CITATION: Rosswill Pools 1995 Ltd. v. Mandarino, 2025 ONSC 7212
COURT FILE NO.: CV-21-655483
DATE: 2025 12 24

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: ROSSWILL POOLS 1995 LTD., *Plaintiff*

- and -

RICHARD AGOSTINO MANDARINO and ENZA ABATE, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: J. De Melo, *for the defendants (moving parties)*
T. Pochmurski, *for the plaintiff*

HEARD: September 15, 2025 (by videoconference)

REASONS FOR DECISION
(Motion to Declare Lien Expired and Dismiss Action)

[1] The defendants move to declare the plaintiff's lien expired, discharge the lien, vacate the related registration of the claim for lien and certificate of action, and dismiss this action in its entirety for delay ranging back to its commencement in January 2021. At the initial return of this motion, the plaintiff conceded that the lien had expired, but opposed dismissal of its joined claims in breach of contract and unjust enrichment.

[2] After hearing the submissions of counsel for the parties, I reserved my decision on dismissal, but granted the relief declaring the lien expired and signed a revised form of the draft order submitted. Having further considered the parties' arguments, I am now granting the requested dismissal of the action as well.

ANALYSIS

[3] The defendants' amended notice of motion cites reliance on ss. 31, 36, and 47 of the *Construction Act*, RSO 1990, c C.30 and rules 1.04 and 37 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*"). Their factum focuses on applying ss. 37 and 46(1) of the *Construction Act* with respect to expiry of the lien and rule 24.01 of the *Rules* with respect to dismissal for delay.

[4] Since expiry of the plaintiff's lien was conceded and has already been addressed, I must deal only with the defendants' arguments that this action should be dismissed for delay. The defendants specifically rely on subrule 24.01(1)(a) and subrule 24.01(2) of the *Rules*, which provide as follows:

> 24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,
>
> (a) to serve the statement of claim on all the defendants within the prescribed time;
>
> […]
>
> (2) The court shall, subject to subrule 24.02 (2), dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14 (1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust.

[5] The defendants argue that subrule 24.01(1)(a) should apply with respect to s. 1(2) of O Reg 302/18 under the *Construction Act*, which provides that a statement of claim shall be served within 90 days after it is issued.

[6] The *Rules* apply in lien actions except to the extent that they are inconsistent with the *Construction Act* and the procedures prescribed for lien actions: *Construction Act,* s. 50(2). The plaintiff argues that rule 24.01 is inconsistent. The defendants argue that there is no inconsistency since O Reg 302/18 does not deal with any consequence for failing to serve a statement of claim within the required 90-day period.

[7] I have previously held that subrule 24.01(1)(c) of the *Rules* is inconsistent with the *Construction Act* and does not apply in lien action*: Bernach v. Makepeace*, 2021 ONSC 1289 at para. 17; *Smith v. Hudson's Bay Company,* 2019 ONSC 2348 at para. 19. This motion deals with subrules 24.01(1)(a) and 24.01(2). In my view, the entirety of rule 24.01 is inconsistent with the *Construction Act* and its regulations.

[8] In my prior decision in *Whitestone Gate Development Inc. v. Perpetual Succession For East Toronto Chinese Baptist Church,* 2022 ONSC 459, cited by the defendants, I accepted that, concurrent with declaring a lien expired, the court may consider dismissal for delay. I held that dismissal for delay was available under s. 47 of the *Construction Act,* which permits a court, upon motion, to dismiss an action on "any proper ground". There is accordingly already a statutory provision in the *Construction Act* that provides the court with authority to dismiss an action for delay where appropriate. Given the breadth of discretion afforded to the court by s. 47 of the *Construction Act,* incorporating and applying the stricter requirements of rule 24.01 in a lien action is inconsistent with that discretion and unnecessary.

[9] Although I have found that rule 24.01 of the *Rules* does not apply in lien actions, in *Whitestone*, I considered the principles from dismissal for delay case law under subrule 24.01(1). In my view, those principles provide relevant guidance to dismissals for delay in lien actions, although should not be viewed as a "test" in the same way that they have been applied under subrule 24.01(1). To do so would limit the broad discretion afforded by s. 47. Those principles are as follows:

(a) To dismiss an action for delay, the court must be satisfied that the plaintiff's default has been intentional and contumelious, or that there has been inordinate and inexcusable delay for which the plaintiff (of the plaintiff's lawyers) are responsible resulting in a substantial risk that a fair trial will not be possible;

(b) A dismissal based on intentional and contumelious delay is warranted in cases in which the delay is caused by the intentional conduct of the plaintiff (or the plaintiff's lawyers) that demonstrates a disdain or disrespect for the court process;

(c) The plaintiff is responsible for moving the action along;

(d) Any delay in the prosecution of an action requires an explanation, and the onus rests with the plaintiff both to show that the delay was not intentional and to rebut the presumption of prejudice from any unexplained delay. Absent an explanation for the delay, the court may presume that the delay was intentional;

(e) "Inexcusable" delay requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay. Explanations that are "reasonable and cogent" or "sensible and persuasive" may be sufficient to support at least that dismissal is inappropriate;

(f) An inordinate delay after the cause of action arose or after the passage of a limitation period gives rise to a presumption of prejudice, in which case the defendant need not lead actual evidence of prejudice and the action will be dismissed for delay unless the plaintiff rebuts the presumption; and

(g) Courts may dismiss actions for delay even when the relevant rules do not mandate it. A court has inherent jurisdiction to control its own process, which includes the discretionary power to dismiss an action for delay, flowing from the inherent power of the court to prevent an abuse of its own process.

[10] I have considered these guiding principles in assessing the defendants' motion.

[11] The parties' dispute arises from a contract between the plaintiff and the defendants for construction of an in-ground pool on the defendants' property. It appears undisputed that work was completed in August 2020, following which the plaintiff preserved a lien under the *Construction Act* in October 2020. This action was subsequently commenced when perfecting the lien in January 2021. A certificate of action was registered on title.

[12] The plaintiff's claim for lien and certificate of action remained registered against title to the defendants' property until my order declaring the lien expired and vacating those registrations in September.

[13] This action is approaching its fifth anniversary, and was well over four years old when this motion was brought. It has not progressed beyond the pleadings stage. There is a dispute over whether the statement of claim has even been served. The unequivocal evidence of Richard Mandarino is that neither he nor his co-defendant spouse have been served with the statement of claim. Conversely, the plaintiff argues that they were served. However, there is no evidence

before me supporting that the statement of claim was, in fact, served. Notably, no affidavit of service has been tendered and the plaintiff's principal, Bill Durward, who swore the plaintiff's responding affidavit, provides no evidence on a source of information and belief for the seeming assumption in his affidavit that the statement of claim was served.

[14] In October 2024, when the defendants were seeking to refinance their property, they retained lawyers who contacted plaintiff's counsel to confirm the status of the lien, whether the action had been set down for trial, and whether the claim had been served. Based on the record before me, although an offer to settle appears to have been made by the plaintiff's lawyer, there was no substantive response. The action was not advanced and no explanation was provided for the delay to that point.

[15] In late summer 2025, the defendants confirmed from court searches that there had been no trial record passed and no order for trial issued. They further confirmed through title searches that there were no other liens. Defendants' counsel sought the plaintiff's consent to discharge the lien. The plaintiff ultimately conceded that the action had not been set down for trial, but the plaintiff's lawyer suggested that the defendants had been served and noted in default. The defendants requested proof of service and noting in default. None was provided.

[16] I agree with the defendants that the onus to advance an action, especially a lien action, rests on the plaintiff. It was accordingly incumbent on the plaintiff, in response to this motion, to tender cogent evidence explaining the delay in this action. That was not done. There is no meaningful explanation for delay in the responding affidavit of the plaintiff's principal, Mr. Durward. The sole explanation provided is that the plaintiff's lawyer advised him "that he has been dealing with significant health issues for him and his family over the last couple of years."

[17] Without diminishing the health issues that the plaintiff's lawyer has been facing, I agree with the defendants that a brief single sentence of explanation with no particulars is not sufficient to satisfy the plaintiff's onus to explain the delay.

[18] In oral submissions, I was provided with details of the health issues suffered by the plaintiff's lawyer. I appreciate the candour of counsel in honestly and openly sharing what are deeply personal matters. I have tremendous sympathy for those health concerns and understand why he did not want them to be included in a public affidavit. However, even if I were to accept those submissions as evidence without a formal affidavit, that is not an end to the matter. The health concerns only explains why the plaintiff's lawyer was unable to advance the action himself. It does not explain why other lawyers at the firm could not step in to assist and, most importantly, what efforts (if any) the plaintiff was making to advance this claim itself. There is no evidence before me of any evinced intention by the plaintiff to pursue the action. Mr. Durward does not discuss his own state of mind or what the plaintiff was (or was not) doing to pursue its lien and contract rights during more than four years of delay.

[19] The fact that the plaintiff had a contract with the defendants and the defendants knew that the work had been performed is immaterial to the analysis of litigation delay. Similarly immaterial are the plaintiff's submissions, without supporting evidence, that Richard Mandarino was convicted of fraud, has served or is serving jail time in the United States, and his lawyer knows

about it. The implied inference from those submissions is that Mr. Mandarino's affidavit evidence that he was not served with the statement of claim should not be believed. Although I was invited to ask Mr. Mandarino to confirm his conviction status (since he was present and observing the motion), doing so would have been improper.

[20] Motions are decided on the record put before the court. There is no evidence before me regarding Mr. Mandarino's alleged fraud conviction. There is no foundation on which I may take judicial notice of a conviction. There is accordingly no evidentiary basis on which to find that Mr. Mandarino's affidavit statements are untrue or should not be believed. In any event, I am not convinced that the fact of a fraud conviction inevitably leads to a proper inference that Mr. Mandarino is lying or should not be believed when he says that he was not served. It was well within the plaintiff's ability to put forward evidence that the claim was, in fact, served to contradict Mr. Mandarino's unequivocal affidavit statements that he and his wife have "never been served with a statement of claim from Rosswill Pools." The plaintiff did not do so.

[21] Based on the record before me, I find that the defendants were not served with the statement of claim. The delay in advancing this action for over four years has not been explained, including since October 2024, when the defendants' lawyers contacted the plaintiff's lawyer to determine the status and some settlement discussion seemingly occurred. There is no evidence supporting a finding that the delay to and after that point was unintentional on the part of the plaintiff. Specifically, as already noted, the plaintiff has tendered no evidence supporting any intention to advance its claim and no evidence of steps taken to follow up with its lawyers or pursue its lien and contract claims. In context of a lien action that is intended to be ready for trial within two years (as set out in s. 37 of the *Construction Act*), I find the delay to be inordinate. Since an insufficient explanation for the delay has been provided, I also find it to be inexcusable.

[22] I have considered whether, despite the inordinate and inexcusable delay in advancing this lien action, the plaintiff should nevertheless be afforded an opportunity to pursue its joined contract and unjust enrichment claims. The plaintiff asserts that there is no prejudice from the action continuing for those claims, although has put forward no evidentiary basis for that assertion. For example, there is no evidence before me dealing with preservation of documents and identities and availability of relevant witnesses.

[23] The plaintiff takes the position that it does not bear the onus of demonstrating that there is no prejudice. Certainly, the defendants have not tendered any evidence of actual prejudice. In their factum, the defendants assert that they will suffer significant prejudice in trying to identify relevant records, recover evidence, and remember details from a residential construction project that took place nearly five years ago. However, those are bald submissions unsupported by any evidence from the defendants on what records and recollections they do have.

[24] As discussed above, though, courts have consistently held that that inordinate delay gives rise to a presumption of prejudice, in which case the defendants need not lead actual evidence of prejudice unless the presumption has been rebutted. More recently, the Court of Appeal has expressly noted that the passage of time, on its own, can constitute sufficient prejudice to dismiss an action for delay and not be simply a rebuttable presumption of prejudice: *Barbiero v. Pollack*,

2024 ONCA 904 at para. 15. The Court of Appeal, at para. 12, also discussed the "culture shift" that must occur regarding indifference to delay in the judicial system, stating as follows:

> Effecting a culture shift requires not only changing the entrenched culture of indifference to delay manifested by far too many litigants and their counsel, but also identifying and changing those judge-created rules or interpretative glosses that do not promote – and in some cases impede – the "prompt judicial resolution of legal disputes".

[25] In my view, particularly given the shift in the extent of the court's tolerance of litigation delay, a plaintiff who fails to address the issue of prejudice in response to a motion seeking dismissal for delay does so at its own risk. That is perhaps even more true in a lien action.

[26] Lien actions are statutorily prescribed to be as far as possible of a summary character: *Construction Act*, s. 50(3). A contract claim may be joined in a lien action, as was done here. However, when that is done, it is still the statutory framework of a lien action that applies to both the lien claim and the joined contract claim. The *Rules* only apply where inconsistent with the *Construction Act* and its regulations. The relevant lens through which I must determine this motion is the statutory framework for actions under the *Construction Act*. That includes the procedures outlined in O Reg 302/18, which all work to expedite lien actions being ready for trial within the two-year period set out in s. 37 of the *Construction Act*. In this case, the prescribed timelines were entirely ignored by the plaintiff.

[27] On the record before me, the plaintiff has failed to take any steps to advance its claim, including serving the statement of claim, in well over four years. During that delay, the plaintiff had no evinced intention of pursuing its lien or contract rights. Only now, in response to a motion to dismiss for delay, does the plaintiff seek to pursue rights that it had seemingly abandoned. In my view, this is a proper case for dismissing an action for delay and I am doing so.

COSTS

[28] The defendants seek their substantial indemnity costs of this motion in the amount of $5,668.39, including HST and disbursements. The defendants cite the court's discretion under s. 86(1) of the *Construction Act* and my prior decision in *Whitestone, supra*, in support of substantial indemnity costs. The defendants argue that this motion was only made necessary by reason of the plaintiff failing to consent to discharge of its expired lien.

[29] In *Whitestone*, the plaintiff was successful in opposing dismissal of its action in similar circumstances where its lien had been declared expired. That motion dealt with a lien governed by the *Construction Act* as it read on June 29, 2018 – *i.e.*, the former *Construction Lien Act* (the "*CLA*"), which has substantially the same s. 86(1) as the current version. In awarding substantial indemnity costs of the motion against the successful plaintiff, I held as follows at para. 24:

> The lien remedy under the *CLA* is a special remedy afforded to those who supply services and materials to construction projects. In my view, when relied upon, it is a remedy that must be taken seriously and pursued in earnest. […] The scheme of the *CLA* is designed to expedite resolution of lien actions. The failure to abide by that

> statutory framework and, as a result, to unnecessarily tie up title to lands is not conduct that should be condoned by the court.

[30] I remain of the same view and the facts of this case are very similar to *Whitestone*. The plaintiff in this case similarly failed to pursue its lien rights in earnest or take any steps to advance this action. In *Whitestone*, the only step taken was serving the statement of claim. I have found that has not even happened here. The plaintiff's claim for lien and certificate of action remained on title and were not voluntarily released despite conceding non-compliance with s. 37 of the *Construction Act*. The defendants provided early notice of their intention to bring this motion, yet the plaintiff did not consent to a discharge order, despite the concession.

[31] I find this to be a proper case for substantial indemnity costs. I am unconvinced by the plaintiff's arguments that I should not award costs on that scale. The hours and rates in the defendants' costs outline are reasonable and within the reasonable expectations of a party in these circumstances.

[32] I accordingly fix substantial indemnity costs in the requested amount of $5,668.39, including HST and disbursements, payable within thirty (30) days.

DISPOSITION

[33] For the foregoing reasons, I order as follows:

(a) This action is hereby dismissed.

(b) The plaintiff shall pay to the defendants their costs of this motion fixed on a substantial indemnity basis in the amount of $5,668.39, including HST and disbursements, payable within thirty (30) days.

(c) This order is effective without further formality.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: December 24, 2025