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One Last Chance: How a Recent Ontario Court of Appeal Decision is Changing the Landscape of Rule 15 Dismissal Motions

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The Ontario Court of Appeal's decisions in *Cunningham v. Hutchings,* 2017 ONCA 938 and *Cunningham v. Hutchings*, 2018 ONCA 365 have made it more difficult to dismiss plaintiff's claims under Rule 15.04(9) *Rules of Civil Procedure*. The Superior Court now regularly cites this case as a basis for refusing dismissal Orders. Where less than six months have passed since the plaintiff's counsel served the plaintiff with an Order removing themselves as solicitor of record, some Masters of the Toronto Court remain unwilling to grant a dismissal.

In *Cunningham*, the plaintiff had commenced an action in March of 2012 after allegedly sustaining injuries from two motor vehicle accidents. In November of 2016, Justice Reilly granted plaintiff counsel's order to be removed solicitors of record. In accordance with the language of Rule 15.03(3), the Order required the plaintiff to either appoint a new lawyer or serve a Notice of Intention to Act in Person. She did neither.

Approximately four months later in March of 2017, the defendant moved to have the action dismissed. Ms. Cunningham did not attend at the motion brought by the defendant and a Dismissal Order was granted by Justice Gordon.

When Ms. Cunningham learned of Justice Gordon's Order she promptly moved before Justice Flynn to have it set aside pursuant to Rule 37.14. Having retained new counsel, the plaintiff argued that the dismissal motion had been made without proper notice. Justice Flynn dismissed the plaintiff's motion, concluding that Ms. Cunningham had been provided with adequate notice of the defendant's March 2017 motion. According to Justice Flynn, Ms. Cunningham's arguments spoke to the merits of the dismissal and thus she ought to have appealed the Order of Justice Gordon to the Court of Appeal.

Ms. Cunningham moved for an extension of time to appeal the Order of Justice Gordon. It was this motion that went before Justice Brown of the Court of Appeal who adopted a "holistic" approach to justice and granted the plaintiff's request for an extension.[1] Citing *Laski v. Laski,* 2016 ONCA 337, Justice Brown examined the relief sought by Ms. Cunningham with consideration for the following factors: (i) an intention to appeal within the relevant time period; (ii) the length of an explanation for the delay in filing; (iii) prejudice to the responding party; and (iv) merits on the proposed appeal.

Justice Brown found the first factor to weigh against Ms. Cunningham, and the second and third factors to be neutral. With respect to the fourth factor, however, – "merits on the proposed

[1] *Cunningham v Hutchings,* 2017 ONCA 938, 287 ACWS (3d) 12, at para 24.

appeal" – Justice Brown held that, by ordering the dismissal, Justice Gordon adopted "the most draconian remedy in the circumstances". [2] To date, this language is referred to by Masters of the Superior Court when hearing Rule 15 dismissal motions. Justice Brown opined:

> Why the dismissal of [Ms. Cunningham's] action was a proportionate response to that failure cannot be ascertained in the absence of reasons. ***A party is not obligated to appoint a lawyer to represent her in a civil action; she is entitled to represent herself: Rule 15.01(3). And one would think that if a party does not appoint a new lawyer, that signifies the party intends to represent herself***. [3] (Emphasis added)

Justice Brown explained that for the purposes of Rule 15.03(3), the Notice of Intention to Act in Person "seems designed to ensure the party's address for service and telephone number are known to the court and to the other parties". [4] He observed that, in this case, the responding party knew where Ms. Cunningham resided as she had delivered the motion materials seeking the action's dismissal to the plaintiff's residence. As a result, Justice Brown held that "the justice of the case" favoured granting the plaintiff an extension of time to appeal.[5]

The plaintiff thereafter appealed the Orders of Justice Gordon and Justice Flynn in *Cunningham v. Hutchings*, 2018 ONCA 365. Here, the Court of Appeal set aside both Orders per curiam.

With its decision in *Cunningham,* the Court of Appeal has made it quite clear: dismissals Orders pursuant to Rule 15.04(9) of the *Rules of Civil Procedure* – failure of the plaintiff to appoint new counsel or serve a Notice of Intention to Act in Person – will not come easy to defence counsel.

Though the Superior Court relies more and more on the *Cunningham* case, there are several factors that were taken into account by the Court of Appeal which ought to distinguish that case from most other dismissal motions. Namely, the initial Order of Justice Reilly was deficient in that it did not include the text of Rules 15.04(8) and (9), as required by Rule 15.04(4); the Plaintiff was not given adequate notice that failure to appoint new counsel or act in person could result in a dismissal. [6] Further, the Court of Appeal found that Ms. Cunningham had not been served with the defendant's motion to dismiss as required by the Rules, which may explain why she did not appear before Justice Gordon.

Nonetheless, *Cunningham* has thus far afforded plaintiffs one last chance to pursue their action. Accordingly, defence counsel must be hypervigilant when bringing a Rule 15 dismissal motion. From experience, the more evidence there is of defence counsel's attempts to contact the plaintiff, the more willing the court will be to grant a dismissal. This may include personally placing a phone call to the plaintiff, which in one instance was the pivotal factor that resulted

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[2] *Ibid,* at para 23.
[3] *Ibid,* at para 21.
[4] *Ibid,* at para 22.
[5] *Ibid,* at para 25.
[6] *Cunningham v. Hutchings*, 2018 ONCA 365, 291 A.C.W.S. (3d) 242 at para 3.

in Dutton Brock LLP obtaining its dismissal Order. Whatever the case may be, best efforts should be made in a post-*Cunningham* world to satisfy the court that the plaintiff has abandoned his or her action and that a dismissal is rightly warranted.