Neutral Citation: [2014] IEHC 7

THE HIGH COURT

Record Number: 2004 No. 17040P

Between:

Vincent Byrne

Plaintiff

And

Owen Martin

Defendant

Judgment of Mr Justice Michael Peart delivered on the 15th day of January 2014:

1. The plaintiff has made an application to renew a Plenary Summons which was issued by his then solicitor on the 21st July 2004 in order to recover damages for personal injuries which he sustained as a result of the alleged negligence of the defendant on the 26th August 2002. That application is necessary because his solicitor did not serve the summons within 12 months of the date of issue. Given the delays involved since these injuries were sustained, the Court, on the ex parte application by the plaintiff, directed that the application be brought on notice to the defendant.

2. No effort to serve the summons was made during that 12 month period, although on the 12th January 2005 a copy of the summons was sent to Quinn Direct, who was the insurer nominated by the Motor Insurers' Bureau, to handle the claim. But, while this is a matter which the Court is asked to take into account on the present application, it is correctly not suggested that it constituted an attempt to serve the summons.

3. Accordingly, it is necessary for the plaintiff to satisfy this Court that in all the circumstances which have occurred there is "other good reason" why the Plenary Summons should be renewed so that he can continue his claim for damages.

4. In his grounding affidavit the plaintiff has stated that shortly after this accident in August 2002 he consulted John Carr, solicitor, then of Messrs. Blake & Kenny solicitors in Galway with a view to recovering damages for his personal injuries. He goes on to say that on the 13th November 2002 the defendant was prosecuted for driving without insurance on the occasion of the accident, and that on the 19th March 2003 Mr Carr wrote to the Motor Insurers' Bureau giving it formal notice of a claim under the MIBI Agreement, after which the latter furnished a questionnaire which was completed and returned to MIBI on the 15th May 2003.

5. The plaintiff goes on to state that on the 22nd July 2003 MIBI confirmed to Mr Carr that it was nominating Quinn Direct to deal with the claim, and that all further correspondence should be addressed to them. On the 8th October 2003 Quinn Direct write requesting that the plaintiff attend for a medical examination on the 21st October 2003. The plaintiff attended for that examination. He had also by time attended his own GP and Orthopaedic Surgeon and they had provided medical reports to his solicitor, John Carr.

6. A Plenary Summons was issued on the 21st July 2004. As I have already noted, a copy of this Plenary Summons was sent to Quinn Direct on the 12th January 2005. But it is not suggested that this constituted service of the summons on the defendant – merely that at least the insurers were aware that proceedings were in being. MIBI is not a named defendant.

7. It appears that around January 2005 Mr Carr left Messrs. Blake & Kenny and joined the firm of William Davis & Co, and the plaintiff was asked to sign an authority to permit his files to be transferred to that firm. It appears that it was not until October 2005 that the file in this case was transferred. By that time of course, the period of 12 months for service of the Plenary Summons had already expired.

8. In more recent times only has the plaintiff learned that in February 2005 Quinn Direct nominated Messrs. C.P. Crowley & Co, solicitors to accept service of the Plenary Summons. However, no explanation for why the summons was not served on that firm has been provided. The defendant does not know why, and had assumed at all times that Mr Carr was looking after his case properly.

9. However, C.P. Crowley & Co wrote to Mr Carr on the 16th January 2006 requesting that the plaintiff attend for examination by Desmond Mackey, Trauma and Orthopaedic Surgeon. The plaintiff attended for that examination. As I have said, the plaintiff at all times since this accident believed that his claim for damages was proceeding satisfactorily towards either trial or settlement.

10. In March 2013 the plaintiff discovered the true position, namely that his Plenary Summons had never been served by Mr Carr, whereupon he consulted his present solicitors, Holmes O'Malley & Sexton in Limerick. In July 2013 Counsel on his behalf moved an *ex parte* application to renew the summons, and the Court directed that the application be brought on notice to the solicitors acting for the defendant in view of the passage of time since the accident is alleged to have occurred, and the length of the delay since the date of issue of the summons..

11. The plaintiff in his grounding affidavit states that he will suffer serious prejudice if his proceedings are not renewed, as his action is now statute barred, and he would be deprived of the opportunity of pursuing what he says is a good claim for damages for personal injuries. He accepts that the accident happened over ten years ago, but points to the fact that the MIBI was on notice of his claim from early in 2003, and in fact had him medically examined on two separate occasions, once in October 2003 and again in February 2006. He refers also to the fact that a copy of his Plenary Summons was sent to Quinn Direct acting for MIBI in January 2005 which was within twelve months from the date of issue. In such circumstances he submits that the defendant will not suffer prejudice from the delay in having the proceedings served and any renewal of the Plenary Summons.

12. On the other hand, Darragh Ryan, solicitor, of C.P. Crowley & Co, solicitors acting for the defendant resists the plaintiff's application to renew, and has filed an affidavit in reply to that of the plaintiff. He refers to the fact that the accident happened eleven years ago at this stage, and says that it is irrelevant that a copy of the summons was sent to Quinn Direct in January 2005 where that was not an act constituting service of the proceedings. Instead, Mr Ryan deposes that his firm wrote to the plaintiff's

solicitor, John Carr on 9th November 2005 complaining that he had "*still not received your pleading*", and stating that if he did not receive same within 14 days he would presume that the plaintiff was not proceeding with his claim and that his file would be put into storage. He wrote a further letter on the 28th February 2006 which, having referred to previous correspondence, stated as follows:

> *"I haven't received same [i.e. pleadings] to date. If a Plenary Summons has issued in respect of this it doesn't appear that it was ever served. Please note that because of the delays to date in relation to this case, I submit that we are prejudice (sic) in the defence thereof and we will be objecting to any application to reissuing of Plenary Summons."*

13. Mr Ryan has submitted that the plaintiff has shown no good reason why the summons was not served, and suggests that he cannot identify any good reason as required by Order 8, rule1 RSC since even Messrs. Holmes O'Malley & Sexton in a letter to him dated 10th July 2013 have stated therein that "it is not clear from the file as to why the summons was never served". He suggests that there is no "good reason" identified for the purpose of Order 8, rule 1 RSC, which, it is submitted, is the first hurdle that a plaintiff seeking to come within the rule must establish, before any question of prejudice and balance of justice is required to be considered by the Court.

14. The defendant submits that the fault must lie at the door of the plaintiff's then solicitor, and that the plaintiff has a remedy open to him in that respect. He submits that it would be unjust to renew the summons in such circumstances and where the defendant would be required to defend a claim arising out of an accident which happened eleven years ago, notwithstanding that the defendant's insurers had had the plaintiff medically examined in 2005 and 2006.

15. The defendant points also to the fact that although the plaintiff has averred that he discovered that the summons had not been served only in March 2013, he nevertheless delayed further until July 2013 before first moving an application to the High Court for a renewal of the summons. The defendant refers also to the total absence on this application of any explanation as to why Mr Carr did not serve the summons within 12 months from the date of issue or take any steps to renew the summons thereafter.

16. Counsel for the plaintiff accepts, as he must of course, that a very long delay has occurred. Nevertheless he points to a number of matters which he suggests support the case for a renewal of the summons. Firstly, the fact that the plaintiff is personally blameless for the delay as he was entitled to and did rely on his solicitor; secondly, that the claim will be statute barred if not renewed; thirdly, the defendant's insurer was notified and sent a copy of the summons within the twelve month period for service thereof; fourthly, the defendant's insurer had the plaintiff medically examined on two occasions in 2005 and 2006.

17. Counsel for the plaintiff has sought support for a renewal from the judgment of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 IR.526, which is a case where the fact that a copy of the summons had been sent to the defendant's insurer with a request that they nominate a solicitor to accept service thereof. A couple of months later a firm of solicitors wrote stating that they were instructed to accept service. However, through oversight the plaintiff's solicitor failed to send the summons to that solicitor for acceptance of service. The proceedings had been issued on the 25th June 2002, and it was not until 15th December 2003 that the plaintiff applied *ex parte* for the renewal of the summons. That application was granted. For some reason, even then the summons was not served until March 2004. The defendant's solicitor entered an conditional appearance on the 8th April 2004, but it was not until the end of January 2005 that the application to set aside the order for renewal was brought, by which time the plaintiff had already delivered his Statement of Claim. In that case the defendant did not identify any particular prejudice to its defence of the claim. The learned judge concluded that such prejudice as was asserted by reference to the threat of proceedings hanging over the defendant for longer than it should, ought not outweigh the prejudice which would be caused to the plaintiff if the proceedings were not renewed, as the Statute of Limitations would have expired.

18. One is immediately struck by the difference between the facts of that case and the present one. In the former, the delay between the expiration of the summons and the bringing of the application to renew was about 6 months, whereas in the present case that delay is more like 8 years. This Court must have regard to that difference when considering the reliance placed on the fact that, as in *Chambers v. Kenefick*, the plaintiff's solicitor sent a copy of the Plenary Summons to the defendant's insurer within the period of twelve months from the date of issue of the proceedings. Given the time involved in the present case, I can attach no weight to that feature, since a further eight and a half years of virtual silence on the part of the plaintiff's solicitor passed before matter re-awoke once the plaintiff's current solicitors wrote to the defendant's insurers on the 10th July 2013. It is true that at least the existence of the proceedings came to the attention of the defendant's insurers. However, in the present case the defendant's solicitor wrote to Mr Carr in November 2005 urging the service of the summons, and again in February 2006 when they stated that they would object to any application to renew the summons. Still nothing happened. In fact, another seven years passed without interaction between the plaintiff's solicitor and the defendant's solicitor. Indeed there is no evidence from the plaintiff that during those years he made any inquiries of Mr Carr as to how his case was proceeding, or made any complaint about what, even to a lay person, must have seemed like an extraordinary delay in getting a relatively simple case disposed of.

19. I consider that given the length of the delay in this case, which is unexplained other than by the plaintiff saying that he presumed that his claim was proceeding towards settlement or trial, and had no reason to believe otherwise, there has been no good reason shown as to why this summons should be renewed. That is the first obstacle which a plaintiff must establish if the Court is then to consider whether in the light of the good reason shown it is nevertheless in the interests of justice necessary to refuse to permit a renewal. Issues of prejudice to the defendant then arise for consideration, and those require to be balanced against the possible prejudice to the plaintiff in the event that his proceedings are not renewed. Finlay Geoghegan J. in *Chambers v. Kenefick* was satisfied that good reason to renew the summons in that case had been shown on the facts in that case. But in the present case there is no evidence as to the reason why the summons was not served. There is no affidavit from John Carr for example. Neither is the plaintiff able to explain the reason. His present solicitors say that there is nothing on the file which provides an explanation. The inference therefore is that the plaintiff's then solicitor negligently overlooked doing so despite reminders from the defendant's solicitors, and the nomination of solicitors to accept service. On the basis of the facts as known at this stage, the plaintiff's remedy in this situation is against the solicitor. His remedy is not to be found by obliging the defendant to defend the claim at the remove of at least eleven years post-accident. That in my view would be manifestly unfair, and would set at nought the defendant's rights in the matter.

20. I therefore refuse this application to renew the Plenary Summons.