

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
Cy Rheault Construction ) Andrew Paterson, for the responding  
 ) party/Plaintiff  
Plaintiff )  
 )  
– and – )  
 )  
Danark Enterprises Limited and the Bank of ) Peter Doucet, for the Moving  
Nova Scotia ) Party/Defendant Danark  
Defendant )  
 )  
 )  
 ) **HEARD:** July 11, 2025 via videoconference

2025 ONSC 4935 (CanLII)

**P.J. BOUCHER, RSJ**

**Endorsement on Motion to Dismiss**

Introduction

[1] The defendant Danark moves for an order dismissing this action for delay pursuant to Rule 24.01 and the court’s inherent jurisdiction, or in the alternative, for an order setting a timetable. The plaintiff opposes the relief sought.

Background

[2] On January 13, 2017, the plaintiff registered a claim for lien in the amount of \$338,326.98 against property of the defendant Danark. On February 27, 2017 the plaintiff started this action in order to perfect its lien.

[3] On March 07, 2017 the plaintiff discontinued this action as against the defendant Bank of Nova Scotia. For the balance of this endorsement, I will refer to Danark as the defendant.

[4] On March 27, 2017 the defendant delivered a statement of defence and counterclaim.

- [5] The plaintiff brought a motion, originally returnable May 19, 2017 to remove Mr. Doucet as counsel for the defendant because of an alleged conflict of interest. It appears that motion was ultimately abandoned.
- [6] In the Spring of 2018, the defendant moved for permission to have Mr. Doucet cross-examine Roger Rheault, principal of the plaintiff, while the motion to remove him as counsel was outstanding. That request was denied by Justice Gauthier on May 22, 2018.
- [7] On August 28, 2018 the plaintiff delivered a reply and defence to counterclaim.
- [8] In December 2018 the parties exchanged affidavits of documents. Examinations for discovery took place in August 2019.
- [9] The defendant provided answers to certain of its undertakings in December 2019; the plaintiff, June 2020. The evidence on this motion suggests there remain some outstanding undertakings on both sides.
- [10] The defendant delivered the present motion to dismiss on November 01, 2024.
- [11] The plaintiff was cross-examined on his responding affidavit on January 27, 2025.

#### Position of the parties

- [12] The defendant argues the plaintiff has not taken the necessary steps to advance its claim in a timely fashion since examinations for discovery were completed. This default has resulted in inherent and actual prejudice to the defendant.
- [13] The plaintiff argues there are reasonable explanations for the delay and the delay itself is not inordinate. In short, the plaintiff submits the delay does not rise to the level required to dismiss the action.

#### The law

- [14] When a plaintiff has failed to set an action down for trial within six months after the close of pleadings, a defendant who is not in default can move to have the action dismissed for delay: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r.24.01(c). Appellate authority has set a high threshold for dismissal under this rule. An action should not be dismissed unless the delay is intentional and contumelious, or the plaintiff and/or their counsel are responsible for inexcusable delay giving “rise to a substantial risk that a fair trial might not now be possible”: *Faris v. Eftimovski*, 2013 ONCA 350 at para. 35.
- [15] In addition to Rule 24.01, the court has the inherent jurisdiction to dismiss an action for delay that is lengthy and unexplained and that undermines the public’s confidence in the administration of justice: *Leblanc v. MacMillan*, 2015 ONSC 1477 at para. 14.

Analysis

*Intentional and contumelious delay*

[16] This branch contemplates conduct for which there is no reasonable explanation and involves disrespect for the court. It is often supported by breaches of court orders: *Cardillo v. Willowdale Contracting et. al*, 2020 ONSC 2193 at para. 34. I am not persuaded on this record that this high threshold is met, and the defendant did not pursue this in argument.

*Inexcusable delay*

[17] From the start of the action in 2017 until June 2020 the matter proceeded in the usual course. The parties exchanged pleadings and affidavits of documents. A motion was argued. Undertakings were answered. Delays during this part of the litigation are accordingly the responsibility of both parties.

[18] The defendant blames the plaintiff for the delays occasioned since June 2020.

[19] The plaintiff explains that its business was severely impacted by the COVID-19 pandemic, which effectively halted its projects in 2020. The plaintiff also lost one of its major clients in 2021, which placed the viability of the plaintiff's business in serious jeopardy. In its affidavit filed in response to this motion the plaintiff indicated that in 2022 it reached out to its lawyers that initially started this action. It learned they had left the firm. However, emails provided by the plaintiff in response to undertakings indicates that as early as December 2020 the plaintiff appeared to be in the process of retaining new counsel, Contant. It asked Contant to obtain its file from its former firm and to move this matter along to a court date or to a mediation.

[20] In 2021 the plaintiff was sued by its prior lawyers for non-payment of fees. It was not until November 28, 2023 that Contant received the plaintiff's file from previous counsel. In the Fall of 2023 and Winter of 2024, the plaintiff followed up unsuccessfully with Contant to move the matter forward. When the defendant served this motion to dismiss, Contant advised the plaintiff he was unable to defend the motion, for personal reasons. The plaintiff hired its current counsel in October 2024 and he responded to the motion. On November 29, 2024 the motion was adjourned without a date to permit cross-examination of Rheault on his affidavit, which took place on January 27, 2025. The motion returned to the short motions list on July 11, 2025 at which time it was argued.

[21] In all the circumstances, the delay is not inexcusable.

[22] This action has been before the court for over 8 years, which appears to be a long time for this type of file, though it is far from exceptional in the circumstances.

[23] The COVID-19 pandemic and its impact, in particular in 2020, was significant. Courts closed before they shifted to remote hearings for urgent matters only. After they reopened,

in-person cases were severely restricted. Limitation periods were suspended for six months. Public health measures seriously curtailed the operation of businesses. Individuals and businesses were impacted financially such that the federal government provided critical financial aid to help them survive. I accept the plaintiff's evidence that its business was severely impacted by the pandemic in 2020 and in 2021 when it lost a major client, and this delayed its pursuit of this action.

- [24] Despite these difficulties the plaintiff tried to retain new counsel and move the matter ahead in late 2020. Litigation between the plaintiff and its previous counsel started in 2021. Contant only received previous counsel's file in the Fall of 2023, and I infer from this evidence that the delay was related to a solicitor's lien on the file. From the time the file was received the plaintiff attempted to engage with its counsel, Contant, to pursue the matter, ultimately hiring current counsel.
- [25] Since late 2024 the proceeding has been consumed by this motion to dismiss. I note this was not set for a long motion, which in Sudbury presently results in delays of at least 6 months or more. Rather, it was heard on a short motion list, which are scheduled roughly every two weeks in Sudbury. The delay in having this motion argued related to the defendant's request to cross-examine Rheault on his affidavit. Prior to argument of this motion, the trial record was passed.

*Is there a substantial risk that a fair trial might not now be possible?*

- [26] Had I found the delay to be inexcusable, I would not have concluded there is a substantial risk that a fair trial might not now be possible.
- [27] This analysis includes a consideration of inherent and actual prejudice. Gordon RSJ (as he then was) set out the law as follows at paragraph 24 of *Leblanc*:
- Inherently, a long delay will cause prejudice. Memories fade and fail, witnesses become unavailable, and documents are lost, creating a presumption of inherent prejudice, and the longer the delay, the stronger the presumption. [See *Langenecker v. Sauve*, supra]. The Plaintiff may discharge this presumption by persuading the Court that no prejudice would be suffered as a result of the delay, and that there is not a substantial risk that a fair trial will not be possible [see *Armstrong v. McCall*, 2006, CanLII 17248 (ONCA)]. If the Plaintiff is able to discharge the presumption of inherent prejudice, the action may still be dismissed if the Defendant leads convincing evidence of case-specific or actual prejudice
- [28] The plaintiff has rebutted the presumption of inherent prejudice. Discoveries were completed early in the proceedings. While there is disagreement about some outstanding undertakings on both sides, most of them are complete. The trial record has been passed. The action is trial ready.
- [29] The defendant has failed to lead convincing evidence of actual prejudice, or any, for that matter. Indeed, the focus of the defendant's submissions were on the inherent jurisdiction

of the court to dismiss for delay in the absence of actual prejudice, which I will now address.

*The court's inherent jurisdiction to dismiss for delay*

- [30] An action that cannot be dismissed for delay under Rule 24.01, may still be dismissed as an abuse of the court's process due to unexplained delay. In other words, the court's inherent jurisdiction to control its process can be invoked to dismiss for delay where the rules do not permit it: *Wallace v. Crate's Marine Sales Ltd.*, 2014 ONCA 671 at paras. 20 and 21.
- [31] For reasons I have already explained, I conclude the plaintiff has provided a reasonable excuse for the delay incurred in prosecuting this case. In my view, the delay occasioned to date does not undermine public confidence in the administration of justice. The plaintiff is accordingly entitled to have this dispute decided on its merits: *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 at para.20.

Conclusion

- [32] The trial record has been passed. The matter is ready to be scheduled for trial. However, it would be helpful to have a judicial pre-trial, at which time the parties and the court can consider whether in-chief evidence can proceed by way of affidavit to shorten the time required. I say this because counsel advised during oral argument that the amount in dispute has been greatly reduced, though I could not find that figure in the evidence on this motion. I accordingly order that the parties contact the trial coordinator to schedule the judicial pretrial. The timetable requested by the defendant in alternative argument is accordingly unnecessary.
- [33] For these reasons, the defendant's motion is dismissed.
- [34] If the parties cannot agree on costs of this motion, the plaintiff may file written submissions of no more than two pages, double-spaced, not including any offers to settle and bills of costs within 15 days of the date of this endorsement. The defendant may file written submissions with the same restrictions, within 30 days of the date of this endorsement. There will be no reply. Late submissions will not be considered.

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Regional Senior Justice P.J. Boucher