

CITATION: Balalaey v. Abolghasmie, 2025 ONSC 3732
COURT FILE NO.: CV-21-2967
DATE: 20250624

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
HOMAYOUN BALALAEY)
)
Plaintiff)
)
– and –)
) Hossein Niroomand, counsel for the
SEYED AMIRHOSSEIN ABOLGHASEMI,) Plaintiff/Respondent
ALI REZA ENSHAEI and 2667634)
ONTARIO LIMITED C.O.B. HEEVA FINE)
FOODS)
)
Defendants) Patrick Di Monte, counsel for the
) Defendant/Moving Party, Ali Reza Enshaei
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) **HEARD:** June 18, 2025
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ENDORSEMENT ON MOTION

THE HONOURABLE JUSTICE SUNIL S. MATHAI

Overview

[1] The defendant, Mr. Reza, seeks a declaration that he has not been served with the statement of claim pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “*Rules*”), and a declaration that the action be dismissed as against him. Despite not being served with the statement of claim, Mr. Reza’s counsel served a draft statement of defence and crossclaim; served a notice of intent to defend; served and attempted to file a defence to a

crossclaim commenced by a co-defendant; and attended two case conferences in relation to the action.

- [2] The plaintiff asserts that Mr. Reza was served with the statement of claim. In the alternative, the plaintiff argues that the statement of claim came to Mr. Reza's attention on November 1, 2021, and service should be validated pursuant to r. 16.08. As a further alternative, the plaintiff argues that service of the claim should be dispensed with under r. 16.04.
- [3] For the reasons that follow, I dismiss Mr. Reza's motion and order that the time for service of the statement of claim is extended to April 6, 2022, *nunc pro tunc* and that service is validated as of that date (see *Marks v. Lehigh*, 2017 ONSC 6673 at para. 27 and *Sbihat v. Nasar*, 2021 ONCA 701).

The pleadings

- [4] For the purpose of this motion, a brief summary of the pleadings will suffice.
- [5] The plaintiff issued his statement of claim on August 26, 2021. The claim seeks damages as against the defendants for a breach of contract, breach of fiduciary duty and unjust enrichment.
- [6] The plaintiff was the sole owner of a grocery store that started experiencing financial difficulties in May 2018. The grocery store eventually closed because the plaintiff could no longer afford the rent. To resurrect his business following its closure, the plaintiff alleges that he sold 2/3 of his business to the defendants, Mr. Abolghasemi and Mr. Reza, for \$375,000. The plaintiff alleges that he entered a contract with these defendants that stipulated, amongst other things, that each party owned 1/3 of the business and intended to share in the profits of the business on a 1/3 basis.
- [7] On November 27, 2018, the three men incorporated the defendant corporation, 2667634 Ontario Limited ("Heeva"). Pursuant to the terms of an unexecuted Memorandum of Understanding, Mr. Abolghasemi and Mr. Reza paid \$150,000 toward the outstanding rent and Heeva assumed the lease for the grocery store. After Heeva became operational, Mr. Abolghasemi and Mr. Reza paid the plaintiff another \$25,000, leaving approximately \$200,000 owing to the plaintiff. The plaintiff also alleges that Mr. Abolghasemi and Mr. Reza have not paid the plaintiff any profits or dividends from Heeva.
- [8] On September 14, 2021, Mr. Abolghasemi and Heeva served a statement of defence on the plaintiff. In the statement of defence, the defendants deny all the allegations in the statement of claim and plead that there was never an agreement to involve the plaintiff in Heeva. The statement of defence was served on the plaintiff and Mr. Reza. Mr. Reza does not dispute service of Mr. Abolghasemi's statement of defence.
- [9] On April 26, 2022, counsel for Mr. Reza, Mr. Di Monte, served a draft statement of defence and crossclaim on the plaintiff and Mr. Abolghasemi. In the draft, Mr. Reza pleads,

amongst other things, that the plaintiff's claim is statute-barred and that the plaintiff was never a director of Heeva.

- [10] Mr. Reza further pleads that he paid the outstanding rent in the sum of \$261,005.96 and that Mr. Abolghasemi agreed to pay him back but never did. Mr. Reza asserts that in November 2020, Mr. Reza sold his shares in Heeva to Mr. Abolghasemi who agreed to indemnify him for all past, present and future obligations relating to Heeva and its business.
- [11] Mr. Abolghasemi and Heeva served a fresh as amended statement of defence and crossclaim on March 20, 2023. These two defendants crossclaimed against Mr. Reza claiming damages, contribution, and indemnity.
- [12] On June 19, 2023, Mr. Di Monte served a demand for particulars in relation to Mr. Abolghasemi's crossclaim.
- [13] On July 4, 2023, Mr. Di Monte served a notice of intent to defend on the plaintiff. The notice of intent to defend was not filed with the court.
- [14] Mr. Reza served a statement of defence to Mr. Abolghasemi's crossclaim on October 15, 2024. The court rejected an attempt to file the pleading because Mr. Abolghasemi's statement of defence and crossclaim was not filed with the court.

Case conference

- [15] On June 6, 2025, the parties, including Mr. Reza, attended a case conference before R.S.J. Edwards. The service issue was raised, and R.S.J. Edwards made the following order:

A motion is to be heard by this court to determine if Mr. Di Monte's client has been served with the Statement of Claim. Mr. Di Monte shall be the moving party with respect to that motion. The Plaintiff will be the responding party. Mr. Di Monte's motion materials shall be delivered by Wednesday June 11, 4pm; the Plaintiffs [sic] responding motion materials shall be served by Friday June 13, 4pm. The motion shall be heard on a date to be fixed by the TC prior to June 30 - the motion date assigned by the TC is nonnegotiable (counsel are to attend). Mr. Di Monte will have 20 minutes in argument and the Plaintiff 20 minutes.

- [16] Given the slow pace of this litigation, R.S.J. Edwards also imposed a timetable on the parties that required the matter to be set down for trial by March 2026.

Issues

- [17] There are three issues on this motion:

- (1) Was the statement of claim served on Mr. Reza in accordance with the *Rules*?
- (2) If not, should service nevertheless be validated pursuant to r. 16.08?

(3) If validated, should the deadline for service be extended?

[18] Given my finding on the above issues, I will not address the plaintiff's arguments that service should be dispensed with.

(a) Was the claim served in accordance with the Rules?

[19] According to r. 16.01(1), an originating process shall be served personally as provided for in r. 16.02 or by an alternative to personal service as provided for in r. 16.03. Rule 16.02(2) stipulates that a party that "delivers" a notice of intent to defend shall be deemed to have been served with the originating process as of the date of delivery. "Deliver" under the *Rules* means "serve and file with proof of service" (see r. 1.03).

[20] The plaintiff alleges that Mr. Reza was served with the claim. A paralegal's affidavit sworn in support of the plaintiff's position on this motion states as follows:

It is the Plaintiff's position that [Mr. Reza] was served, has long had full knowledge of the claim, and has participated in all material steps of this litigation.

At the time, our office was not yet operating under a fully digital system. We retained a process server to serve [Mr. Reza] with the Statement of Claim. The process server has since advised that they do not retain copies of affidavits of service and they use [sic] to only send originals by mail. Due to an internal oversight, our office has misplaced the original Affidavit of Service confirming service on Mr. [Reza].

[21] The paralegal's affidavit does not indicate who was retained to serve the claim, does not include the instruction letter to the process server, and does not include an invoice from the process server. There is no direct evidence that supports the otherwise bald assertion that Mr. Reza was served with the claim in accordance with the *Rules*.

[22] Mr. Reza swore an affidavit in support of his response to the motion. In that affidavit, he unequivocally states that he was not served with the statement of claim. The evidence filed on the motion corroborates Mr. Reza's assertion that he was not served with the claim in accordance with the *Rules*.

[23] In or around September 2021, Mr. Reza was served with Mr. Abolghasemi's statement of defence. Subsequently, on November 1, 2021, Mr. Di Monte wrote plaintiff's counsel advising that he was retained by Mr. Reza in relation to the plaintiff's claim. Mr. Di Monte requested a copy of the affidavit of service and asked for 30 days to deliver a statement of defence and crossclaim. If there was a response to this correspondence, it is not included in the record before me.

- [24] Based on the record before me, it appears that Mr. Di Monte sent the November 1, 2021, letter in response to being served with Mr. Abolghasemi’s statement of defence. I will have more to say on this correspondence later in my reasons.
- [25] Mr. Di Monte’s request for an affidavit of service, approximately three months after the statement of claim was issued, supports Mr. Reza’s assertion that he was not served.
- [26] On April 6, 2022, Mr. Di Monte wrote counsel for Mr. Abolghasemi, Mr. Fulton, and asked him to, “send me on a rush basis a copy of the statement of claim on [sic] balaley v. heeva”. Mr. Fulton complied with the request.
- [27] On the same day, Mr. Di Monte exchanged email correspondence with counsel for the plaintiff. Counsel for the plaintiff wrote Mr. Di Monte, “I understand you are looking for the SoC in this matter? Please find it attached”. There is nothing in the record before me that establishes how counsel knew that Mr. Di Monte was “looking for the SoC”. Mr. Di Monte responded, “Thank you but I need a copy of the affidavit of service before I deliver our defence and crossclaim”.
- [28] On April 8, 2022, counsel for the plaintiff advised Mr. Di Monte, “There seems to have been a clerical error here and due to that we have misplaced our Affidavit of Service. At this time, we would request whether you would accept service on behalf of your client. Please advise.”
- [29] On April 28, 2022, Mr. Di Monte served the draft statement of defence and crossclaim on counsel for the plaintiff. In the email enclosing the pleading, Mr. Di Monte states, “My client was never served with the Statement of Claim. You will need to move to extend time to serve which we will oppose. I am enclosing a copy of the Draft Statement of Defence and crossclaim which will not be filed until you obtain an order” (emphasis in the email).
- [30] The April 2022 correspondence corroborates Mr. Reza’s evidence that he was not served with the statement of claim.
- [31] There is simply no evidence that supports the plaintiff’s assertion that Mr. Reza was served with the statement of claim in accordance with the *Rules*. In contrast, the correspondence from November 2021 to April 2022, corroborates Mr. Reza’s evidence that he was not served with the statement of claim.
- [32] Further, Mr. Reza is not “deemed” to have been served with the statement of claim because he did not file a notice of intent to defend. As noted above, Rule 16.02(2) applies when a notice of intent to defend is served *and* filed.
- [33] Considering the above, I find that Mr. Reza has not been served with the statement of claim in accordance with r. 16.01(1) and (2). While Mr. Reza’s lawyer had a copy of the claim as late as April 6, 2022, Mr. Di Monte did not accept service of the claim as required by r. 16.03(2). As such, Mr. Reza has not been served with the statement of claim in accordance with the *Rules*.

(b) Should service be validated?

- [34] Pursuant to r. 16.08, where a document has been served in a manner other than one authorized by the *Rules* or a court order, the court may make an order validating service where the court is satisfied that the document came to the notice of the person who should have been served.
- [35] Based on my findings above, the statement of claim was not served in a manner authorized by the *Rules*. However, it is clear that the statement of claim came to Mr. Reza's notice. The question is: when?
- [36] The plaintiff argues that the statement of claim came to Mr. Reza's notice on November 1, 2021. I disagree.
- [37] On its face, the November 1, 2021, correspondence gives rise to a strong inference that Mr. Reza did have notice of the claim. The letter: (a) includes the style of cause; (b) states that Mr. Di Monte has been retained to act for Mr. Reza; (c) does not request a copy of the statement of claim; and (d) requests 30 days to serve a statement of defence and crossclaim.
- [38] The last two points strongly suggest that Mr. Reza had notice of the claim by November 1, 2021. If Mr. Reza did not have the claim at this time, why did Mr. Di Monte not request a copy? Why did Mr. Di Monte request 30 days to serve a statement of defence and crossclaim in response to a claim that was never served? What did Mr. Di Monte intend to respond to if he did not have the statement of claim?
- [39] Unfortunately, these questions must remain rhetorical. Mr. Reza was never cross-examined on his affidavit and there is no affidavit from Mr. Di Monte or his associates or staff that sets out exactly when Mr. Di Monte received a copy of the statement of claim.
- [40] Despite the strong inferences arising from the November 1, 2021 correspondence, I find that Mr. Reza was, "not served in a manner other than those authorized by the *Rules*" on or before that date. I come to this conclusion for two reasons.
- [41] First, the letter does not state that Mr. Di Monte was in possession of the statement of claim. Second, Mr. Di Monte's April 2022 correspondence with Mr. Fulton and counsel for the plaintiff strongly suggests that he did not have the statement of claim.
- [42] I note that the record does not include a single piece of correspondence from Mr. Reza or his counsel requesting that plaintiff's counsel send him the statement of claim. Instead, Mr. Di Monte first requested the statement of claim from his co-defendant. Why Mr. Di Monte did not request the statement of claim directly from the plaintiff remains a mystery.
- [43] Based on the above, I conclude that Mr. Reza received the statement of claim on April 6, 2022, when it was emailed to Mr. Di Monte. Mr. Di Monte did not accept service of the claim on behalf of his client, so the receipt of the claim was not in accordance with the *Rules*; however, I find that April 6, 2022, is the date when, without doubt, Mr. Reza

received the statement of claim. As such, I validate service as of April 6, 2022, which is 37 days after the statement of claim was required to be served (i.e. six months from August 26, 2021, is February 28, 2022).

(c) *Should the time to serve the claim be extended?*

[44] In *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780 (C.A.), the Ontario Court of Appeal articulated the principles for determining whether to grant an extension of time for the delivery of a statement of claim:

(1) although the onus is on the plaintiff to show that the defendant will not be prejudiced by an extension of time, the plaintiff cannot be expected to speculate and the defendant has at least an evidentiary obligation to provide some details of prejudice;

(2) the defendant cannot create prejudice by his or her failure to do something that could reasonably have been done;

(3) the prejudice that will defeat an extension of time for service must be caused by the delay;

(4) an extension of the time for service should not be denied simply because the delay is longer than the applicable limitation period; and

(5) each case should be decided on its facts, focusing on whether the defendant is prejudiced by the delay.

(*Chiarelli*, at para. 14-17; *Nash Estate v. Schell Estate*, 2013 ONSC 4813 (Div. Ct.); *Shah v. Mohammed*, 2018 ONSC 6888, at para. 2).

[45] In evaluating prejudice, the court will consider whether: (a) material witnesses have disappeared or died; (b) relevant documents have been preserved; (c) the delay is such that it can reasonably be assumed that memories have faded; and (d) any new facts are being alleged (see *Chiarelli* at para. 14-16; *Khroad v. Hill*, 2010 ONSC 945 at para. 28; *Shah*, at para. 2). Mr. Reza does not rely on any of these types of prejudice.

[46] Importantly, the prejudice analysis is focused only on the prejudice caused by the delay in serving the statement of claim and not any prejudice that arises from the passage of time from the relevant events to the commencement of the action (see *McGroarty v. CIBC Mellon Trust Co.*, 2012 ONCA 241 at para. 14; *Chiarelli*, at para. 16).

[47] Mr. Reza argues that late service of the claim will cause him prejudice because he sold his Heeva shares at a discounted price to Mr. Abolghasemi in November 2020. Mr. Reza claims that he would not have done so if he was aware of the plaintiff's claim.

- [48] I reject this argument for two reasons. First, it is not clear to me that this is the type of prejudice that the Court of Appeal considered in *Chiarelli*. The prejudice identified in *Chiarelli* relates to prejudice to a party's ability to defend an action. Mr. Reza's sale of shares does not impact his ability to defend the action.
- [49] Second, the sale of the shares predates the issuance of the statement of claim. As noted above, only prejudice caused by the delay in serving the claim is relevant when determining whether to extend a motion to serve the claim.
- [50] Mr. Reza further argues that the plaintiff's claim is statute-barred as the unexecuted Memorandum of Understanding is dated January 29, 2019, and the claim was started in August 2021. Assuming that Mr. Reza's assertion of an expired limitation period is correct, there is still no prejudice that would impede Mr. Reza's ability to defend the claim. Again, the "prejudice" existed before the claim was started and Mr. Reza can still bring a motion for summary judgment arguing that the action is statute-barred. Extending service does not prejudice his ability to assert a limitation period defence.
- [51] Mr. Reza also argues that there is "presumed prejudice" given the delay between the issuance of the claim and the commencement of this motion. There are two reasons why I reject this argument.
- [52] First, I have already found that the claim came to Mr. Reza's attention on April 8, 2022. 37 days is not a significant delay. Second, even if the "presumed prejudice" is evaluated from the commencement of the claim until this motion was brought, any such prejudice is rebutted by Mr. Reza's active involvement in the litigation and the expedited timetable ordered by R.S.J. Edwards. I note that the five-year anniversary of this action is not until August 26, 2026.
- [53] Finally, Mr. Reza relies on the Ontario Court of Appeal's decision in *York Region Standard Condominium Corporation No. 1039 v. Richmond Hill (Town)*, 2018 ONCA 511 in support of his argument that "presumed prejudice" is evaluated from the time the claim is commenced until the commencement of the motion. I do not believe *York Region* assists Mr. Reza.
- [54] *York Region* was a motion to dismiss an action for delay where the moving party defendants were never served with the claim and, like this case, the moving party defendants only learned of the claim once they received statements of defence from the defendants that were served with the claim. There are certainly similarities between this case and *York Region*. Importantly, however, the Court of Appeal reversed an appeal judge's order dismissing the action for delay on the basis that the appeal judge did not accord the appropriate deference to a Master's finding, at first instance, that there was no actual prejudice caused by the delay in serving the claim late (paras. 11-12). In this case, much like *York Region*, there is no evidence of prejudice.

[55] Based on the above, I find that extending the time for service of the claim will not cause any relevant prejudice to Mr. Reza and I order that the time for service of the claim is extended, *nunc pro tunc*, to April 6, 2022.

Conclusion and costs

[56] In coming to this conclusion, I recognize that the plaintiff did not bring a cross-motion seeking to validate service and extend service. In the unique circumstances of this case, I do not find that the absence of a cross-motion prevents me from granting this relief.

[57] The motion proceeded in an unusual manner because the plaintiff took the position that the statement of claim was, in fact, served. That led R.S.J. Edwards to order Mr. Reza to commence this motion. Requiring the plaintiff to bring a separate motion that would invariably lead to the same findings would be a triumph of form over substance. Such an approach would be inconsistent with the requirement to interpret the *Rules* liberally and in a manner that secures the just, most expeditious and least expensive determination of a proceeding. I rely on rr. 1.04, 2.01 and 3.02 to order that the service date is extended *nunc pro tunc* to April 6, 2022, and that service is validated on that date.

[58] The plaintiff was successful on this motion and is entitled to costs. In oral submissions, Mr. Niroomand sought costs in the amount of \$3,755. This is a reasonable amount and is less than the costs sought by Mr. Di Monte (\$4,548.96). That said, the circumstances that led to this motion warrant a discount on costs.

[59] The plaintiff is partially responsible for the circumstances that led to this motion. While Mr. Reza's steadfast refusal to accept service of the statement of claim was not reasonable, the plaintiff should have brought a motion to extend the time to serve the statement of claim and/or validate service in the spring of 2022, when it was clear that there was no affidavit of service and Mr. Reza denied being served with the claim.

[60] As a result, I order that Mr. Reza pay costs to the plaintiff in the amount of \$2,500 (all inclusive) on a partial indemnity basis.

The Honourable Justice S. Mathai

Released: June 24, 2025