Neutral Citation Number: [2009] IEHC 272

THE HIGH COURT

2002 3572 P

BETWEEN/

FRANCES KEARNS

PLAINTIFF

AND

ROCHES STORES

DEFENDANT

JUDGMENT of Mr Justice Cooke delivered on the 18th May, 2009.

1. By order of 17th May, 2004, made by Peart J. pursuant to O. 8, r. 1 of the Rules of the Superior Courts, the plenary summons in this action, which had been issued from the Central Office of the High Court, on 6th March, 2002 but not served, was renewed for a period of six months, that is, until 16th October, 2004.

2. The renewed summons was apparently delivered to the offices of Messrs. O'Flynn Exhams, the solicitors nominated to accept service on behalf of the defendant on 18th May, 2004, but the firm declined to accept service as the summons did not bear the impressed stamp of the date of renewal as required by O. 8, r. 1.

3. The plaintiff's solicitors then purported to serve the summons by registered post at the registered office of the defendant (an unlimited company) on 11th October, 2004, although the summons still did not bear the renewal stamp.

4. A conditional appearance was entered on behalf of the defendant and the present application is now brought pursuant to r. 2 of O. 8 to set aside the renewal of the summons by the order of 17th May, 2004.

5. There can be no doubt but that this action has been characterised by quite exceptional delay on the part of the plaintiff when it is realised that its claim for damages for personal injuries arises out of an accident which it is alleged the plaintiff sustained in the defendant's department store on 27th July, 1983 – over a quarter of a century ago – when she was aged two years and four months.

6. The plaintiff attained the age of 18 years on 12th March, 1999, so the issue of the plenary summons on 6th March, 2002, took place only a few days short of the third anniversary of that birthday.

7. No attempt was apparently made to serve the summons in the following year and it expired on 5th March, 2003. In an affidavit sworn by Mr. Raphoe Collins of the plaintiff's current solicitors Messrs. O'Rourke Reid on an unspecified date (but filed on 4th May, 2004), to ground the *ex parte* application to renew the summons, reference is made to the fact that, according to the file which that firm took over from City Gate Law, the plaintiff's previous solicitors, the summons had been delivered personally to the assistant general manager of the defendant on 6th March, 2003 at the department store in Dublin.

8. Again by reference to the file, the plaintiff's solicitor claims that on 17th July, 2003, the defendant's insurers had nominated the firm of Messrs. O'Flynn Exhams to accept service of the proceedings on its behalf. By letter dated 18th July, 2003 the latter firm confirmed their instructions and asked for a series of details relating to the accident and the claim. No reply was received from City Gate Law to that letter but, having apparently learned of the change of solicitors which had taken place in July 2003, they wrote forwarding a copy of the letter and repeating the request for the information on 23rd September, 2003. A reply giving the information was sent to O'Flynn, Exhams & Partners on 30th January, 2004.

9. It appears that it was at this point that it was realised that any service purported to have been effected on 6th March, 2003 was out of time and ineffective and accordingly, it was not until fourteen months after the expiry of the summons that an application was made *ex parte* to Peart J. for its renewal.

10. Under O. 8, r. 1 an expired summons may be renewed by the court when it is satisfied that the plaintiff has shown that "reasonable efforts have been made to serve the defendant" or that "for other good reason" the summons ought to be renewed. As the affidavit grounding the *ex parte* application makes no reference to any attempt to serve the summons during the year following its original issue from the Central Office, it must be assumed that the order of 17th May, 2004 was based upon some "other good reason" – presumably the fact that the summons had been delivered to the department store one day late. Not surprisingly, therefore, when they learned that the summons had apparently been renewed (if not yet properly served,) the defendant's solicitors wrote on 22nd and 24th September, 2004, asking to be furnished with a copy of the affidavit grounding the *ex parte* application for renewal together with any exhibits or documents referred to therein.

11. It must be a matter of surprise, therefore, having regard to the long delays that had already occurred and the difficulties that had been experienced in effecting service, that no response was made to either of those letters and (apart from the attempt to serve the summons by registered post on 11th October, 2004) no further step was taken on the part of the plaintiff in the proceeding until the defendants' solicitors wrote once more to the plaintiff's solicitors on 8th October, 2008 pointing out that the service by registered post effected on 17th November, 2004 was outside the period of six months from the renewal and therefore ineffective. The letter also pointed out that the earlier letters had received no reply and no copy of the grounding affidavit and exhibits had been furnished. They wrote again to the plaintiff's solicitors on 17th October, 2008 in similar terms and again demanded a copy of the affidavit.

12. Showing no sense of discomfort at the inactivity in the proceeding on the plaintiff's side in the intervening years, the plaintiff's solicitors replied to these letters on 20th October, 2008, by adopting a robust stand on the demand for a copy of the grounding affidavit as follows:-

> "We are at a complete loss to understand your insistence upon inspecting the affidavit of Raphoe Collins grounding the *ex parte* application to renew the plenary summons. We cannot see how you can insist upon it in circumstances where you failed to respond to our calls to enter an appearance on behalf of your client, the defendant herein. As a result of such we are left with no option but to correspond directly with the defendant and we are perfectly entitled to act in this manner."

The letter warned that judgment would now be marked against the defendant in default of appearance.

13. This difficulty in understanding could, of course, have been cured by a perusal of r. 2 of O. 8 which expressly provides that where a summons has been so renewed on an *ex parte* application, "any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside" the renewal order. It is only by consulting the grounding affidavit that the defendant can assess what reasonable efforts at service or "other good reason" were relied on and whether an application to set aside might be justified.

14. On 28th January, 2009, a conditional appearance was entered on behalf of the defendant and the present motion was then brought.

15. Although the history of this proceeding has been set out above in order to give the context in which the present application has been brought, it is important to note that this is not an application to dismiss the action for want of prosecution either under the relevant orders of the Rules of the Superior Courts or under the inherent jurisdiction of the court not withstanding the inordinate delay that has obviously occurred even since the plaintiff attained her majority in March, 1999. Although the length of delay which has occurred combined with any resulting prejudice to the defendant are factors that can be taken into account upon an application to set aside under r.2, the primary issue before the court is, in effect, the issue as to whether there was "other good reason" which justified the renewal of the summons.

16. A defendant is not precluded from moving subsequently to dismiss the action for want of prosecution on grounds of inordinate delay and prejudice to the defendant once an unconditional appearance has been entered. The essential issue which the court must decide on an application under r. 2 is whether, having regard to all of the information now placed before the court and particularly that now offered on behalf of the defendant there is still "other good reason" for renewing the summons or whether, if any additional information had been before the court on the making of the *ex parte* application, it is satisfied that the order would not have been made.

17. This is a case in which, if the renewal of the summons is set aside, the plaintiff's claim will be statute barred. In that regard, the Court agrees with the approach suggested by O'Neill J. in *O'Grady v. Southern Health Board* [2007] 2 I.L.R.M. 51, where he says:-

> "In the light of all this, in my view, this court on an application under O.8, r.2. should not refuse to renew, where the case would otherwise be statute-barred, unless the defendant demonstrates to the satisfaction of the court, the clearest possible case of actual prejudice, such that his defence to the claim has been in actual terms substantially impaired."

18. On behalf of the defendant the point is made that as it is 25 years since the alleged accident the recollections of parties involved and any witnesses must inevitably be affected by the delay. Indeed, the possibility of correctly identifying witnesses and then making them available must be highly questionable at this stage. On behalf of the plaintiff, the element of prejudice to the defendant is sought to be discounted by pointing out that the full medical records in relation to the plaintiff's treatment after the accident are available.

19. The accident out of which the claim arises apparently occurred when the plaintiff as an infant fell on an escalator in the department store while in the company of her grandparents. So far as the accident itself is concerned, the point made on behalf of the defendant is obviously of considerable substance. It is not known at this stage if it is to be alleged that the escalator was in any way defective and if so whether that same escalator still exists to be examined, if necessary. It would be furthermore quite understandable if the plaintiff herself has little if any accurate recollection of the accident happening.

20. The court considers, however, that these are issues that are more properly left to a more detailed examination when the full basis of the plaintiff's claim is pleaded and the defendant has an opportunity of moving to dismiss the claim upon grounds of gross delay and prejudice. So far as those factors are concerned, having regard to the fact that the major delay is that between the date of the accident and the plaintiff's attaining 18 years of age, the position of the defendant does not appear to be materially different now as compared with its position had the summons been served within the twelve months following its issue on 6th March, 2002.

21. In spite of the very considerable delays that have occurred and the casual attitude adopted by the plaintiff's solicitors towards compliance with the rules of court governing effective and timely service of proceedings, it can at least be said that the defendant was alerted to the threat of the claim by the letter of 26th February, 2002 and that it had placed itself in a position to deal with the claim by nominating solicitors for the purpose in July, 2003. The additional facts placed before the court by the defendant on this application do not materially alter the position as it was on the *ex parte* application. The only new facts so indicated post-date this renewal of the summons namely, the rejection of service of the summons as renewed on 18th June, 2004, and the alleged defectiveness of the service by registered post in October, 2004.

22. For theses reasons the application to set aside the order renewing the summons of 17th May, 2004 will be refused.