CITATION: DE ALMEIDA v. PERIC, 2026 ONSC 324
DIVISIONAL COURT FILE NO.: DC-25-00000776-0000
DATE: 20260116

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE:

MARLUCE LUIZ DE ALMEIDA	Plaintiff/Appellant

AND:

MARKO PERIC; MILEVA PERIC	Defendants/Respondents

BEFORE: Justice L. Brownstone

COUNSEL: Yovin Jaimangal, Counsel for the Appellant
Stephanie Messina, Counsel for the Respondent

HEARD: January 15, 2026

ENDORSEMENT

Introduction

[1] The appellant appeals the decision of Associate Justice Robinson dated August 12, 2025, in which Associate Justice Robinson refused to set aside a registrar's August 2024 order dismissing her action.

[2] The dismissed action was a claim that the defendants, respondents on this appeal, improvidently sold property when acting as mortgagees under a power of sale. The power of sale occurred in 2014, and the action was commenced in 2015. In 2019, one year after she was ordered to do so, the appellant appointed new counsel. The action never proceeded beyond the exchange of affidavits of documents. The registrar administratively dismissed the action for delay on August 1, 2024.

[3] The appellant submits that Associate Justice Robinson erred in principle and made palpable and overriding errors in his application of the factors set out in *Reid v. Dow Corning Corp*., (2001),

11 C.P.C. (5th) 80, at para. 41 (Ont. S.C.J.), rev'd on other grounds, (2002), 48 C.P.C. (5th) 93 (Ont. Div. Ct.).

[4] In applying the factors set out in *Reid*, Associate Justice Robinson determined that the appellant had not led evidence that established that the plaintiff had intended to set the action down for trial within the time limit, but had failed to do so through inadvertence. He also found the appellant did not establish that the respondents would not suffer significant prejudice because of the delay. He found there was actual prejudice to the respondents given the death of a law clerk, whom he found to be a material witness, the death of one of the respondents, and the faded memory of the remaining elderly respondent.

Jurisdiction and standard of review

[5] The appellant appeals this final order of an Associate Justice of the Divisional Court under s. 19(1)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[6] The parties agree that Associate Justice Robinson's decision is a discretionary one, entitled to deference on appeal. An appellate court may intervene if the Associate Justice made a palpable and overriding error, proceeded on an erroneous legal principle, or gave no or insufficient weight to relevant factors: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, 330 O.A.C. 378, at para. 19.

[7] As noted above, the appellant claims Associate Justice Robinson made two errors that warrant appellate intervention. The appellant submits Associate Justice Robinson did not assess two of the four Reid factors contextually, as he was required to do, thereby erring in principle and making palpable and overriding errors.

Analysis

1. The appellant did not establish that the failure to set the trial down was because of inadvertence.

[8] Associate Justice Robinson first carefully reviewed the chronology of the litigation, which I need not repeat here. He noted that the plaintiff is expected to put her best foot forward and present cogent evidence to support her explanations for delay. Further, he noted that it is the plaintiff who has the primary burden of advancing an action to final disposition on its merits.

[9] The appellant does not challenge these principles.

[10] In reviewing the lack of explanation for the delay, which was acknowledged to be inordinate, Associate Justice Robinson noted the plaintiff put forward no evidence of: a) what occurred between the appellant and her former lawyers, b) what happened during the time she was without counsel, c) the actual delay caused by new counsel seeking the files from former counsel, and d) how current counsel's personal matters, referred to by the appellant, impeded counsel from taking steps on behalf of his client.

[11] Associate Justice Robinson concluded that there were multiple significant periods of inactivity that were not explained by the appellant. He stated, "[i]n my view, the plaintiff has failed to adequately explain the significant delays in advancing this action to completion of discoveries, let alone to trial."

[12] Associate Justice Robinson then reviewed and assessed the plaintiff's evidence on the issue of her intention to set the matter down for trial. He held:

> [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.
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> [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.
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> [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 … 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.

[13] The appellant argues Associate Justice Robinson erred in finding she did not have a genuine intention to proceed with the proceeding, since her affidavit evidence was that she intended to proceed. The appellant argues that Associate Justice Robinson conflated the inordinate delay with a lack of intention to proceed.

[14] However, Associate Justice Robison specifically reviewed the appellant's affidavit evidence and found it inconsistent with the evidence before him about the appellant's actions. Associate Justice Robinson was entitled to draw this conclusion based on the record before him of the appellant's failure to take any steps to move the matter forward past the exchange of affidavits of documents. He was not bound to accept the appellant's bald assertion without regard to the remainder of the record and the chronology of the litigation.

[15] Further, the appellant argues that she retained three different lawyers in the case, evidencing an intention to proceed to trial. Retaining lawyers is, of course, different form instructing them to proceed with moving a matter forward, an issue on which there was a marked paucity of evidence.

[16] Associate Justice Robinson made no reviewable error in fact or in principle in his assessment of the evidence before him and the conclusions he drew therefrom.

2. The appellant did not establish there was no substantial prejudice to the respondents because of the delay

[17] Associate Justice Robinson found the respondents had put forward "compelling arguments" on the issue of presumptive prejudice. However, he did not need to determine the case on the basis of presumptive prejudice, as there was actual prejudice to the respondents. One of the respondents had died, as had the real estate clerk who was involved in decisions that were made regarding the sale about which the appellant complains. The other respondent is 90 years old and has little memory of the events in question.

[18] Associate Justice Robinson concluded:

> [30] I reject the plaintiff's argument that this is primarily a document case and that Mr. von Bogen [the real estate lawyer] 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 [the law clerk] 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.
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> [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.
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> [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.
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> [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.

[19] The appellant states the motion judge erred in concluding that the death of the real estate clerk constituted prejudice, since Mr. von Bogen, the real estate lawyer who supervised the law clerk in practice, was still alive and available. The appellant argues that Associate Justice Robinson failed to understand the distinction between the lawyer and the law clerk in terms of who was responsible for the power of sale proceedings at the heart of the claim.

[20] Again, I disagree.

[21] Associate Justice Robinson's conclusion that the law clerk was the material witness with knowledge of what happened was open to him on the record. As the respondents note, "[i]t was the evidence from the real estate lawyer for the Respondents that he had no independent knowledge of the material facts relating to the Respondents' sale of the Appellant's property and that all of that knowledge had been possessed only by his law clerk, Alves." Although Mr. von Bogen identified documents put to him in cross-examination, this was not purely a document case. The state of Mr. von Bogen's knowledge was addressed directly by Associate Justice Robinson and was grounded firmly in the record before him. General supervision of someone's practice does not equate to actual knowledge of everything done by the supervisee. Mr. Peric's evidence was that Ms. Alves was the person with whom he dealt about the impugned sale.

[22] The appellant argues that there is no evidence of what the law clerk's added evidence would be. Clearly, such evidence is unavailable because the appellant did not proceed to examine the law clerk during her lifetime. The fact that the content of her evidence is unknown is not a factor that now enures to the appellant's benefit.

[23] The appellant also says Associate Justice Robinson erred in concluding the faded memory of Mr. Peric and the death of Mrs. Peric constituted prejudice, as the evidence showed that the respondents themselves had little relevant evidence. In fact, Associate Justice Robinson considered these matters as a whole, concluding that the cumulative effect of the loss of two witnesses' evidence and the fading memory of a third witness is significant prejudice leading him to conclude that a fair trial is no longer possible. There was ample evidence before him to support this conclusion.

[24] Associate Justice Robinson did not adopt a formulaic or mechanical application of the factors to the timeline. Nor was this a case of technical non-compliance. It is a case of lengthy, inadequately explained delay and actual prejudice. The interests of justice are not confined to access to justice – they require that relevant factors be balanced and applied in each case. This is what Associate Justice Robinson did.

[25] While there is a preference that legal disputes be decided on their merits, it is a preference, not a rule. Where it is just that matters administratively dismissed for delay not be reinstated, that option is available to the court. There is no basis upon which to interfere with Associate Justice Robinson's findings and exercise of his discretion that this is such a case. The appeal is dismissed.

[26] The parties' bills of costs were very similar. The respondents seek costs on a partial indemnity scale in the amount of $7,477.12, a few hundred dollars less than the appellant's bill of costs. It is a reasonable and proportionate amount, reflecting the importance of the issue to the parties, a factor set out in Rule 57 that both counsel emphasized. Given the appellant's own costs, it is an amount that should have been within the contemplation of the appellant as an amount that would be awarded.

[27] The appellant shall pay the respondent costs of $7,477.12 inclusive of disbursements and HST.

L. Brownstone J.

Released: January 16, 2026