Neutral Citation Number: [2011] IEHC 156

THE HIGH COURT

2004 17316 P

BETWEEN:

SINEAD GANNON

PLAINTIFF

AND

THE MINISTER FOR FINANCE

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 14th day of March 2011:

On the 21st July 2004, the plaintiff commenced these proceedings by way of Plenary Summons in order to bring her claim for damages for personal injuries and other loss suffered by her on the 25th May 2003 whilst she was a passenger in a Garda patrol car. She was a member of An Garda Siochána at that date, but from her affidavit grounding this application for an extension of time to renew this Plenary Summons and for an order for renewal, she is now retired from that employment.

The date of issue of these proceedings happens to be the last day on which personal injury claims could be pursued without having to first lodge a claim with the Personal Injuries Assessment Board, and, indeed, the plaintiff in her grounding affidavit has stated that her then solicitor explained to her in August 2004 that a Plenary Summons had been issued "in order to beat the Personal Injuries Assessment Board".

Nonetheless for whatever reason, and it is not clear at all, this Plenary Summons was never served on the defendant either within one year of its issue, or indeed thereafter. No attempt at such service was made, and therefore if this Court is to permit a renewal of the Plenary Summons under the provisions of Order 8 of the Rules of the Superior Courts, it must be satisfied that there is some "other good reason" why a renewal should be permitted – in other words some other good reason besides reasonable attempts at service having been made.

Nothing appears to have happened during 2005 except that the plaintiff attended a medical appointment for the purposes of a medical report in October of that year. By that date of course the time for service of the Plenary Summons had already expired. The medical report was provided in June 2006. Nothing much occurred until well into 2007, unless this Court has not been provided with relevant correspondence, and by letter dated 27th July 2007 the plaintiff's then solicitor wrote to her noting that she had been in touch to say that her back pain was continuing, and stating that the defendant was prepared to meet to discuss settlement, but he advised also that matters should be allowed to wait until after she had given birth to the child with which she was then pregnant.

Prior to making this application the plaintiff's current solicitor has been in communication with the defendant's solicitor. They are aware that the defendant is relying on the Statute of Limitations, and would oppose any application to renew the proceedings, and, if necessary bring an application to set aside any *ex parte* order for renewal obtained, pursuant to the provisions of Order 8, rule 2 RSC. That explains why the plaintiff's solicitors notified the defendant's solicitors of their intention to bring this application, and why it has proceeded by way of application on notice, rather than on a purely *ex parte* basis as provided for in Order 8 RSC.

The plaintiff has stated on affidavit that shortly after her injuries were sustained in May 2003 she consulted her solicitor, and it appears that she did so in September 2003, as she was continuing to have problems with her neck, shoulder, arms, back and left hip as a result of this accident. Her medical attendants at that time have provided medical reports to her solicitor from time to time.

Her then solicitor first wrote to the defendant to put them on notice of this claim in November 2003. This correspondence was duly acknowledged and the plaintiff's solicitor was notified that the State Claims Agency would be dealing with the claim and any further correspondence should be addressed to it. That Agency was written to in December 2003, and in due course, while not admitting liability, the Agency set up a medical appointment to have the plaintiff examined by Mr. Nial Mulvihill, Consultant Orthopaedic Surgeon. The Agency wrote an open letter dated 16th March 2004 stating that a medical report had been received and enquiring if at that stage the plaintiff was interested in meeting "with a view to opening without prejudice settlement discussions at the Law Library". That offer was not taken up, and according to the plaintiff's affidavit, this was because her solicitor did not recommend settlement negotiations at that time.

The plaintiff then refers to the report which was obtained from her orthopaedic surgeon in June 2006, and states that in July 2007 her then solicitor wrote to her stating that once again the defendant was willing to enter into negotiations, but that, as I have already mentioned, she was advised that any such negotiations should await the birth of her child.

The plaintiff has then exhibited a letter dated 24th September 2008 from her then solicitor to the State Claims Agency which refers to "our recent telephone conversation", and a copy of the issued Plenary Summons was enclosed, and reference is made to a medical report which has been requested from the plaintiff's General Practitioner which was not then to hand, though I notice that in his letter to the plaintiff dated 27th July 2007 her then solicitor stated that he would telephone the plaintiff when he received a report from her G.P. I am not aware if that report was ever requested or whether it was provided. It is certainly not exhibited on this application.

Tom Daly of the State Claims Agency has sworn a replying affidavit and he has referred to that letter dated 24th September 2008, and states that in fact it was written in response to a letter from him dated 29th August 2008. The plaintiff has referred to that letter and it appears that the State Claims Agency had made the point in that letter that these proceedings were by that time statute-barred. She states that she was not made aware of that correspondence.

By letter dated 25th November 2008, Mr Daly wrote to the plaintiff's the n solicitor stating that he was refusing to accept service of the proceedings as the claim was statute-barred, and he was not prepared to enter into discussions in relation to the claim.

The plaintiff has stated that her previous solicitor had proven difficult to contact in spite of letters which she wrote to him, and that ultimately she had no option but to instruct her present solicitors. Those solicitors appear to have received the plaintiff's file in October 2010. Obviously it was then discovered that the Plenary Summons had not been served within the prescribed period of one year from its issue, and on the 3rd December 2010 the plaintiff's affidavit was sworn in order to mount the present application.

The plaintiff has submitted that the defendant is not prejudiced by the delay in serving the Plenary Summons since it was at all times on notice of the claim and had the plaintiff medically examined by March 2004. It is also submitted that as the plaintiff was a passenger in the defendant's vehicle, liability will not an issue, and that the case will be an assessment of damages only. A draft Statement of Claim has been prepared and has been exhibited.

The defendant has raised an objection to the plaintiff having exhibited certain correspondence between the parties which was clearly marked 'without prejudice'. Mr Daly also states that during 2007 he had no communication or discussions with the plaintiff's then solicitor as suggested by the plaintiff in her affidavit. He also does not recall any telephone conversation with the plaintiff's solicitor in August 2008 or prior to receiving the letter dated 24th September 2008, even though that letter refers to such a conversation, and states that although it is his invariable practice to record such a conversation on his file, there is no such record on his file.

This is clearly a case where the plaintiff entrusted her claim to her then solicitor and was entitled to presume that he was looking after her interests. It is clear also that she was let down by that solicitor, because while a Plenary Summons was issued within three years of the claim arising, the important step of serving that summons was not taken. Furthermore there is no evidence that any effort whatsoever was made to serve the summons, save for a request by letter dated 18th December 2003 to the State Claims Agency to nominate solicitors to accept service of proceedings, which had not of course by that date been commenced. No such solicitor was nominated in subsequent correspondence. This is not a case in which there could have been any difficulty whatsoever in effecting service of the Plenary Summons within the prescribed time. Even after the time had expired for service of the proceedings, the plaintiff's then solicitor took no step to renew the proceedings. Indeed, there is nothing before this Court to indicate that he was concerned in any way about this failure on his part.

The failure to serve the proceedings within time, and also the failure to bring a timely application to renew the Plenary Summons, is entirely the fault of the plaintiff's then solicitor. The plaintiff herself is personally blameless in that regard, and could assume that necessary steps were being taken by her solicitor.

The plaintiff's injuries were sustained almost eight years ago. The State Claims Agency were on notice of the claim from an early stage, and even had the plaintiff medically examined in 2004, but had no reason to believe that any proceedings had been instituted until September 2008 when the plaintiff's then solicitor sent a copy of the Plenary Summons and stated a willingness to enter discussions to settle the claim "prior to making an application to renew the Summons". There had been no communication between the plaintiff's solicitor and the State Claims Agency between March 2004 and September 2008 save for the latter's letter dated 29th August 2008 stating that since the claim was by then statute-barred their file was being closed. Whether the plaintiff has a claim in negligence against her former solicitor is not something upon which this Court can speculate. That solicitor is not a party to the present proceedings and has not been heard. The possibility of such a claim cannot is not relevant to this Court's decision.

A similar situation arose in *Kerrigan v. Massey Brothers (Funerals) Limited and Another*, (Unreported, High Court, 15th March 1994). In that case, an accident occurred in February 1986. The plaintiff's solicitor notified a claim for damages about a month later, and correspondence ensued over the next twelve months or so, and in June 1987 the defendant arranged for the plaintiff to be medically examined, but the plaintiff failed to attend. In May 1989 the defendant's insurers wrote stating that they were closing their file in the matter. Some three years later in August 1989 another solicitor wrote to the insurers indicating an intention to proceed with the claim, but it was not until the end of 1992 that the defendant was notified that proceedings had been instituted in 1989.

In order to succeed on this application the plaintiff must show some good reason why an order should be made to renew the summons thereby reviving the plaintiff's claim. The only reason which can be put forward in that regard is the plaintiff's own lack of culpability for the delay, and the prejudice which she will suffer by not being able to pursue her claim for damages, given that her claim is statute-barred. That of itself is not a reason for granting the order sought. But an order for renewal could be seen as an injustice to the defendant who is entitled to rely on the statute, and as stated by O'Flaherty J. in *Roche v. Clayton* [1998] 1 I.R. 596 at page 600:

> "It is not a good reason in light of *O'Brien v. Fahy* [unreported, Supreme Court, 21st March 1997] to renew a summons simply to prevent the defendant from availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."

Roche v. Clayton was also a case where the plaintiff's solicitor had failed to serve proceedings within time.

In *Kerrigan v. Massey Brothers (Funerals) Limited and another*, Geoghegan J. stated that the fact that the plaintiff's claim was statute-barred was not determinative, but was a factor to be weighed in the balance when considering where the justice of the situation lay. Having referred to *Baulk v. Irish National Insurance Company Limited* [1969] I.R. 66 and *McCooey v. Minister for Finance* [1971] I.R. 150, he stated:

> "It is implicit in the Court's reasoning in both cases that the respective defendants could not have reasonably believed that the intention to sue had been abandoned. But in this case the defendant were entitled to make that assumption and close their file having regard to the conduct of the plaintiffs. In my view, the defendants in this case went out of their way to facilitate the plaintiffs' processing of their claims and behaved impeccably. Accordingly, a renewal of the Plenary Summons is an injustice to the defendants and I believe that had all the facts been before Carroll J. she would not have made the order which she made. The question of prejudice does not arise. Independently of whether the defendants would be prejudiced or not, there is no "good reason" within the meaning of the rule for renewing the summons."

Similarly in the present case there is no "good reason". The defendant has not claimed any particular prejudice by the delay, but it is clear from the remarks of Geoghegan J. that such a consideration does not arise until such time as the plaintiff has come within the provisions of Order 8 rule 1 RSC by demonstrating some such "good reason". The defendant was at all times willing to discuss the plaintiff's claim with a view to settlement, but were never made aware that proceedings had been commenced until September 2008. Even after that date there was gross delay by the plaintiff's then solicitor in seeking to renew the summons, which is unexplained other than by the plaintiff stating that she personally is not culpable in that regard.

In all the circumstances of this claim, I believe that justice requires that the application to renew the Plenary Summons should be refused.