Neutral Citation Number. 2006 IEHC 314

THE HIGH COURT

Record Number: 2004 No. 4583P

BETWEEN

HELEN DAVERN

PLAINTIFF

AND

HEATHER HENEGHAN AND THERESE HENEGHAN

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 13th day of October 2006

1. In these proceedings the plaintiff claims damages for personal injuries which she received as a result of a collision when a vehicle being driven at the time by the second named defendant collided with the rear of her vehicle. The first named defendant owned the vehicle. This accident happened on the 30th May 2001, about two years and eleven months prior to the commencement of these proceedings on the 15th April 2004. Those proceedings were not served on the defendants within the twelve months permitted for doing so under the Rules of the Superior Courts, 1986 (hereinafter referred to as "the Rules" or "RSC")) and this is therefore an application by the plaintiff to renew the summons pursuant to O.8, r.1 RSC. By letter dated 16th June 2005 the defendants' solicitors who had been in correspondence with the plaintiff's solicitors asked to be put on notice of any intended application to renew the summons, and this was done, so that when the application came before me for renewal, counsel for the defendants was present and he opposed the application. While strictly speaking the application for renewal is an ex parte application by the plaintiff at which the defendants have no entitlement to heard under the terms of O.8, r.1 RSC, there seems to be no objection in principle to the defendant being heard, especially given the provisions of O.8, r.2 RSC which gives the defendant an opportunity to apply to have an order made ex parte under O.8, r.1 set aside.

2. I will return to that series of correspondence between the plaintiff and defendants' solicitors in due course.

3. In his grounding affidavit the plaintiff's solicitor refers to the fact that in this accident the plaintiff, who was aged 38 years at the date of the accident, suffered an injury to her back, but that she had suffered a previous back injury in 1987 in a previous accident. He states that he wrote to the plaintiff's general practitioner seeking a medical report, and that "*because the plaintiff's back injury was complicated and continuing, no medical report was forthcoming and the plaintiff was referred to various consultants.*"

4. Some correspondence with doctors and consultants exhibited by the plaintiff's solicitor shows what efforts he made to assemble the medical evidence for the plaintiff's case. I will come to that.

5. However, he goes on to state that on the 20th July, 2001, i.e. some three months following the accident he wrote to both the second named defendant and the insurers of the vehicle involved ("AXA") to notify them of the accident and indicating that they were acting on behalf of the plaintiff, the plaintiff's husband as well as their children. His letter to the second named defendant called for an admission of liability within 7 days, and indicating that unless she did so, his instructions were to commence proceedings without further notice. His letter to AXA outlined details of repairs necessary to the plaintiff's vehicle and enclosed an estimate for repairs in the sum of €1,123.17, and asked AXA to make arrangements to inspect the vehicle, and that details of personal injuries would be provided "at a later date". This aspect of the claim for repairs was settled by AXA in August 2002.

6. On the 30th July, 2001, the plaintiff' solicitor wrote to the plaintiff's G.P, Dr Rowley seeking a medical report. The Court has not been told if there was any response to that request as such, but it appears from other correspondence exhibited that Dr Rowley must have referred the plaintiff to Mr Steven Young, Consultant Neurosurgeon, who in turn referred her to Dr David O'Flaherty, Consultant in Anaesthesia and Pain Control at Portiuncula Hospital. Mr Young reported back to Dr Rowley in July 2002, stating, inter alia, that the plaintiff would not benefit from a microdiscectomy, which could do something for her leg pain but might make her back pain worse. He felt she might benefit from epidural injections – hence the referral to Dr O'Flaherty. Dr O'Flaherty reported to Mr Young in September 2002, stating *inter alia* that he would see the plaintiff again in November 2002 when he might give her an epidural injection.

7. From this correspondence it appears that Dr Rowley also referred the plaintiff in early 2003 to Mr Sean O'Laoire, Consultant Neurosurgeon at the Mater Hospital in Dublin, and he reported back to Dr Rowley both in March 2003 and May 2003. By the latter date the plaintiff had undergone an MRI Scan.

8. In June 2003, Dr O'Flaherty reported back to Dr Rowley that he had given the plaintiff a caudal injection and would consider an epidural injection if she gets no relief. He also referred the plaintiff for nerve conduction studies in view of some ongoing right leg pain. These studies were carried out in July 2003 by Dr Conor O'Brien who reported to Dr O'Flaherty on the 18th July 2003. Dr O'Flaherty reported to Dr Rowley again in August, and November 2003, and on the 16th December 2003 the correspondence exhibited shows that Dr O'Flaherty wrote directly to the plaintiff on the 16th December 2003 in answer to a letter written to him by the plaintiff dated 17th November 2003 and in which the plaintiff appears to have raised some questions.

9. I have set out this detail because it confirms what the plaintiff's solicitor has stated in his supplemental affidavit sworn on the 20th July 2006, namely that he did not receive a reply from Dr Rowley to his request for a medical report. He avers that he met the plaintiff on several occasions during this period of time and that the plaintiff confirmed to him that Dr Rowley had received his request for a medical report but that she was holding off sending one to him "until the matter could be fully investigated." It certainly appears from the correspondence between the doctors and consultants that it was not clear what treatment if any would resolve the plaintiff's difficulties, and that things were taking a considerable time to be dealt with.

10. I should add that in April 2003 the plaintiff's solicitor had written to AXA telling them of the delay in obtaining medical reports. This was after enquiry as to the delay had been made on a few occasions in 2002 and 2003 by AXA. It would appear that AXA had expressed themselves as willing to discuss settlement of the plaintiff's claim. AXA wrote again in September 2003 enquiring if they could discuss settlement. On 17th May, 2004 they again wrote seeking discussions.

11. The plaintiff's solicitor avers also that AXA arranged for the plaintiff to be medically examined in January 2004, and that he arranged for a Plenary Summons to be issued in April 2004 in order to avoid the plaintiff's claim becoming statute barred after the 29th May, 2004. It appears that the plaintiff was able to give to her solicitor all the correspondence which had taken place between the various doctors and consultants, and the plaintiff's solicitor has averred also that on examination of this correspondence it appeared to him that AXA would be unlikely to settle the case without sight of all medical reports from the earlier accident which had taken place in 1987. He therefore set about in May 2004 obtaining the medical reports in respect of the 1987 accident. He wrote to the doctor who had treated the plaintiff in relation to that injury but never received any reply.

12. Importantly the plaintiff's solicitor wrote a detailed letter to AXA dated 21st May, 2004 which was in response to AXA's letter dated 17th May, 2004. In his letter the plaintiff's solicitor noted the willingness of AXA to enter discussions to settle the case and expressed interest in engaging in such discussions at a future date. The letter went on to state that High Court proceedings had been issued in order to protect the claim against the Statute of Limitations, and requested AXA to nominate solicitors to accept service of same.

13. He also set out the names and addresses of all the medical personnel from whom he was then waiting to receive medical reports, and further disclosed the fact that the plaintiff had been involved in a previous accident in 1987 in which a back injury was suffered, and informing them that this claim had been settled for a sum in the region of €40,000. He informed AXA that his own file in respect of that case had been shredded prior to the current accident, and asked whether AXA might be able to obtain details of the 1987 accident by means of insurance company data. He avers also that in his experience it was going to be difficult to settle the present case without these previous records since AXA in all probability would argue that most of the plaintiff's present symptoms resulted from the 1987 accident. He failed to receive any response from AXA in this regard.

14. Following the issue of the summons herein in April 2004, the plaintiff's solicitor again wrote to Dr Rowley, the plaintiff's GP seeking a full medical report on the plaintiff, both in respect the period prior to the present accident and afterwards. He wrote also on the 21st May 2004 to Mr Young, Dr O'Flaherty, Dr Conor O'Brien, Mr O'Laoire, as well as Dr Fintan Regan, Consultant Radiologist who had carried out an MRI Scan in May 2003. He avers also that the plaintiff found it difficult to attend all these consultants for the purposes of the medical reports which he was seeking, and that in spite of reminder letters written in June 2005, he has received only two medical reports, namely from Dr O'Brien and Mr O'Laoire.

15. Apart from this correspondence with the plaintiff's medical advisers in relation to obtaining medical reports, the plaintiff's solicitor had further correspondence with a firm of solicitors acting on their behalf, namely Tormeys, solicitors of Athlone, following the issue of the proceedings in April 2004. It will be recalled that the plaintiff's solicitor had written to AXA by letter dated 21st May 2004 telling them, *inter alia*, about the issue of proceedings and asking that a firm of solicitors be nominated to accept service of same.

16. By letter dated 2nd November 2004 Messrs. Tormeys, solicitors wrote to the plaintiff's solicitors informing them that they were acting on behalf of AXA and they requested that the original proceedings be furnished so that they could endorse their acceptance of service thereon. By the 22nd November 2004 they wrote again seeking the original summons so that they could accept service of same, and they also asked about possible talks to discuss settlement. Again, they wrote a reminder letters on the 11th January 2005, 25th January 2005, 18th February 2005, 21st March 2005 since they had not received the original summons for acceptance of service. The last mentioned letter went on to state that "the delay is prejudicing our client's position". Again there was no response to these requests, and a further letter was written on the 29th April 2005. It was not until the 7th June 2005 that the plaintiff's solicitors wrote a letter finally enclosing the original summons for acceptance of service. They also stated that they would furnish a Statement of Claim "shortly" and that they were still awaiting medical reports. They asked that no motion be issued for six weeks. By letter dated 16th June 2005 Tormeys wrote back pointing out that the original summons no longer remained in force, same having issued more than twelve months previously. They also asked to be put on notice of any application which the plaintiff's solicitors might wish to make to have the summons renewed. The first grounding affidavit sworn by the plaintiff's solicitor to ground the application to renew the summons was sworn over one year later on the 5th July 2006.

17. There is no affidavit filed in opposition to the present application, but Counsel, Declan McHugh BL has appeared at the application in order to oppose same on the grounds of prejudice, though same has not been specified, and Counsel has of course referred to the passage of time from the date of the accident in May 2001, and to the long series of letters written by Tormeys to the plaintiff's solicitors after the proceedings were issued and in which they requested time and time again that the proceedings be served on them. Counsel has submitted that in the light of this correspondence to which there was never any reply or even acknowledgement, there is no good reason shown as to why the summons ought to be renewed. Mr Clarke on the plaintiff's behalf argues that the reason for the non-service of the proceedings was that the plaintiff's solicitor was having difficulties in obtaining sufficient medical evidence in the form of reports from the consultants whom the plaintiff had been attending, as well as trying to resolve the problem about the previous accident in 1987.

18. I presume that the prejudice which the defendants allege is more a prejudice to be implied given the passage of time since the accident, rather than a specific prejudice such as the death of an important witness, for example. Undoubtedly there has been a lengthy passage of time since May 2001. On the other hand this is not a case in which any issue is likely to be raised on liability. Certainly there has been no averment to the effect that liability will be in issue, and from the facts as known it seems unlikely. This in all probability will be an assessment of damages only, and in this regard it is noteworthy that the defendants' insurers have already had the plaintiff examined. It will also be the case that the plaintiffs' medical reports will be made available to AXA should the case go to trial – certainly in respect of any doctor who is to be called on her behalf. This is a case which AXA have repeatedly stated it is anxious to settle. That invitation, while welcomed, has not yet been taken up due to the absence of sufficient medical reports to date. I am satisfied that the defendants' insurers are not prejudiced to any extent in this case by the delay which has occurred. Excepting the unusual failure to respond to the frequent and many requests to serve the proceedings on Tormeys after being requested to do so in November 2004, the plaintiff's solicitor has been diligent in his efforts to secure the necessary medical reports to assist the plaintiff in her claim. He has also corresponded with AXA from July 2001, albeit that at times AXA were anxious to move things along more quickly that the plaintiff's solicitor thought possible given the difficulties he was experiencing in obtaining medical reports. This difficulty with obtaining medical reports seems to have endured even to the present time.

19. However, the plaintiff's solicitor seems by June 2005 to have come to the view that he could no longer keep postponing the service of the summons. It is a great pity that he did not pay attention to the passing of the twelve month period for service and seek a renewal of the summons, if still necessary, before the period actually expired, since by that time the Statute had run. I presume that by June 2005 he had decided that the plaintiff had better get on with the case even in the absence of whatever medical reports were then still outstanding.

20. Since we know that no effort was made between 15th April 2004 and 14th April 2005 to serve the summons, the Court must be satisfied that there is some "good reason" why the summons should be renewed. It is worth noting that by virtue of how O.8, r.1 is worded, it is not a requirement that there be some good reason why the summons was not served within twelve months of issue, but rather there must be some good reason for the Court to grant leave to renew the summons. If it were the former the plaintiff may well have a more difficult task in persuading the Court that it is appropriate to renew the summons, given the many letters from Messrs. Tormeys calling for the service of the summons. Those reminders came regularly and were regularly ignored to the extent that it would be impossible for the plaintiff's solicitor to plead that he simply overlooked serving the summons through mistake or inadvertence.

21. On the other hand, in spite of this glaring oversight in the matter of service of the summons, the plaintiff's solicitor has been

reasonably diligent in his efforts for his client. I am sure this has not been an easy case to get off the ground. Such cases will arise from time to time in the life of any busy solicitor, and I am satisfied that it would be an injustice to this plaintiff, given her solicitor's genuine efforts on her behalf, and the genuine difficulties which he encountered concerning medical reports, to effectively bar her claim on account of an unfortunate lapse in effort since November 2004 when her solicitor was first called upon to serve the proceedings on Tormeys. The mere fact that the Statute has by now expired would not of itself be sufficient to justify renewal of the summons. It was important also that at an early date the defendant's insurers had been put on notice of the claim, and were not prejudiced in any real sense.

22. I so conclude, in spite also of the unfortunate further delay which occurred from June 2005 until this application came before this Court for the first time in July 2006. This application should have been moved at least twelve months sooner. I do not understand why the plaintiff's solicitor was not galvanised into more swift action following the discovery that the summons had expired. The defendants' insurers were certainly entitled to object to this renewal given the many calls they had made upon the plaintiff's solicitor to serve the proceedings, and frankly it is incomprehensible why none of these letters resulted in the proceedings being served.

23. I should add that if there was any chance that the defendants' insurers were actually prejudiced by the delay which has occurred, and none has been shown the inactivity of the plaintiff's solicitor between November 2004 and June 2005 in the matter of service, and the added delay from that date to July 2006 would have tilted the scales very much in favour of refusing to renew the summons, and leaving the plaintiff with whatever other remedy may remain open to her, since the Court would have struggled to find "other good reason" for ordering the renewal as required by the Rules.