

*Case Name:*

**Om Sai Physiotherapy Clinic Inc. v. Kucher**

**Between**

**Om Sai Physiotherapy Clinic Inc., Plaintiffs, and  
Robert Kucher, Defendant**

**And between**

**Robert Kucher, Plaintiff by Counterclaim, and  
Om Sai Physiotherapy Clinic Inc.  
and V.P. Raju, Defendants to the  
Counterclaim**

[2015] O.J. No. 604

2015 ONSC 814

Court File No.: CV-06-3651-00

Ontario Superior Court of Justice

**J.K. Trimble J.**

Heard: January 27, 2015.

Judgment: February 4, 2015.

(25 paras.)

*Civil litigation -- Civil procedure -- Pleadings -- Counterclaim, cross-claim and set-off -- Disposition without trial -- Dismissal of action -- Delay or failure to prosecute -- Excuse for -- Failure to fulfil undertakings -- Prejudice to defendant -- Motion by defendant to strike reply and defence to counterclaim and main action allowed -- Cross-motion by plaintiff and defendants by counterclaim to restore action to trial list, dismiss counterclaim against individual defendant and allow individual defendant to act for corporation allowed in part -- Claim against individual defendant by counterclaim was that he defamed defendant and no basis to dismiss -- Individual defendant by counterclaim was sole director and officer so could act for corporation -- No explanation provided for 13-year delay, critical undertakings remained outstanding, most records had been destroyed, defendant prejudiced by outstanding allegations of fraud.*

Motion by the defendant to strike the reply and defence to counterclaim and main action for failure to comply with an interlocutory order, failure to comply with undertakings and delay. Cross-motion

by the plaintiff and defendants by counterclaim to restore the action to the trial list, dismiss the counterclaim against the individual defendant by counterclaim and allow him to act for the corporation. The plaintiff claimed the defendant, then an employee of the clinic, misappropriated funds between 2003 and 2006. The statement of defence and counterclaim alleged improper dismissal.

HELD: Motion allowed. Cross-motion allowed in part. The claim against the individual defendant by counterclaim was that he defamed the defendant, and there was no basis for dismissal. The individual defendant by counterclaim was the sole director and officer of the corporate plaintiff and could act for it. The events underlying the main action occurred between nine and 13 years ago. The plaintiff and defendants by counterclaim did not provide any explanation for their delay in prosecuting, most of the relevant records had been destroyed, and critical undertakings remained outstanding. The defendant had been barred from obtaining his mutual fund dealer's license while allegations of fraud were outstanding against him, so there was prejudice.

### **Statutes, Regulations and Rules Cited:**

Rules of Civil Procedure, Rule 24

### **Counsel:**

Santosh Mishra, for the Plaintiffs.

**Courtney Madison**, for the Defendant.

**Courtney Madison**, for the Plaintiff by Counterclaim.

Santosh Mishra, for the Defendants to the Counterclaim.

V.P. Raju, Self-Represented, for the Defendants to the Counterclaim.

### **REASONS FOR JUDGMENT**

**1** J.K. TRIMBLE J.:-- The Defendant, Kucher, moves to strike the Reply and Defence to Counterclaim of V.P. Raju and Om Sai for failure to comply with an interlocutory order of Justice Van Melle dated November 8, 2013, and to dismiss the Reply and Defence to Counterclaim and Om Sai's main claim against Dr. Kucher for delay and failure to comply with undertakings.

**2** The Plaintiff and Defendants by Counterclaim move to restore the action to the trial list, an order dismissing the claim against him personally, and to obtain leave to have Mr. Raju act for the Clinic in both its capacities.

### **DISPOSITION**

**3** For the reasons that follow, I grant the Defendant's motion in both aspects: striking Defence of the Defendants to the Counterclaim, and dismissing the main action. I allow Mr. Raju to act for the Clinic in both its capacities, but dismiss the balance of their motion. Costs are to be paid by the Plaintiff and Defendant to Counterclaim, Raju, to Kucher, in an amount to be assessed by me. The parties will provide their costs submissions within 14 days of the release of these Reasons. Submissions shall not exceed three pages, excluding bills of costs.

## **FACTS**

4 The Plaintiff alleges that between 2003 and 2006, the Defendant, then an employee of the Clinic, misappropriated funds. The eleven paragraph Statement of Claim was issued on October 26, 2006 and claimed that the Defendant altered payment cheques to the Clinic by substituting his name for that of the Clinic, then cashing the cheques. Breach of trust is alleged; fraud is not, but that is the gravamen of the claim. The Clinic claimed \$100,000 in damages and \$100,000 in exemplary and punitive damages.

5 The Statement of Defence and Counterclaim was issued on December 19, 2006. The Counterclaim claimed improper dismissal following Kucher's complaining about late commission payments by the Clinic. Damages were claimed at \$100,000.

6 On January 8, 2007, in one pleading the Clinic replied and defended, and Raju defended the Counterclaim.

7 On December 5, 2007, Kucher examined the Clinic for Discovery.

8 On September 30, 2009, Kucher issued an Amended Statement of Defence and Counterclaim, on consent, to which the Defendants by Counterclaim responded on November 5th. Kucher increased his prayer for relief in the Counterclaim by \$3 million in general damages and \$1 million in punitive damages. Kucher particularized the allegations of fact to include allegations Raju made to the College of Chiropractors of Ontario, wherein Raju alleged fraud and falsifying records. He pleads that he was dismissed from his position at RBC as a mutual fund dealer, as he was unable to maintain his licence given the allegations of fraud.

9 On July 11, 2011, the Clinic amended its Statement of Claim to particularize the allegations of fact whereby Kucher is said to have taken money.

10 The Clinic's then lawyer passed a Trial Record on April 9, 2012. In August, a pre-trial date was set for November 18, 2013. Before that date, the then lawyer for the Plaintiff removed himself from the record. By this time, the Clinic and Raju had changed lawyers twice. The Court struck the matter from the list. The order removing the lawyer for the Clinic and Raju provided that the Clinic had to appoint counsel.

11 In December, 2013, the Clinic and Raju retained Mr. Mishra who canvassed new pre-trial dates. By August, 2014, Mr. Mishra advised he was acting only for the Clinic as Plaintiff and not for the Defendants by Counterclaim.

## **CLAIM AGAINST RAJU, PERSONALLY**

12 The claim against Raju is that he defamed Kucher. Raju gave no basis on which to dismiss the claim against him, personally. His motion in this respect is dismissed and the Counterclaim against him, personally, stands.

## **AUTHORITY TO ALLOW RAJU TO ACT FOR THE CLINIC**

13 Mr. Raju may act for the Clinic, in person. He is the sole officer and director of the Clinic corporation. There is no evidence to suggest that he should be prevented from acting for the corporation.

## **THE DEFENCE TO COUNTERCLAIM OF THE CLINIC FOR FAILURE TO APPOINT COUNSEL**

**14** As I have given Mr. Raju leave to act for the corporation, the defence of the corporation need not be struck for that reason.

**DISMISSAL OF THE ACTION AND REPLY AND DEFENCE TO COUNTERCLAIM  
BECAUSE OF DELAY**

**15** Kucher's motion to dismiss the action and the Reply and Defence to the Counterclaim is based on the Clinic's and Raju's failure to answer a number of undertakings. The motion must succeed. The main action is dismissed and Reply and Defence to Counterclaim is struck as there is non-compensable prejudice to Kucher.

**16** The evidence conflicts as to what undertakings were answered and what remain outstanding. It is clear that two critical undertakings remain outstanding: one to provide bank records and copies of cheques (and grant access to the originals) between January 2004 and March 2006 that the Clinic and Raju says Kucher doctored and cashed; and one to provide the list of patients during January, 2004 and March, 2006. The Clinic's allegation is that a patient advised Raju about Kucher's activities.

**17** The parties agree that in order to dismiss the Claim and the Reply and Defence to Counterclaim for delay under Rule 24, there must be inexcusable delay and prejudice to Kucher that is not compensable or remediable, such that a fair trial is not possible [see Master Dash's helpful review of the law in *Woodheath Developments Ltd. V. Goldman* (2001), 56 O.R. (3d) 658]. In my view, in this case, there is such prejudice.

**18** The events and documents giving rise to the Clinic's claims (and through which Kucher hopes to establish his defence) are between nine and 13 years old. Mr. Raju admitted to the Court that the records retention policy of Iron Mountain, where he stores his files, is that they are destroyed when they reach ten years old. In other words, when one year's files go into storage, those reaching ten years, are destroyed automatically. This, plus the passage of the limitation period, is sufficient to raise the presumption of prejudice to Kucher.

**19** Mr. Raju also admitted that he thought that the Bank's record retention policy is seven years, meaning that any records it has with respect to the undertakings given, would have been destroyed in 2013 at the latest. This, alone, is sufficient evidence of prejudice to Kucher that is not compensable.

**20** Mr. Raju's admission regarding the Clinic's and his records retention policy means that all but one year of relevant files have likely been destroyed. Only one year of relevant documents may still be accessible. Mr. Raju has not led positive evidence that the records he undertook to produce are still available. His admission about records storage confirms the probability of prejudice to Kucher because of destroyed records. He admitted in argument that it is possible that the memory of the patient alleged to have reported to him Kucher's fraud could have faded. This is in contrast to his statement in paragraph 25 of his Affidavit wherein he said that the case does not turn on the memories of witnesses. In any event, the case will turn, in part, on Kucher's and Raju's memories.

**21** Mr. Raju has not explained the delay in prosecuting an action already nine years old concerning actions that are up to 13 years old.

**22** There is other evidence of prejudice. Kucher, after leaving the Clinic, obtained his MBA and began working toward his Mutual Fund dealer's licence, while working at RBC. That employment ended when the allegations of fraud were reported. So long as there is an allegation of fraud, Kucher

cannot obtain his Mutual Fund dealer's licence. This prejudice increases with every year that Kucher is prevented from obtaining his licence, because of the outstanding allegations of fraud.

**23** As the Court of Appeal said in *Wallace v Crate's Marine Sales Ltd.*, [2014] O.J. No. 4606 (a case with parallels to this case), "There comes a time when enough is enough, and the civil justice system will no longer tolerate inordinate and inexplicable delay".

**24** The action is dismissed and the Reply and Defence to Counterclaim is struck.

**25** Kucher shall have his costs. The parties shall provide submissions as to costs within 14 days of these Reasons. Those submissions shall not exceed three pages in length, excluding Bills of Costs.

J.K. TRIMBLE J.

---- End of Request ----

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