CITATION: Halton Healthcare Services Corporation v. Plenary Health Milton LP, 2025 ONSC 2223
COURT FILE NO.: CV-23-00698060
DATE: 20250410

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HALTON HEALTHCARE SERVICES CORPORATION	)	*Julie Parla, Richard Lizius,* and *Gregory Ringkamp*, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
PLENARY HEALTH MILTON LP, PLENARY HEALTH MILTON GP INC., and PLENARY HEALTH MILTON LP INC.	)	*Andrew Stead, Preet Saini,* and *Reuben Rothstein*, for the Respondent
Respondent	)	
	)	
	)	**HEARD:** April 9, 2025

REASONS FOR JUDGEMENT

PAPAGEORGIOU J.

Overview

[1] Halton Healthcare Services Corporation ("HHS") brought an Application against the Respondents, which is scheduled to be heard over a full day on June 19, 2025.

[2] HSS and the Respondents entered into a contract to design, build, finance and maintain a portion of a hospital facility pursuant to a public-private partnership (the "Project Agreement"). HHS says that this dispute involves the interpretation of their agreement.

[3] The parties had a dispute. HHS pays the Respondents for ongoing maintenance according to a formula set out in the Project Agreement. This dispute concerns the interpretation of the "painshare/gainshare" provisions for payments related to energy efficiency. Essentially the issue is whether certain drivers of energy costs such as boiler and transformer efficiencies, and temperature set points, are the responsibility of HHS or the Respondents under the Project Agreement.

[4] In December 2022, HHS delivered a notice of arbitration seeking an interpretation of the Project Agreement. HHS proposed that the matter be arbitrated by one of several experienced commercial arbitrators. After two months of silence, the Respondents proposed that the matter be arbitrated by a non-lawyer with no arbitral experience. As a condition of agreeing to arbitrate, HHS insisted the matter be arbitrated by a lawyer experienced in these types of contract disputes, while the Respondents insisted the matter be arbitrated by a legally untrained technical expert. The parties therefore could not and did not agree to proceed by way of arbitration.

[5] The Respondents then served a Notice of Application on or about April 17, 2023.

[6] The Respondents bring a motion to stay the Application pursuant to s. 7 of the *Arbitration Act*, 1991, S.O. 1991, c., 17. (the "*Act*").

Decision

[7] For the reasons that follow the motion is dismissed.

Issues

- Issue 1: Is there a binding agreement where the parties agreed to arbitrate this matter?
- Issue 2: Have the Respondents taken substantive steps in this litigation prior to bringing this motion?
- Issue 3: Did the Respondents move with undue delay in bringing this stay motion?

Analysis

The Relevant Provisions of the *Act*

[8] Section 7 of the *Act* provides as follows:

> **7** (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).
>
> Exceptions
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. The arbitration agreement is invalid.

> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment. 1991, c. 17, s. 7 (2).

The test for a Stay

[9] There is a two-part test set out in *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2023 ONCA 260, citing the Supreme Court of Canada in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41.

[10] The first part considers whether the moving party has met the four technical prerequisites for a stay in favour of arbitration: (a) an arbitration agreement exists; (b) court proceedings have been commenced by a party to the arbitration agreement; (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and (d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings: *Peace River* at para. 20.

[11] The party seeking a stay must only establish an "arguable case" that the technical prerequisites are met.

[12] If the moving party satisfies the first part of the test, then the onus shifts to the responding party as to whether there are statutory exceptions to grant a stay, which must be proven on a balance of probabilities: *Peace River* at para. 83.

[13] I begin by noting that the only part of the first aspect of the test engaged in this case are (a) and (d), and so those are the only ones addressed in these reasons.

Issue 1: Is there a binding agreement where the parties agreed to arbitrate this matter?

[14] I conclude that the Respondents have failed to establish an arguable case that there is an agreement to arbitrate.

[15] The Project Agreement provides that certain classes of dispute may be referred to arbitration on the consent of both parties. Arbitration is not mandatory.

[16] Section 8.1 provides that:

> Upon the mutual written consent of the parties,
>
> (a) where the Parties fail to resolve a Dispute through the process set out in Sections 2, 3, 4, 5 and 6 (to the extent required) of this Schedule 27, and

> (b) all other requirements set out in this Schedule 27 have been satisfied.
>
> such Dispute may be referred to arbitration in accordance with the Arbitration Act, 1991 (Ontario) and this Section.

[17] There is no mutual written consent in the record before me. The fact that HHS delivered a Notice of Arbitration does not change the fact that the Project Agreement does not require the parties to arbitrate. Because the parties could not agree on the type of arbitrator, by email dated April 17, 2023, HHS advised the Respondents:

> As the parties did not reach mutual agreement to proceed to arbitration, we have commenced litigation by the attached Notice of Application. Please advise if you have instructions to accept service on behalf of the named respondents; otherwise, we will arrange to have them served personally.

[18] It is telling that there is no response in the record to this email where the Respondents dispute the statement that the parties did not reach any mutual agreement to proceed to arbitration for more than a year when it ultimately served its motion to stay as part of its Responding Motion Record.

Issue 2: Have the Respondents taken substantive steps in this litigation prior to bringing this motion?

[19] I conclude that the Respondents have failed to establish an arguable case that they did not take substantive steps in this litigation prior to bringing this motion.

[20] In *Peace River* at para. 97, the Supreme Court set out the way in which this aspect of the test is assessed:

> [97] Determining whether a step in the proceedings has been taken requires an objective approach. The court must ask itself whether, on the facts, the party should be held impliedly to have affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration (*McEwan* and *Herbst*, at § 3:27). A step in the proceedings means "something in the nature of an application to the Court, and not mere talk between solicitors. ... nor the writing of letters" (*Larc Developments*, at para. 15, citing *Ives & Barker v. Willans*, [1894] 2 Ch. 478 (C.A.), at p. 484).

[21] See also *RH20 North America et al v. Bergmann et al*, 2023 ONSC 2378, aff'd 2024 ONCA 445.

[22] I find that the Respondents have taken numerous substantive steps in this litigation which would deprive them from seeking a stay as follows:

- They accepted service of the Application Record.

- They delivered a Notice of Appearance.
- They attended Civil Practice Court.
- They consented to the court ordered timetable.
- They complied with the timetable and court ordered steps.
- They prepared affidavit materials on the merits of the case. The affidavit of Jason Poirer sworn March 28, 2024 specifically states that it was "prepared in response to the Application" as well as being in support of the stay motion ultimately served by the Respondents with their responding record in April 2024. Notably, this was the first time the Respondents advised that they would be seeking to stay the Application.
- After the Respondents served this motion, HHS invited them to bring their jurisdiction motion first and they declined. They elected to participate in the Application and indicated that they would defend the Application on the existing Responding Record and bring the stay motion at the same time. They indicated that they did not intend to file any additional evidence. The only reason this motion ended up being brought before the argument of the Application is that Centa J. ordered this.
- They cross-examined fact witnesses and an expert witness.

[23] Even if the Respondents had brought the motion for a stay first and then defended, the subsequent steps they took would still have constituted steps in the litigation. See *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2024 BCSC 1465 at para. 47 where a party brought a motion for a stay first and later brought a motion to strike. The court concluded that the party was not entitled to a stay because the subsequent motion to strike constituted a step in the proceeding.

[24] This is because the mischief that this provision of the Act was intended to prevent was that a party should not be able to take the benefit of the litigation process while preserving its ability to reject the process in favour of arbitration: *Montaigne Group Ltd*., at para. 47.

[25] In *Larc Development Ltd. v. Levelton*, 2010 BCCA 18, the Court found that making a request for particulars in a letter that sought to preserve the right to arbitrate constituted taking a step in the proceeding. The court analogized this to the law of attornment:

> [31] Although there are significant differences in the law of attornment and the law applicable to stays in favour of arbitration, in my view the analogy is not misplaced. The law generally recognizes the right of litigants to their choice of forum. While usually the right of an opposing party to challenge the choice is preserved, at common law any step that invokes the jurisdiction of the court will result in attornment even if the party has reserved or is pursuing a challenge to jurisdiction.

[26] Here, the Respondents participated in the process and have sought to bring their stay motion at the same time as substantively defending the process. In taking these steps, in particular by conducting cross examination, which is a greater step than merely seeking particulars, it has sought to take the benefit of this litigation and should not be able to then opt for arbitration after having done so.

[27] The Respondents sought to argue that they had to file a Responding Record on the merits in case HHS argued that this matter was appropriate for summary judgment. I reject this argument. It could have brought the motion for a stay and received and reviewed any materials in response. It could have asked what defences would be raised and whether HHS would rely on s. 7(2)(5).

[28] It did not need to engage with the merits in order to bring the stay motion at first instance.

Issue 3: Did the Respondents move with undue delay in bringing this stay motion?

[29] In *Crosslinx Transit Solutions v. Ontario Infrastruct*ure, 2023 ONSC 3500 at para. 32, Penny J. indicated that were a party has failed to advance its position at the earliest opportunity, and has participated in the litigation process, this constitutes undue delay. He indicated that similar considerations of waiver, attornment and estoppel apply.

[30] The Respondents received the Notice of Application in or around April 2023. They said nothing about their intention to move for a stay. As noted, they participated in the proceeding and then one year later served materials seeking a stay together with their Responding Motion Record. Then when HHS suggested they bring their stay motion first, they said they did not wish to.

[31] I am satisfied on a balance of probabilities that the Respondents did move with undue delay and that they did not bring their motion for a stay at the earliest opportunity.

[32] Again, the only reason that this stay motion occurred before me is because Centa J. ordered that the stay motion proceed before the Application at a recent case conference.

[33] I note that the parties are approaching an Application date in a few months. The Respondents' approach would be to have that secure date for a hearing be sidelined by a process where they spend another six weeks trying to choose an Arbitrator. It seems unlikely that they will agree and there would then have to be a motion to appoint an Arbitrator.

[34] This makes no sense and shows the prejudice occasioned when a party moves with undue delay. It results in additional needless additional expenditures as well as further delay.

Conclusion

[35] The motion is dismissed.

[36] I reserve the costs of the motion to the Application judge.

Papageorgiou J.

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Respondent

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