CITATION: Romanko v. Aviva, 2017 ONSC 2393
COURT FILE NO.: 07-CV-38350PD2
DATE: 20170419

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Omelian Romanko & Neonila Romanko, Plaintiffs

AND:

Aviva Canada Inc. & Aviva Insurance Company of Canada, Defendants

BEFORE: Madam Justice Darla A. Wilson

COUNSEL: *Neonila Romanko*, self-represented; *Omelian Romanko* self-represented, not in attendance

D. Lynn Turnbull & Geoffrey Keating, Counsel for the Defendants

HEARD: April 18, 2017

ENDORSEMENT

[1] This is a claim for damages for personal injuries advanced by the Plaintiffs, Omelian and Neonila Romanko, arising from a motor vehicle accident that occurred on April 18, 2003. It is alleged that on that date, the vehicle driven by Mr. Romanko was struck by a car driven by Joseph Nixon, who was uninsured. This case has a long history; it was called for trial today, did not proceed and I dismissed the claim. A review of the relevant events leading up to today is necessary to understand the context in which the dismissal order was made. My transcribed endorsements of April 10 and 12, 2017 are appended to this endorsement as Schedule “A” and Schedule “B” and are to be considered when reading these reasons.

Background

[2] The action was commenced in 2007, the claim was amended in 2010 and it was set down for trial in 2010. Initially, Mr. and Mrs. Romanko were represented by counsel but from 2010 onwards, apart from a brief period of a few months in 2013, the Plaintiffs have represented themselves.

[3] There was a scheduled case conference before Justice Moore on December 8, 2011 which the Plaintiffs failed to attend because they advised they were ill. As a result, Justice Moore made an endorsement that another case conference be scheduled so the Plaintiffs could attend before a judge to discuss the action and set a timeline for

completion of any remaining steps before trial. Although counsel for Aviva, Ms. Turnbull, contacted the Plaintiffs on numerous occasions to schedule the case conference, they refused to co-operate. In 2013, while represented by counsel, the consent trial date of May 25, 2015 was set and a trial certification form was filed with the court.

[4] A case conference was scheduled by the court for February 24, 2014 to establish a timetable for the steps that needed to be completed prior to trial, but the Plaintiffs failed to attend. A judicial pre-trial was set by the court for January 9, 2015. Justice Archibald presided at the pre-trial and Mr. and Mrs. Romanko attended. The Plaintiffs indicated there were further medical forms that needed to be completed to secure a designation of catastrophic impairment and that they wished to retain counsel for the trial. Justice Archibald made an endorsement that there should be a further case conference with him in April, 2015.

[5] On April 24, 2015, the Plaintiffs and counsel attended before Justice Archibald. He endorsed the record, “The Plaintiffs are elderly and the husband was in hospital for 2 months over the winter. They seek an adjournment of the trial date to acquire counsel. Adjournment is granted; trial date of May 25, 2015 is vacated. New trial date of April 10, 2017 is set, 4 weeks with or without counsel, peremptory, with a jury.”

[6] It appears that very little happened after April 2015 when the trial was adjourned and March 20, 2017 when a judicial pre-trial was set in advance of the April trial date. Justice McEwen presided at the pre-trial and Mrs. Romanko attended alone. She advised that her husband was undergoing medical tests and she would be asking for an adjournment of the trial set for April 10, 2017. McEwen J. made an endorsement that the Plaintiffs had to secure medical evidence to present to the presiding judge to support a request for an adjournment of the trial date. The Defendants advised that they would oppose another adjournment of the trial.

[7] On April 10, 2017, I was the assigned trial judge. Mrs. Romanko attended court with an interpreter and her son. She did not have any further medical documentation concerning her husband. She asked for an adjournment of the trial date, and stated that the trial date was “invalid, false and staged” and violated her rights and that her husband was undergoing testing although he was not hospitalized. The solicitors for the Defendants opposed any further adjournments and were ready to start the trial. Mrs. Romanko provided me with a book of documents entitled “Protest” which included some medical notes concerning her husband. These reports indicated Mr. Romanko was being investigated for complaints which could be indicative of a stroke. Dr. Borys, a physician from a walk-in clinic, noted “Mr. Romanko has been unwell recently and until further clarification of his health issues is determined he may have difficulty fully participating l legal proceedings.”

[8] In my April 10 written reasons, I noted it was unfair to the defence to further adjourn the trial, given that the date had been fixed 2 years ago and there was no medical evidence that Mr. Romanko could not testify at the trial. I denied the request for

the adjournment and ordered the trial to proceed before me on April 12 but that if there was further medical evidence concerning Mr. Romanko's medical condition, I would receive that evidence at the outset of trial. My endorsement of April 10 was provided to the Plaintiffs on that date.

[9] On April 12, the jury panel was again summoned. Neither Plaintiff attended, although Mrs. Romanko was outside of the courtroom. The son of the Plaintiffs attended court as did a friend of the Plaintiffs who identified himself and presented the court with a brief of medical documents concerning Mr. Romanko. The agent confirmed that the Plaintiffs were aware their case had been called for trial and they felt the process was an abuse and invalid and they would not be attending. The Defendants moved for an order dismissing the claim pursuant to Rule 52.01(2)(c) of the *Rules of Civil Procedure*.

[10] I reviewed the brief of documents that I was provided with and there was no medical opinion that indicated Mr. Romanko could not testify at trial or that there was any urgency to his medical condition. In her consultation note dated March 9, 2017, Dr. Hopyan noted Mr. Romanko is 78 years of age and he suffered a head injury when he fell down some stairs in 2015. She noted that any cognitive decline could be related to the 2015 head injury or an underlying neurodegenerative disease.

[11] The medical information provided included another note from Dr. Borys dated April 11, 2017 which stated, "Mr. Romanko's condition has not changed significantly. He has had no further episodes of slurred speech. His memory testing shows mild cognitive impairment.

[12] On April 12, I did a 17 page endorsement in which I noted the history of delay on the part of the Plaintiffs in moving the matter forward to trial. I observed that the Plaintiffs had changed counsel multiple times and that they had failed to abide by numerous orders of the court and that the trial date was peremptory on the Plaintiffs.

[13] I noted that the relief sought by the Defendants was severe: a dismissal of the action. As a result, I specifically gave the Plaintiffs a further opportunity to re-evaluate their decision not to attend the trial. I endorsed that the trial would proceed on April 18 but if they failed to commence the trial at that time, I would dismiss the action.

[14] Today, the case was called for trial and the jury panel was summoned. Mrs. Romanko attended court with her son and an interpreter. She advised the court that she was physically unfit to do the trial because she had difficulty walking, had a headache and was in a "risky" state of health. She stated that her husband continued to undergo medical tests and further advised that she had retained a lawyer. She confirmed that she was again requesting an adjournment of the trial. She stated that the first adjournment in 2015 was at the request of the Defendants and that the Plaintiffs had never asked that the May 2015 trial date be adjourned.

[15] I confirmed with Mrs. Romanko that she had received my April 12 written reasons. In response to my questions, Mrs. Romanko advised that she had not yet met with a lawyer but had an appointment to meet with him. She had no medical documentation to file with the court concerning her husband's condition or her own.

[16] The solicitors for the Defendants strenuously opposed any adjournment of the trial. They took exception to the Plaintiff's assertion that the previous trial date had been adjourned at the request of the defence and advised that that was inaccurate. The solicitors for the Defendants argued that a peremptory trial date has to have meaning and cannot be ignored and that the actions of the Plaintiffs have demonstrated a disregard for the rules of the court. They asked that the case be dismissed.

Analysis

[17] The accident giving rise to this claim occurred almost exactly 14 years ago. The Plaintiffs have had the benefit of a number of counsel but have chosen to represent themselves, essentially, since 2010. A review of the history of this action reveals that the Plaintiffs have failed to attend court mandated conferences dating back to 2011, asserting that one or both of them was ill. The court record is clear that it was the Plaintiffs and not the defence who asked that the trial date of May 2015 be adjourned, so they could get medical documentation and secure counsel to do the trial. They did neither. They knew that the April 2017 trial date was peremptory and that it would proceed with or without legal representation.

[18] The Plaintiffs were aware that the Defendants were opposed to any adjournment of the trial date and Mrs. Romanko was advised at the pre-trial that she needed to obtain medical documentation to support her contention that her husband was unable to testify at trial. While I appreciate Mr. Romanko had an incident of difficulty with speech in December 2016 which has led to a series of medical tests, there is no evidence that he is unable to testify on his own behalf at trial or that there is any urgency to his medical condition. He is 78 years of age.

[19] It appears that Mrs. Romanko has chosen to ignore the endorsement of Justice McEwen of March 20, 2017 as well as my endorsements of April 10 and 12, 2017. Similarly, her assertion that she has retained a lawyer is inaccurate and there is nothing to indicate that the Plaintiffs have retained a lawyer who is prepared to do the trial. At most, Mrs. Romanko made an appointment with a lawyer on the date that the action was called for trial.

[20] The Plaintiffs have been granted numerous indulgences by the Court and they have been given every opportunity to ensure their case is ready to proceed to trial. When considering a motion for dismissal, the court must consider the rights of all of the parties and the history of the action. In *Lochner v. Toronto (City) Police Service*, [2016] O.J. No. 3396, the Court noted:

> This court must be very wary of allowing the admirable precepts of access to justice and reasonable accommodation of self-represented parties to be stretched and abused by over-indulgence of unacceptable behaviour. Access to justice is a right, but not without limit. Parties responding to self-represented litigants also have a right to access to justice on a level playing field. No litigant has the right to operate by rules of their own choosing while exhibiting open contempt for rulings of the court and its procedures.

[21] I agree with these comments; the court must control its own procedure to ensure fairness to all litigants.

[22] In my view, it would be manifestly unfair to the Defendants to further adjourn this trial. The Plaintiffs have had 2 years since the adjournment of the May 2015 trial date to find counsel, secure the required evidence to put their case forward and get ready for trial. They have failed to do so, knowing the case would proceed whether or not they were represented by counsel. They have shown contempt for orders of the court and flagrant disregard for the endorsements of March 20, April 10 and April 12, 2017. At some point, the delay becomes intolerable and the court must say enough is enough. Unfortunately, this case has reached that point.

[23] This is not a case where some unforeseen problem or event or medical emergency has occurred that prevents a Plaintiff from proceeding with a trial that has been marked peremptory. In such cases, the court has the discretion to adjourn the trial date on appropriate terms and in doing so, the Court strives to achieve a fair result between the parties based on all of the facts. That is not the situation here; the Plaintiffs have been granted numerous indulgences by the court to assist them in ensuring their case was ready for trial. Today, they are making the same excuses as they did in 2015: that one or both of them isn't well and that they intend to get a lawyer. I do not accept these as legitimate reasons to adjourn a peremptory trial date. The action is dismissed.

D.A. Wilson J.

Date: April 19, 2017