

Case Name:

Morgan v. Spanogreco

Between

**Jennifer Morgan et al, Plaintiffs/Moving Party, and
Tony Spanogreco et al, Defendants/Respondents**

[2009] O.J. No. 81

Court File No. 07-CV-327722 PD2

Ontario Superior Court of Justice

J.E. Kelly J.

Heard: January 8, 2009.

Judgment: January 9, 2009.

(44 paras.)

Civil Litigation -- Civil procedure -- Parties -- Adding or substituting -- Service -- Substituted -- Settlements -- Releases -- Setting aside, grounds -- Setting aside judgments and orders -- Fresh evidence -- Motion by plaintiffs for order adding defendant, setting aside or varying order for summary judgment and other relief dismissed -- There would be prejudice to proposed defendant due to unexplained delay and potential loss of benefit of limitation period -- Amendment was untenable in law as plaintiffs had executed releases in favour of proposed defendant -- Plaintiffs made no effort to serve defendant personally nor proved inability to personally serve -- Evidence was available to plaintiffs prior to hearing of summary judgment motion -- Evidence did not establish triable issue -- Attempt to set aside release was abuse of process and attempt to re-litigate.

Motion by the plaintiffs for an order setting aside or varying the order for summary judgement dismissing plaintiff's claim against Optimum, amending the statement of claim and adding a defendant, validating service on the defendant sought to be added, setting aside released pertaining to the plaintiffs' accident benefit claims and that Optimum make interim payments to the plaintiffs. The plaintiffs brought a claim for damages as a result of an accident. The allegations against Optimum related to statutory accident benefits. The defendant sought to be added was alleged to have been the driver of the motor vehicle involved in the accident and was insured by Optimum at the time of the accident. The statutory accident benefits and tort claims of the plaintiffs were settled and the plaintiffs were represented by competent counsel when negotiating and finalizing their settlements. In arguing that the order for summary judgement should be set aside, one of the plaintiffs submitted that she

was unable to provide the required material to the judge as she did not have time, her computer hard drive was dysfunctional and her telephone lines were not working.

HELD: Motion dismissed. There would be prejudice to the proposed defendant due to the unexplained delay in adding him to the action and the potential loss of the benefit of the limitation period. Further, the plaintiffs' proposed amendment was untenable in law given that the plaintiffs had already executed a release in favour of the proposed defendant. The plaintiffs made no effort to serve the defendant personally nor had they proved their inability to serve him personally. The plaintiffs' evidence was available to the plaintiffs prior to the hearing of the summary judgment motion or was irrelevant and the plaintiffs had been granted an adjournment in order to deliver their material in advance of the motion. Furthermore, the evidence did not establish a triable issue. The plaintiff's attempt to set aside their releases was an abuse of process and an attempt to re-litigate. There was no basis for an order for interim payments by Optimum.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 16.04(1), Rule 16.08, Rule 26.01, 59.06(2)

Counsel:

Jennifer Morgan, for the Plaintiffs.

Morgan A. MacDonald, for the Defendant.

REASONS FOR JUDGMENT

1 J.E. KELLY J.:-- Optimum Insurance Company Inc. ("Optimum") brought a Summary Judgment motion before Forestell, J. on December 12, 2007 to dismiss the Plaintiffs' claim in its entirety as against Optimum. Optimum was successful in its motion.

2 The Plaintiffs, represented through Ms. Jennifer Morgan, have brought this Motion that appears to seek the following relief that affects the Defendant, Optimum with respect to the motor vehicle based claims:

- a) An Order amending the Statement of Claim and adding an Optimum insured, Mr. Vladamir Divis as Defendant;
- b) An Order validating (nee substituting) service on the proposed Defendant, Mr. Vladamir Divis by serving Optimum;
- c) An Order setting aside or varying the Order for Summary Judgment of Forestell, J. dismissing the Plaintiffs' claim against Optimum in its entirety and for payment of costs in the Summary Judgment Motion;
- d) An Order setting aside the releases that pertain to Ms. Morgan and Mr. Michael Lavigne's Statutory Accident Benefits Claims that arose out of a January 3, 2002 motor vehicle accident and were fully and finally settled on April 15, 2003 and August 20, 2002 respectively; and,
- e) An Order that Optimum make interim payments to the Plaintiffs.

3 There were seven volumes of material that were filed by the Plaintiffs regarding the Motions before the Court. I have reviewed those materials, together with the Factum that was served and filed by the Plaintiffs on the morning of the Motion, January 8, 2009. I have also listened to the submissions of Ms. Morgan who assured me that she had made all arguments that she wished to make before the Court. I also considered the materials and submissions of the Defendant, Optimum.

4 I will now address the facts giving rise to the Motions as set out above.

5 The Plaintiffs advance claims for damages in the amount of \$15,000,000.00 in their Statement of Claim. The allegations against Optimum relate to Statutory Accident Benefits claims as a result of an accident, which occurred on January 3, 2002.

6 The Plaintiffs seek to add Mr. Divis as a Defendant. Mr. Divis is alleged to have been the driver of a motor vehicle that was involved in an accident with the Plaintiffs, Ms. Morgan and Mr. Lavigne. Mr. Divis was insured with Optimum at the time of the motor vehicle accident.

7 The Statutory Accident Benefits claims of the Plaintiffs, Ms. Morgan and Mr. Lavigne were settled and Full and Final Releases were executed on April 15, 2003 and August 20, 2002 respectively.

8 The Tort claims of the Plaintiffs, Ms. Morgan and Mr. Lavigne, were settled. Full and Final Releases were executed on June 3, 2002 and July 8, 2002 respectively.

9 The Plaintiffs were both represented by competent counsel when negotiating and finalizing their respective settlements of the Statutory Accident Benefit claims and Tort claims.

10 I will now address the Motions in the order as set out in paragraph 2 above.

a. The Motion to Amend the Statement of Claim and add an Optimum insured, Mr. Divis as Defendant.

11 The Plaintiffs submit that the Statement of Claim should be amended to add Mr. Divis as a Defendant because the initial Statement of Claim (that was settled) alleged the tort of negligence as opposed to assault and battery. However, the allegations in both Statements of Claim arise out of the same motor vehicle accident that is said to have occurred on January 3, 2002.

12 Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that:

On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

13 There would be prejudice against Mr. Divis due to the unexplained delay in adding him to the action. The Plaintiffs settled their claims against Mr. Divis and duly executed Full and Final Releases on June 3, 2002 and July 8, 2002. The Plaintiffs initiated this action on February 14, 2007 and commenced this Motion in June 2008.

14 In accepting that there is prejudice to the proposed Defendant, Mr. Divis, the Court adopts and relies on the Ontario Court of Appeal decision in *Family Delicatessen Ltd. v. London (City)* [2006] O.J. No. 669 where the court commented at paragraph 6:

While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy unexplained delay.

15 Mr. Divis would suffer prejudice if the Statement of Claim is amended due to the potential loss of the benefit of the limitation period. At paragraph 8 of *Family Delicatessen Ltd.*, the Court found "The effective loss of the benefit of a limitation period is presumptively prejudicial to the City and must be taken into account in considering a proposed amendment."

16 Further, the mandatory language of Rule 26.01 does not create an absolute right of amendment for the party seeking to amend a pleading simply because there is a lack of prejudice to the opposite party. Rather, the court is entitled to inquire into the merits of the amendment to ensure that the amendment is tenable in law. (See *Daniele v. Johnson* [1999] O.J. No. 2562 at para. 13.)

17 In *Daniele et al v. Johnson et al.* Then, J. upheld a master's decision refusing to allow the defendants to deliver a fresh counter-claim due to the existence of a release that made the amendments sought by the appellants "untenable in law". The evidence before Master Polika "indicated that there was a settlement executed between the plaintiffs and the defendants regarding the counterclaim of the defendant".

18 The factual situation before Then, J. in the case of *Daniele et al v. Johnson et al (supra)* is similar to the case before this Court. The Plaintiffs seek to amend their Statement of Claim to add a party in whose favour a release was already executed for the subject matter of the claim. The Plaintiffs' proposed amendments are therefore untenable at law.

19 In light of the above, the Plaintiffs' Motion to amend the Statement of Claim to add an Optimum insured, Mr. Divis as a Defendant is dismissed.

b. The Motion to validate (nee substitute) service on the proposed Defendant, Vladimir Divis by serving Optimum.

20 Ms. Morgan, on behalf of the Plaintiffs, submits that they have made no attempt to serve the materials personally on Mr. Divis because they fear for their safety in effecting personal service upon him. Ms. Morgan submitted that no attempts, whatsoever, for personal service were made on Mr. Divis either by the Plaintiffs personally or by an agent for the Plaintiffs.

21 Rule 16.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that:

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.

22 Rule 16.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides:

Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

- i. the document came to the notice of the person to be served; and
- ii. the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

23 In *Laframboise v. Woodward* [2002] O.J. No 1590 at para. 9, Justice Quinn noted an "obligation upon counsel to show that he or she is unable to carry out prompt personal service." His Honour continued, "Substituted service is not intended to spare a plaintiff the inconvenience or expense of personal service, if the latter can be effected. Mere difficulty in serving a defendant personally is not enough". Finally, "Rule 16.04(1) does not provide an automatic right to an order for substituted service whenever there is some delay, expense, inconvenience or difficulty locating a party."

24 The Plaintiffs seek to validate/substitute service on the proposed Defendant, Mr. Divis, by serving Optimum with their claim that is well over the limits of Mr. Divis's policy of insurance. The Plaintiffs have submitted that they have not made any attempts at service on Mr. Divis. There is no evidence that Mr. Divis is attempting to evade service or that personal service is impractical in the circumstances.

25 According to Justice Quinn in *Laframboise v. Woodward (supra)* at para. 10: "The inability to serve a party personally is proved by showing 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."

26 As stated above, the Plaintiffs have made no effort whatsoever to serve Mr. Divis personally and the Plaintiffs have not proved their inability to serve Mr. Divis. Therefore the Motion for an Order validating or substituting service on the proposed Defendant, Mr. Davis by serving Optimum is dismissed.

c. The Motion to set aside or vary the Order for Summary Judgment of Forestell, J. dismissing the Plaintiffs' claim against Optimum in its entirety and for payment of costs in the Summary Judgment Motion.

27 Ms. Morgan, submitted that the Plaintiffs were not able to provide the required materials to Forestell, J. because she did not have the time, her hard drive on her computer was dysfunctional and her telephone lines were not working during the period June and July, 2007 - approximately six months before the Motion was heard by Forestell, J. At the hearing of this Motion, Ms. Morgan filed a volume of materials entitled "Volume 7" which included numerous documents which both pre-dated and post-dated the Motion before Forestell, J.

28 Rule 59.06(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that:

A party who seeks to,

- iii. have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made;
- iv. suspend the operation of an order;
- v. carry an order into operation; or
- vi. obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

29 In other actions, motions have been brought for an order to set aside a Summary Judgment on the basis of new/fresh evidence. In such circumstances the proposed evidence must satisfy three (3) criteria: First, the evidence must be such as to have an important influence on the decision as to whether there is a triable issue. Second, it must be apparently credible. Finally, it must be demonstrated that the evidence could not have been obtained by reasonable diligence prior to the motion for Summary Judgment. (See: *Watts, Griffis and McOuat Ltd. v. Harrison Group of Companies* [2001] O.J. No. 3775 at para. 19.)

30 The majority of the evidence contained in the Plaintiffs' materials was available to the Plaintiffs prior to the December 12, 2007 Summary Judgment Motion. Any other evidence contained in Volume 7 that post-dated Forestell J.'s Motion is irrelevant (ie. the endorsement of Roberts, J. of July 31, 2008 setting a timetable for service of materials, etc. in this Motion).

31 Furthermore, the Plaintiffs sought and were granted an adjournment of the Summary Judgment Motion on November 2, 2007 to enable them to organize and file materials that Ms. Morgan claimed were in her possession at that time and were related to the Plaintiffs' action. Despite the adjournment, the Plaintiffs failed to deliver any materials in advance of the Summary Judgment Motion heard on December 12, 2007.

32 It is further submitted that the material served by the Plaintiffs does not establish any triable issue arising out of the January 3, 2002 motor vehicle accident and in fact, the Plaintiffs' materials include Full and Final Releases duly executed by Ms. Morgan and Mr. Lavigne for both their Statutory Accident Benefits claims against Optimum and their Tort claims against Mr. Divis.

33 As a result of the above, the Plaintiffs fail to meet the criteria set in the case of *Watts, Griffis and McOuat Ltd. v. Harrison Group of Companies (supra)* and the Motion to set aside the Judgment of Forestell, J. dated December 13, 2007 is dismissed.

d. The Motion to set aside the releases that pertain to Ms. Morgan and Mr. Lavigne's Statutory Accident Benefits Claims that arose out of a January 3, 2002 motor vehicle accident and were fully and finally settled on April 15, 2003 and August 20, 2002 respectively.

34 Ms. Morgan submits that the releases that were signed by herself and Mr. Lavigne regarding their Statutory Benefits Claims arising from the January 3, 2002 motor vehicle accident were obtained fraudulently. She submits that at the time of signing the release, they were not aware of the claim to be made for assault and battery against Mr. Divis.

35 Optimum submits that the Plaintiffs' attempt to set aside Mr. Lavigne and Ms. Morgan's Full and Final Releases to the Statutory Accident Benefits claims that were duly executed on August 20, 2002 and April 15, 2003 is an abuse of process and an attempt to re-litigate. I agree.

36 The Plaintiffs attempt to add Mr. Divis as a party to this action despite the existence of duly executed Full and Final Releases for the Tort claims arising out of the January 3, 2002 motor vehicle accident is an abuse of process and an attempt to re-litigate.

37 The Supreme Court of Canada addressed this issue in the case of *Toronto (City) v. Canadian Union of Public Employees* [2003] 3 S.C.R. 77 at paragraphs 37-38:

para. 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. **It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.** See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.). [Emphasis added.]

[page103]

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

As Goudge J.A.'s comments indicate, **Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.** (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), *aff'd* (1987), 21 C.P.C. (2d) 302 (Man. C.A.)) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson, supra*, at pp. 624-25) [Emphasis added].

para. 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

38 The court has invoked the doctrine of abuse of process to dismiss or stay Plaintiffs' claims in situations regarding relitigation. (See: *Sinclair-Cockburn v. Richards*, [2002] O.J. No. 3288 (C.A.), *Niagara North Condominium Corp. No. 125 v. Waddington* [2007] O.J. No. 936 (C.A.) and *Rahman v. TD General Insurance Co.*, [2007] O.F.S.C.D. No. 27.

39 The Plaintiffs' claims for Statutory Accident Benefits arising out of the January 3, 2002 motor vehicle accident and any claim against Mr. Divis arising from the same motor vehicle accident have been fully and finally settled with the Plaintiffs receiving valuable consideration in exchange for their Full and Final Releases. As such, the Plaintiffs are precluded from litigating their previously settled claims. To allow the Plaintiffs to litigate in this situation would amount to an abuse of process.

40 Accordingly, the Plaintiffs' Motion for an Order setting aside the releases regarding the Statutory Accident Benefits Claims that arose out of a January 3, 2002 motor vehicle accident is dismissed.

e. The Motion for an Order that Optimum make interim payments to the Plaintiffs.

41 Ms. Morgan submits that Optimum should make interim payments to the Plaintiffs because the releases were signed "under fraudulent circumstances".

42 Optimum submits that there are simply no grounds for an Order for interim payments to the Plaintiffs. In light of my rulings above, I agree and accordingly, the Motion for an Order that Optimum make interim payments to the Plaintiffs is dismissed.

43 The Defendant, Optimum has been successful in defending the Motions before the Court. Ordinarily, Optimum would be entitled to significant costs in the circumstances. Counsel for Optimum proposed that costs in the range of \$5,000 would be appropriate in light of the costs that his client has incurred to date (over \$10,000). Ordinarily, I would grant costs to Optimum as requested but Ms. Morgan is an impecunious Plaintiff. Accordingly, I am ordering Ms. Morgan to pay costs in the

amount of \$1,000, inclusive of disbursements and G.S.T. which must be paid by her to Optimum by Friday, February 13, 2009 at 12 noon. Payment of these costs is a pre-condition to the Plaintiffs instituting any further court proceedings arising from this matter.

44 I am also dispensing with the necessity of the Plaintiffs approving the formal order arising from these reasons for judgment.

J.E. KELLY J.

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