CITATION: Toronto Standard Condominium Corporation No. 2501 v. Tarion Warranty Corporation, 2025 ONSC 7261
COURT FILE NO.: CV-17-588653
MOTION HEARD: 20250922
REASONS RELEASED: 20251230

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

TORONTO STANDARD CONDOMINIMUM CORPORATION NO. 2501

Plaintiff

- and-

TARION WARRANTY CORPORATION, EMERALD PARK (2010) INC., BAZIS INC., 2145785 ONTARIO INC., METROPIA (EMERALD PARK) GP CORPORATION, METROPIA INC. and EMERALD PARK INC.

Defendants

BEFORE: ASSOCIATE JUSTICE McGRAW

COUNSEL: M. Shell
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-for the Defendants Emerald Park (2010) Inc., Emerald Park Inc., Bazis Inc., 2145785 Ontario Inc., Metropia (Emerald Park) GP Corporation and Metropia Inc.

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REASONS RELEASED: December 30, 2025

Reasons for Endorsement

I. Background

[1] The Defendants Emerald Park (2010) Inc., Emerald Park Inc., Bazis Inc., 2145785 Ontario Inc., Metropia (Emerald Park) GP Corporation and Metropia Inc. (collectively the "Defendants") seek costs of the Plaintiff's discontinued action and their Third Party Claim. The Defendants also request reimbursement of premiums for the performance bond (the "Bond") they posted with the Defendant Tarion Warranty Corporation ("Tarion").

[2] This action arises from the construction of the Emerald Park residential condominiums on Bogert Avenue in Toronto (the "Project"). The Plaintiff is the condominium corporation

created upon registration of the Declaration on December 17, 2015 under the *Condominium Act* (Ontario) which operates the building and facilities. The Defendant Emerald Park (2010) Inc. ("2010") was the developer and Declarant of the Project under the *Condominium Act*. The other Defendants were investors. The Defendants did not provide any construction services or materials. 2010 entered into agreements with numerous contractors (the "Contractors") for the provision of construction services and materials.

[3] As the Project was subject to the *Ontario New Home Warranties Plan Act* ("ONHWPA"), Tarion required 2010 to post the Bond in the amount of $11,300,000 to secure performance of the Project. The amount was increased to $11,480,000 then reduced to the original amount which carried annual premiums of $12,999.

[4] The Plaintiff commenced this action by Notice of Action and Statement of Claim issued on December 18, 2017 and January 17, 2018, respectively. The Plaintiff claimed damages of $2,600,000 from the Defendants for breach of contract, negligence and other causes of action for alleged construction deficiencies and $2,500,000 from Tarion under its warranty obligations. As required under s. 44 of the *Condominium Act*, the Plaintiff retained an engineer to conduct a performance audit to determine if there were any construction deficiencies and file it with Tarion pursuant to the warranty claims process under the ONHWPA. On November 15, 2016, the engineer delivered numerous reports comprising the Performance Audit (the "Audit") which included the relevant Tarion Builder Bulletin Tracking Summaries ("PATS") and was submitted to Tarion pursuant to the *Condominium Act*.

[5] Plaintiff's counsel served the Notice of Action and Statement of Claim on the Defendants on June 13, 2018. The service letter stated as follows, citing the "Final report: Review of the Ontario New Home Warranties Plan Act" of Cunningham J. dated November 2015 (the "Review"):

> "This is to advise your counsel that the pleadings have been served solely to preserve TSCC 2501's rights and that at this time we do not require that a Statement of Defence be delivered, in fact we discourage it while we proceed through the warranty process with Tarion.
>
> We are doing this in keeping with the process idenitfied in Justice Cunningham's Review of Tarion and the ONHWPA as follows:
>
> > "It was noted that in some cases, particularly in the condominium sector, the timelines for warranty claims are such that a party may need to initiate litigation as a precaution to ensure that their claim is brought in time should the warrant process not resolve the matter. I heard from several stakeholders that the current time limits allow a builder to "red line" offers to settle, presenting them late in the day, leaving homeowners with little time to consider or seek legal advice on a proposed settlement. This problem is particularly acute in the context of condominiums.
> >
> > Consideration should be given to whether it would be appropriate to suspend the running of limitation periods for initiating court action where the parties are engaged

> in the warranty dispute resolution process. It would be important to evaluate the implications "

[6] The Defendants served a Defence and Counterclaim on December 12, 2019. In the Counterclaim the Defendants sought damages of $350,000 for equipment and systems repairs or alternatively, unjust enrichment for remedial work and $100,000 for misappropriation of the engineering report prepared for the Defendants. The Defendants commenced a Third Party Claim seeking contribution and indemnity from the Contractors on December 16, 2019. The Defendants advised the Third Parties that they did not require Defences, however, four (4) Notices of Intent to Defend were delivered on behalf of seven (7) Third Parties. Tarion did not deliver a Defence.

[7] The Plaintiff and the Defendants engaged in the conciliation and mediation process under the ONHWPA to determine the Tarion warranty work. On March 30, 2020, Tarion issued a Warranty Assessment Report (the "WAR") under the ONHWPA setting out the deficiencies and warranty work 2010 was required to complete. The Tarion warranty work was completed in July 2021. On August 4, 2021, the Plaintiff's property manager confirmed with Tarion by email that the warranty work had been completed. Defendants' counsel wrote to Tarion numerous times requesting that it deliver up the Bond for cancellation. Defendants' counsel also wrote to Plaintiff's counsel requesting that the Plaintiff abandon its claims and discontinue the action so that Tarion would deliver up the Bond.

[8] The Plaintiff did not take any further steps in the litigation until it served a Notice of Discontinuance on February 12, 2024. Tarion delivered up the Bond for cancellation on March 7, 2024.

II. The Law and Analysis

[9] The Defendants seek their costs of the action and the Third Party Claim in the amount of $107,263.08 on a full indemnity scale or alternatively, $88,900.58 on a substantial indemnity scale or in the further alternative $61,356.83 on a partial indemnity scale. These amounts include the costs of this motion. The Defendants also request reimbursement of Bond premiums in the amount of $33,233.50 which they paid for the period August 1, 2021 to March 7, 2024.

[10] Rule 23.05(1) provides that if all or part of an action is discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action.

[11] The considerations on a Rule 23.05(1) motion were summarized by Emery J. in *Mississauga Fire Fighters Assn., IAFF Local 1212* v. *McNamara,* 2024 ONSC 4508:

> 34 In *Digiuseppe v. Todd*, 2012 ONSC 1028, McCarthy J. outlined how Rule 23.05(1) was amended on October 1, 2009 from a rule entitling a defendant to costs for an action that had been discontinued unless the court ordered otherwise, to a new process for bringing a motion within 30 days for a determination of costs. In *Digiuseppe,* McCarthy J. concluded that the dynamics of the rule had changed to remove the *prima facie* right of the defendant to costs, and for the court to now consider making costs in favour of either

party.

35 McCarthy J. reviewed the jurisprudence under the previous version of the rule and described how those principles are the starting point when deciding whether to relieve the plaintiff from paying costs upon a discontinuance. In that analysis, the court must determine if the plaintiff's pleadings show it has a *bona fide* cause of action, that the claim was not frivolous or vexatious, and which the plaintiff had some justification to commence because of the defendant's conduct. If the plaintiff cannot meet this threshold, costs will more than likely follow.

36 The test for the justification to be absolved of liability for costs was restated by Price J. in *Great Lakes Copper* (at para. 63) as follows :

a. The material filed discloses a *bona fide* cause of action;

b. The action was not frivolous or vexatious; and

c. The plaintiff was justified in commencing a lawsuit.

37 It was held in *Great Lakes Copper* that if the three factors are satisfied, no costs should follow on an Order granting leave to discontinue.

38 Put another way, the commencement of the action must be justified in the eyes of the court to relieve the plaintiff from paying costs to the defendant for a discontinued action. The analysis for the "justified action test" therefore includes a consideration of relevant facts on the balance of probabilities to determine if there was a justified basis to commence the action. Even so, Rule 23 does not restrict the broad discretion of the court to decide costs on the circumstances of a case. See *MTCC No. 943 v. Khan*, 2013 ONSC 3278, at para. 9."

[12] As I set out in *Seto* v. *Larocque*, 2022 ONSC 2333, notwithstanding the "justified action test", costs under Rule 23.05(1) should be considered together with the court's more general discretion to award costs under Rule 57.01(1) and section 131(1) of the *Courts of Justice Act* (Ontario):

> "….The court has complete discretion under Rule 23.05 to fashion a costs award for a discontinued action that is in the interests of justice (*Enerworks Inc*. v. *Glenbarra Energy Solutions Inc.*, 2016 ONSC 4291 at paras. 13-15; *Muskoka Standard Condominium Corp., No. 66* v. *Thompson et al..*, 2019 ONSC 1558 at paras. 7-13; *Icecorp Logistics Inc*. v. *Tsitlishvilli*, 2015 ONSC 4214 at para. 11). Costs under Rule 23.05 dovetail with and follow the general principles set out in section 131(1) of the *Courts of Justice Act* (Ontario) and Rule 57.01 (*Muskoka* at para. 12). Whether or not a defendant should be awarded costs on the discontinuance of an action requires a very fact-specific analysis of the circumstances giving rise to the initiation of the action and its discontinuance (*Enerworks* at para. 15; *Muskoka* at para. 8). The analysis should consider whether the plaintiff has satisfied the court that the material

> filed on the motion discloses a bona fide cause of action which is not frivolous and vexatious and which the plaintiff had some justification to commence, having regard to the conduct of the defendant; there must be some evidence to justify the commencement of the action even if at an early stage it is not possible to say that the action may or may not ultimately succeed (*Enerworks* at para. 13; *Muskoka* at para. 8)."

[13] Subject to the provisions of an Act or the *Rules*, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent costs shall be paid (s. 131(1), *Courts of Justice Act* (Ontario)). In exercising its discretion, the court may consider the factors set out in Rule 57.01(1). The overriding principles in determining costs are fairness and reasonableness (*Boucher* v. *Public Accountants Council for the Province of Ontario,* (2004) 71 O.R. (3d) 291 (C.A.)).

[14] For the reasons that follow, I conclude that it is in the interests of justice, fair and reasonable for the Defendants to receive some costs of the main action and the Third Party Claim and to deny the Defendants' request for reimbursement of the Bond premiums.

[15] As a preliminary issue, the Defendants requested that certain paragraphs of the affidavit of Keith Juriansz sworn October 25, 2024 be struck on the basis that they included legal argument. Mr. Juriansz is a lawyer and Chairman and director of the Plaintiff. I suggested to counsel that since the same arguments were set out in the Plaintiff's factum, that I give them no weight as evidence but consider them in the ordinary course as legal submissions together with counsel's oral submissions. The parties agreed and no ruling on the paragraphs at issue was required.

[16] I conclude that the Plaintiff has satisfied the justified action test. The Plaintiff advised the Defendants upon serving the Statement of Claim that the action was brought to preserve its rights while the parties proceeded through the warranty process under the ONHWPA. The Plaintiff also advised that it did not require a Defence and in fact discouraged it during the warranty process. As the Plaintiff concedes, Justice Cunningham's recommendations in the Review are not law. However, the Plaintiff's commencement of this action is consistent with the process endorsed by the Court of Appeal which entitles claimants to both engage the statutory warranty claims process under the ONHWPA and to commence a civil action (*Metropolitan Toronto Condominium Corporation No. 1352* v. *Newport Beach Development Inc.*, 2012 ONCA 850 at para. 42; *Baradaran* v, *Tarion Warranty Corp.*, 2014 ONCA 597 at paras. 35-38). The Plaintiff pleaded the warranty process including the Audit and the PATS in the Statement of Claim and there were in fact construction deficiencies set out in the WAR which required remediation. All of this supports the conclusion that the Plaintiff was justified in bringing the action, that the motion materials disclose a *bona fide* cause of action and the action was not frivolous or vexatious.

[17] The Defendants submit that the Plaintiff cannot satisfy this test because the Statement of Claim was drafted in broad terms without sufficient particulars regarding the alleged construction deficiencies and was intended to be a placeholder capturing all possible construction

claims. This is insufficient to establish that the main action is not a *bona fide* claim which should not have been commenced or continued. The Defendants had access to the Audit and the PATS which were pleaded in the Statement of Claim. The Defendants also provided the "Vendors' Response" in the PATS dated February 8, 2019 and later on had access to the WAR. If the Defendants had concerns about the lack of particulars in the Statement of Claim, they could have served a Demand For Particulars before delivering their Defence. In any event, it appears that at least some particulars were available through the Audit and the PATS.

[18] The fact that the Defendants delivered a Defence anyway is inconsistent with their assertion that the Statement of Claim lacked particulars especially since the Plaintiff did not require one. The fact that the Plaintiff waived the requirement for a Defence and served the Statement of Claim close to the six-month deadline does not support the Defendants' position. It was reasonable in the circumstances for the Plaintiff to not require a Defence and the time of service was in compliance with the Rules and therefore immaterial. The narrower issue of whether the claim should have been continued after August 4, 2021 is more appropriately addressed under the Rule 57.01(1) factors and the quantum to be awarded. Nothing in the record or the Defendants' submissions supports the Defendants' claim that this action is or at any point became frivolous or vexatious.

[19] Notwithstanding my conclusions above, based on the relevant factors under Rule 57.01(1), I am satisfied that the Defendants are entitled to some costs related to the conduct of this action and the Third Party Claim on a partial indemnity scale. While it was reasonable and consistent with Rule 1.04(1) for the Plaintiff to commence the action to preserve their rights, this does not mean that there should not be any cost for doing so when it was discontinued. There is no basis to award costs on a full or substantial indemnity scale which are reserved for rare and exceptional cases where the conduct of the party against whom costs is ordered is reprehensible or egregious, where the proceedings are clearly vexatious, frivolous or an abuse of process or where there are other special circumstances that justify costs on a higher scale (*Blair* v. *Toronto Community Housing Corporation*, 2014 ONSC 2292 at para. 31; *D.I.* v. *E.C.*, 2023 ONCA 494 at para. 19). In my view, nothing in the Plaintiff's conduct or the conduct of these proceedings calls for costs on a substantial or full indemnity scale, a finding supported by my conclusions on the justified action test. The amount claimed by the Defendants on a partial indemnity scale must be reduced to better reflect specific steps taken or not taken and more reasonable, proportionate amounts consistent with the reasonable expectations of the parties. This is especially the case where, as here, the action was commenced with a view to avoiding significant costs pending the warranty process. Further, I decline to order any costs of this motion which will be resolved by the parties or determined separately as provided below. At the same time, the Plaintiff's submission that it was successful in the action is inaccurate and without basis. The Plaintiff discontinued the action, it did not proceed past the pleadings stage and therefore, there is no result, no successful party and no success to measure.

[20] I am satisfied that the Defendants are entitled to some costs of the main action primarily for the period after August 4, 2021. The Plaintiff has not provided a sufficient explanation for the delay from August 4, 2021, when the Plaintiff confirmed with Tarion that all warranty work had been completed, until February 12, 2024, when it served the Notice of Discontinuance. As the Plaintiff's stated purpose for commencing this action was to preserve its rights while the

warranty process was completed, it would seem to follow that once the Plaintiff was satisfied that all deficiencies had been resolved, it would discontinue this action. However, the Plaintiff failed to do so for approximately 2.5 years, which unnecessarily extended the duration of this action and caused the Defendants to incur costs for which they should be indemnified (Rule 57.01(1)(e)). I accept that the Defendants should receive a limited amount related to the Defence and Counterclaim but in a quantum commensurate with the delivery of a pleading to preserve their rights pending completion of the warranty process.

[21] I also conclude that the Defendants are entitled to some costs of the Third Party Claim. By agreements with 2010, the Contractors provided the construction services which were the subject of the deficiency claims in this action and the statutory warranty process. Therefore, it was reasonable for the Defendants to commence the Third Party Claim in order to preserve their right to claim contribution and indemnity as against the Contractors pending completion of the warranty claim process in the event that the Plaintiff pursued the main claim. Although the Plaintiff did not require a Defencne, the Plaintiff was aware that the Contractors provided the construction services and that by commencing this action the Defendants would likely need to preserve their rights against them. As a result, the Defendants incurred costs in commencing the Third Party Claim and dealing with the Third Parties.

[22] Having reviewed the Defendants' Bill of Costs and considered the relevant factors and cirumstances, including the context in which the action was commenced and the discontinuance, I conclude that it is fair and reasonable, proportionate and within the reasonable expectations of the parties for the Plaintiff to pay costs of the main action and the Third Party Claim fixed in the amount of $25,000 on a partial indemnity scale within 30 days.

[23] I reject the Defendants' request for reimbursement of the Bond premiums after August 1, 2021 of $33,233.50. It appears uncontroverted in the record that the Plaintiff was aware that Tarion would not deliver up the Bond for cancellation until the Plaintiff discontinued the action. Tarion ultimately did so approximately 23 days after the discontinuance. The Defendants argue that had the Plaintiff discontinued the action soon after it confirmed that the warranty claims were resolved rather than waiting 2.5 years, Tarion would have returned the Bond and the Defendants would not have incurred additional premiums.

[24] I have not been referred to any case law or other basis which supports the Defendants' argument that the Bond premiums should be treated as costs or disbursements arising from these proceedings. The Bond was posted under the ONHWPA at the start of the Project and is unrelated to this action. The fact that the Defendants did not include the Bond premiums in their Bill of Costs as a disbursement supports this conclusion. In my view, to the extent to which the Bond premiums are claimable in this litigation, they are more properly characterized as damages and therefore are not claimable as costs on this motion under Rule 23.05(1), Rule 57.01(1), section 131(1) of the *Courts of Justice Act* (Ontario) or otherwise. In addition, it was solely Tarion's decision to hold onto the Bond notwithstanding that the Plaintiff had confirmed that the warranty claims had been resolved. It does not follow that the costs of Tarion's decision should be visited upon the Plaintiff.

III. Disposition and Costs

[25] Order to go directing the Plaintiffs to pay costs of the main action and the Third Party Claim to the Defendants fixed in the amount of $25,000 on a partial indemnity scale within 30 days. The Defendants' motion for reimbursement of the Bond premiums is dismissed.

[26] The parties should attempt to resolve the costs of this motion. If the parties are unable to agree, they may file written costs submissions with me not to exceed 3 pages (excluding Costs Outlines) on a timetable to be agreed upon by counsel.

Released: December 30, 2025

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Associate Justice McGraw