

2011 ONSC 958
Ontario Superior Court of Justice

Niemi v. Western Assurance Co.

2011 CarswellOnt 879, 2011 ONSC 958, 16 C.P.C. (7th) 362, 197 A.C.W.S. (3d) 371

Grant Niemi, Plaintiff and Western Assurance Company, et al, Defendants

J.S. Fregeau J.

Heard: February 2, 2011

Judgment: February 10, 2011

Docket: CV-10-0216

Counsel: W. Danial Newton (Agent), for Sloan H. Mandel, for Plaintiff
Nestor E. Kostyniuk, for Defendant, Western Assurance Company

Subject: Civil Practice and Procedure; Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

[IX](#) Service of originating process

[IX.3](#) Statement of claim

[IX.3.a](#) Manner of service

[IX.3.a.ii](#) Substituted service

[IX.3.a.ii.B](#) Miscellaneous

Headnote

Civil practice and procedure --- Service of originating process — Statement of claim — Manner of service — Substituted service — General principles

Plaintiff brought action against insurer and individual claims adjustors including SS and SM who handled his file during particular periods of time, alleging bad faith and improper failure to pay statutory accident benefits — Plaintiff brought motion for order for substituted service of statement of claim on SS and SM by service by mail on insurer, or dispensing with service on SS and SM — Motion dismissed — Plaintiff had no knowledge as to current location of SS or SM — SS and SM were no longer employed by insurer — Efforts by insurer to contact SS and SM at last known addresses resulted in letters to SM being returned as undeliverable and letters to SS not being returned — It was not established that there was "some likelihood" that substituted service on insurer would bring action to attention of SM or SS — Service by way of substituted service on insurer denied — Rule 16.04(1) of Rules of Civil Procedure allows court to make order dispensing with service, as alternative to substituted service, "where necessary in the interests of justice" — If order dispensing with service on SS and SM was granted, matter would proceed without notice to those defendants, and they would be deemed to admit factual allegations in claim — If order was not granted, plaintiff could maintain his cause of action against insurer and all other defendants — Claim expressly pleaded that insurer was vicariously liable for all breaches of duty, want of care, and/or bad faith conduct of these and other defendants — Plaintiff would not be restricted in his pursuit of damages if he could not serve SS and SM — It was not necessary in interests of justice to dispense with service.

Table of Authorities

Cases considered by *J.S. Fregeau J.*:

Chambers v. Muslim (2007), 2007 CarswellOnt 6438, 87 O.R. (3d) 784 (Ont. Master) — followed

Laframboise v. Woodward (2002), 59 O.R. (3d) 338, 2002 CarswellOnt 1448 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 16.04(1) — considered

MOTION by plaintiff for order for substituted service of statement of claim on certain individual defendants by service by mail on defendant insurer, their former employer, or for order dispensing with service of statement of claim on these defendants.

J.S. Fregeau J.:

Introduction

1 This is a motion brought by the plaintiff requesting an order for substituted service of the Statement of Claim on the defendants Sean Sullivan ("*Sullivan*") and Sandra Martin ("*Martin*") by service by mail on the defendant Western Assurance Company ("*the insurer*"), their former employer.

2 In the alternative, the plaintiff requests an order dispensing with service of the Statement of Claim on these defendants.

3 The plaintiff also requests an order for an extension of the time for serving the defendants to April 1, 2011.

4 The insurer opposes both substituted service on them and an order dispensing with service. They do not oppose an order for extension of time for service.

Background

5 Approximately 15 years ago, the plaintiff suffered serious personal injuries as a result of a single vehicle motor vehicle accident. At the time of the accident, the insurer was the plaintiff's automobile insurer. The plaintiff has brought this action against the insurer and the individual claims adjusters who handled his file during particular periods of time, alleging bad faith and the improper failure to pay statutory accident benefits. The defendants, Sullivan and Martin, were two of the claims adjusters.

6 Sullivan and Martin are no longer employed by the insurer. The plaintiff has been unable to find alternative business addresses for these defendants and has never had information as to home addresses for them. Plaintiff's counsel conducted Canada411 searches in an attempt to locate home addresses for these defendants. The searches yielded 835 results for "Sandra Martin" and 132 results for "Sean Sullivan". The plaintiff has gone no further in attempting personal service on these defendants.

7 Counsel for the plaintiff requested that counsel for the insurer provide the last known contact information for these two defendants. Counsel for the insurer has been provided with the last known addresses for both Sullivan and Martin by the insurer and has written to each of them asking to be contacted to discuss the claim. The letter to Martin was returned as undeliverable. There has been no response from Sullivan. The insurer alleges that they have no other means

of contacting these defendants. The insurer has instructed their counsel that these addresses are not to be disclosed to plaintiff's counsel due to privacy restrictions.

The Test for Substituted Service

8 Rule 16.04(1) of the *Rules of Civil Procedure* sets out in what circumstances an order for substituted service may be made. It provides as follows:

16.04(1) Where order may be made - Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

9 The generally accepted test for substituted service is set out in *Chambers v. Muslim* (2007), 87 O.R. (3d) 784 (Ont. Master), at para. 13:

What is the test for substituted service under rule 16.04? The plaintiff must satisfy the court, on proper evidence, that the proposed method of substituted service will have "some likelihood" or a "reasonable possibility" of bringing the action to the attention of the defendant, otherwise "the exercise of obtaining an order for substituted service is a charade." One must select the mode of services "that is most likely to bring the document in question to the attention of the defendant". This could include publication in a newspaper in the defendant's locality. However, "substituted service is not available if the whereabouts of the defendant are unknown". If "the defendant will not learn of the action through substituted service" it may be "more appropriate to ask for an order dispensing with service altogether". Furthermore, before substituted service is ordered the plaintiff must show that "all reasonable steps have been taken to locate the party and to personally serve him or her. What is reasonable will depend on the nature of the case, the relief claimed, the amount involved and all of the surrounding circumstances". Substituted service is not intended to spare the inconvenience or expense or difficulty of personal service if personal service can be effected.

10 While the threshold under Rule 16.04(1) is low, it does require some likelihood of the action coming to the attention of the defendant. Substituted service is not available if the whereabouts of the defendant are not known. See *Laframboise v. Woodward* (2002), 59 O.R. (3d) 338 (Ont. S.C.J.) at para. 14.

Analysis Regarding Substituted Service

11 The plaintiff has no knowledge as to the current location of either Sullivan or Martin. These defendants are no longer employed by the insurer. Efforts by the insurer to contact these defendants at their last known addresses have resulted in letters to Martin being returned as undeliverable. The letters to Sullivan have not been returned. In light of the letters sent to Martin being returned as undeliverable, the plaintiff is unable to establish there is "some likelihood" that substituted service on the insurer will bring the action to the attention of this defendant. In the result, the request for service of the claim on Martin by way of substituted service on the insurer is denied.

12 I am also unable to accept that there is some likelihood that the action would be brought to the attention of Sullivan if substituted service on the insurer were ordered. The only contact information the insurer has for Sullivan is a stale home address. Attempts to solicit a reply from Sullivan at this address have been unsuccessful. Simply because the insurer has an address for a former employee and letters to that address have not been returned does not satisfy me that there is "some likelihood" or a "reasonable possibility" that service of the claim on the insurer would come to the attention of this defendant. In the result, service of the claim on Sullivan by way of substituted service on the insurer is denied.

The Test for Dispensing with Service

13 Rule 16.04(1) allows the court to make an order dispensing with service, as an alternative to substituted service, "where necessary in the interests of justice." Master Dash, in *Chambers*, suggested that if the defendant will not learn of the action through substituted service, it may be more appropriate to ask for an order dispensing with service altogether.

Analysis Regarding Dispensing with Service

14 The interests of justice necessarily include the interests of the plaintiff and of these defendants together with a consideration of all the circumstances of the action. The insurer and three of five individual defendants have been served. In the prayer for relief, the plaintiff's claims include punitive, aggravated, and/or exemplary damages. The plaintiff pleads that the insurer is vicariously liable for the breaches of duty, want of care, and/or bad faith conduct of all defendants. Very serious allegations of bad faith are made against all defendants.

15 If an order dispensing with service of the claim on these defendants is granted, the matter will proceed without notice to these defendants. The result would be that these personal defendants would be deemed to admit the factual allegations in the claim.

16 If the order is not granted, the plaintiff can maintain his cause of action against the insurer and all other defendants. The claim expressly pleads that the insurer is vicariously liable for all breaches of duty, want of care, and/or bad faith conduct of these and the other defendants. The plaintiff would not be restricted in his pursuit of damages if he cannot serve these two individual defendants.

17 In the result, I do not find that it is necessary in the interests of justice to dispense with service of the Statement of Claim on the defendants Sullivan and Martin. The plaintiff is obviously free to pursue personal service if they so choose.

18 The plaintiff's motion is dismissed with no order as to costs.

Motion dismissed.