

**Buim v. Sherritt; Wilson, Third Party**

[1972] O.J. No. 1710

[1972] 2 O.R.268-271

Supreme Court of Ontario

**Master's Chambers  
Senior Master (Rodger)**

January 6, 1972.

N. Campbell, for third party, applicant.

W. Scott, for defendant, respondent.

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**1** (SENIOR MASTER (RODGER)):- This is an application by the third party for an order:

- (a) extending the time for the bringing of this application and, (b) setting aside the third party notice herein and a cross-application by the defendant for an order extending the time for service of the said third party notice to and including November 3, 1971.

**2** Filed in support of the application of the third party is an affidavit by a solicitor in the firm of the solicitors for the third party in which he swears, inter alia, that the third party notice was served on November 3, 1971; that no copy of the writ of summons or statement of defence was served on the third party with the said notice; that the statement of claim indicates that the accident which is the subject-matter of this action occurred on or about May 31, 1968; that the writ was issued on May 23, 1969; and the statement of claim was delivered on September 28, 1971, and that a search in the Registrar's Office at Toronto disclosed that an appearance was entered on May 14, 1971, and that the statement of defence was filed on October 8, 1971.

**3** Filed in support of the application of the defendant is an affidavit by a member of the firm of solicitors for the defendant in which he swears, inter alia, that the statement of claim herein was received in his office on September 29, 1971; that due to the pressure of his practice, he was not able to prepare and issue a third party notice until October 7, 1971; that on October 8, 1971, he wrote to the Sheriff on the County of Simcoe asking him to serve the third party notice upon the third party at 59 Ardagh Rd., in the Town of Barrie; that this address was obtained from the police report of this accident; that on October 21, 1971, he was informed by the Sheriff of the County of Simcoe that the third party had moved to 150 Colborne St. in the Town of Richmond Hill; that on the same

date a messenger in his office delivered the third party notice and statement of claim to the Sheriff of the Judicial District of York for service upon the third party and that his secretary, due to inadvertence, failed to arrange for the Sheriff to serve a copy of the writ of summons and statement of defence herein upon the third party at the same time as the third party notice and the statement of claim were served.

**4** Rule 168 provides that a third party notice may be set aside upon an application made at any time before the time limited for the entry of the appearance and delivery of the statement of defence of the third party.

**5** Rule 169(1) provides that if a third party desires to dispute his liability to the defendant or the plaintiff's claim in the action as against the defendant he shall enter an appearance and deliver his statement of defence within 15 days from service of the notice.

**6** By reason of the two rules to which I have just referred, the application of the third party should have been brought on or before November 18, 1971. Although dated December 7, 1971, the notice of motion and the affidavit in support thereof were not served on the solicitor for the defendant until December 8, 1971, nor filed until December 9, 1971.

**7** While it is true that the notice of motion asks for an extension of time for the bringing of this application, there is nothing in the material filed in support of this application to account for the delay of the third party in bringing this application and, accordingly, there is no basis upon which the Court can properly exercise its discretion in favour of the third party by allowing an extension of the time prescribed by the Rules. For that reason alone, the application of the third party must, in my opinion, be dismissed. There are, however, in my view, more substantial reasons for dismissing the application.

**8** Counsel for the third party places great stress upon the fact that the accident in question in this action occurred on or about May 31, 1968, that the writ of summons was not issued until May 23, 1969, that the appearance was not entered by the defendant until May 14, 1971, and that the statement of claim was not delivered until September 28, 1971. While those dates are quite significant in the sense that, if the defendant is granted an extension of time for service of the third party notice until November 3, 1971, nunc pro tunc, he will have been allowed to commence an action against the third party long after the limitation period prescribed by s. 146(1) of the Highway Traffic Act, R.S.O. 1970, c. 202, has expired, that fact alone, however, is not, in my opinion, fatal to the cross-application. In my view, it is merely a factor, albeit an important one, to be taken into consideration a deciding whether or not the defendant ought to be granted an extension of time for service of the third party notice beyond the time prescribed by the Rules: see *Linder v. Hyla*, [1962] O.W.N. 13.

**9** Rule 167(3), as recently amended [am. O. Reg. 285/71, s. 1], provides that a third party notice shall be served on the third party within 10 days after the defendant's statement of defence has been delivered or the time limited for the delivery thereof has expired, together with a copy of the writ, a copy of the plaintiff's statement of claim and copies of any other proceedings taken in the action.

**10** In this action the last day for delivering a statement of defence was October 7, 1971, and, accordingly, by virtue of Rule 167(3) the defendant was not obliged to issue and serve his third party notice until October 17, 1971. Since October 17, 1971, was a Sunday he had by virtue of Rule 176 and s. 30 of the Interpretation Act, R.S.O. 1970, c. 225, until Monday, October 18, 1971, within which to do so. It would appear, therefore, that the defendant was only in default to the extent of some 16 days.

**11** Counsel for the third party relied primarily on the judgment of Master Barlow (as he then was) in *Cleave et al. v. Calnan et al.*, [1938] O.W.N. 38n, [1938] 1 D.L.R. 798n, affirmed on appeal by Jeffrey, J., at p. 40n, O.W.N., p. 799n D.L.R. Counsel for the third party, however, overlooked the fact that in the very same year the appeal was dismissed in the *Cleave* case, s-s. (3) of s. 60 of the Highway Traffic Act, R.S.O. 1937, c. 288, was amended [rep. & sub. 1938, c. 17, s. 12] so as to provide for the institution of third party proceedings in an action brought within the time limited by the Highway Traffic Act, notwithstanding the expiration of the limitation period.

**12** There is, however, no evidence of actual prejudice to the third party by reason of the delay in question. While the expiration of the limitation period normally gives rise to a presumption of prejudice, that presumption cannot, in my opinion, be said to have arisen where, as here, the limitation period expired long before the defendant was required by the Rules of Practice to issue and serve his third party notice.

**13** Accordingly, in the absence of prejudice either actual or presumed, I have come to the conclusion that this application ought to be dismissed on the merits.

**14** As to the cross-application, I am satisfied that the facts set out in the material filed in support thereof are sufficient to justify the Court, in the proper exercise of its discretion, making an order extending the time for service of the said third party notice to and including NOVEMBER 3, 1971, and I so order.

**15** The costs of the application and of the cross-application will be to the defendant in the cause in the third party proceedings as of one application.

---- End of Request ----

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