

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** A3 Construction Inc., Plaintiff

**AND:**

David John Chalmers, Kirsten Chalmers, Starlight Investments, and Bank of Nova Scotia, Defendants

**BEFORE:** Regional Senior Justice Patrick J. Boucher

**COUNSEL:** Katie McGurk, counsel for the Plaintiff

Jay Nathwani, counsel for the Defendants

**HEARD:** June 4, 2025, in person

**ENDORSEMENT ON MOTIONS**

Introduction

- [1] The Chalmers defendants (the “Chalmers”) move for a declaration that the plaintiff’s (A3) construction lien registered against title to their property expired, and an order vacating from title the lien and certificate of action. A3 opposes the relief sought, and by way of cross-motion, asks for a declaration that its action was set down for trial prior to the expiry of the limitation period.

Background

- [2] On March 4, 2021, A3 registered a claim for lien in the amount of \$243,026.17 on title to the Chalmers’ property. A3 perfected its lien on June 07, 2021, by starting this action and by registering a certificate of action on title to the property.
- [3] Pursuant to section 37 of the *Construction Act*, R.S.O. 1990, c. C.30, A3 (the “Act”) A3 had until June 07, 2023, to either set this action down for trial or to obtain an order for trial, failing which the lien would expire. On June 06, 2023, A3 submitted the trial record for filing with the court through the Civil Submissions Online Portal (the “Portal”).
- [4] On June 09, 2023, counsel for A3 received an email from the court advising the trial record could not be accepted for filing because the pleadings were still open. This was because one of the defendants, the Bank of Nova Scotia, had neither delivered a statement of defence nor been noted in default.
- [5] On June 21, 2023, the Bank of Nova Scotia was noted in default at A3’s request. On July 06, 2023, A3 submitted for filing a second trial record through the Portal. On July 14, 2023, the court advised

counsel for A3 that the second trial record could not be accepted for filing because it was missing some defence documents.

- [6] On October 3, 2023, A3 submitted for filing a third trial record through the Portal. On October 16, 2023, the court accepted the third trial record for filing effective October 03, 2023.

The law

- [7] The relevant portions of the Act are set out below:

37 (1) A perfected lien expires immediately after the second anniversary of the commencement of the action that perfected the lien, unless one of the following occurs on or before that anniversary:

1. An order is made for the trial of an action in which the lien may be enforced.
2. An action in which the lien may be enforced is set down for trial.

(2) Where a lien has expired under subsection (1), a motion may be made under section 46.

...

46 (1) Where a perfected lien that attaches to the premises has expired under section 37, the court, upon the motion of any person, shall declare that the lien has expired and shall make an order dismissing the action to enforce that lien and vacating the registration of a claim for lien and the certificate of action in respect of that action.

..

46 (3) A motion under subsection (1) or (2) may be brought without notice, but no order as to costs in the action may be made upon the motion unless notice of that motion was given to the person against whom the order for costs is sought.

...

50 (2) Except to the extent that they are inconsistent with this Act and the procedures prescribed for the purposes of this Part, the *Courts of Justice Act* and the rules of court apply to actions under this Part.

- [8] Rule 48.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “Rules”) sets out when an action can be set down for trial:

48.01 After the close of pleadings, any party to an action or to a counterclaim or crossclaim in the action who is not in default under these rules or an order of the court and who is ready for trial may set the action down for trial, together with any counterclaim or crossclaim.

- [9] Rule 48.02 describes how an action can be set down for trial:

48.02 (1) Where an action is defended, a party who wishes to set it down for trial may do so by serving a trial record prepared in accordance with rule 48.03 on every party to the action or to a counterclaim or crossclaim in the action and on any third or subsequent party and forthwith filing the trial record with proof of service.

[10] Rule 48.03(1) sets out the documents that must be included in the trial record. Paragraph (h) is relevant to this motion, and it provides as follows:

- (h) a certificate signed by the lawyer setting the action down, stating,
  - (i) that the record contains the documents required by clauses (a) to (g),
  - (ii) that the time for delivery of pleadings has expired,
  - (iii) where applicable, that a defendant who has failed to deliver a statement of defence has been noted in default, and
  - (iv) where applicable, that judgment has been obtained or that the action has been discontinued or dismissed against a defendant.

[11] Rule 25.05 defines when pleadings are closed:

25.05 Pleadings in an action are closed when,

- (a) the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired; and
- (b) every defendant who is in default in delivering a defence in the action has been noted in default.

[12] The relevant portions of r. 4.05 and r. 4.05.2 read as follows:

4.05

(4.1) If these rules permit or require a document to be filed electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the filing.

...

(7) A document that is issued or filed electronically is considered to have been issued or filed, as the case may be, on the date indicated on the document by the registrar or the authorized software.

4.05.2

(2) Any document that may or must be filed under these rules, other than a document listed under subrule 4.05.1 (2) or that is filed for the purposes of rule 60.07, may be filed electronically by submitting the document through the Civil Submissions Online Portal, if the Civil Submissions Online Portal provides for the electronic filing of the document.

(3) A document submitted for filing through the Civil Submissions Online Portal is filed only if it is accepted by the registrar.

(4) If the registrar accepts the document for filing, the registrar shall send confirmation of the filing by e-mail.

(5) A document filed under subrule (3) is considered to have been filed on the day indicated in the confirmation sent by the registrar.

[13] Rules 2.01 and 2.03 address non-compliance with the Rules as follows:

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

...

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

The positions of the parties

*The Chalmers*

[14] I note at the outset that counsel for the parties acknowledged in oral argument that the focus of this inquiry is on A3's attempt to file the first trial record.

[15] The Chalmers argue the court was justified in refusing to accept the first trial record because it did not comply in several respects with the Rules. First, A3 failed to provide a certificate from its counsel pursuant to r. 48.03(1)(h). Second, an action may only be set down for trial after the pleadings have closed. Here, the pleadings were still open pursuant to r. 25.05 because the Bank of Nova Scotia had neither delivered a statement of defence nor been noted in default.

[16] The Chalmers further submit A3 used the Portal to submit the trial record despite warnings in the terms of use and on the website that documents submitted for filing are not considered filed until they are accepted by the court registrar. The terms of use further state "...you should not use this system if...you need to meet a timeline to take a step in the proceeding that is established by legislation, court rules, court practice or a court order that is five business days or less away." This is because the terms of use confirm the court registrar has up to five days to respond to submissions.

[17] The Chalmers argue that by using the Portal, rather than filing the first trial record in person, A3 only learned about the deficiencies with the trial record after the lien had expired. As set out in the

terms of use, the Portal does not extend time limits. Accordingly, A3 failed to set the action down for trial within the two-year limitation period.

A3

- [18] A3 argues that it complied with the two-year limitation period and the court should dispense with strict compliance with the Rules. In other words, A3 submits that applying the Rules to rectify the procedural irregularity does not extend the limitation period under the Act.
- [19] A3 argues that pursuant to the *Superior Court of Justice Civil Procedures Manual* (the “Manual”) the court registrar was required to accept the first trial record and to point the deficiencies out to the plaintiff on a “On Explicit Instructions Form.” A3 submits this error is like the one made by the court registrar in *1475707 Ontario Inc. v. Foran*, 2014 ONCA 830. In that case, the court registrar accepted a deficient trial record (the pleadings were still open) but only discovered the deficiency after the two-year limitation period in the Act had expired. The Court of Appeal confirmed the action had been set down for trial on time and the irregularity could be cured by rule 2.01.

#### Analysis

- [20] The court in *Foran* concluded that the Act does not deal with procedural matters such as how to set an action down for trial and how to deal with irregularities in the process of setting it down. Rather, these issues are governed by the Rules: *Foran*, at para. 24.
- [21] I note the Act was amended after *Foran* was released. In arriving at its conclusion in paragraph 24 of its decision, the court relied upon subsection 67(3) of the Act. That provision was removed by the legislature a few years after *Foran* was released.
- [22] Subsection 67(3) read as follows:
- Except where inconsistent with this Act, and subject to subsection (2), the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act.
- [23] Similar wording is found in subsection 50(2) in the version of the Act that was in force when A3 submitted the first trial record (and which remains in force). The new wording is different only because the provisions relating to procedures for actions were moved from the Act to a regulation (*Procedures for Actions Under Part VIII*, O. Reg. 302/18). In my view, the changes have no impact on the purpose of the section: to express the legislature’s intention that except where inconsistent with the Act or the regulation, “the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings” under the Act. I accordingly conclude that in this case the Rules govern both how to set the action down for trial and how to deal with irregularities in that process.
- [24] The facts of the cases submitted by counsel vary but an important theme runs through them: the lien claimant submitted a trial record to the court registrar prior to the expiry of the lien period. At the time *Foran* was decided, the Portal did not exist, and parties filed their documents in person at the courthouse.

- [25] The Portal's terms of use set out a five-day period within which the court registrar can review the submission, and they warn against the possibility of missing limitation periods because of this delay. The Chalmers argue A3 should have heeded this warning and their counsel ought to have attended in person at the court counter to file the trial record. A3 could have then dealt with the deficiency in the trial record prior to the expiry of the period prescribed by the Act.
- [26] The fact the Portal was used does not determine the issue. This is because if it had been accepted, the court registrar would have designated it filed when it was submitted. In fact, this is what happened when the third trial record was accepted for filing. Accordingly, the date of submission is significant in this case: it was within the two-year limitation period established by the Act.
- [27] In *Foran*, the court registrar accepted for filing within the time limit prescribed by the Act an irregular trial record, notably with the same irregularity as this case. It was only after the expiry of the limitation period that the problem was discovered. Here, too, it was only after the expiry of the limitation period that the irregularity was discovered and cured.
- [28] I pause at this point to address A3's argument that the court registrar erred in rejecting the first trial record, which would make the facts of this case much more like those in *Foran*. This argument is not persuasive because the Manual allows court registrars to seek direction from the court about issues covered by the Manual. There is an absence of evidence on this point which makes it impossible to conclude the court registrar erred in rejecting the first trial record. This comparison to *Foran* is therefore unavailable.
- [29] Significantly, however, like in *Foran*, the Chalmers were served with the trial record and A3 submitted it to the court for filing prior to the expiry of the limitation period. As observed in *Foran*, had the staff refused it, the lien claimant could have taken steps to correct it within the time set out in the Act. The same applies to this case: had it been refused on the date of submission the irregularity could have been cured by counsel for the plaintiff.
- [30] I accordingly conclude that A3 took sufficient steps to set the action down for trial within the time requirements of s. 37(1) of the Act when they submitted the first trial record through the Portal. To hold otherwise in the circumstances of this case would "be to ignore the clear language of rule 2.01:" *Foran*, at para 41. A3's submission of an irregular trial record did not render the step or the document a nullity in the circumstances. The Chalmers were served with the first trial record on time. They were aware the action was actively progressing. In my view, a declaration that the trial record was considered filed on June 06, 2023, will allow for the "just determination of the real matters in dispute:" r. 2.01(1)(a).

## Conclusion

- [31] For these reasons, the Chalmers' motion is dismissed and A3's cross-motion is granted.
- [32] I accordingly order that the within action was set down for trial as of June 06, 2023.
- [33] If the parties are unable to agree on costs of this motion, the plaintiff may file written submissions on costs of no more than two pages, double-spaced, not including a bill of costs and offer to settle, within fifteen days of the date of this decision. The defendants will have thirty days from the date of this decision to file written submissions on costs with the same restrictions. There will be no reply. Late submissions will not be considered.

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Regional Senior Justice Patrick J. Boucher

**Date:** June 24, 2025