

CITATION: *RSR Road Surface Recycling v Bonnechere Excavating et al.*, 2026 ONSC 698
COURT FILE NO.: CV-23-73
DATE: 20260204

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
RSR Road Surface Recycling Limited)
) Tim Harmar for RSR Road Surface Recycling
Plaintiff) Limited
)
– and –)
)
Bonnechere Excavating Inc. and His Majesty) Anthony Imbesi for Bonnechere Excavating
the King in Right of Ontario as represented) Inc.
by the Ministry of Transportation)
) Antonin Pribetic for the Ministry of
Defendants) Transportation
)
)
)
)
) **HEARD:** November 19, 2025

2026 ONSC 698 (CanLII)

DECISION ON MOTION TO DISMISS AND SECURITY FOR COSTS

HOOPER J.

[1] The moving party, Bonnechere Excavating Inc. (“BEI”) brings this motion to dismiss this action for delay, discharge the plaintiff RSR Road Surface Recycling Limited’s (“RSR”) construction lien, and return the security posted by BEI earlier in this proceeding to vacate the lien.

[2] It is BEI’s position that the action should be dismissed for delay and its security returned as a result of RSR’s failure to take any steps to advance its claim beyond the close of pleadings over two years ago. Further BEI submits that the relief it seeks is justified by RSR’s longstanding breach of court orders including various cost orders. In the alternative, BEI seeks an order requiring RSR to post security for BEI’s costs of this action on the basis of RSR’s insolvency and instability.

[3] RSR resists this motion asserting its lien action is valid and meritorious and ought to proceed in its normal course. While RSR concedes there has been some delay in moving forward with this proceeding, RSR advises the court that it has now paid the outstanding cost awards against it. RSR concedes that under the circumstances, security for costs may be warranted at an amount deemed fair by the court.

[4] The Ministry of Transportation (“MTO”) filed no material and did not take any position on this motion.

Factual background

[5] BEI was retained by MTO in March 2021 to perform highway resurfacing work on a portion of King’s Highway 41. BEI subcontracted a portion of this work to RSR.

[6] The project did not go well. As expected, the parties have very different views as to what caused the problems on this project.

[7] BEI terminated RSR’s contract in May 2023 alleging RSR had breached its contract and abandoned the project. Subsequently, MTO terminated its contract with BEI in September 2023. BEI alleges it was terminated by MTO because of RSR’s delay and poor quality control in the performance of RSR’s work.

[8] Upon termination, RSR liened the project for \$1,646,628.19 – the amount it alleges remains owing under the contract. In June 2023, BEI obtained an order vacating this lien after posting security in the amount of \$250,000.

[9] RSR perfected its appeal by commencing an action on July 24, 2023. BEI defended and brought its own counterclaim. Pleadings closed on October 10, 2023, with the delivery of a Reply and Defence to Counterclaim.

[10] It is undisputed that no steps have been taken by RSR in this litigation since the close of pleadings.

[11] On September 27, 2024, RSR's former legal counsel obtained an order removing them as lawyers of record. Pursuant to that order, RSR had 30 days to appoint new counsel.

[12] In November 2024, RSR's current counsel, Tim Harmar, sent an email confirming his retainer but did not file a Notice of Change of Counsel or Notice of Appointment of Lawyer. Having not received any formal notice that Mr. Harmar was officially on the record, BEI wrote to Mr. Harmar requesting that a Notice of Change be delivered, failing which, BEI would proceed with its motion to strike RSR's claim.

[13] Frank Crupi, RSR's Vice President, swore an affidavit in response to this motion. In that affidavit, Mr. Crupi confirms that Mr. Harmar was not formally retained until shortly before this motion. He states at paragraph 11:

... Between October 2024 and August 2025, I contacted several law firms, and RSR has recently retained Tim Harmar as counsel in this matter. A Notice of Change of Lawyer appointing Tim Harmer as counsel is in the process of being filed and served this week.

[14] BEI received the Notice of Change appointing Mr. Harmar in the days leading up to this motion. The payment of the outstanding cost awards was also only arranged to be paid in the days leading up to this motion.

Legal Analysis

Should the action be dismissed for delay?

[15] Rule 24.01(1)(c) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 ("the Rules") provides that a defendant who is not in default under the rules or a court order may move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings.

[16] Any delay in the prosecution of an action requires an explanation. The onus rests with the plaintiff to show that the delay was not intentional. In the absence of an explanation from the plaintiff for the delay, it is to be presumed that the delay was intentional. (*Berg v. Robbins*, [2009] O.J. No. 6169 (Div. Ct.) at para. 13)

[17] The onus is on the plaintiff to rebut the presumption of prejudice arising from the unexplained delay by showing that documents have been preserved, and that the issues in dispute do not require the recollection of witnesses, or that necessary witnesses are available with detailed recollection of events. (*Berg*, para. 14)

[18] Mr. Crupi's affidavit contains his explanation for the delay in the following paragraphs:

12. The time expenditure in appointing new counsel was influenced by RSR's allocation of resources to other ongoing matters, including litigation with the City of Greater Sudbury initiated in 2023 over a hot in-place recycling project on The Kingsway, where RSR claimed \$1,000,000 in damages for unpaid work and the city counterclaimed for \$4,500,000 related to performance issues. That matter involved stopping work on July 12, 2023, following a third-party report by WSP dated September 1, 2023, which is disputed by RSR in that proceeding.

16. From 2023 to 2025, RSR's resources were directed toward maintaining operations amid financial pressures from unpaid amounts on this and other projects, including the Greater Sudbury matter. During this period, RSR completed two smaller paving contracts in Ontario, generating revenue helping to sustain the business. The delay in advancing this action did not result in the loss of any project documents or witness availability, as all relevant individuals remain employed or contactable.

17. RSR intends to proceed with this action, including by serving an affidavit of documents within 30 days of the motion hearing and proposing a timetable for examinations for discovery to be completed by December 2025 and setting the action down for trial in 2026. I can state that that RSR is committed to having this matter adjudicated promptly.

[19] In support of its position that the entire action should be dismissed, BEI relies upon the case of *Aqua Mechanical v. Grascan Construction*, 2017 ONSC 1028. While the facts in *Aqua Mechanical* are somewhat similar, there are some significant differences in that case. For instance, in *Aqua Mechanical* the court had sufficient evidence to make a finding that the plaintiff had effectively abandoned the claim and the court relied upon that finding to grant the relief sought. Here, there is no evidence to support a finding RSR has abandoned the action. In my view, while there has been some delay, Mr. Crupi's explanation for the delay and commitment to move this matter forward expeditiously, is sufficient to allow the action to proceed. There will, however, be a timetable imposed on the parties. I have set out that timetable below.

Should BEI's security be returned?

[20] BEI was compelled to post security to discharge the lien on its construction project with MTO. As a result, the security is premised on the validity of the original lien. To return BEI's security is, in effect, discharging the lien under s. 47(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 ("the Act"): *Interhaven Development Corp. v. Slovak Village Non-Profit Housing Inc.* (1997), 36 O.R. (3d) 502.

[21] Section 47(1)(b) of the Act provides that the court may, on motion, order the discharge of a lien on any proper ground. There is no language in s. 47 limiting the court's discretion to assess and decide what is "a proper ground" to discharge a lien or dismiss an action in the particular circumstances of a particular case: *Infinite Construction Development Ltd. v. Chen*, 2022 ONSC 3929 (CanLII) at para. 18.

[22] The record before me ties the delay and breach of the court order to appoint new counsel as the primary reasons to discharge the lien. The moving party is not arguing the claim is frivolous, vexatious or an abuse of process.

[23] I have already decided that the action should not be dismissed the action for delay. As a result, I decline to exercise my power under s. 47(1) to discharge the lien and return the security bond.

Should RSR be required to post security for costs?

[24] BEI moves under Rule 56.01(1)(d) of the Rules, seeking security for costs against RSR. Rule 56.01(1)(d) provides that the court may make such order for security for costs as is just where it appears that the plaintiff is a corporation or a nominal plaintiff, and there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant.

[25] The parties do not dispute the test before me. BEI bears the initial burden of satisfying me that it appears there is "good reason to believe" RSR has insufficient assets in Ontario to pay an adverse cost award. If BEI satisfies that onus, the burden shifts to RSR to demonstrate that an order for security for costs would be unjust.

[26] BEI has satisfied its threshold onus on the following evidence before me:

- a) During the project, BEI was required to provide RSR with extensive financial assistance to enable it to attempt to complete its work. This included providing RSR with materials and fuel, maintaining RSR's own equipment, and making advance payment to RSR to assist with its cash flow;
- b) RSR has not made any of its required annual filings since it was created following amalgamation in 2020;
- c) RSR has several outstanding civil judgments against it, totalling at least \$152,187.12, exclusive of interest;
- d) There are several writs of seizure and sale issued against RSR and its principals; and
- e) RSR failed to pay outstanding cost awards against it in this action until shortly before the within motion.

[27] The onus then turns to RSR. RSR is not claiming impoverishment. Quite the opposite. Mr. Crupi's affidavit makes bald statements of financial viability without any detail:

Assets and Operations

18. In response to paragraph 18 of the Enright Affidavit, RSR has equipment used in its hot in-place recycling operations, including the paving train and related machinery, with a total estimated value of approximately \$10 million and continues to operate as a going concern.

Cash Flow and Capacity

20. RSR's cash flow has been affected by the Greater Sudbury litigation and the non-payment under the Subcontract with BEI, which represented approximately 40% of RSR's projected revenue for 2022-2023. Despite these challenges, RSR has not ceased operations and has secured financing for equipment maintenance in June 2025. RSR's ability to resolve the PNJ claim demonstrates its capacity to manage liabilities.

21. Further RSR is actively engaged in other projects including but not limited to a recycling project using its technology in Durham, Ontario.

[28] Not one financial document is attached as an exhibit. Although Mr. Crupi suggests that RSR owns \$10,000,000 in equipment, I highly doubt that this equipment is owned outright by RSR. I suspect that, if this equipment does exist, it is heavily financed or leased.

[29] Mr. Crupi's affidavit also does not address the other allegations raised by BEI including the outstanding civil judgments and enforcement proceedings against both himself, and the other principal of the company.

[30] I find that the evidence put forth by RSR is insufficient to meet its burden to resist an order for security for costs. If RSR does have \$10,000,000 in equipment as attested to by Mr. Crupi, it should not have any difficulty financing security for costs and an order requiring security for costs will not impede its ability to proceed with this litigation.

[31] I have also stepped back and considered the justness of an order for security for costs: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 (CanLII), at paras. 22-25. In doing so, I find the following factors are relevant:

- a) The evidence establishes that RSR is experiencing financial difficulties;
- b) The evidence of Mr. Crupi is that there are sufficient assets available to access funds for security for costs;
- c) Counsel for RSR agreed his client could post security for costs and still maintain this litigation;
- d) To remove RSR's lien, BEI was required to post security of \$250,000. Thereafter, RSR took no steps to move the matter forward; and
- e) Ordering RSR to pay security for costs would be, in effect, levelling the playing field between the parties. It would also compel RSR to move this matter forward expeditiously.

[32] After hearing from both counsel on the appropriate amount of security, I find that \$190,000 should be posted by RSR. RSR's counsel agreed that his client could post this amount.

[33] That security must be posted by no later than March 31, 2026.

Misuse of Artificial Intelligence in generation of factum by RSR

[34] At the end of BEI's submissions on this motion, counsel for BEI raised an issue regarding the factum filed on behalf of RSR and his concern that it was generated using AI software. One

basis for this concern was a quote from a Court of Appeal case within the factum. While the Court of Appeal case existed, counsel could not find the quote reproduced in RSR's factum. After hearing this concern, I took a short recess to allow counsel for RSR to find the quotation within the case.

[35] During that recess, I read one of the other cases RSR had relied upon, *Louis Jones Construction Ltd. v. Rocque*, 2022 ONSC 2362. The principles set out in RSR's factum did not match the findings of the court in that case.

[36] When court resumed, I asked counsel for RSR about the use of AI in generating his factum. He conceded that he had used an AI software to assist in preparing the factum. He advised the court that although he had confirmed the cases referred to in the factum existed, he did not verify their content by reading them.

[37] I note that the factum filed by RSR did not comply with Rule 4.06.1 of the Rules:

4.06.1 (1) A factum that is required to be filed by these rules shall consist of a concise argument stating the facts and law relied on by the party filing the factum. O. Reg. 300/24, s. 3.

Citations

(2) Each citation to an authority in a factum must include a reference to the relevant paragraph, provision or page number of the authority. O. Reg. 300/24, s. 3.

(2.1) A factum shall include a statement signed by the party's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, certifying that the person signing the statement is satisfied as to the authenticity of every authority cited in the factum. O. Reg. 384/24, s. 1.

(2.2) An authority that is published on a government website or otherwise by a government printer, on the Canadian Legal Information Institute website (CanLII), on a court's website or by a commercial publisher of court decisions is presumed to be authentic for the purposes of subrule (2.1), absent evidence to the contrary. O. Reg. 384/24, s. 1.

If Filed Electronically

(3) A factum that is filed electronically must meet the following requirements:

1. The factum must include bookmarks, as appropriate, for each section.

2. Each citation to an authority that is published on a website referred to in subrule 4.05.3 (7.1) must be hyperlinked to the published authority or, if possible, to the relevant provision or portion of the published authority. O. Reg. 300/24, s. 3.

[38] RSR's factum did not contain a statement certifying authenticity nor were there hyperlinks to the specific references within the cited caselaw. I find that this failure to comply with Rule 4.06.1 was deliberate as counsel could not certify the authenticity of the authorities relied upon nor could he locate the precise paragraphs for hyperlinks.

[39] The Ontario Superior Court of Justice has recently published new practice directions governing the responsible use of artificial intelligence in civil proceedings.¹ These practice directions are intended to maintain the integrity of the justice system. Within that practice direction is the following:

Potential Sanctions for Misuse of Artificial Intelligence for Court Proceedings

The court has a range of powers to ensure that counsel and litigants comply with their duties to the court. Where those duties are not complied with, the court's powers include, but are not limited to, public reprimand of the counsel or litigant, the imposition of cost orders, adjourning a hearing or dismissing the matter, the initiation of contempt proceedings, and in regards to counsel, referral to the Law Society of Ontario. In each instance, the court's response will depend on the specific facts and circumstances of the case.

[40] After considering counsel for RSR's explanation and apology to the court for the misuse of AI, I advised that I would hear from him in oral submissions but would not rely on his factum. I further advised that during my deliberations on this motion, I would consider what additional remedy, if any, would be appropriate.

[41] Having now re-reviewed all of the material and considered all of the remedies available to me, I will reserve the right to factor in this misuse of AI when I receive cost submissions from the parties.

¹ [Consolidated Civil Provincial Practice Direction – Ontario Superior Court of Justice](#)

Disposition

[42] The motion to dismiss this claim for delay is denied. The motion to return BEI's security is denied. The motion for RSR to post security for costs is granted. RSR will post security for costs in the amount of \$190,000 by no later than March 31, 2026.

[43] The matter must now proceed in a timely fashion. The following timetable is being imposed by the court:

- a) Affidavits of documents to be exchanged by March 31, 2026;
- b) Examinations for discovery to be completed by September 30, 2026;
- c) Undertakings to be answered by November 15, 2026;
- d) A case conference will be scheduled before me as soon after November 15, 2026 as possible to determine if the above steps have been completed and to set any further timelines for expert reports. If all steps have been completed and expert reports are necessary or have already been served, the parties should be prepared to set a pretrial and trial date at that November case conference; and
- e) This timetable can be adjusted on consent of the parties without further order of the court.

Cost submissions

[44] BEI will have until February 13, 2026 to serve and file cost submissions of no more than 5 pages in length excluding a bill of costs and any offer to settle.

[45] RSR will then have until February 23, 2026 to serve and file responding costs submissions with the same page restrictions.

Justice Jaye Hooper

Released: February 04, 2026

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Plaintiff

-and-

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in Right of Ontario as represented by the Ministry of
Transportation

Defendants

**DECISION ON MOTION TO DISMISS AND
SECURITY FOR COSTS**

Justice Jaye Hooper

Released: February 04, 2026