DCPI 1885 of 2009

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# PERSONAL INJURIES ACTION NO. 1885 OF 2009

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BETWEEN

###### HUANG NEERACHA Plaintiff

and

OSIM (HK) CO. LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: Deputy District Judge C. Lee in Chambers

Date of Hearing: 28th June 2010

Date of Decision: 28th June 2010

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DECISION

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A. Introduction

1. This hearing is held to consider the Plaintiff’s application to vacate the trial dates fixed in the fixture list and the Defendant’s application to uplift the automatic stay under the Legal Aid Ordinance. At the time of the Plaintiff’s application dated 11th June 2010, she was represented by Messrs. Christine M. Koo & Ip. In this morning, a notice to act in person was filed on behalf of the Plaintiff. As a result of the short notice, the Plaintiff became unrepresented again. Another short notice is a memorandum of notification dated 23rd June 2010 and filed on 25th June 2010 in that the Plaintiff was refused legal aid. This Court received the said memorandum this morning. The said memorandum makes the argument on the uplift of the legal aid stay academic but I am still obliged to make rulings on the Plaintiff’s application to vacate the trial dates and the Defendant’s application to uplift the legal aid stay. The Plaintiff said that she was appealing against the legal aid refusal made on 23rd June 2010.

*B. BACKGROUND*

1. By a letter dated 11th June 2010, the former solicitors for the Plaintiff wrote to the Registrar to vacate the trial dates fixed on 2nd and 5th July 2010 on the ground that the Plaintiff has applied for legal aid and the relevant memorandum dated 7th June 2010 was filed on 10th June 2010. According to section 15 of the Legal Aid Ordinance and Regulation 7A of the Legal Aid Regulations, Cap. 91, there shall be an automatic stay of 42 days until 22nd July 2010.
2. The said letter was placed before me for consideration and I directed this pre-trial review hearing. I also directed the Parties to lodge their written submissions specifically on 3 aspects (i) whether the Plaintiff was late in making application for legal aid, if so, why; (ii) when the case was set down for trial on 7th May 2010, whether the Plaintiff represented to the Master verbally or in writing in the checklist that she had no outstanding matter and she was ready for trial; (iii) whether belated application for legal aid amounts to exceptional circumstance under O.25, r.3 of the Rules of the District Court (“RDC”).
3. The above are also the main issues in this hearing.

*C. DISCUSSION*

1. It is common ground that when the case was set down for trial, the Plaintiff was unrepresented.
2. From the Plaintiff’s affirmation filed on 21st June 2010 and the letter dated 21st June 2010 from her former solicitors, the gist of the Plaintiff’s explanation on the respective issues are: (i) the Plaintiff has been diligently conducting the claim. She has done nothing to delay the proceedings; (ii) when the case was set down for trial on 7th May 2010, she did indicate that “she was not ready for trial pending the arrangement of mediation”. She was impressed that “if mediation fails, then go to trial.”; (iii) the court should be slow to lift the stay, especially if a point of law had to be dealt with by a layman. However, if the court is satisfied that the application for legal aid was an abuse of process, then the court should exercise its discretion to lift the stay. See Her Honour Judge Ng in *Chan Shing Ching v Hong Kong District Security Limited DCPI No. 910 of 2005 dated 10th April 2007*, applying the Court of Appeal’s judgment in *Lee Shiu Ming v Yep Hiap Seng (Hong Kong) Limited, CACV 39 of 1993 dated 14th July 1993).*
3. In this hearing, the Plaintiff also added that the Defendant’s solicitors asked her not to retain a lawyer sometime around the end of September 2006. She only received the medical expert report of Dr. Yip recently.
4. The Defendant replied on the respective issues by way of the letter dated 24th June 2010 as follows: (i) the Plaintiff applied for legal aid twice in June 2007 and April 2009 and the applications were refused for failing the “means test”. In short, the application for legal aid on 7th June 2010 was the third time. Further, although the Plaintiff was on record unrepresented, she was receiving legal assistance as reflected from her pleadings and questionnaires filed for the checklist review hearings. The Defendant also relied on what they said a similar case in *Chan Chun Shing v Chang Chen Chin HCPI 395/2008 dated 4th May 2009* where the stay was uplifted; (ii) while the Plaintiff did indicate the desire to have mediation on 7th May 2010, the Master also indicated that he would not stay the proceedings for mediation when the case was ready for trial. The Plaintiff also stated that she was ready for trial and there was no outstanding matter; (iii) the Defendant also relied on the Practice Direction (“PD”) 5.2 paragraph 42 to stress that “late instructions from client, change in the team of lawyers” does not amount to exceptional circumstances under O.25, r.3 of the RDC (same provision as O.25, r.1B of the Rules of the High Court).
5. In respect of the new allegations made in this hearing, Ms. Sy, solicitors for the Defendant stood to correct that Dr. Yip’s report was served in February 2010. Further, the Plaintiff in the checklist review hearing, stated to the Master that she elected not to adduce medical expert evidence.
6. The ultimate question in this case is whether the Court shall uplift the stay or the trial may proceed as scheduled. Another question is whether the late and repeated application for legal aid amounts to exceptional circumstances under O.25, r.3 of the RDC, if not, the Plaintiff’s application for vacating the trial dates should be refused.
7. I do not intend to set out the provisions on automatic stay and uplift of stay under section 15 of the Legal Aid Ordinance. I agree to the legal proposition advanced by the Plaintiff’s former solicitors.
8. Another relevant provision is Order 25, r.3(2)(3) which provides that:

*“(2) A party may apply to the Court if he wishes to vary a milestone date.*

*(3) The Court shall not grant an application under paragraph (2) unless there are exceptional circumstances justifying the variation.”*

1. In this case, the date of the accident was 16th September 2006. The Statement of Claim was filed on 15th September 2009. The Statement of Damages was filed on 16th November 2009. The Plaintiff’s list and copies of medical reports were filed on 25th February 2010. Her witness statement was filed on 15th April 2010. This shows objectively, the Plaintiff was ready for trial.
2. The Plaintiff simply failed to explain reasonably as to why she was late in making the application for legal aid for the third time. The mere fact that she was unrepresented was not a reasonable explanation. Assuming a litigant in person may not familiar with legal procedures or the availability of legal aid, a reasonable and prudent litigant would have asked if they do not know. Such possible enquiry would have been conducted timely. From the Plaintiff’s pleadings and documents, it is apparent that she prepared the documents with legal assistance. She knew the availability of legal aid as she said her applications were refused twice before. Had she been so ignorant on 7th May 2010 when the case was set down for trial, she could have taken the initiative to ask and enquire before or shortly after hearing, she could have then applied for legal aid before or shortly after the hearing. If that is the case, the legal aid stay, if any, would be expired before the trial dates on 2nd and 5th July 2010. However, her notice of application for legal aid was filed one month after the case was set down for trial.
3. Secondly, when the case was set down for trial in the fixture list on 7th May 2010, save and except the desire to have mediation, the Plaintiff was ready for trial whether it was considered subjectively or objectively. The pre-action protocol of PD 18.1 in respect of “the Personal Injuries List” and PD 5.2 in respect of “Case Management” in other civil cases provides a mechanism for exploration for settlement or mediation at early stage of proceedings, when a plaintiff’s claim is disclosed or after the pleadings are closed. It is unlikely that the Court will stay the proceedings for mediation at a late stage of the proceedings. Having said that, there is usually a substantial period between the hearing when the case is set down for trial and the trial dates, as in this case, a period of 8 weeks. Any litigant may explore for settlement or mediation without a stay and get prepared for litigation at the same time in the event that the last attempt fails. In essence, I do not see an indication to have mediation during the 2nd checklist review hearing or during a case management conference is a valid reason to vacate a milestone date, especially the trial dates.
4. In essence, I am of the view that the Plaintiff’s litigating conduct amount to an abuse of process. Simply put, she applied for legal aid twice before and were refused. She was not ignorant as she knew how to obtain legal assistance and prepared the succinct and concise pleadings and related documents. If she was so ignorant, she could have asked and applied for legal aid again before or shortly after the case was set down for trial on 7th May 2010. But a notice of application for legal aid was filed on 7th June 2010. There has been inordinate and inexcusable delay in making the third application for legal aid. I am of the view that the belated application for legal aid was an abuse of process.
5. Another question is whether the belated application for legal aid amounts to exceptional circumstances under O.25, r.3.
6. *In Chan Chun Shing v Chang Chen Chin HCPI 395/2008 dated 4th May 2009*, a represented Plaintiff made a last minute application for legal aid. Fung J was of the view that the Plaintiff failed to explain reasonably why the Plaintiff was late in applying for legal aid. Further, the Plaintiff failed to show an exceptional reason to change a milestone date, thus His Lordship directed that *“the action not be stayed notwithstanding the Legal Aid application, and the solicitors for the Plaintiff do stay on the record and do proceed to instruct counsel on behalf of the Plaintiff without any costs of accounts being placed.”*
7. While the facts of that case are not identical to the present case, they were similar. Unlike that case which involved the first application for legal aid, in the present case, the Plaintiff made the third attempt. I would adopt the same approach.
8. As a result, I am of the view that the Plaintiff failed to establish “exceptional circumstances” under O.25, r.3 of the RDC and the application to vacate the trial dates should be refused.
9. The Defendant also by way of a letter dated 24th June 2010 applied for leave to file an answer to the statement of damages. Although it was filed and served on 23rd June 2010, leave is yet to be obtained. The Defendant explained that due to an oversight, the said answer was not filed and served when the case was set down on 7th May 2010 until they received an index to the pre-trial review bundle on 23rd June 2010. I concern two questions, firstly, whether there was reasonable explanation for failing to file the answer before or at the time the case was set down. Secondly, whether the refusal of leave to file the said answer would prevent the Defendant from taking issue on quantum. In my view, belated but important application requires satisfactory explanation, failing which the Court may refuse a belated application on that ground alone if a milestone date would be affected. In the present case, there were two checklist review hearings before the case was set down for trial and the Defendant still failed to discover the failure to file and serve the answer. The duty to conduct a final check is particularly essential when the Defendant asked for leave to set down for trial, bearing in mind the Plaintiff was acting in person at that time. However, the Defendant was in breach of the duty despite there were ample opportunities. It was the Defendant who brought itself to this situation and they should take the consequence arising out of their mistake. The answer was served on 23rd June 2010, just 9 days before the trial. If reasonable time should be given to the Plaintiff, say 14 days, to consider the answer, the trial has to collapse. Secondly, even without the said answer, Ms. Sy said that they could still put the Plaintiff to the strict proof on both liability and quantum as they did in their Defence. As a result, I refused leave to the Defendant to file the said answer and it shall be expunged accordingly. I am of the view that there be no order as to costs for this application. The trial dates fixed on 2nd and 5th July 2010 remain unchanged.

*C. CONCLUSION*

1. In the premises, I make the following orders:-
   * + 1. The Plaintiff’s application to vacate the trial dates be refused.
       2. The Defendant’s application to uplift the automatic stay be allowed.
       3. Cost of and occasioned by the above applications be to the Defendant assessed summarily in sum of $2,930 payable by the Plaintiff within 14 days.
       4. The Defendant’s application to file the answer to the statement of damages be refused and the said answer shall be expunged accordingly. There be no order as to costs of this application.
       5. The pre-trial review bundle prepared by the Plaintiff’s former solicitors do stand as the trial bundle.
       6. The Defendant is directed to draw up these orders in Chinese, file and serve the same.

(Clement Lee)

Deputy District Judge

The Plaintiff appears in person.

Ms. C. Sy of Messrs Deacons for the Defendant

Note: This judgment is pronounced in Punti. Any party wishes to have the Chinese translation of the written judgment must apply in writing on or before 19th July 2010.

注意: 此判決是以本地話宣讀。如訴訟一方欲索取書面判決中文譯本，必須於2010年7月19日前申請。