

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Maria Natario, Plaintiff

**AND:**

Manuel Rodrigues and Lucia Goncalves, Defendants

**BEFORE:** The Honourable Mr. Justice R.E. Charney

**COUNSEL:** P. Michael Rotondo, Counsel for the Plaintiff

Alan L. Rachlin and Jame Pedro, Counsel for the Defendant, Lucia Goncalves

Shahen A. Alexanian, Counsel for the Defendant, Manuel Rodrigues

**HEARD:** In-Writing

**ENDORSEMENT RE: MOTION TO STRIKE JURY NOTICE**

**Introduction**

- [1] The Plaintiff moves to strike the jury notice under s. 108(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 47.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [2] As the Plaintiff has set the action down for trial, leave of the Court is required pursuant to Rule 48.04(1). The Defendants do not object to leave being granted.
- [3] Leave is granted to the Plaintiff to bring this motion.
- [4] The Defendants do oppose the striking of the jury notice.
- [5] The issue on this motion is whether the jury notice should be struck.

**Procedural History**

- [6] This action arises from an accident that occurred on June 16, 2012 while the Plaintiff was visiting the Defendants' home in King City. The Defendants were renovating their home. The Plaintiff was on the upper floor of the Defendants' home when she alleges that the floor gave way and she fell to the floor below. As a result of the fall, the Plaintiff alleges that she is unable to walk and requires assistance for almost all aspects of her daily living activities. The Plaintiff seeks damages pursuant to the *Occupiers' Liability Act* and in negligence.

- [7] The action was commenced on September 16, 2012.
- [8] The Defendants served their Statement of Defence and Jury Notice on April 11, 2013.
- [9] Examinations for Discovery were conducted in February 2014.
- [10] On December 9, 2014 the Court granted the Plaintiff's motion to amend the Statement of Claim to plead that she fell through the attic floor. The Statement of Claim was formally amended on January 29, 2015.
- [11] On December 9, 2015, the Plaintiff was granted leave to amend the Amended Statement of Claim to increase the damages claimed and to plead an additional injury. The Defendants served an amended Statement of Defence on December 15, 2015.
- [12] The action was set down for trial in January 2016.
- [13] The first pretrial conference was conducted on October 17, 2017.
- [14] At a Trial Scheduling Court hearing held on July 26, 2018, a 3 week jury trial was scheduled for November 2019.
- [15] On March 18, 2019, the Defendants served a Notice of Change of Lawyer.
- [16] On July 19, 2019, counsel for the Defendants advised counsel for the Plaintiff that the Defendants' insurer would not provide coverage for this claim.
- [17] In August and September 2019, counsel for the Defendants provided an extensive list of corrections to answers the Defendants gave during the discovery in 2014.
- [18] A second pretrial conference was held on November 4, 2019. The case was not ready for the November 2019 sittings, and was adjourned to May 2020.
- [19] On January 31, 2020, the Defendants brought a motion seeking to stay the action "until such time as the Plaintiff brought a proceeding to determine the Defendants' insurance coverage". In the alternative, the Defendants sought an Order for security for costs against the Plaintiff on the basis that she was no longer a resident of Ontario (the Plaintiff had moved to Portugal to live with her adult children in 2018). The Defendants' motions were dismissed on February 19, 2020.
- [20] The comments of Master Muir in dismissing the Defendants' motion are relevant to the issue on this motion. Master Muir stated, at para. 16:

I do not see it as just to effectively order the plaintiff to place her action on hold and bring a proceeding now in order to determine the defendants' coverage issues. This action is on the eve of trial. The plaintiff was seriously injured and deserves her day in court. This action was started in 2012 and the plaintiff has spent considerable time and effort to advance

the proceeding to this point. There is no evidence that explains why the defendants themselves have not taken steps to address the coverage issue. If they had done so when the issue first arose it may have been determined by now. Moreover, it appears that the coverage issue arose because the defendants may have given false evidence on discovery. It is not just that the plaintiff now pays the price for this by having her action stayed and further delaying her day in court.

- [21] Costs of this motion were ordered against the Defendants on May 13, 2020 in the sum of \$11,000, payable within 90 days. These costs remain unpaid and are subject to a separate motion brought by the Plaintiff.
- [22] As a result of the COVID-19 pandemic, court operations were suspended on March 15, 2020, and this matter could not proceed in the May 2020 trial sittings.
- [23] A case conference was held before RSJ Edwards on February 19, 2021.
- [24] On March 12, 2021, counsel for the Defendants, Mr. Rachlin, was granted an Order to be removed as lawyer of record for the Defendant, Manuel Rodrigues. Mr. Rachlin still represents the Defendant Lucia Goncalves.
- [25] On April 19, 2021, Mr. Shahen Alexanian was appointed as lawyer of record on behalf of the Defendant, Manuel Rodrigues. Mr. Alexanian has also been retained on behalf of the Defendant to commence a legal action against his insurer.
- [26] There is no dispute that this case is now ready for trial, and that the matter could have proceeded in the May 2021 trial sittings but for the jury notice, and will be ready for the November 2021 trial sittings.
- [27] Due to the number of settlements, the Courts in Central East Region were able to reach all of the trials scheduled for the May 2021 sittings. Subject to the availability of counsel, there is no reason why this case will not be dealt with in the November 2021 trial sittings.

### **Positions of the Parties**

- [28] The Plaintiff takes the position that the significant pandemic delays in this action warrant the striking of the jury in this case. The Plaintiff also takes the position that the significant corrections in the Defendants' discovery evidence will have a prejudicial effect on a juror's ability to fairly and objectively consider the liability evidence in this case, and there is a "risk" that the insurance dispute issue will be inadvertently disclosed to the jury.
- [29] The Defendants argue that they have "tailored their strategy on the basis that the action would be tried by a jury" although no particulars are given because "the details of the strategy are subject to lawyer-client privilege". The defence also argues that Mr. Rachlin "has numerous trials in different regions already scheduled for the Fall of 2021" and that he "does not anticipate that he will be available for the trial of this matter until 2022".

- [30] The Defendants take the position that the motion to strike the jury be dismissed, and that the trial not proceed until it can be conducted before a jury. In the alternative, the Defendants ask the jury notice be struck provisionally, so that it may proceed before a jury if juries are available when the case is reached.

### Analysis

- [31] There have been a number of decisions from various courts since the Court of Appeal's decision in *Louis v Poitras*, 2021 ONCA 49 addressed the issue of striking a jury notice in the context of a pandemic. Many of the most recent decisions arising in the Central East Region were summarized by Healey J. in *Frye v. Pattenden*, 2021 ONSC 2373, at paras. 16 -17:

There have been a spate of decisions in Central East Region in the last two months in which jury notices have been struck in large part as a result of the high degree of improbability of civil jury cases being heard in this region in a timely way: *Francisco v. Li*, 2021 ONSC 1032; *Barikara v. Kyei*, 2021 ONSC 1636; *MacKenzie v. Pallister*, 2021 ONSC 1840; and *Sweetman v. Kowalczyk*, 2021 ONSC 2131.

In *MacKenzie*, Justice McCarthy summed up the situation, at para 14:

No person familiar with what has been the reality on the ground for some time in this region could disagree that since the Supreme Court's decision in *Jordan*, civil jury trials have taken a back seat to criminal jury trials when it comes to the allocation of judges and courtrooms. There is no reason to suspect that the reality will change anytime soon. In fact, a dire forecast that many civil jury trials which would otherwise be ready to proceed will be postponed or delayed into late 2022 or even 2023 might prove sadly prophetic

- [32] The Central East Notice to the Profession issued on February 10, 2021 notes that "the court does not anticipate having the capability to conduct a civil jury trial until well into 2022."
- [33] I adopt the analysis of Sanfilippo J. in *Johnson v. Brielmayer*, 2021 ONSC 1245, where the court summarized the factors to consider in undertaking this analysis, at para. 32:
- (i) the resources available to the court to outfit its courtrooms to allow for the conduct of jury trials with social distancing;
  - (ii) the local impact of the pandemic, to assess the likely timing for the resumption of jury trials;
  - (iii) the prejudice to the parties that would be caused by delay in adjudication;
  - (iv) the age of the case; and

(v) the history of adjournments.

- [34] Taking these factors into consideration, I am satisfied that this is an appropriate case to strike the jury notice.
- [35] As noted above, it is unlikely that there will be any civil jury trials in Central East Region until “well into 2022”. That means that the Plaintiff will likely have to wait an additional 18 months before a jury trial can be realistically reached. In contrast, the case can be reached in only 5 months if the jury notice is struck. Mr. Rachlin’s availability for trial in the November 2021 trial sittings is a matter that will have to be addressed when the case is reached.
- [36] This action is old. The subject accident occurred in 2012, the action was commenced in 2013, and the examinations for discovery were completed in 2014. As Master Muir noted in his decision in February 2020: “This action was started in 2012 and the Plaintiff has spent considerable time and effort to advance the proceeding to this point”.
- [37] This delay is inherently prejudicial to the Plaintiff’s case: *Louis v. Poitras*, at para. 22: “Delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice.”
- [38] This trial has already been subject to two adjournments: the first of the November 2019 trial date, and the second of the May 2020 trial date. The Court cannot countenance more delay.
- [39] In my view the Defendants have failed to provide any real evidence that the striking of the jury notice will cause the Defendants any prejudice. Vague, unspecified references to confidential “trial strategy” are insufficient to meet the test for prejudice or outweigh the prejudice to the Plaintiff of further delay. In this regard, I adopt the statement of Sanfilippo J. in *Johnson*, at para. 51:

The Defendant did not tender any evidence of detriment that would be sustained if his jury notice were struck, apart from the loss of his election that the trial proceed with a jury. In oral submission, the Defendant stated that he would sustain detriment because he has prepared this action as a jury trial and would now have to convert his preparation for a non-jury trial. To the extent that the Defendant suggested different preparation for a non-jury trial than a jury trial, it was not particularized or substantiated.

- [40] See also *Ismail v. Fleming*, 2021 ONSC 1425, at para. 26:

Apart from a general assertion that the jury notice has informed their litigation and settlement strategy, there is no evidence of a specific litigation disadvantage that would justify deferring this trial to an unknown date in the uncertain future so a jury can determine the matter.

- [41] See also *Tomson v. Jackson*, 2021 ONSC 3422, at para. 78.

[42] When I weigh these factors, I find that the Defendants' right to a trial by jury must give way to the Plaintiff's right to access justice in an affordable and timely manner.

### **Conclusion**

[43] For the foregoing reasons, there shall be an order to go as follows:

- (1) The Defendants' jury notice is struck;
- (2) The matter shall be placed on the November, 2021 trial sittings for an estimated 3 week trial before a judge alone at Newmarket (to be held remotely or as directed by the trial judge);
- (3) Should civil jury trials be restored prior to the hearing of this trial, the defendants shall be at liberty to bring a motion, on notice, to have the jury notice restored.

[44] If the parties are unable to agree on costs, the Plaintiff may file costs submissions of up to 3 pages, plus costs outline and any offers to settle, within 15 days of the release of this decision, and the Defendants may file responding submissions on the same terms within a further 10 days.

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Justice R.E. Charney

**Date:** June 8, 2021