

CITATION: Canadian Urethane Spray Equipment Inc. v. Palmer, 2025 ONSC 6804
COURT FILE NO.: CV-23-1862
DATE: 2025-12-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Canadian Urethane Spray Equipment Inc., Plaintiff

AND:

Michael Harold Palmer, 10639931 Canada Inc., o/a Weathertight Insulation,
Defendants

BEFORE: The Honourable Justice L. E. Standryk

COUNSEL: C. Davis, Counsel, for the Plaintiff

K. Cura and O. Boverhof, Counsel, for the Defendants

HEARD: November 27, 2025

REASONS FOR DECISION

Overview

- [1] The plaintiff, Canadian Urethane Spray Equipment Inc., brings this motion for an order extending the time for service of the statement of claim on the defendants, Michael Harold Palmer and 10639931 Canada Inc., o/a Weathertight Insulation.
- [2] The defendants oppose the motion, arguing that the plaintiff's action is statute-barred and that they have failed to demonstrate that the defendants will not suffer prejudice from an extension.
- [3] For the reasons that follow, I grant the plaintiff's motion and order that the time for service of the statement of claim is extended.

Factual Background

- [4] The plaintiff is a supplier of construction materials specializing in spray foam equipment and related products.
- [5] The defendant, Michael Harold Palmer, is a director and officer of the corporate defendant, 1069931 Canada Inc., o/a Weathertight Insulation ("Weathertight"). Weathertight operated as a supplier of spray foam and other insulation services before ceasing operations in 2022. As of today, Weathertight has not been dissolved due to outstanding liabilities.

- [6] The plaintiff supplied equipment, spray foam, and related materials to Weathertight, which Weathertight and its customers used to complete various construction or renovation projects across Ontario.
- [7] The plaintiff issued 15 invoices to Weathertight for equipment and materials from October 22, 2021 to December 15, 2021. Other than a nominal payment of \$2,228.06 made in December 2021, Weathertight failed to pay the plaintiff.
- [8] As a result, the plaintiff commenced an action against Weathertight for breach of contract on May 9, 2022, court file CV-22-0000488-0000 (the “Contract Action”). Weathertight did not defend the action. Default judgment was obtained in the amount of \$80,432.16 plus pre- and post-judgment interest and costs. Weathertight has not satisfied the outstanding judgment.
- [9] The plaintiff commenced this action against the defendants claiming \$80,432.16 for breach of trust pursuant to Part II of the *Construction Act*, R.S.O. 1990, c. C.30 (the “Trust Action”). The plaintiff alleges that the defendants, including Michael Harold Palmer as the directing mind of Weathertight, failed to remit funds received by customers to the plaintiff, which is a breach of the statutory trust. The plaintiff issued the statement of claim for the Trust Action on December 27, 2023, due to concerns that the action may be statute-barred by a limitation period.
- [10] The plaintiff did not serve the statement of claim, preferring to wait until after an examination in aid of execution for the Contract Action was conducted on April 18, 2024. Answers to undertakings provided on June 13, 2024, confirmed for the first time that Weathertight had been paid by its customers.

Law

- [11] Rule 14.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requires that a statement of claim be served within six months after it is issued. The statement of claim in the Trust Action should have been served on or before June 28, 2024. The plaintiff emailed a copy of the statement of claim to counsel for the defendants on May 15, 2025.
- [12] Rule 3.02(1) provides the court with a general discretion to extend or abridge any time prescribed by the *Rules* on terms that are just. The principles that guide this exercise of discretion are outlined in the *Rules* and relevant case law. Rule 1.04(2) states that the *Rules* shall be interpreted liberally to ensure the just, most expedient, and least expensive resolution of every civil proceeding based on its merits. According to r. 2.01(1), a failure to follow the *Rules* is an irregularity, and the court may grant relief to secure the just determination of the real matters in dispute.
- [13] Both counsel agree that the leading authority to guide the court’s discretion in this matter is *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780 (C.A.). The basic consideration is whether the extension of time for service of the claim will advance the just resolution of the dispute without prejudice or unfairness to either party. The plaintiff must explain the reason for the delay in serving the statement of claim. But, most importantly, the plaintiff has the onus

to prove that the extension of time for service will not prejudice the defendant: *Chiarelli*, at paras. 9, 12.

- [14] More recently, the court in *Tookenay v. O'Mahony Estate*, 2024 ONSC 709, at para. 32, listed additional factors that may be considered when determining whether to grant an extension of time to serve a statement of claim, including;
- a. the length of the delay,
 - b. the evidence filed that explains the delay,
 - c. whether the evidence regarding the explained delay is sufficient,
 - d. whether or not the plaintiff moved promptly for an extension of time after the period expired,
 - e. whether or not the delay in serving the claim resulted from the direction, participation, or involvement of the plaintiff personally in the service of the claim,
 - f. the extent to which the defendant, themselves, bears some or all of the responsibility for this delay,
 - g. whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned his claim,
 - h. whether the applicable limitation period for the action has already expired,
 - i. whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against the defendant, and
 - j. whether the defendant would suffer prejudice if the motion is granted.

Issues

- [15] 1. Has the plaintiff provided a reasonable explanation for the delay?
2. Will the defendant suffer prejudice by an extension of time for service of the claim?

Analysis

Reasonable Explanation for Delay

- [16] The plaintiff asserts that the delay in serving the statement of claim was due to counsel's inadvertence. The defendants assert that the plaintiff strategically delayed service, in part to gain an evidentiary advantage.
- [17] I am satisfied that the plaintiff has provided a reasonable explanation for the delay in serving the statement of claim and that they did not delay for tactical reasons alone.

- [18] The plaintiff obtained default judgment for the Contract Action on June 28, 2023. Accordingly, they were entitled to conduct an examination in aid of execution. Plaintiff's counsel explained that examination in aid of execution might provide evidence in support of the breach of trust claim and therefore decided to serve the claim in the Trust Action after examinations were complete.
- [19] The examination was conducted on April 18, 2024. Weathertight gave several undertakings, answers to which were relevant to the Trust Action. Weathertight satisfied several undertakings on June 13, 2024, including, for the first time, confirmation of the payment in full by customers for whom Weathertight completed work using materials supplied by the plaintiff.
- [20] The statement of claim in the Trust Action was to be served by June 28, 2024, roughly 15 days after answers to undertakings were provided. Plaintiff's counsel deposes that their focus on obtaining answers to undertakings, neglect in diarizing the deadline to serve the claim and a particularly challenging workload all contributed to the failure to serve the claim: this should not be attributed to the plaintiff, who at all times intended to serve and pursue the Trust Action.
- [21] The decision made by plaintiff's counsel in this case was not solely a tactical maneuver intended to secure an advantage over the defendant. I accept that it was undertaken to obtain information relevant to the Trust Action and to assist the plaintiff and their counsel in evaluating the viability of pursuing that claim on its merits. Assessing the viability of a claim at the early stages of litigation is something counsel should be encouraged to do as it promotes efficiency and fairness in litigation by ensuring that parties proceed on a principled basis, informed by the strength of their legal position. It helps to conserve judicial resources, reduce unnecessary costs, and foster the resolution of disputes grounded on substantive merits. Further, as discussed later regarding prejudice, the record does not demonstrate that an unfair advantage was gained over the defendants.
- [22] A copy of the statement of claim, together with a motion to extend the time for service, was provided to the defendants via counsel on May 15, 2025. There is no evidence regarding when the omission first came to the plaintiff's counsel's attention, nor why it took approximately 11 months to inform defence counsel of the Trust Action.
- [23] In considering the jurisprudence referenced by counsel, the delay, while notable, is not so substantial as to be considered extraordinary or one that undermines the integrity of the litigation process: *Chiarelli*, at para. 17; *Transplatinum v. Ferguson*, 2011 ONSC 2543, at para. 14; *Tookenay*, at para. 8. Moreover, the length of delay is not decisive. Even a one-month delay may not be cured if a party fails to offer a reasonable explanation: *Tookenay*, at paras. 55-57.
- [24] In considering the explanation offered, the court "should be concerned mainly with the rights of litigants, not with the conduct of counsel": *Chiarelli*, at paras. 9, 12; see also *Tookenay*, at para. 29.

[25] The plaintiff's explanation demonstrates that the delay arose from inadvertence rather than deliberate disregard of the *Rules*. There is no indication of bad faith or an attempt to gain an unfair advantage, nor does the evidence before me demonstrate any advantage was gained.

Prejudice to the Defendants

[26] The key consideration in this motion is prejudice to the defendants. The court should not extend the time for service if doing so would prejudice the defendants. While the plaintiff bears the onus of demonstrating that the defendants will not be prejudiced, the defendants have an evidentiary burden to provide details of actual prejudice arising from the delay itself: *Chiarelli*, at paras. 14-16.

[27] Prejudice must stem from the delay itself. Prejudice that exists regardless of whether service is delayed is typically irrelevant: *Chiarelli*, at para. 16.

[28] The defendants' submissions may be summarized as follows:

1. There is a clear and irrebuttable presumption of prejudice because a substantial portion of the plaintiff's claim is statute-barred by a limitation period. If an extension is granted, the balance of the claim would be served well beyond the applicable limitation period: *Tookenay* at para 59.
2. The Trust Action is a duplicative proceeding arising from the same facts and issues previously adjudicated under the Contract Action.
3. The defendants would suffer actual prejudice if the relief requested in the motion is granted.

Presumption of Prejudice

[29] Although late service of a claim beyond the limitation period gives rise to a presumption of prejudice, I disagree with defence counsel that it is an irrebuttable presumption. The presumption is rebuttable because the overarching principle is that cases should, wherever possible, be determined on their merits rather than on procedural technicalities, ensuring fairness to the parties: r. 3.02; *Transplatinum*, at para. 14; *Bargain Club Inc. v. Co-Operators General Insurance Company*, 2018 ONSC 3402, at paras. 12-17.

[30] Additionally, having an irrebuttable presumption based on a limitation period would create a rigid rule that determines motions for extensions without considering the reasons for the delay or whether there is any actual prejudice to the defendants. The approach taken by the defendants would directly contradict the Court of Appeal's guidance in *Chiarelli*, at para. 17: courts should not establish fixed rules or guidelines in advance regarding when an extension should be denied.

[31] In cases where a limitation period has expired between issuance and service of the statement of claim, a presumption of prejudice is the starting point. Where the plaintiff

demonstrates that the defendant will not suffer prejudice, it is appropriate that the defendant show actual prejudice to defeat the motion: *Bargain*, at para. 16. This is a fair and logical approach to the analysis, given that the defendant is uniquely positioned to identify and articulate the nature and extent of any prejudice they may endure.

Limitation Period - Is the Trust Claim Statute-Barred?

- [32] There is no prescribed limitation period for a trust claim under the *Construction Act*; rather, the general two-year limitation period begins to run on the day the claim is discovered: *Limitations Act, 2002*, S.O. 2002, c. 24 Sched. B, ss. 4, 5. The key question is when a reasonable person in the plaintiff's position ought to have known that a breach of trust had occurred.
- [33] Courts have held that the limitation period runs concurrently with that of the breach of contract: *Normar Drywall v. 4241258 Ontario Inc. o/a Laurin General Contractor and Dennis Laurin*, 2023 ONSC 3106, at para. 60, citing *Carmen Drywall Limited v. BCC Interiors Inc.*, 2013 ONSC 4644, at paras. 27-28; *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.* (2008), 71 C.L.R. (3d) 54 (Ont. S.C.), aff'd February 20, 2009, File #DC-08-00013-00 (Ont. Div. Ct.); *Aldine Construction v. Brucegate Holdings Inc.*, 2010 ONSC 3032, 95 C.L.R. (3d) 194, at para. 18.
- [34] Section 39 of the *Construction Act* permits the plaintiff, as a trust beneficiary, to request information from the defendants about the state of accounts, including if and when money was received and what use was made of those funds, consequently revealing whether a trust claim exists: *Carmen Drywall*, at paras. 27-29. Arguably, if Weathertight had not received funds for the supply of equipment or materials, a breach of trust claim would not yet have crystallized, even if the s. 39 inquiry was made on the date the breach of contract occurred.
- [35] The defendants submit that the plaintiff's Trust Action and Contract Action both arise from the non-payment of 15 invoices issued from October 22, 2021, to December 15, 2021. The defendants argue that the limitation period for both actions began after a reasonable time had passed to allow for payment of the invoices. Accepting the limitation period for each invoice runs 30 days from receipt of the invoice, the latest possible limitation date for the breach of trust claim on the first invoice is November 22, 2023, and on the last invoice, January 15, 2024.
- [36] The plaintiff submits that the defendants have not provided any authority to support their argument that, in the construction industry, the limitation period runs on an invoice-by-invoice basis. Counsel argues that, even if one accepts the defendants' argument that the limitation period begins after a reasonable period of time for payment, the outermost limitation period would not expire until January 15, 2024. Therefore, the plaintiff's claim is not entirely statute-barred.
- [37] The plaintiff asserts that in the construction industry, the limitation period does not run on

an invoice-by-invoice basis: it does not commence until a reasonable period of time for payment, usually 30 to 60 days, has expired after receipt of the last invoice delivered to the defendants. According to the plaintiff, the limitation period in this case would therefore not expire until either January 15, 2024 or February 15, 2024.

- [38] Neither party has provided any authority to support their respective positions.
- [39] The plaintiff must exercise reasonable diligence to determine if they have a trust claim when they have not been paid. Reasonable diligence would include making inquiries under s. 39 of the *Construction Act* to discover if and when the defendants received funds and what use was made of them. A plaintiff cannot rely on its own failure to act with due diligence to delay the running of the limitation period: *Normar*, at paras. 60-62.
- [40] Determining when the limitation period begins is fact-specific. There is insufficient evidence in the record to permit the necessary findings of fact required to resolve the limitation period issue. There is no evidence regarding whether the invoices were delivered under a general construction contract. There is little evidence that indicates, with any degree of certainty, when the invoices in question were delivered or received. Both parties acknowledge that the invoice dates do not reflect the delivery dates. The record is devoid of any evidence of direct communications between the parties. There is no evidence as to whether, or when, the plaintiff made inquiries pursuant to s. 39 of the *Construction Act*. Did the defendants respond to the s. 39 inquiries? This evidence would assist in creating a complete evidentiary record necessary to make findings of fact regarding the parties' reasonable expectations regarding payment and the existence of trust obligations, both of which influence the discoverability analysis relevant to determining the limitation period issue.
- [41] For these reasons, I am unable to find on the record before me that the Trust Action is statute-barred, resulting in prejudice to the defendants.

Res Judicata - Is the Trust Action a Duplication of the Previously Adjudicated Contract Action?

- [42] The defendants briefly raised a *res judicata* argument in submissions, without fully articulating the argument. I will address it briefly.
- [43] The trust provisions of the *Construction Act* create a separate cause of action which is distinct from breach of contract: *Arborform Countertops Inc. v. Stellato* (1996), 29 O.R. (3d) 129 (Gen. Div) as cited in *Architectural Millwork & Door Installations Inc. v. Provincial Store Fixtures Ltd.*, 2016 ONCA 320, 51 C.L.R. (4th) 42 at paras. 13-14. The Court of Appeal at paras. 9-15 of its decision in *Architectural* concluded that the claims in question were separate and distinct. As a result, the defendants could not use section 12, which pertains to set-off allowances for the trust, as a defence against the breach of contract claim. Since the plaintiffs did not sue for trust, the defences applicable to a breach of trust are irrelevant to the breach of contract claim.
- [44] Accordingly, I find that *res judicata* does not bar the Trust Action because it is a distinct

cause of action created by the statutory trust provisions of the *Construction Act*. The factual foundation of both the Trust and Contract Actions may overlap, but that alone is not sufficient for a finding of *res judicata*.

- [45] *Res judicata* also arises when the parties or their privies are the same in both actions. The defendant Michael Harold Palmer was not a party to the Contract Action. Defence counsel acknowledged during submissions that although Mr. Palmer is a principal of Weathertight, he was not privy and therefore not personally liable in the Contract Action.
- [46] The plaintiff's Trust Action is not barred by action estoppel or *res judicata*.

Actual Prejudice to the Defendants

- [47] I am satisfied that the plaintiff has discharged its onus and demonstrated that the defendants will not suffer prejudice as a result of an extension of time to serve the statement of claim. In responding to this motion, the defendants were able to access information relevant to the Trust Action, including records from the corporate accounting software pertaining to the company's books and records, notwithstanding that Weathertight ceased operations in 2022.
- [48] There is no evidence before me that any key witness is unavailable to testify. Harold Michael Palmer, as a principal of Weathertight, is a key witness in the Trust Action. He was available and provided evidence during the examination in aid of execution in the Contract Action. He also instructed counsel and provided sworn affidavit evidence in response to this motion. There is no indication of diminished memory or any inability on his part to participate in the Trust Action.
- [49] Further, the defendants have not established that any additional financial records or information relevant to the Trust Action are no longer available as a consequence of the delay. The authorities relied upon by the defendants, *Pagliuso v. Primerica Financial Services Ltd.*, 2019 ONSC 460, and *Tookenay*, are distinguishable. In each of those cases, the courts found actual prejudice because key witnesses were no longer capable or available to give evidence. That is not the case on the facts before me.

Conclusion

- [50] I am persuaded that an extension of time for service of the statement of claim is warranted, as it will facilitate the just adjudication of this proceeding on its merits. Such relief accords with the liberal construction of the *Rules* and the overarching principle that courts ought to enable the determination of claims on their substantive merits where no prejudice ensues. This determination is fair and equitable and does not compromise the defendants' right to advance a limitation period defence.

Disposition and Costs

- [51] Order to go extending the time for service of the statement of claim to January 15, 2026.

[52] The plaintiff was successful on the motion and is presumptively entitled to costs on a partial indemnity basis. The parties are encouraged to settle the issue of costs, failing which the plaintiff may serve and file written costs submissions up to three pages, excluding a bill of costs and any offers to settle, as well as upload them to Case Center and send a copy to my attention at St.Catharines.SCJJA@ontario.ca no later than December 19, 2025;

responding submissions on the same terms no later than January 9, 2026, and reply submissions, if any, limited to two pages, no later than January 13, 2026.

L. E. Standryk J.

Date: December 5, 2025