1969 CarswellOnt 951, 40 O.R. (2d) 110

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Nugent v. Crook

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Ontario Court of Appeal

Aylesworth, Schroeder and Brooke JJ.A.

Judgment: September 16, 1969
Docket: None given.

Counsel: *John Cannings*, for appellant

Joseph Lewis, for respondent

Subject: Civil Practice and Procedure

Practice --- Institution of proceedings — Writ of summons — Renewal — Discretion of court

Writ expiring due to neglect of solicitor — Principles governing discretion of Court on application to renew — Ont. R. 8.

R. 8 grants to the Court jurisdiction to make an order renewing a writ after expiry. The Court only exercises its discretion if the material filed reveals one or more circumstances such as evidence that the expiry of the writ resulted from a slip or mere inadvertence of the solicitor or another reasonable cause, that the conduct of defendant lulled plaintiff into a false sense of security or that defendant was not prejudiced by the delay.

***Aylesworth J.A.*:**

1 This appeal is brought by leave of Ferguson J. from an order of Moorhouse J. dated April 15, 1969, dismissing an appeal by the defendant from the order of Master Dunn dated March 24, 1969, renewing the writ of summons in this action.

2 We are all of the opinion that the appeal must succeed. We think that the master exercised his discretion in the matter of granting an order of renewal completely upon a wrong principle or wrong principles. Incidentally, it is to be observed that the order is somewhat unusual in that it is a double extension, the order being worded to provide that the writ of summons be renewed for 12 months from September 19, 1967, and for a further 12 months from September 19, 1968. Be that as it may, we are all of the opinion as I have said that the mas-

ter proceeded upon a wrong principle. While *Brown v. Humble*, [1959] O.R. 586, 21 D.L.R. (2d) 38, makes it abundantly clear that the court has jurisdiction in proper cases to grant an order of renewal of a writ of summons after the expiration of the writ as originally issued, the jurisprudence on the rule which is Rule 8 reveals that the discretion is exercised only when one or more circumstances are made apparent in the material. The circumstances in which such an order will be granted would include one or more of the following: where the writ has not been renewed through the mere slip or mere inadvertence of the plaintiff's solicitor; where the writ has not been renewed for some other reasonable cause, the rule itself employing the words "if for any sufficient reason any defendant has not been served"; the circumstance that the defendant's conduct has lulled the plaintiff into a false sense of security or in some other way has led the plaintiff reasonably to forego the service of the writ; the absence of prejudice to the defendant by reason of the delay. In the *Humble* case as in all other cases comprising the jurisprudence with respect to this rule, one or more of the above circumstances were present; the decisions themselves make this abundantly clear.

3 In our view none are present here. It was through no mere slip of a solicitor that the writ was not served. We have not the affidavit of the solicitor who, it is alleged in the material failed in the matter of securing service or any explanation as to the reason, if any, for such failure, but the material does make it clear that instead of a mere slip in the failure of service, there was a continuous if not studied neglect of the provisions of the Rules of Practice respecting service of the writ and of the effect of the statute concerning intervention of limitation of the action, and this for an approximate period of two and one-half years. There is no explanation whatsoever offered with respect to what took place except the reliance on what I have said is alleged to have been a slip on the part of a solicitor. There is, it is true, a bald statement in the material that the defendant is not prejudiced. Speaking for myself that is not sufficient, and again speaking for myself, that does not cast an onus upon the defendant to answer such a bald statement by bringing forward positive proof that he has been prejudiced. It is the plaintiff who is seeking the indulgence and it is for the plaintiff to establish proper grounds for the exercise of the discretion of the court. This has not been done in any particular in this case. We are of the opinion that if this renewal were to stand, it would have the practical effect of abrogation of the rule of practice which has been ignored in this case for so long a period of time.

4 In the result, the appeal is allowed with costs. The order of Moorhouse J. is set aside with costs. The order of the master is set aside and in lieu thereof an order of the master will go dismissing the application. There was no order as to costs on the motion before the master and we therefore make no order as to costs with respect to that motion. I neglected to say that the costs of the motion for leave to appeal to this Court which motion was made before Ferguson J. also should be granted to the appellant.

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