CITATION: De Almeida v. Peric, 2025 ONSC 4677
COURT FILE NO.: CV-15-523294
DATE: 2025 08 12

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARLUCE LUIZ DE ALMEIDA, *Plaintiff*

- and -

MARKO PERIC and MILEVA PERIC, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: Y. Jaimangal, *for the plaintiff*
E. Mehrabi, *for the defendants*

HEARD: May 12, 2025 (by videoconference)

REASONS FOR DECISION
(Motion to Set Aside Registrar's Dismissal)

[1] This action arises from a disputed power of sale process undertaken by the defendants as mortgagees of the plaintiff's property, which occurred in October 2014. The plaintiff commenced this action in March 2015 alleging that the power of sale was improper and improvident. Ms. De Almeida claims $300,000 in damages and an accounting of the amounts owing by the plaintiff under the mortgage and of all amounts received by the defendants from the power of sale. The defendants dispute the claim, taking the position that there were a series of defaults under the mortgage, that they properly issued notice of sale based on the outstanding balance, that they properly proceeded with power of sale, and that the plaintiff took no steps to redeem the mortgage or even express an intention to do so until the day after the power of sale had closed.

[2] Over the span of nearly ten years, this action has only proceeded through pleadings and exchange of affidavit of documents. Examinations for discovery were scheduled to proceed in April 2018, but were vacated when the plaintiff appointed new counsel. Those examinations have still not occurred. The plaintiff's current counsel was appointed in November 2019, following which no steps were taken to advance the action until after the registrar administratively dismissed this action for delay on August 1, 2024.

[3] The plaintiff moves to set aside the registrar's dismissal of the action. The defendants oppose the set aside on the basis that the plaintiff has failed to adequately explain the litigation delay, has tendered no real evidence of any ongoing intention to prosecute the action, and has tendered no evidence to rebut prejudice from the delay. That prejudice includes the passing of the

defendant, Mileva Peric, and a key witness, Mary Alves, who dealt with the mortgage defaults and power of sale process on behalf of the defendants.

[4] I am dismissing the motion. The plaintiff has not met her evidentiary burden. There is an insufficient explanation of the litigation delay, the length of which belies the plaintiff's statements of her intention to advance this action to trial for a hearing on the merits. I am also unconvinced by the plaintiff's arguments that the passing of Ms. Alves is surmountable prejudice. Her death has given rise to clear non-compensable prejudice to the defendants. In my view, a fair trial on the merits is no longer possible without her evidence, which could have been secured had the plaintiff taken steps to advance the action.

ANALYSIS

[5] The plaintiff moves under subrule 37.14(1)(c) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*"), which provides that a party who is affected by an order of a registrar may move to set aside the order. As set out in subrule 37.14(2), the court may set aside or vary the order on such terms as are just.

[6] Whether to set aside a registrar's administrative dismissal order is a discretionary decision. The legal test for setting aside a registrar's dismissal is well-settled. It requires me to consider the so-called *Reid* factors, namely:

(a) whether the plaintiff has provided a satisfactory explanation for the litigation delay;

(b) whether the plaintiff has led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order but failed to do so through inadvertence;

(c) whether the plaintiff moved promptly to set aside the dismissal order as soon as the order came to their attention; and

(d) whether the plaintiff has convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action.

[7] These four factors are not to be applied as a rigid, one-size fits all test. Rather, they afford a framework for the analysis. They are to be considered contextually, with all relevant factors considered and weighed in determining what order is just in the circumstances of the particular case: *Prescott v. Barbon,* 2018 ONCA 504 at paras. 14-15; *Scaini v. Prochnicki,* 2007 ONCA 63 at paras. 23-25.

[8] In this case, since the defendants concede that the motion was brought promptly upon the registrar's dismissal coming to the attention of the plaintiff's lawyer, I need only consider the other three *Reid* factors.

Explanation for delay

[9] The plaintiff concedes that there has been some inordinate delay in prosecuting this action. In considerign whether the plaintiff has put forward a satisfactory explanation for delay, the plaintiff is expected to put her best foot forward and present cogent evidence to support her explanations for delay. Bald assertions or delays caused by a parties' own actions are insufficient to discharge the onus: *Reid v. Town of Bracebridge and Tatham*, 2025 ONSC 2535 at para. 62.

[10] Case law has consistently confirmed that the primary burden of advancing an action to final disposition on its merits rests with the party who initiates the claim. In *Barbiero v. Pollack*, 2024 ONCA 904, at para. 6, the Court of Appeal described that obligation as follows:

> […] this court repeatedly observes that the party-prosecution character of our current civil court adjudication system imposes on the party who initiates a claim the burden of moving a proceeding to its final disposition on the merits. As a result, the consequences of any dilatory regard for the pace of litigation falls on the initiating litigant, absent resistance from a defendant to proceed to a final disposition on the merits […]

[11] It was accordingly the plaintiff's obligation to advance this action to both trial readiness and trial. The consequences of failing to do so rest at the plaintiff's feet unless the defendants are demonstrated to have resisted in advancing the litigation. That is not the case here.

[12] Although at least the plaintiff's written submissions have attempted to characterize the defendants as contributing to delay, such a finding it is not supported by the record. The relevant chronology is as follows:

(a) The claim was issued on March 5, 2015, following which it was promptly served on the defendants.

(b) The defendants retained a lawyer in mid-April 2015 and sought to defend shortly after being noted in default on April 8, 2025.

(c) A statement of defence was sent to the plaintiff's then-lawyer on April 15, 2015.

(d) After back and forth about a potential claim amendment, which did not occur, the defence was ultimately filed on consent in June 2015.

(e) The record supports that counsel for the parties were coordinating on next steps until February 2016.

(f) After that time, the plaintiff took no steps until September 2016, when the defendants (not the plaintiff) served a draft affidavit of documents and sought to move the action forward.

(g) The plaintiff did not serve an affidavit of documents until mid-July 2017, despite multiple follow ups from the defendants' lawyer.

(h) The plaintiff thereafter took no steps until January 2018.

(i) In January 2018, counsel agreed to proceed with discoveries in March 2018 (subsequently rescheduled to April 2018). An agreement was reached between the lawyers for the parties to have Mary Alves, a clerk who worked for the defendants' real estate lawyer, Lutz von Bogen, to be examined for discovery along with Marko Peric. That agreement was premised on an understanding that the defendants themselves seemed to have no personal knowledge of what transpired with the power of sale proceedings. The default proceedings were dealt with and handled by Ms. Alves. The record supports that, at the material times, the defendants were a retired couple seeking to make extra money by lending to borrowers needing mortgages, but those mortgages were handled by their lawyer's office.

(j) In late March 2018, the plaintiff's then-lawyer requested an adjournment of the discoveries because the plaintiff was switching lawyers.

(k) A notice of change of lawyer was served on March 21, 2018.

(l) Despite new lawyers coming onto the record, no steps were taken by the plaintiff to advance the litigation. A motion was ultimately brought by the new lawyers for an order removing them from the record. It was granted on November 22, 2018.

(m) Nearly a year later, in October 2019, the defendants' lawyer notified the plaintiff that she was in breach of the removal order by failing to appoint new counsel or serve a notice of intention to act in person. The letter afforded the plaintiff thirty days to take action, failing which a motion to strike the claim would be brought.

(n) A month later, on November 5, 2019, a notice of appointment of lawyer was served by the plaintiff's current lawyer.

(o) Copies of the parties affidavits of documents were requested by new plaintiff's counsel and provided by defendants' counsel in mid-November 2019.

(p) Other than plaintiff's counsel suggesting that the statement of claim may be amended in November 2019, no further steps were taken before the registrar's dismissal nearly five years later on August 1, 2024.

(q) On September 5, 2024, the plaintiff's lawyer contacted the defendants' lawyer about the registrar's dismissal and this long motion was thereafter requisitioned and brought.

[13] Nothing in the chronology of this litigation supports delay by the defendants. To the contrary, up until November 2019, the defendants regularly took reasonable steps to advance the litigation when it was languishing. I give no weight to the alleged "failure" of the defendants to continue to press after that time. Examinations for discovery had been scheduled for April 2018 and were adjourned to accommodate the plaintiff's change of lawyers. It was incumbent on the plaintiff – not the defendants – to reschedule them. This is a not a case in which the defendants have counterclaimed. Only the plaintiff is pursuing judgment in this action. It was accordingly the plaintiff's sole obligation to advance her case.

[14] The plaintiff's explanation for the long periods of delay and ongoing inaction is lacking. She states in her affidavit that she was unhappy with how her first and second lawyers were handling her file, which is why she ultimately retained her current lawyer in November 2019. However, no evidence has been given on why I should attribute litigation delay to the plaintiff's former lawyers, rather than the plaintiff herself. There is no evidence on what occurred between the plaintiff and her former lawyers nor is there any evidence at all on what transpired in the period between retaining her second lawyer in March 2018 and the removal motion in November 2018.

[15] The plaintiff generally submits that she was not well served by her former lawyers, but has tendered no evidentiary basis for me to accept that submission. She also does not explain why it took a year to retain a new lawyer after the removal order was granted.

[16] The plaintiff seeks to explain delay after her new lawyer was retained in November 2019 by stating that he had difficulty obtaining the file from former counsel. Various emails are appended to the plaintiff's affidavit, which disclose several requests for the file that were sent to the plaintiff's former lawyers in November 2019. However, there is nothing after November 2019 and there is no evidence on when the files were received from the former lawyers. I am unable to find that delay in obtaining the files was in any way material to the plaintiff's inability to advance the action. There is no evidence on what records were required and were unavailable to do so.

[17] The plaintiff's evidence tendered to explain the delay between November 2019 and September 2024 is similarly lacking and insufficient.

[18] The plaintiff points to personal impacts to her lawyer. Notably, unparticularized evidence has been given on impacts during the pandemic, as well as general comments on medical concerns with and the ultimate passing of the lawyer's father in 2022/2023. I have sympathy for these impacts, but there is no specific evidence on what being "particularly adversely affected by and during the Covid-19 virus and pandemic" means or how these personal matters impeded the plaintiff's lawyer from taking any steps in the action on behalf of his client. Importantly, he has not tendered any affidavit himself.

[19] The plaintiff also asserts that she was "hampered in dealing with many matters for personal, family, and health reasons from 2020 to 2024." However, other than some evidence on extended family health matters during a trip to Brazil in 2021, there is no meaningful explanation of any ongoing inability to engage with this litigation over that four-year period and what specific personal, family, and health challenges the plaintiff was facing.

[20] The affidavit suggests that the trip to Brazil in 2021 was for only three months. That was followed by a period of seven months in the United States because the plaintiff and her spouse were not being readmitted to Canada due to incomplete vaccinations. There is no explanation on why the plaintiff could not instruct her lawyer from the United States, but even if I accept that evidence, it appears to explain only ten months of the delay from November 2019 to August 2024, when the action was dismissed.

[21] I agree with the defendants that there are multiple significant periods of inactivity that have not been explained by the plaintiff, notably the following:

(a) February 5, 2016 to July 12, 2017 (1 year, 5 months), during which the defendants' served a draft affidavit of documents and followed up on the plaintiff's productions on three occasions before receiving the plaintiff's affidavit of documents;

(b) July 12, 2017 to January of 2018 (6 months), during which no steps were taken by the plaintiff;

(c) March 21, 2018 to November 22, 2018 (8 months), during which no steps were taken by the plaintiff after her new lawyer was appointed;

(d) November 22, 2018 to November 5, 2019 (12 months), during which the plaintiff took no steps to retain new counsel or advance her action until after the defendants' lawyer sent a letter advising that a motion to strike would be brought if the plaintiff's inaction continued; and

(e) November 19, 2019 to September 4, 2024 (4 years, 9 months), during which the plaintiff failed to take any steps from the defendants' perspective and regarding which limited evidence has been tendered (as already discussed above).

[22] At the time this motion was requisitioned, the litigation was already approaching its tenth anniversary. In my view, the plaintiff has failed to adequately explain the significant delays in advancing this action to completion of discoveries, let alone to trial.

Intention to prosecute the action

[23] The plaintiff makes the following statement regarding her intention to prosecute this action:

> It has always been my intention to take my action to trial or to have it heard on its merits. I have not at anytime abandoned this claim despite my absences from the country during the Covid-19 pandemic where I may have inadvertently neglected to instruct my present counsel to pay proper attention to my file during this time period.

[24] This is a bald and self-serving statement that is belied by the extensive and unexplained delay in this action. I agree with the defendants' submission that inadequately explained inaction over a protracted period is fundamentally inconsistent with a credible claim of having any genuine intention to prosecute a claim.

[25] I find that the plaintiff has not met her burden of satisfying me that she always intended to prosecute this action in accordance with the time limits in the *Rules*, but failed to do so through inadvertence. The five years prescribed under subrule 48.14(1) had already expired years before to the registrar's dismissal. This action would already have been dismissed for delay but for the suspension of administrative dismissals during the pandemic, which was only lifted last year.

Prejudice

[26] Prejudice is a key consideration on a motion to set aside a dismissal order. The focus is on whether a defendant would suffer any significant prejudice in presenting their case at trial, particularly as it relates to the effect of the delay on their ability to mount a full and fair defence.

Importantly, the plaintiff bears the burden of establishing that there is no prejudice from setting aside the registrar's dismissal. The defendant has no obligation to adduce evidence of actual prejudice, particularly where the plaintiff has not been able to provide a satisfactory explanation for the delay: *Fazal v. ABC Corporation,* 2022 ONSC 4358 at paras. 233-234.

[27] Although decided in the context of a motion to dismiss for delay, I find the comments in *Barbiero v. Pollack, supra,* to be relevant. In that case, at paras. 11-15, the Court of Appeal discussed the importance of changing the lens through which delay is viewed to one that focuses on prompt judicial resolution of legal disputes. Notably, the Court of Appeal observed 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. In my view, the length of delay in this case is significant and is a factor of prejudice in and of itself.

[28] The defendants have put forward compelling arguments on presumptive prejudice from the delay in this litigation. However, in my view, because there is actual prejudiced from the delay, I need not address those arguments. One defendant and one material witness have passed during the period of delay and the evidence before me supports that the other defendant has no recollection of the events.

[29] Specifically, Ms. Peric passed away in September 2022. Mr. Peric, who is now 90 years old, has tendered evidence that he does not know anything about the power of sale because Mary Alves handled it. Lutz von Bogen, the defendants' real estate lawyer, has given evidence that he had no personal involvement in the mortgage or the mortgage default proceedings, which were handled by Mary Alves on his behalf. Ms. Alves, who the record supports was the person dealing with the mortgage defaults and handling the power of sale proceedings, passed unexpectedly in October 2021.

[30] I reject the plaintiff's argument that this is primarily a document case and that Mr. von Bogen will be the key witness at trial as the lawyer supervising the work performed by his clerk. In my view, the defendants correctly characterize Mary Alves as the witness with the only firsthand knowledge of the events giving rise to the dispute underlying this action. That appears to have been acknowledged by the plaintiff's first lawyer, who agreed to examine Ms. Alves for discovery on behalf of the defendants (along with Mr. Peric). It is also borne out by Mr. von Bogen's cross-examination on his affidavit for this motion.

[31] Based on the record before me, I accept that Ms. Alves was the only individual with direct knowledge of the defendants' response to the mortgage defaults and the events surrounding the power of sale. Despite the plaintiff's position that this is a document-based case, I have been directed to no specific documentary evidence that could reasonably stand in place of Ms. Alves' evidence. I agree with and accept the defendants' submission that, because of Ms. Alves' passing, they are now deprived of material evidence that is necessary to meaningfully respond to or defend against the plaintiff's allegations of improper and improvident sale.

[32] Notably, the plaintiff's own factum describes this case as "a complex legal case involving complicated and peculiar facts". The record supports that the defendants and Mr. von Bogen have no independent knowledge of those relevant facts.

[33] In my view, the prejudice from Ms. Alves' passing was avoidable, or at least could have been mitigated, which only serves to highlight the prejudice. Ms. Alves was to have been examined in April 2018. Albeit that the plaintiff retained new counsel twice, there were still nearly two years in which Ms. Alves could have been examined between November 2019 and her passing in October 2021. The insufficient explanation for delay in that period is particularly stark with that context.

[34] I am satisfied that the loss of Ms. Alves' evidence, coupled with the lack of personal knowledge of both Mr. Peric and Mr. von Bogen and the passing of Ms. Peric, is significant prejudice supporting that a fair trial is no longer possible.

[35] For the foregoing reasons, I am dismissing the plaintiff's motion.

COSTS

[36] The defendants have been successful in opposing this motion and are entitled to their costs. They seek costs of the motion in the partial indemnity amount of $11,098.74, including HST and disbursements. They are not pursuing costs of the action. The plaintiff did not serve a costs outline since she did not seek any costs if successful.

[37] The costs requested by the defendants were not substantively challenged. In my view, the costs claimed are reasonable and proportionate to the issues on the motion, which included motion records, cross-examinations, and facta. In my view, the hours and rates claimed are reasonable and within the reasonable expectations of the plaintiff for a motion of this nature, which involved significant issues of importance for both sides. I see no reason to discount the partial indemnity cost claim of the defendants and am awarding the requested costs.

DISPOSITION

[38] The plaintiff's motion is hereby dismissed. I fix costs of the motion on a partial indemnity basis in the amount of $11,098.74, including HST and disbursements, which shall be payable by the plaintiff to the defendants within thirty (30) days. Order accordingly.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: August 12, 2025