Neutral Citation Number: [2009] IEHC 154

THE HIGH COURT

2001 12657 P

BETWEEN

PATRICIA ROONEY

PLAINTIFF

AND

JOHN RYAN

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered on the 31st day of March, 2009.

The plaintiff in this case is a housewife. The defendant is sued as the occupier and the person in control of the Coombe Hospital in the city of Dublin. On 18th August, 1998, the plaintiff lawfully visited a clinic on the ground floor of the hospital premises and was in the process of exiting the said clinic when she alleges that she was caused and permitted to slip on an unsafe, slippery and wet floor in consequence whereof she suffered personal injuries, loss and damage.

The defendant was notified of the plaintiff's accident by letter dated 10th September, 1999 from a firm of accident consultants namely Aaran and Carroll and Co. The defendant's insurers, Church and General Insurance plc, by letter dated 28th September, 1999 denied liability for the plaintiff's accident.

The plaintiff's solicitors became involved in this matter in June 2001, and by letter dated 23rd July, 2001, the firm of Donal Reilly and Collins, solicitors, wrote to the insurance company for the defendant informing them that they now acted on behalf of the plaintiff and asked the defendant's insurers to nominate a firm of solicitors to accept service of proceedings. A and L Goodbody, solicitors, were nominated to act on behalf of the defendant herein. A plenary summons was issued on 10th August, 2001, and a statement of claim was delivered on 12th February, 2002. The solicitors for the defendant entered an appearance to these proceedings on 14th February, 2002, and thereafter particulars were raised on behalf of the defendant on 6th March, 2002, replies were delivered on 11th April, 2002, a notice for further and better particulars was raised on 26th April, 2002, a defence was filed on 6th June, 2002, and replies to further and better particulars were delivered on 11th June, 2002. Various other steps have been taken in the proceedings culminating in the issue of a notice of motion by the defendant on 20th June, 2008, in which the following relief is sought:

> "1. An order dismissing the plaintiff's claim on the grounds that the plaintiff has failed to prosecute it within the time provided by the Rules of the Superior Courts or within any reasonable time or at all. In particular, the plaintiff (sic) will rely upon the provisions of Order 36, Rule 12 and Order 122, Rule 11.
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> 2. An order dismissing the plaintiff's claim on the grounds that it discloses no reasonable cause of action.
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> 3. An order dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in prosecuting her claim."

No complaint is made as to the conduct of the proceedings between the time of issue of the plenary summons and the close of pleadings. However, complaint is made as to the conduct of the proceedings since the pleadings have closed and the defendant has also complained as to the pre-commencement delay in this case.

It would be helpful to set out the matters that have taken place in the proceedings following the delivery of the replies to the notice for further and better particulars delivered here in on 11th June, 2002. The solicitors for the defendant wrote to the plaintiff's solicitors by letters dated 24th June, 2002, and 31st July, 2002, seeking voluntary discovery. This was a process which culminated in an order for discovery made herein on the 4th November, 2005. An affidavit of discovery was filed on behalf of the plaintiff on the 15th December, 2005. It is difficult to understand how the process of discovery could have taken so long to complete in a straightforward "slip and fall" case.

After the completion of the plaintiff's discovery, it seems that nothing further happened in the proceedings until 24th January, 2007, when the plaintiff's solicitors requested that the defendant make voluntary discovery. Terms of voluntary discovery were agreed on 16th April, 2007 and an affidavit of discovery was sworn on behalf of the defendant on 28th June, 2007.

A letter was written on 26th February, 2008, by the solicitors for the defendant complaining of delay and threatening a motion to dismiss for want of prosecution. A reply was received by letter dated 5th May, 2008 referring to the service of a notice of trial on receipt of an engineer's report. An inspection of the defendant's Hospital at the site of the accident took place on 28th January, 2008. The inspection took place after protracted correspondence between the parties which commenced with the letter of 16th April, 2007, from the plaintiff's solicitors to the defendant's solicitors. Eventually, it was necessary for the party's engineers to liaise to agree a suitable date. It is difficult to see why this process took so long to arrange, particularly as the defendant agreed to facilitate an inspection by letter dated 19th July, 2007.

On 5th March, 2008, a letter was written by the plaintiff's solicitor requesting particulars arising out of the defence and a reply was furnished by letter dated 16th April, 2008.

Finally, by letters dated 9th June, 2008, and 17th June, 2008, the plaintiff's solicitor requested the defendant's solicitor

consent to these proceedings being remitted to the Dublin Circuit Court. By letter dated 4th June, 2008, the defendant's solicitors had written to the plaintiff's solicitors informing them that, owing to the prejudice suffered by the defendant they would apply to have the plaintiff's claim dismissed for want of prosecution on the grounds of inordinate and inexcusable delay. The motion herein was issued on 20 June, 2008.

There was little dispute between the parties during the course of the submissions as to the applicable law. I was referred to the decisions of the Supreme Court in the cases of *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, *Stephens v. Paul Flynn Ltd* [2008], (Unreported, Supreme Court, 25th February, 2008), *Desmond v. M.G.N. Limited* (Unreported, Supreme Court, 15th October, 2008), and *Gilroy v. Flynn*, [2005] 1 I.L.R.M. 290.

During the course of the hearing before me, Counsel on behalf of the plaintiff conceded that this was a case in which there had been inordinate and inexcusable delay on the part of the plaintiff in the prosecution of this case. Given that the proceedings commenced in 2001 in relation to an accident alleged to have occurred in 1998 and that no excuse of any kind is proffered in the affidavit sworn herein on behalf of the plaintiff to explain the delay on the part of the plaintiff, this was an entirely appropriate concession.

In the course of his judgment in the case of *Desmond v. M.G.N. Limited*, referred to above, Geoghegan J. at p. 2 of his judgment commented as follows:

> "The second matter on which I wish to comment relates to the views expressed by Kearns J. in his judgment that the jurisprudence well-established by two Supreme Court decisions in relation to when an action should be struck out for delay have somehow now to be modified having regard to the European Convention on Human Rights incorporated into domestic law by the 2003 Act. This view which has been expressed in one or two other judgments exclusively derives, as far as I am aware, from the dicta of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, as set out in the judgment of Kearns J. On my reading of that case, these dicta can be regarded as *obiter dicta*. Macken J. in her judgment, expresses the view with which I fully agree that the basic principles as set out in *Rainsford v. Limerick Corporation*, [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, remain substantially unaltered. I do not think that the case law of the Court of Human Rights relating to delay justifies reconsideration of those principles or in any way modifies those principles. I do not know of any relevant case of the Court of human rights dealing with when an action should be struck out for delay.
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> The dicta of Hardiman J. to which I have already referred indicate that his view is that application of those principles should now change or indeed that the principles themselves might have to be '*revisited*'. I am not convinced that that would be either necessary or desirable. It would seem to me that those principles have served us well. Unless and until they are altered in an appropriate case by this Court, I think that they should still be treated as representing good law and in that respect, I entirely agree with Macken J."

Given the clear views expressed by Geoghegan J. which are in agreement with those of Macken J. in the judgment referred to above, it is clear that in considering the application of the defendant herein I should have regard to the principles set out in the cases of *Rainsford v. Limerick Corporation* and *Primor plc v. Stokes Kennedy Crowley*.

In the case of *Primor* referred to above, in a well known passage often quoted from the judgment in that case, Hamilton C.J. commented as follows:

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows-
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> (a) The courts have an inherent jurisdiction to control their own procedure and to dismiss the claim when the interests of justice require them to do so.
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> (b) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof that the delay was inordinate and inexcusable.
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> (c) Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case.
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> (d) In considering this latter obligation the court was entitled to take into consideration and have regard to
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> (i) the implied constitutional principles of basic fairness of procedures
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action.
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> (iii) Any delay on the part of the defendant -- because litigation is a two-party operation, the conduct of both parties should be looked at.
>
> (iv) Whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay.
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> (v) The fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not in law constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike up the claim, the weight be attached to such conduct depending upon all the circumstances of the particular case.

(vi) Whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant.

(vii) The fact that the prejudice of the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business."

Having regard to those principles and bearing in mind the concession by the plaintiff that the delay herein has been both inordinate and inexcusable, it follows that the court must exercise a judgment on whether on the facts of this case the balance of justice is in favour of or against the proceeding of the case. In the context of this case, it is necessary to look at the prejudice to the defendant and the issue of acquiescence. It is also necessary to bear in mind the obvious prejudice to the plaintiff that would result from a decision to strike out the proceedings.

In the grounding Affidavit sworn herein on behalf of the defendant, Kevin Power, solicitor, deposed to the fact that the plaintiff in replies to particulars dated the 11th April, 2002, pleaded that she notified the alleged accident to a cleaning woman on the day it occurred. He went on to say that the defendant has not and never had any record of the plaintiff reporting the alleged accident to any member of staff within the hospital. At the time of the alleged accident, two cleaners, Sadie Byrne and Ann Mulhall, were on duty in the general area in which the plaintiff allegedly slipped and fell. Ms. Mulhall and Ms. Byrne have no recollection of the day in question which is now more than ten years ago. Undoubtedly that is a cause of concern to the defendant. It is important to bear in mind however that the defendant was first notified as to the occurrence of an accident by a letter dated 10th September, 1999, and of the plaintiff's intention to claim compensation arising from the accident. That letter was from Aaran and Carroll & Company as referred to previously and stated as follows:

"Re: Our client Patricia Rooney

Fall at Coombe 18th of August 1998

Location outside Doctor Fitzpatrick/Margaret Boyle Clinic

(Downstairs)

Dear Sir,

We act on behalf of the above named who was involved in an accident at your premises on the above said date. Our client was caused to fall on the wet floor when she had exerted the above mentioned clinic…"

The defendant's insurers replied to that letter with a denial of liability on 28th September, 1999.

There was a delay of some thirteen months in notifying the defendant of any potential claim. In his subsequent affidavit, Kevin Power complained that the defendant was not aware of the exact nature of the plaintiff's accident until the delivery of the statement of claim on 12th February, 2002 and was not aware that the plaintiff had allegedly reported the accident to any member of the hospital staff until 11th April, 2002, when that information became available in replies to the notice for particulars. I accept that the defendant was not aware that the plaintiff allegedly notified a member of the cleaning staff of the defendant of her accident on the date of its occurrence. However, following the receipt of the letter of 10th September, 1999, from the plaintiff's representatives, the defendant was in a position to make enquiries from its staff and its records as to whether any accident had been notified to them or had occurred and it is clear that within a relatively short period after receipt of that letter, the defendant's insurers were in a position to deny liability. I take it to be the case that the defendant did not discuss the matter with Ms. Mulhall or Ms. Byrne until after the receipt of the replies to particulars of the 11th April, 2002. It is clear that when Ms. Mulhall and Ms. Byrne were contacted about the plaintiff's incident, they had no recollection of any accident. It does not seem to me that any prejudice flows to the defendant in respect of the lack of recollection of Ms. Mulhall and Ms. Byrne by reason of the delay in the prosecution of the plaintiff's claim. The lack of recollection referred to has presumably been in existence since Ms. Byrne and Ms. Mulhall were first contacted by the defendant. During the course of submissions, counsel on behalf of the defendant referred to a passage in the case of *Stephens v. Paul Flynn Limited* where Kearns J. noted at p. 4 as follows:

"In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution."

Relying on that passage, counsel on behalf of the defendant submitted that all that was required to be shown was that there was a moderate degree of prejudice suffered by the defendant. It does not appear however that the defendant in this case is in any worse position to deal with the case now than it would have been had the case been dealt with in 2002. To that extent, I am satisfied that the level of prejudice contended for by the defendant herein is of little significance.

I want to deal briefly with the issue of acquiescence. Following the completion of the plaintiff's discovery, the proceedings became dormant for a period of time. Then, in January 2007, the proceedings became active again with a series of steps initiated by the plaintiff. Discovery was sought from the defendant; a request was made for inspection facilities and a notice for particulars was raised in respect of the defendant's defence. Some criticism could justifiably be made in respect of the timing of these steps. All of them could have been taken at an earlier stage in the proceedings. However, the defendant responded to all of these matters. The plaintiff has contended that by so responding, the plaintiff was encouraged to continue with the proceedings and to engage in further expense in relation to the proceedings.

There is no doubt that the defendant in this case has dealt with the issue of its own discovery and the replies to particulars raised in respect of its defence efficiently and expeditiously. There was some delay in relation to facilitating the inspection of the defendant's Hospital and I have already referred to that above. It is clear from the principles set out in the *Primor* decision that delay on the part of the defendant and the conduct of the defendant may be relevant factors to be borne in mind on an application to dismiss for want of prosecution. I find it somewhat surprising that when the plaintiff sought discovery from the defendant in January 2007 consideration was not given at that stage to an application to dismiss for want of prosecution. The proceedings were then six years old. The accident, the subject matter of the proceedings, had occurred nine years earlier. Instead, the defendant engaged with the plaintiff in dealing with the discovery sought. Later, after the defendant had first threatened a motion to dismiss for want of prosecution in February 2008, the plaintiff raised a notice for particulars, as mentioned before, in relation to the defendant's defence and replies were furnished to that notice for particulars. In those circumstances, it seems to me that the defendant has by its conduct lulled the plaintiff into a false sense of security such that the plaintiff was not impressed with any sense of urgency in relation to the proceedings. I am not entirely sure whether that conduct on the part of the defendant could be classed as acquiescence but it is certainly the case that the defendant delayed in bringing an application to dismiss for want of prosecution and during that period of delay, the plaintiff incurred further expense in conducting the litigation, albeit without a sense of urgency.

Given these circumstances and having regard to the facts of this case I am not satisfied that it would be unfair to the defendant to allow the action to proceed. On the contrary, I am satisfied that it would be unjust to the plaintiff to strike out the proceedings. Accordingly, I am refusing the relief sought herein.