COURT OF APPEAL FOR ONTARIO

CITATION: Hervieux v. Huronia Optical, 2016 ONCA 294

DATE: 201604025

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Hoy A.C.J.O., Pardu and Roberts JJ.A.

BETWEEN

Donald Hervieux

Plaintiff (Respondent)

and

Huronia Optical, Ben Pezik, and Huronia Eye Clinic

Defendants(Appellants)

Jason Arcuri, for the appellant Ben Pezik

Keegan Boyd and Jessica Laham, for the appellant Huronia Eye Clinic

Asha James and Marc Gibson, for the respondent

Heard: February 4, 2016

On appeal from the order of Justice G.M. Mulligan of the Superior Court of Justice (Divisional Court), dated March 19, 2015, with reasons reported at 2015 ONSC 1810, allowing an appeal from the order of Deputy Judge V. Stabile of the Small Claims Court, dated February 21, 2014.

L.B. Roberts J.A.:

Overview and Background

[1] The appellants appeal from the order of the Divisional Court that allowed the respondent's appeal from the dismissal of his action, and remitted his claim back to the Small Claims Court for a hearing.

[2] The respondent commenced an action in the Small Claims Court against the appellants. In his action, the respondent claimed damages arising out of the appellants' alleged professional negligence in diagnosing and treating an eye condition that led to blindness in the respondent's eye.

[3] The respondent failed to produce expert reports in accordance with orders made during settlement conferences on March 1 and May 31, 2013. The appellants brought a motion under r. 12.02 of the *Rules of the Small Claims Court*, O. Reg. 258/98 ("*Small Claims Court Rules*"), to dismiss the respondent's claim.

[4] R. 12.02 provides as follows:

> 12.02 (1) The court may, on motion, strike out or amend all or part of any document that,
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> (a) discloses no reasonable cause of action or defence;
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> (b) may delay or make it difficult to have a fair trial; or
>
> (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> (2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:
>
> 1. In the case of a claim, order that the action be stayed or dismissed.
>
> 2. In the case of a defence, strike out the defence and grant judgment.
>
> 2.1 In the case of a motion, order that the motion be stayed or dismissed.
>
> 3. Impose such terms as are just.
>
> (3) The court may, on its own initiative, make the order referred to in paragraph 1 of subrule (2) staying or dismissing an action, if the action appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process.

[5] On February 21, 2014, the deputy judge allowed the appellants' motion and

dismissed the respondent's claim because of the respondent's failure to file expert evidence supporting his claim on the issues of standard of care and causation, concluding that: "Absent such evidence, and no prospect of such evidence being secured, it is reasonable for this court to invoke the provisions of Rule 12.02(1) [and] (2) of the Small Claims Court, and I do so." (Emphasis added.)

[6] On March 19, 2015, the appeal judge allowed the respondent's appeal on the bases that the deputy judge had made an error of law and exceeded his jurisdiction in treating the appellants' motion as a motion for summary judgment and dismissing the respondent's claim under r. 12.02(1), because the claim was not inflammatory, a waste of time, a nuisance or an abuse of the court's process. The appeal judge held that it was a denial of natural justice to dismiss the respondent's claim under r. 12.02(1), and that the deputy judge should have given the respondent, a self-represented litigant, another opportunity to provide expert reports.

Analysis

[7] The appellants submit that the appeal judge made several errors in reversing the deputy judge's dismissal of the respondent's action. The appellants argue that the appeal judge erred in finding that the deputy judge effectively granted summary judgment when the deputy judge merely and correctly applied the provisions of r. 12.02. The appellants complain that the effect of the appeal judge's decision is that deputy judges will not have the jurisdiction to dismiss actions in which plaintiffs have failed to comply with an order to produce expert reports and, as a result, they will not be able to enforce deadlines for the delivery of documents, including expert reports, under r. 12.02 of the *Small Claims Court Rules*.

[8] I disagree that the appeal judge's order has that wide-reaching effect.

[9] There is no question that a deputy judge has the jurisdiction to alter the time deadlines otherwise provided under the *Small Claims Court Rules* and even to dismiss an action. In particular, in accordance with the provisions of r. 13.05(1) and (2)(a)(vi), it was open to the deputy judge during the settlement conferences to require the respondent to provide his expert evidence to the appellants in advance of the trial. Further, under r. 13.05(2), if the circumstances warranted it, the deputy judge, with written reasons, could have stayed or dismissed the action.

[10] It would also be open to a deputy judge in the appropriate case to dismiss an action under r. 12.02 for a party's failure to comply with a court production order or any other order.

[11] Indeed, it was open to the deputy judge in the present case to invoke r. 12.02 if the circumstances supported any of the criteria listed in that rule. However, for the reasons that follow, I agree with the respondent's submissions that the circumstances of this case did not warrant the dismissal of the action under r. 12.02.

[12] The motion before the deputy judge to dismiss the respondent's action was not based on his breach of a court order. Rather, in their notice of motion, the appellants submitted that because of the respondent's failure to serve an expert report "critical of the care received at the Huronia Eye Clinic or linking any defect in care to his alleged damages", permitting his action to proceed to a trial "would be a waste of this Honourable Court's time, and, as such, the Plaintiff's Claim should be struck and this action dismissed."

[13] I agree with the appeal judge that the deputy judge erred by concluding that the respondent's claim was "a waste of time" under r. 12.02, based on his finding that there was no prospect of the respondent's providing independent expert evidence.

[14] Specifically, the deputy judge erred in determining that the respondent's treating physicians could not provide expert evidence in support of the respondent's claim and that, as the respondent had failed to meet the threshold test, his action was a waste of time and there was no reason to provide him with a further 30-day extension to file the evidence of his treating physicians.

[15] In *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at para. 60, leave to appeal refused 2015 CarswellOnt 16501 (S.C.C.), this court recently held that a treating physician could provide expert opinion evidence for the truth of its contents without complying with the formal requirements of r. 53.03 of the *Rules of Civil Procedure*, O. Reg. 17014, in the following circumstances:

i. The opinion to be given is based on the witness's observation of or participation in the events at issue; and

ii. The witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[16] If the formal requirements of r. 53.03 are not mandatory in the Superior Court of Justice for treating physicians to appear as trial witnesses in the above circumstances, it follows that under the *Small Claims Court Rules,* parties are not obliged to engage independent experts and provide formal expert reports in the same circumstances. To hold otherwise would undermine the fundamental objective of the Small Claims Court to provide easier and less expensive access to justice, especially to self-represented litigants who are the most frequent users of the Small Claims Court system.

[17] There was ample evidence before the deputy judge that the respondent could provide the expert evidence of his treating physicians in support of his claim. The

respondent had delivered medical records to the appellants. He had not provided a formal expert report; however, he had repeatedly indicated his intention to call his treating physicians as experts at trial and had included their names on his witness list that he filed with the court. He had also requested the opinions of his treating physicians.

[18] I agree with the appeal judge's determination that the deputy judge's dismissal of the respondent's claim was an error and a breach of natural justice in the circumstances of this case.

Disposition

[19] Accordingly, I would dismiss the appeal.

[20] The respondent is entitled to his costs of the appeal in the amount of $15,000.00, inclusive of all amounts.

Released: April 25, 2016

"L.B. Roberts J.A."

"I agree Alexandra Hoy A.C.J.O"

"I agree G. Pardu J.A."