CITATION: Alvi v. YM Inc., 2025 ONSC 2041
COURT FILE NO.: CV-14-00501448-0000
MOTION HEARD: 2024-12-12; 2025-01-15; 2025-01-24

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ASIM ALVI, plaintiff

AND:

YM INC., defendant

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: Shanthi Devanand for the plaintiff
Mordy Mednick for the defendant

HEARD: December 12, 2024; written submissions January 15, 2025 and January 24, 2025[1]

REASONS FOR DECISION

[1] These are reasons for decision with respect to two motions before the court: (1) the plaintiff's motion to restore this action to the trial list (the "Motion to Restore"); and (2) the defendant's motion to dismiss this action for delay pursuant to Rules 24.01(2) and 48.14(1) (the "Motion to Dismiss").

[2] For the reasons that follow, the plaintiff's Motion to Restore is dismissed and the defendant's Motion to Dismiss is granted.

A. NATURE OF THE ACTION AND PROCEDURAL HISTORY

[3] In the underlying action, the plaintiff alleges that he was wrongfully dismissed by the defendant in 2013. In his statement of claim, the plaintiff alleges that the defendant made gross misrepresentations to him and breached its duty to act fairly and in good faith. The pleadings make specific allegations of conduct and representations by various officers and employees of the defendant company at the time, including the defendant's president, CEO, Regional Manager, and two vice presidents of operations.

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[1] The motions were heard on December 12, 2024 and taken under reserve. On December 16, 2024, the Court of Appeal released its decision in *Barbiero v. Pollack*, 2024 ONCA 904 ("*Barbiero*"). The parties requested leave to make submissions on *Barbiero*. Pursuant to my order dated January 6, 2025, the defendant filed written submissions on *Barbiero* on January 15, 2025, and the plaintiff filed written submissions on *Barbiero* on January 24, 2025.

(i) Initial steps in the action

[4] The plaintiff commenced this wrongful dismissal action by statement of claim issued on April 3, 2014. The defendant served its statement of defence on May 13, 2014.

[5] The parties exchanged affidavits of documents, and examinations for discovery were held on May 20, 2015. The plaintiff gave certain undertakings, took certain questions under advisement, and refused to answer one question on his examination. By May 2016, the plaintiff had answered some but not all the undertakings given on his examination. Mediation was held on November 28, 2016, but no settlement was reached.

(ii) The first period of inactivity

[6] The plaintiff took no steps to advance the action between November 2016 and June 2018.

(iii) Action set down, trial certification form not completed, action struck from trial list

[7] On June 19, 2018, plaintiff's counsel instructed a process server to file the trial record, which was filed on June 22, 2018. The defendant's evidence is that it had not consented to the action being set down for trial.

[8] On August 8, 2018, plaintiff's counsel received a certification form from the Trial Scheduling Office (the "Trial Certification Form"). The form indicated that it was to be completed on a joint basis following discussions among counsel for the parties. The form expressly stated in two places that the action would be struck off the trial list without further notice if the action was not scheduled for trial by June 28, 2019.

[9] There is no evidence that the plaintiff took any steps with respect to the Trial Certification Form until October 29, 2018. On October 29, 2018, plaintiff's counsel sent an email to defendant's counsel requesting that he fill in the details necessary for completion of the Trial Certification Form. On January 22, 2019, plaintiff's counsel sent an email to defendant's counsel indicating that she had not received a response to her October 29, 2018 email and would be seeking an attendance at "To be Spoken to Court". That same day, defendant's counsel advised plaintiff's counsel that he did not recall receiving her October 29, 2018 email and that he would review the Trial Certification Form and respond to her by the end of the week. On January 26, 2019, defendant's counsel provided his comments on the Trial Certification Form. He also took the position that certain of the plaintiff's undertakings remained outstanding and advised that the defendant intended to have the plaintiff attend a continued examination for discovery to answer questions arising from his answers to undertakings.

[10] On January 28, 2019, plaintiff's counsel responded to the defendant's comments on the Trial Certification Form, agreeing to make certain amendments and seeking clarification on certain points. The compendium filed by the plaintiff on these motions includes email correspondence in January, April and May 2019 between plaintiff's counsel and defendant's counsel about the information needed to complete the Trial Certification Form, including the availability of defendant's counsel for trial. It also includes email correspondence in April and May 2019 between

the trial office and the parties' counsel about the information needed to complete the Trial Certification Form in order for the action to be listed for trial.[2]

[11] By email dated May 23, 2019, the Trial Coordinator asked counsel to resubmit a complete copy of the Trial Certification Form and confirm trial dates agreeable to all parties. The plaintiff did not do so.

[12] On June 28, 2019, the Trial Coordinator struck the action off the trial list.

(iv) Defendant seeks answers to the plaintiff's undertakings and reattendance by the plaintiff to answer questions arising from the answers to undertakings

[13] As noted, defendant's counsel notified plaintiff's counsel in January 2019 that the defendant was seeking answers to certain outstanding undertakings and a reattendance by the plaintiff to answer questions arising from his answers to undertakings. The defendant's evidence is that it did not take steps to obtain the outstanding answers to undertakings or continue the examination for discovery of the plaintiff sooner because it believed that the plaintiff had decided not to pursue this action.

[14] Correspondence between counsel in the spring of 2019 includes an April 29, 2019 email from defendant's counsel to plaintiff's counsel attaching a list of the plaintiff's outstanding undertakings and inquiring about the plaintiff's availability for a continued examination in June 2019. When the plaintiff did not provide further answers to undertakings or agree to reattend, the defendant brought a motion seeking an order compelling the plaintiff to answer his undertakings and reattend for continued discovery. In response to the defendant's undertakings motion, the plaintiff provided answers to certain outstanding undertakings in August and September 2019. That resolved all the issues on the defendant's motion other than whether the plaintiff should be required to reattend for a continued examination for discovery.

[15] The defendant's undertakings/reattendance motion was heard on December 11, 2019. The plaintiff opposed reattendance on the basis that there is no automatic right to examine on answers to undertakings, as well as on the basis that the defendant had not taken any steps since the 2015 examination for discovery to enforce the outstanding undertakings or pursue the plaintiff's reattendance. Associate Justice Robinson (then titled Master Robinson) ordered that the defendant was permitted to continue the examination of the plaintiff. His endorsement included the following:

> ...The evidence does support the plaintiff took no substantive steps from the mediation late 2016 to October 2018, including answering outstanding undertakings...That evidence has only been disclosed as of August 21, 2019. I do not fault the defendant for

[2] Some of the correspondence in the plaintiff's compendium (namely email correspondence between counsel and the court, or between counsel) does not appear to be included in any of the motion records filed on these motions. The defendant did not object to reference by the plaintiff to this correspondence at the hearing of the motions. For purposes of these motions, the correspondence is accepted as evidence and forms part of the record for the motions.

> leaving it to the plaintiff to move his action forward, which is his obligation to do. (emphasis added)

[16] The plaintiff reattended for examination on February 11, 2020. On April 15, 2020, defendant's counsel sent plaintiff's counsel a list of the undertakings given at the plaintiff's reattendance. The plaintiff answered those undertakings on May 13, 2020.

(v) The second period of inactivity

[17] There is no evidence of any activity by the plaintiff to advance the action, nor of any correspondence from plaintiff's counsel to defendant's counsel, between May 14, 2020 and February 2023.

(vi) Activity leading to the Motion to Dismiss and the Motion to Restore

[18] In early February 2023, plaintiff's counsel sent email correspondence to defendant's counsel advising that the plaintiff wished to move the matter along and asking for the defendant's position. On February 8, 2023, defendant's counsel replied, indicating the following:

> "…I believe that the matter was struck from the Trial list, in which case you would have needed to seek leave to restore it to the Trial List. At this point, we will need to review the matter and seek instructions from our client. Given the very significant delay, we suspect that we will get instructions to move to have the action dismissed for delay."[3]

[19] Between February and April 2023, counsel exchanged email correspondence. Defendant's counsel proposed dates for a motion to dismiss for delay, to be heard in March 2023, or February or March 2024. Plaintiff's counsel declined to provide her availability for a dismissal motion and instead advised that the plaintiff would be seeking an attendance in Civil Practice Court to set a trial date. Defendant's counsel questioned the purpose of an attendance in Civil Practice Court given that the matter had been struck from the trial list and took the position that the plaintiff would have to bring a motion for leave to restore the matter to the trial list. The plaintiff did not bring a motion to restore the action to the trial list at that time.

[20] On May 6, 2023, defendant's counsel wrote to plaintiff's counsel as follows: "We have given you ample time to schedule a motion to restore the matter to the trial list. We have not heard from you. Therefore, we will be moving to schedule a motion for dismissal for delay". On May 25, 2023, plaintiff's counsel requested defendant's counsel availability to attend Civil Practice Court. That same day, defendant's counsel provided his availability and asked plaintiff's counsel for her availability for the defendant's contemplated motion to dismiss the action for delay. Plaintiff's counsel responded "I am not going to agree for motion dates at this time. The purpose of CPC is

[3] Initially, the response from defendant's counsel also suggested that the plaintiff had failed to reattend for examination for discovery as ordered on December 11, 2019. Plaintiff's counsel reminded defendant's counsel that the continued examination had taken place, and the reattendance issue was not pursued by defendant's counsel.

to set the matter for a five-day trial". However, once again, the plaintiff did not schedule an attendance in Civil Practice Court.

[21] On July 6, 2023, the defendant served a notice of motion for the Motion to Dismiss, returnable on June 17, 2024. On December 19, 2023, the defendant served its motion material in respect of the Motion to Dismiss. By that date, defendant's counsel had not received any correspondence from plaintiff's counsel since her May 25, 2023 email (to which defendant's counsel had responded on the same day), and the plaintiff had still not scheduled an appearance in Civil Practice Court or taken any steps with respect to a motion to restore the action to the trial list.

[22] On June 10, 2024, the plaintiff served a responding affidavit and factum in opposition to the Motion to Dismiss, which had been pending since July 6, 2023. Also on June 10, 2024, the plaintiff served motion materials with respect to the Motion to Restore. The plaintiff brought the motion as an opposed in-writing motion pursuant to Rule 37.12.1. The materials consisted of a motion record containing a notice of motion dated June 10, 2024 and a supporting affidavit sworn by plaintiff's counsel on June 10, 2024.

[23] The defendant's Motion to Dismiss came before me on June 17, 2024. In view of the numerous issues to be argued, including the plaintiff's recently served Motion to Restore, I adjourned the motions to be heard together by me as long motions on December 12, 2024. My June 17, 2024 endorsement included the following:

> 1. This is a motion by the defendant for an order dismissing the action for delay (the "Motion to Dismiss"). The plaintiff served a motion record with respect to a motion to restore the action to the trial list (the "Motion to Restore") and the notice of motion proposes that the motion be heard as an in-writing opposed motion. The plaintiff also served a responding factum in response to the Motion to Dismiss. Although the plaintiff has not served a separate factum with respect to the Motion to Restore, the plaintiff's responding factum requests an order restoring the action to the trial list.
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> 2. The Motion to Dismiss was scheduled for 2 hours. Counsel for the defendant explained that 2 hours was chosen because the plaintiff's counsel did not cooperate with respect to scheduling and it did not seem appropriate to book a long motion absent any indication from the plaintiff's counsel that more than 2 hours would be required. In this regard, the defendant provided the plaintiff with prior notice that it intended to bring the Motion to Dismiss and served its notice of motion record (*sic*) in July 2023, and its motion materials were delivered in December 2023. The plaintiff only served his responding material on June 10, 2024 with respect to a motion returnable today, and further complicated matters by serving the in-writing Motion to Restore on June 10, 2024.
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> 3. The motion could not proceed today because insufficient time was booked. Argument with respect to the issues involved in the lead up to the Motion to Dismiss and the Motion to Restore and the substantive issues raised in those motions require

> a long motion. In the result, the motions are adjourned to be heard together by me as long motions. …

[24] I also ordered a timetable for delivery of further motion materials, completion of cross-examinations, and delivery of factums and compendiums in advance of the hearing of the long motions.

B. ISSUES

[25] The issues on these motions are as follows:

1. Should the action be restored to the trial list?
2. Should the action be dismissed for delay pursuant to Rules 24.01(2) and 48.14(1)?

C. LAW AND ANALYSIS

1. Should the action be restored to the trial list?

(a) Applicable principles

[26] Rule 48.11 provides as follows:

> 48.11 Where an action is struck off a trial list, it shall not thereafter be placed on any trial list except,
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> (a) in the case of an action struck off the list by a judge, with leave of a judge; or
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> (b) in any other case, with leave of the court.

[27] The Court of Appeal has explained the applicable test on a motion to restore an action to the trial list as follows:

> [42] The decision whether to restore an action to the trial list is discretionary. Where there is no impending dismissal, the question on a rule 48.11 motion is simply whether the plaintiff has shown that the action is "ready for trial" within the meaning of rule 48.01, that is, whether it is at a stage where pre-trial and trial dates can be scheduled. If restoration to the trial list is premature, the court should consider the imposition of a timetable or terms.
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> [43] Where, as here, the refusal to restore an action to the trial list will result in its dismissal, the *Nissar* test, informed by the case law respecting rule 48.14 dismissals, will apply. This is because the inevitable result of the failure to restore the action to the trial list would be dismissal, as occurred here. As discussed in several decisions of this court concerning dismissal for delay, a motion judge must strike a balance between the

need for efficiency and the need for flexibility, such that cases can be tried on the merits where there is a reasonable explanation for non-compliance with the rules: see *1196158 Ontario Inc.*, at para. 20; *Fuller*, at para. 25; *Faris v. Eftimovski*, [2013] O.J. No. 2551, 2013 ONCA 360, 306 O.A.C. 264, at para. 24; and *Kara v. Arnold*, [2014] O.J. No. 5818, 2014 ONCA 871, 328 O.A.C. 382, at para. 9.[4]

[28] Under the two-part *Nissar* test, the plaintiff has the burden to show: (1) there is an acceptable explanation for the delay in the litigation; and (2) if the action is allowed to proceed, the defendant would suffer no non-compensable prejudice.[5] The two-part *Nissar* test for dismissal under Rule 48.11 is conjunctive.[6]

[29] With respect to the requisite explanation for delay, the applicable principles include the following:

(a) the plaintiff must show an "acceptable", "satisfactory" or "reasonable" explanation for the delay;[7]

(b) … in assessing whether a plaintiff's explanation for delay is reasonable, a motion judge should consider the overall conduct of the litigation, in the context of local practices;[8]

(c) the context of the action and other relevant factors specific to the case must be considered. These will include the overall progress of the action before it was listed for trial, the circumstances of how the action came to be struck from the trial list, and the conduct of all parties;[9]

(d) the longer the delay, the more cogent the explanation for delay must be;[10] and

(e) the court will consider not only the credibility of the explanations offered for individual parts of the delay, but also the overall delay and the effect of the explanations considered as a whole.[11]

[30] With respect to the issue of prejudice, the applicable principles include the following:

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[4] *Carioca's Import & Export Inc. v Canadian Pacific Railway Limited*, 2015 ONCA 592 ("*Carioca's*") at paras 42-43. Citing *Nissar v. Toronto Transit Commission,* 2013 ONCA 361 ("*Nissar*"), In *Cardillo v. Willowdale Contracting et.al*, 2020 ONSC 2193 ("*Cardillo*") at para 43, Lemay J. explained that the test for leave to restore a matter to the trial list under Rule 48.11 is the same as the test for dismissing an action for delay under Rule 48.14.
[5] *Nissar* at para 31; *Ennin* at para 19
[6] *Nissar* at para 31; *Ennin* at para 19
[7] *Carioca's* at para 45
[8] *Carioca's* at para 46
[9] *Carioca's* at para 55
[10] *Kara v. Arnold*, 2014 ONCA 871 at para 17
[11] *Langenecker v. Sauvé*, 2011 ONCA 803 ("*Langenecker*"), at para 10

(a) "The issue of prejudice is a factual question. The plaintiff bears the onus of demonstrating that the defendant would suffer no non-compensable prejudice if the action were allowed to proceed. The mere passage of time cannot be an insurmountable hurdle in determining prejudice, otherwise timelines would become inflexible and explanations futile";[12]

(b) a defendant is not required to offer evidence of actual prejudice;[13]

(c) the court must consider the defendant's conduct in relation to the question of prejudice;[14]

(d) the prejudice at issue is to the defendant's ability to defend the action as a result of the plaintiff's delay, not as a result of the sheer passage of time;[15]

(e) in *Langenecker*, the Court of Appeal held that the existence of delay gives rise to a rebuttable presumption of prejudice,[16] explaining as follows:

> [11] … Prejudice is inherent in long delays. Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay: *Tanguay v. Brouse*, 2010 ONCA 73, at para. 2.
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> [12] In addition to the prejudice inherent in lengthy delays, a long delay can cause case-specific prejudice. …[17]

(f) recently, the Court of Appeal in *Barbiero* held as follows:

> [15] … To the extent that *Langenecker* denies that the passage of time, on its own, can constitute sufficient prejudice to dismiss an action for delay and not simply a rebuttable presumption of prejudice, it should not be followed."[18]

(b) Analysis

(i) *Applicable test*

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[12] *Carioca's* at para 49
[13] *Carioca's* at para 50
[14] *Carioca's* at para 50 citing *H.B. Fuller Co. v. Rogers (c.o.b. Rogers Law Office)*, 2015 ONCA 173 at para 39
[15] *Carioca's* at para 57
[16] *Langenecker* at paras 2, 20-23
[17] *Langenecker* at paras 11-12
[18] *Barbiero* at para 15

[31] This action was struck off the list more than 2 years before the plaintiff brought the Motion to Restore.[19] Rule 48.14(1), para 2, provides that the registrar shall dismiss an action for delay where "The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off." Therefore, the applicable test in these circumstances is not based on an assessment of whether the action is ready for trial. Rather, the two-part conjunctive *Nissar* test applies,[20] namely: (1) whether the plaintiff has provided an acceptable explanation for the delay in the action; and (2) whether the plaintiff can demonstrate that the defendant will suffer no non-compensable prejudice if the action is allowed to proceed.[21]

(ii) *Has the plaintiff provided an acceptable explanation for the delay in the action?*

[32] In this case, in addition to the overall delay, there are two specific periods of inaction and delay that need to be considered, namely (1) the period from November 2016 to June 2018; and (2) the period from May 2020 to June 2024. It is also relevant to consider the period from June 2019 (when the action was struck from the trial list) to June 2024 (when the plaintiff served the Motion to Restore), including correspondence from the plaintiff's lawyer beginning in February 2023 indicating the plaintiff's intention to move the action along to trial.

[33] While the plaintiff has the primary responsibility for moving the action forward, the court must also consider the defendant's conduct, particularly where a plaintiff encounters some resistance when trying to move the action along.[22] It is also relevant to consider the context of the action and other factors that may be specific to it, including the overall progress of the action before it was listed for trial and the circumstances of how the action was struck from the trial list.

Delay #1 – the period from November 2016 to June 2018

[34] The plaintiff acknowledges that he took no steps to advance the action between November 2016 until June 2018. However, the plaintiff submits that, as was the case in *Cardillo*, the delay can be partly explained by the defendant's conduct.[23] More specifically, he submits that the defendant contributed to this delay because it did not take any steps during this period to require the plaintiff to answer his undertakings. I do not accept this submission. In my view, the facts of *Cardillo* are distinguishable and do not support a finding that this action should be restored to the trial list. In *Cardillo*, the defendant did not move promptly to compel answers to questions that the plaintiff refused to answer. In this case, the plaintiff's motion related to undertakings the plaintiff did not fulfill. Further, in this case, Associate Justice Robinson considered the issue of the defendant's delay in bringing its motion to compel the plaintiff to answer his undertakings and reattend for further discovery. Associate Justice Robinson ordered the plaintiff to reattend for further discovery, finding that the defendant's delay in bringing its motion was understandable

[19] The action was struck off the trial list on June 28, 2019. The Motion to Restore was served on June 10, 2024.
[20] *Carrioca's* at paras 42-43; *Cardillo* at para 43
[21] *Carrioca's* at para 43; *Ennin v BMO*, 2023 ONSC 873 at para 19 ("*Ennin*"), citing *Nissar* at para 31
[22] *Carioca's* at para 53
[23] *Cardillo* at para 64

because the action had been inactive and that he did "not fault the defendant for leaving it to the plaintiff to move his action forward".

[35] In my view, the defendant did not create any obstruction to the plaintiff moving the action forward. The outstanding undertakings were those of the plaintiff and it was his responsibility to answer them. When plaintiff's counsel ultimately reinitiated contact with defendant's counsel in the fall of 2018 and then again in January 2019, defendant's counsel noted the plaintiff's outstanding undertakings and demanded that the plaintiff reattend for continued examination for discovery. When the plaintiff refused to reattend, the defendant brought a motion that was heard in December 2019. In support of the Motion to Dismiss, the defendant filed an affidavit from one of its lawyers involved in the action in which he deposed that the defendant did not bring the motion earlier because it believed that the plaintiff had decided not to pursue this action. The plaintiff did not cross-examine on this evidence. In my view, the following principle is apt in the current circumstances:

> In this case…the defendants did nothing to resist any attempt by the plaintiff to advance the action. They cannot be accused of "lying in the weeds" and hoping to gain a tactical advantage. Failing any initiative on the part of the plaintiff, to require the defendants to spend time and money to prepare for a case that, from all appearances, was dead on the vine would, in my view, be to impose an unnecessary and unreasonable burden.[24]

[36] In any event, there is no evidence of any an impediment – created or exacerbated by the defendant – to the plaintiff setting it down for trial, as he eventually did. There was no correspondence from the plaintiff's lawyer to the defendant's lawyer in this period. There is nothing in the record demonstrating any unilateral activity on the plaintiff's side to ready the action for trial in this period. There is no reason why the plaintiff could not have done sooner what he eventually did in June 2018. Based on the evidence in the record and the procedural history of this matter, there is no basis to attribute any of the delay from November 2016 to June 2018 to the defendant.

[37] In the result, I find that the plaintiff has failed to provide a reasonable or acceptable explanation for the delay from November 2016 until June 2018.

Delay #2 – the period from May 2020 to June 2024

[38] The defendant submits that the plaintiff has not provided a reasonable explanation for the inactivity on this action between May 2020 and June 2024.[25] The plaintiff seeks to explain this delay based on (1) the COVID-19 pandemic, and (2) various health issues faced by him and his family.

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[24] *1196158 Ontario Inc v 6274013 Canada Limited*, 2012 ONCA 544 ("*1196158 Ontario*") at para 30

[25] The defendant acknowledges that the calculation of the length of the delay during this period should be reduced to account for the period during which procedural timelines were suspended by the Ontario government due to the COVID-19 pandemic.

[39] With respect to the COVID-19 pandemic, the plaintiff submits that as a result of the pandemic "normal court proceedings were suspended to the best of my knowledge and belief which resulted in the loss of traction of these current proceedings", that the pandemic "severely impacted our ability to move the case forward between February 2020 to May 2023", and that "[t]he courts' limited operations and the challenges in coordinating necessary in-person meetings significantly disrupted our progress." I do not accept this explanation. The bald assertion about the COVID-19 Pandemic is not a reasonable or acceptable explanation for the delay in moving this action forward between February 2020 and May 2023 other than with respect to the six month period during which procedural timelines were suspended.[26]

[40] The plaintiff also seeks to explain this period of delay based on medical conditions affecting him and his family. In support of this assertion, the plaintiff relies on certain medical reports and records from 2020 to 2024 pertaining to himself, his spouse, and his daughter. The plaintiff argues that the records demonstrate that various medical conditions and resulting family circumstances were significant contributing factors to the plaintiff's delay in this action. This includes various ailments suffered by the plaintiff, such as respiratory issues, extreme Psoriasis, gastro-reflux disease, and assessment for cancerous tumours. As well, the plaintiff submits that he was unable to prosecute the action because his wife had an operation in June 2022 and coronary treatment (stents) in June 2023. He also submits that there were certain periods in which his daughter, who suffers from a chromosomal disorder known as Jacobsen syndrome, was undergoing diagnosis, hospitalization and treatment with respect to a potential brain tumour and certain psychiatric issues.

[41] I accept that the plaintiff faced certain medical issues and related stresses throughout certain parts of this period of delay. I also accept that there were periods during which the plaintiff and his family faced challenges as a result of his health, his wife's health and his daughter's physical and mental health. However, based on the evidence in the record, I do not accept the plaintiff's argument that these medical challenges impeded his ability to prosecute this action for the period from May 2020 to June 2024 (when the plaintiff served the Motion to Restore) or even to February 2023 (when plaintiff's counsel reinitiated contact with the defendant's lawyer). There is no contemporaneous correspondence between the plaintiff and his lawyer supporting the plaintiff's assertions that he had an intention to move the action forward but was unable to do so because of medical issues faced by him and his family. There is insufficient evidence to find that the plaintiff's medical condition or family circumstances precluded him from taking steps to have the action listed for trial.[27] In this regard, the next step the plaintiff needed to take was to bring the Motion to Restore. This was not a particularly onerous step as can be seen from the materials filed by the plaintiff in support of the motion. The plaintiff's claims that his health impeded his ability to diligently pursue this action are effectively unsupported assertions without corroborating evidence, such as a note from a family doctor or other medical practitioner. On the other hand, the defendant obtained an expert report in which Dr. David Eisen concluded that "there are no conditions reported [in the medical records produced by the plaintiff] that would have prevented

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[26] *Divisions 9 + 10 Inc v McDonald Brothers et al*, 2024 ONSC 2423 at para 37; *Gordon v Gordon*, 2021 ONSC 273 at para 33

[27] *Beshay v Labib*, 2024 ONCA 186 ("*Beshay*") at paras 16-17 and 20; affirming *Beshay v Labib*, 2023 ONSC 2874

Mr. Alvi from taking any steps required in this litigation in the normal course between 2020 and 2024, with the possible exception of his daughter's condition during the hospital stay of nine days in September 2021." Dr. Eisen was not cross-examined, and no responding expert's report was filed by the plaintiff.

[42] In summary, while there is some evidence of medical issues involving the plaintiff and his family during parts of the period in question, there is insufficient "cogent evidence" to support the plaintiff's assertion that they prevented him from pursuing this litigation throughout that lengthy period.[28] The onus is on the plaintiff to provide a reasonable explanation for the delay. Bald assertions that a medical condition prevented him from pursuing the litigation are insufficient to discharge that onus.[29] Considering the evidence as a whole, I am unable to find that the medical issues and related stresses faced by the plaintiff and his family are an acceptable explanation of the overall delay from May 2020 to June 2024 (or from May 2020 to February 2023).

Delay in bringing the Motion to Restore

[43] The action was struck from the trial list in June 2019 and the plaintiff did not bring the Motion to Restore until June 2024, a period of 5 years. For purposes of the Motion to Restore, the 5 year period is reduced to 4.5 years because of the 6 month suspension of procedural timelines imposed by the Ontario government due to the COVID-19 pandemic.

[44] The defendant submits that the 4.5 year delay for the plaintiff to bring the Motion to Restore is not properly explained. The plaintiff's lawyer submits that she was not aware that the action had been struck from the trial list in June 2019 and received no notice of it at the time. I do not accept this an explanation as to when the plaintiff knew or should have known the action was struck from the trial list. The plaintiff's lawyer received notice from the court on August 8, 2018 expressly stating in two places that if the action was not scheduled for trial by June 28, 2019 it would be struck off the trial list without further notice. Further, the action was struck from the trial list due to the plaintiff's failure to take the necessary steps to schedule the trial of the action. After the trial record was filed in June 2018, the court sent the Trial Certification Form to the plaintiff's lawyer on August 8, 2018. Plaintiff's counsel did not forward that Trial Certification Form to defendant's counsel until October 29, 2018. There is no explanation for that delay of nearly 3 months. Granted there was a delay from October 29, 2018 to January 2019 during which the defendant did not respond to the plaintiff's request for information necessary to complete the Trial Certification Form, although that appears to have been the result of inadvertence. However, no serious steps were taken by the plaintiff to complete the Trial Certification Form until January 2019, and from that time forward the defendant cooperated fully with respect to completion of the Trial Certification Form. It was the plaintiff who simply failed to complete the process of submitting the form over the next 5 months (by June 28, 2019) that led to the action being struck from the trial list.

[45] In oral argument, the plaintiff's lawyer made two inconsistent assertions about the failure to complete the steps needed to schedule the action for trial. First, the plaintiff's lawyer submitted

[28] *Beshay* at paras 17 and 20
[29] *Beshay* at para 17

that the Trial Certification Form was not completed because, at that time, the defendant was still seeking certain continued discovery of the plaintiff. However, this is not supported by the evidence in the record. In any event, the defendant's assertion that it was entitled to continued discovery of the plaintiff was not a barrier to the filing of a finalized Trial Certification Form, and the defendant did not take the position that it was premature to schedule the trial. To the contrary, as noted above, the defendant cooperated in providing the information necessary for the completion of the Trial Certification Form. Later in oral argument, and inconsistently with the first assertion, the plaintiff's lawyer indicated that she was not sure why the Trial Certification Form was not finalized and filed. This is also not a reasonable explanation as to why the Trial Certification Form was not filed, or why the plaintiff's lawyer did not know that the action would be, and was, struck off the trial list as of June 28, 2019.

[46] A further failure by the plaintiff to advance the action occurred in February 2023, when the plaintiff's lawyer sent correspondence indicating the plaintiff's intention to move the action along to trial. However, the plaintiff failed to take appropriate steps to restore the action to the trial list after the defendant expressly advised the plaintiff on February 8, 2023, and again in April and May 2023, that the matter had been struck from the trial list. Rather than bringing the Motion to Restore, plaintiff's counsel simply advised that the plaintiff wished to schedule an attendance at Civil Practice Court. Yet the plaintiff did not even do that. Although defendant's counsel cooperated and provided his availability for an attendance in Civil Practice Court, the plaintiff never scheduled such an attendance. Rather, on June 10, 2024, 11 months after the defendant had served its notice of motion with respect to Motion to Dismiss (on July 6, 2023) and nearly 6 months after service of the defendant's motion record (on December 19, 2023), the plaintiff served a motion record with respect to his Motion to Restore. At the same time, just one week before the June 17, 2024 return date for the Motion to Dismiss, the plaintiff served his responding materials with respect to that motion. In addition, the plaintiff brought the Motion to Restore as a contested in-writing motion, and the plaintiff's motion materials were incomplete (no factum was filed, contrary to Rule 37.12.1(4)). Leaving aside that, in my view, it was inappropriate for the plaintiff to seek to have the Motion to Restore determined in-writing, doing so nearly 5 years after the action was struck from the trial list on June 28, 2019, and 16 months after express notice that it had been struck, was not "prompt".

[47] I also infer that the Motion to Restore was only served on June 10, 2024 because of the pending June 17, 2024 return date for the defendant's Motion to Dismiss.[30] In this regard, I note that the plaintiff's motion materials for the Motion to Restore were served on the same day as his responding materials with respect to the Motion to Dismiss, and there is no evidence of any prior notice to the defendant that the plaintiff would be bringing the Motion to Restore.

[48] In the result I find that, unlike the circumstances in *Carioca's* and *Croy Properties Inc. v. 2273865 Ontario Inc.*,[31] both of which are relied on by the plaintiff, the plaintiff lost sight of the need to restore the action to the trial list and failed to bring the Motion to Restore promptly after

[30] *Queen Britain Holdings Inc. v. Ohayon,* 2021 ONSC 7599 at para 19
[31] *Croy Properties Inc. v. 2273865 Ontario Inc.*, 2015 ONSC 3332

the action had been struck.[32] The plaintiff has not provided a reasonable explanation for the delay in bringing the Motion to Restore.

(iii) *Has the plaintiff demonstrated that the defendant will suffer no non-compensable prejudice if the action were allowed to proceed?*

[49] As noted above, the two-part *Nissar* test for dismissal under Rule 48.11 is conjunctive.[33] Therefore, if the plaintiff has not satisfied the first part of the test, it is not necessary for me to consider the second part of the test. Nevertheless, even if I had concluded that the plaintiff has provided an adequate explanation for the delay, I would still dismiss the Motion to Restore on the basis that the plaintiff has failed to demonstrate the defendant will suffer no non-compensable prejudice if the action is allowed to proceed. My reasons are as follows.

[50] Relying on *Carioca's*, the plaintiff asserts that the action should be allowed to proceed because it is trial ready. While trial readiness can be one factor to consider, other factors come into play.[34] Further, unlike the circumstances in *Carioca's*, the plaintiff has not adduced the requisite evidence that there would be no non-compensable prejudice if the action is restored to the trial list.[35] In this regard, the plaintiff's affidavit evidence regarding prejudice is as follows: "The delay has not prejudiced the Defendant's ability to mount a defense. The necessary documents and evidence have been preserved and the Defendant has been fully aware of our intentions to proceed with the case." This is merely a bald assertion.

[51] The events giving rise to this action took place prior to June 2013. The claim was issued in April 2014. The examination for discovery of the defendant took place 9 years prior to service of the Motion to Restore and 8 years prior to the scheduling of the Motion to Dismiss.[36] The plaintiff has not put forward any evidence as to the witnesses who will testify at trial, their availability, the nature of their evidence, the preservation of their testimony, or how they can be expected to recall key events (or alternatively that the issues to be determined at trial will not depend on the recollection of witnesses), or what essential documents are required for trial and whether they still exist.[37] The defendant intends to call five witnesses. Only one of those anticipated trial witnesses was examined for discovery, and that examination took place nearly a decade ago. Based on the nature of the allegations in the statement of claim in this action, including allegations of oral misrepresentations and misconduct of numerous officers and employees of the defendant, much will turn on witness testimony about events that are alleged to have occurred in 2013. Given the

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[32] *Carioca's* at para 54
[33] *Nissar* at para 31; *Ennin* at para 19
[34] *Carioca's* at para 54. In addition, the circumstances of this action are distinguishable from those in *Carioca's*. Here, as outlined above and contrary to the plaintiff's submission, the defendant did not cause any resistance to the progress of the action and the defendant's conduct did not contribute to the delays. While the action was struck off the list administratively, this was because the plaintiff failed to submit the Trial Certification Form with all the requisite information. No reasonable explanation is provided for this failure.
[35] *Carioca's* at para 77
[36] The plaintiff was examined for discovery in 2015 but his discovery was only completed in 2020 because of the plaintiff's delay in answering his undertakings, as well as the plaintiff's refusal to reattend to complete his discovery, which necessitated the defendant's 2019 motion to compel the plaintiff's reattendance.
[37] *Ennin* at para 27

issues in dispute in this action and the plaintiff's own evidence that "there are many factual disputes", I do not accept the plaintiff's bald assertion that there is no prejudice to the defendant from the delay. Rather, considering the length of the delay, I find that it will be more difficult for the defendant to defend an action that relates to events that occurred many years ago and that will be even more remote by the time of trial.[38] "The longer the delay, the less reliable people's memories become, and therefore the greater potential for prejudice to [a defendant]."[39] In a case such as this, the ability of witnesses to recall key events will be important, and their credibility will be in issue.

[52] As noted above, the Court of Appeal recently held in *Barbiero* that the passage of time can, on its own, constitute sufficient prejudice to dismiss an action for delay and not simply a rebuttable presumption of prejudice.[40] A defendant is not required to offer evidence of actual prejudice.[41] In the current circumstances, I find that the delay in this action constitutes sufficient prejudice to dismiss the action for delay. Further, even if I were to apply a pre-*Barbiero* analysis, I would find that the plaintiff has failed to rebut the presumption of prejudice arising from the delay. Given the lengthy delay in this action with respect to events that are alleged to have occurred in 2013, the presumed prejudice is more inherent and is not rebutted by the evidence.

[53] In summary, the plaintiff's assertion that there is no prejudice to the defendant is unsupported by the evidence. The plaintiff has failed to meet his onus of demonstrating that the defendant will suffer no non-compensable prejudice if the action is allowed to proceed.

(c) Conclusion on the Motion to Restore

[54] The plaintiff has not provided a reasonable or acceptable explanation for the period of delay from November 2016 until June 2018, or the period from May 2020 to June 2024 (or even to February 2023). The plaintiff has also failed to provide a reasonable or acceptable explanation for the 4.5 year delay in bringing the Motion to Restore. The delay in the action, which was commenced in 2014 with respect to events that are alleged to have occurred in 2013, is such that the defendant will suffer non-compensable prejudice if the action is allowed to proceed. Further, the defendant is entitled to some finality. In all the circumstances, the plaintiff should not be granted leave to restore the action to the trial list.

2. Should the action be dismissed for delay pursuant to Rule 24.01(2) and Rule 48.14(1)?

(a) Applicable principles

[55] Rule 24.01(2) provides:

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[38] *1196158 Ontario* at para 43; *Ennin* at para 29
[39] *Ennin* at para 28
[40] *Barbiero* at para 15
[41] *Carioca's* at para 50

> (2) The court shall…dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14(1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust.

[56] Rule 48.14(1) provides:

> (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances…
>
> …
>
> 2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off.

[57] The court has applied different tests in determining whether to dismiss an action for delay under Rules 24.01(2) and 48.14(1).[42] In *Smith v Armstrong*, Gordon J. held that the two-part conjunctive test outlined in *Faris v Eftimovski*[43] applies to motions to dismiss pursuant to Rule 24.01(2).[44] Under the *Faris* test, the plaintiff has the onus of demonstrating that: (1) there is an acceptable explanation for the delay; and (2) if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice because of the plaintiff's delay. This is the same test as the one applied above with respect to the Motion to Restore.

[58] In *Nanak Homes Inc. v Arora*, McSweeney J. held that the Rule 24.01 test for dismissal due to delay (the "*Langenecker* test") is not modified by Rule 24.01(2).[45] McSweeney J. explained that on a motion to dismiss for delay under Rule 24.01, an action will be dismissed where the delay is inordinate, inexcusable and such that it gives rise to a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay.[46]

[59] In *Grewal*, the parties agreed that the *Langenecker* test applied. As a result, the court did not need to decide if the *Faris* test, through which the plaintiff has the onus to show cause why the action should not be dismissed for delay, was applicable.

[60] On this motion, the defendant submits that the *Faris* test is the same test as the test for a motion under Rule 48.11 to restore an action to the trial list, and that the *Faris* test should be applied with respect to the Motion to Dismiss. The plaintiff made no submissions on the applicable test for Motion to Dismiss.

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[42] *Grewal v Peel District School Board*, 2023 ONSC 159 ("*Grewal*") at para 44
[43] *Faris v Eftimovski*, 2013 ONCA 360 ("*Faris*")
[44] *Smith v Armstrong et al*, 2018 ONSC 2435 at para 33
[45] *Nanak Homes Inc. v Arora*, 2019 ONSC 6654 ("*Nanak*") at paras 11 and 14
[46] *Nanak* at paras 14 citing *Langenecker v. Sauvé*, 2011 ONCA 803 ("*Langenecker*") at para 7; see also *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 ("*Ticchiarelli*") at para 15. The test under Rule 24.01(1) is modified in the rare cases in which the delay is caused by the intentional conduct of the plaintiff or his counsel that demonstrates a disdain or disrespect for the court process; see *Langenecker* at para 6. That modified test is not applicable on these motions.

[61] In the circumstances of this case, I need not decide whether to apply the *Faris* test or the *Langenecker* test for the analysis under Rule 24.01(2). For the reasons outlined below, I would reach the same result applying either test.

(b) Analysis

[62] If the *Faris* test applies, the analysis is the same as that outlined above with respect to the Motion to Restore. Applying that test, I find that the plaintiff has failed to satisfy the onus of demonstrating that: (1) there is an acceptable explanation for the delay; and (2) if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice because of the plaintiff's delay. On that basis, I would dismiss the action for delay pursuant to Rule 24.01(2) and Rule 48.14(1).

[63] If the *Langenecker* test applies, for the following reasons, I find that there has been an inordinate delay that is inexcusable, and that the delay is prejudicial to the defendants in that it gives rise to a substantial risk that a fair trial of the issues will not be possible.

(i) *The delay is inordinate*

[64] The inordinance of the delay is measured by reference to the length of time from the commencement of the proceeding to the motion to dismiss.[47]

[65] On a motion to dismiss for delay under Rule 24.01(1)(e) for failure to restore an action to the trial list, the court has held that it is entitled to consider the entire delay in the action, and not just the period from when the action was struck off the trial list. Further, the court is entitled to consider all of the conduct of the litigation up to the date of the motion.[48] If the test under Rule 24.01(2) is the same as the test under Rule 24.01(1), those same principles apply in this case.

[66] Here, the action was commenced by statement of claim issued on April 3, 2014. The defendant brought the motion to dismiss on July 6, 2023 (returnable on June 10, 2024). By that time, the delay of more than 9 years was inordinate. Further, even if I were to consider the delay from the time when the action was struck from the trial list in June 2019 to the time the defendant brought the Motion to Dismiss in July 2023 (which, in my view, is not the appropriate period for which to assess whether the delay is inordinate), I would find that the delay of 3.5 years (after adjustment for the COVID suspension of procedural timelines) would be inordinate on its own. In that 3.5 year period, the plaintiff failed to take the simple step of bringing the Motion to Restore and, despite indicating an intention to do so, did not even schedule an attendance in Civil Practice Court.[49]

(ii) *The delay is inexcusable*

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[47] *Ticchiarelli* at para 15
[48] *Alexander v. Rosedale United Church*, 2010 ONSC 4224 ("*Alexander*") at paras 63 and 64
[49] *Alexander* at paras 66-67 and 74

[67] In determining whether the delay is inexcusable, the court assesses the reasons for the delay and whether they afford a "reasonable and cogent" or "sensible and persuasive" explanation for the delay.[50] For the reasons outlined above,[51] I find that the plaintiff has not provided a "reasonable and cogent" or a "sensible and persuasive" explanation for the delay.

(iii) *There is a substantial risk that a fair trial will not be possible*

[68] My reasons outlined above for finding that the delay in this case is prejudicial to the defendant apply equally to the issue of whether there is a substantial risk that a fair trial will not be possible.[52] In the circumstances, I conclude that there is a substantial risk that a fair trial will not be possible.

(iv) *Conclusion on Motion to Dismiss*

[69] The delay in this action is not properly explained. In addition, the delay is inordinate and inexcusable. Further, the defendant would suffer non-compensable prejudice if the action is allowed to proceed, and there is a substantial risk that a fair trial will not be possible as a result of the delay. As a result, this action should be dismissed for delay pursuant to Rules 24.01 and 48.14(1).

D. DISPOSITION AND COSTS

[70] For the reasons outlined above, the Motion to Restore is dismissed and the Motion to Dismiss is granted.

[71] With respect to costs, the plaintiff submitted that, if successful, he should be awarded costs of $13,447.00 on a substantial indemnity basis, or alternatively $8,740.53 on a partial indemnity basis. The defendant submitted that, if successful, it should be awarded costs of $15,105.84 for the motion on a partial indemnity basis, and costs of the action in the amount of $21,885.83 on a partial indemnity basis.

[72] I have reviewed the plaintiff's costs outline with respect to the motions and the defendant's bills of costs with respect to the motions and the action, and I have considered the parties costs submissions. I am guided by the factors set out in Rule 57.01(1) when awarding costs. In particular, I note the importance of the motions to the parties. I also note that although the defendant's costs are higher than the plaintiff's, the defendant was the moving party, and its materials were necessarily more comprehensive in order to provide a record of the context for the two motions. Considering all of the relevant factors, I find that it is fair and reasonable in the circumstances and within the reasonable expectations of the parties for the plaintiff to pay to the defendant costs of

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[50] *Langenecker* at para 9; *Ticchiarelli* at para 16

[51] See the reasons above for finding that the plaintiff has failed to provide a reasonable or acceptable explanation for the delay.

[52] See also *Ticchiarelli* at paras 28, 29, 32, 33, 35 and 36

the Motion to Restore and the Motion to Dismiss in the amount of $15,105.84, inclusive of taxes and disbursements, within 30 days.

[73] With respect to costs of the action, I am not prepared to fix those costs based on the limited information in the record, the very brief submissions of the parties on those costs, and in view of Rule 24.05.1. The parties are encouraged to try to reach an agreement with respect to costs of the action. If they are unable to do so, the defendant may submit brief written submissions of no more than 3 pages (not including its bill of costs) by no later than April 14, 2025. The plaintiff may deliver responding costs submissions with the same restrictions by no later than April 28, 2025.

[74] I order as follows:

1. The plaintiff's Motion to Restore the action to the trial list is dismissed.
2. The defendant's Motion to Dismiss the action for delay is granted, and the action is dismissed.
3. The plaintiff shall pay to the defendant costs of the Motion to Restore and the Motion to Dismiss in the amount of $15,105.84, inclusive of taxes and disbursements, within 30 days.

DATE: April 2, 2025 R. Frank Associate J.