendant having the plaintiff's reports from Dr. Kaplan and Dr. Salmon;
- (f) the plaintiff's medical reports do not reflect that a brain injury scenario was present, save for that by a physiatrist, Dr. Kumbhare, but noting such a diagnosis was out of his area of expertise;
- (g) defence medical examinations are intrusive; and
- (h) the plaintiff's condition had not changed or deteriorated since the prior examinations nor was a more current assessment required for trial.

[20] With these and other factors considered, the motions judge determined a further defence medical examination was not required to level the playing field or for a just and fair trial. In her analysis, the motions judge considered what she felt was the relevant caselaw.

Discussion

[21] The test for leave to appeal is set out in Rule 62.02(4). Leave shall not be granted unless:

- (a) there is a conflicting decision and it is desirable leave be granted; or
- (b) there is good reason to doubt the correctness of the order granted and the proposed appeal involves matters of such importance leave should be granted.

[22] Although the moving party relies on both provisions, in my view it is the latter one that applies to this case.

(i) Leave for Original Motion

[23] In determining leave was required, the motions judge found the defendant to have consented to the action being set down for trial by virtue of the timetable agreed to by both parties pursuant to Rule 48.14(11). Counsel report there are no decisions on this point. Failing a consent timetable, a judge would have granted a similar order under Rule 48.14(13), provided the plaintiff was able to show cause why the action should not be dismissed. The remedy available to the defendant at the time was to seek an amendment to the timetable. Such did not occur.

[24] In denying leave, the motions judge made reference to the circumstances of the case without a detailed analysis.

[25] My role is not to determine the issue in dispute. However, it seems to me leave was required and leave should have been granted. Requiring leave is a common sense application of the requirement for a timetable in cases of extreme delay as here. Only in the rarest of cases ought leave be denied when the subject-matter involves substantive rights.

[26] Nevertheless, the motions judge did consider and rule on the merits of the motion. Hence, I conclude the trial ought not be delayed solely for the purpose of having Divisional Court address the issue of leave for motions. Had only the first and second issues, as previously described, been raised, leave to appeal would be denied.

(ii) Proposed Neuropsychological Assessment

[27] I accept the proposition, as advanced by the moving party, that the decision on this substantive issue is open to serious debate. Determining whether a further defence medical is warranted involves the exercise of discretion. In denying the defendant's request, the motions judge articulated sound reasons and considered a multitude of factors.

[28] The nature of the dispute in this case, as I understand it, is with the cognitive impairment of the plaintiff resulting from the accident. There is an argument the proposed neuropsychological assessment was necessary, having regard to the defendant's ability to address the dispute at trial.

[29] Hence, I conclude the moving party has met the first branch of the test. But does he meet the second?

[30] I am not persuaded there are matters of general importance necessitating Divisional Court review. Rather, the issue is only a matter of relevance to these litigants.

[31] The defendant was aware from the outset the claim involved cognitive impairment but, perhaps, was not aware of the extent. He failed to seek the defence medical examination in a timely manner and ought not be allowed to correct an error in litigation strategy or oversight. The issue simply cannot reach the requisite level of general importance.

Decision

[32] For these reasons, leave to appeal to Divisional Court is denied. The motion is dismissed.

[33] I expect counsel will be able to resolve the issue of costs; failing which, brief written submissions are to be delivered to my chambers in Cayuga within 30 days.



D.J. Gordon J.

Date: June 13, 2014