CITATION: Opara Law PC v. 1171328 Ontario Ltd, 2024 ONSC 6113
COURT FILE NO.: CV-15-00529204-0000
DATE: 2024-11-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: OPARA LAW PC v. 1171328 ONTARIO LTD. et al

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: June 11, 2024 [by videoconference]

COUNSEL: Z. Zahra for moving parties/defendants, 1171328 Ontario Ltd and Living Properties Inc.
V. Opara, for responding party/plaintiff, Opara Law PC
M. Siboni for defendant, City of Toronto

E N D O R S E M E N T

[1] The moving defendants 1171328 Ontario Ltd. and Living Properties Inc., bring this motion under Rule seeking to dismiss the plaintiff's action for delay. The defendant, City of Toronto, supports the motion. The plaintiff is opposed. For the reasons that follow the motion is granted.

Background

[2] The plaintiff, Opara Law PC, is the professional corporation of Victor Opara, an Ontario lawyer and sole practitioner, practicing primarily in litigation. Victor Opara is the director of the plaintiff and was its representative on examinations for discovery. Mr. Opara is also the lawyer of record for the plaintiff in this proceeding.

[3] This action arises out of an alleged business interruption claim as a result of flooding incidents which occurred at the commercial property leased by the plaintiff on or about May 29, 2013, and July 9, 2013, over 11 years ago. The plaintiff seeks damages totaling $1,000,000.00 from the named defendants 1171328 Ontario Ltd. (the owner of the property), Living Properties Inc. (the property manager) and the City of Toronto. The Plaintiff's Statement of Claim was issued on May 28, 2015, more than 9 years ago.

[4] This notice of motion on this motion was served in November 2022. The motion was originally returnable on August 18, 2023. In addition to dismissal for delay, the original notice of motion sought a court ordered litigation timetable in the alternative. The motion has been adjourned four times since August 18, 2023. The plaintiff did not file any materials in response to

the motion prior to the original August 18, 2023 return date and did not respond to the moving defendant's attempts to confirm the motion. On the evening of August 17, 2023, Mr. Opara sent an email to counsel for the moving defendants attaching a letter from a doctor advising that Mr. Opara would be away from work for medical reasons from August 17-22, 2023. Mr. Opara attended the Motion on August 18, 2023, but did not appear on video and called in to request an adjournment. Associate Justice Abrams granted the adjournment and scheduled the hearing to continue by case conference on August 24, 2023 to set a timetable for next steps.

[5] Despite being provided with the Zoom coordinates in Associate Justice Abrams' endorsement, Mr. Opara did not attend before Associate Justice Abrams on August 24, 2023 and did not advise the court or defendants' counsel that he would not be attending. At the case conference Associate Justice Abrams adjourned the motion to dismiss to be heard on December 15, 2023. Associate Justice Abrams ordered that the new return date was peremptory upon the plaintiff, with the proviso that if Mr. Opara was in ill health and was unable to retain a lawyer to appear in his stead, he could request an adjournment if he filed evidence substantiating the reasons underlying the request.

[6] The motion came before me on December 15, 2023. Mr. Opara attended and requested a further adjournment of the motion. In support of his adjournment request, Mr. Opara submitted his own affidavit sworn December 13, 2023. The affidavit attached the August 17, 2023 letter from his doctor excusing him from work August 17-22, 2023 (that was previously provided to opposing counsel before the August 18, 2023 return date) and a further letter from the same doctor, dated August 23, 2023, recommending rest with no work activities for an additional week. The affidavit also attached two emails from "Vision Diagnostic, Personal Injury Medical Consultations" confirming appointments for orthopedic and neurological assessments in November and December 2023.

[7] I had concerns regarding the evidence filed by Mr. Opara as reflected in my endorsement from the December 15, 2023 attendance (released December 22, 2023):

> I have concerns with the veracity of Mr. Opara's evidence in support of the adjournment. None of the documents attached to his affidavit speak to Mr. Opara's current ability to participate in or respond to this motion. An appointment for an assessment is not evidence of a medical condition. Further, the attached documents are inconsistent with both the substance of the affidavit and Mr. Opara's oral submissions to the court. In his affidavit and oral submissions Mr. Opara described that assessments as having been arranged by his family physician and that they were required as a result of his continuing symptoms. However, the email from Vision Diagnostic states that the assessments were booked "per the request of your legal representation" and appear to relate to a personal injury litigation matter. In oral submissions, Mr. Opara conceded that at least one of the assessments related to a personal injury litigation matter. He attributed his "confusion" on this point to his ongoing medical symptoms.

[8] I further noted in my endorsement of December 22, 2023, that contrary to the direction of AJ Abrams, Mr. Opara filed no evidence on his ability to retain another lawyer to appear on this

motion on his behalf. Nevertheless, given that the plaintiff had filed no materials in response to the substance of this motion, I adjourned the motion to come back before me on March 7, 2024. That date was peremptory on the plaintiff with the same proviso contained in the August 24, 2023 endorsement of Associate Justice Abrams. I ordered that the plaintiff shall deliver a responding record on the motion by February 16, 2024 and any evidence filed in support of an additional adjournment request should be filed by February 23, 2024. My endorsement further directed that "[t]he plaintiff should not assume that an adjournment will be granted and is encouraged to file a responding motion record on the substance of the motion regardless of whether an adjournment is sought."

[9] The plaintiff did not file a responding record on the motion by February 16, 2024 and did not file any evidence in support of an additional adjournment by February 23, 2024. Nevertheless, Mr. Opara attended the return of the motion on March 7, 2024 and requested a further adjournment for health reasons. Mr. Opara did not file any affidavit in support of this request. The only new documents he relied on were two doctor's letters both dated February 27, 2024 and uploaded to Case Center on March 2, 2024. The doctor's letters were not attached to an affidavit and were not properly in evidence. In any event, the letters said nothing about Mr. Opara's ability to prepare materials (which were due before the date of the injury to his right thumb that was the subject of the doctor's letters) nor to attend on the motion so they were not relevant to the adjournment request.

[10] I denied the plaintiff's adjournment request on March 7, 2024 and heard the moving defendant's motion for the alternative relief. I awarded the moving defendant's alternative relief and set a litigation timetable requiring the plaintiff to deliver the answers to undertakings from Mr. Opara's April 23, 2018 examination for discovery by April 11, 2024 and to attend continued examination for discovery by May 16, 2024. I also awarded the moving defendants partial indemnity costs of the motion to that date in the amount of $6,000. I adjourned the motion to dismiss to come back before me on June 11, 2024, giving the plaintiff one further opportunity to move the litigation forward and to respond to the motion to dismiss.

[11] The plaintiff did not deliver any answers to undertakings by April 11, 2024. As the plaintiff had still not delivered any answers to undertakings by May 15, 2024, the defendants reasonably advised that they would not be proceeding with a continued examination for discovery. The purpose of the continued examination for discovery was to examine on the answers to undertakings. The defendants delivered a supplementary motion record and factum on May 31, 2024.

[12] On June 5, 2024, more than six years after Mr. Opara's examination for discovery and after this motion hearing had been confirmed, the plaintiff sent a partial response to undertakings from to counsel for the defendants. That response to undertakings has not been filed in evidence on this motion but was uploaded to Case Center on June 6, 2024. On the face of the letter responding to the undertakings it appears that completed answers have been provided for only 6 of the 18 undertakings from Mr. Opara's April 2018 examination for discovery. The remaining 12 undertakings are indicated as "to be provided" or as having been requested from third parties, or have not been answered at all.

[13] On June 6, 2024, Mr. Opara provided to defendants' counsel and uploaded to case center notes from a doctor at a health clinic reporting on four appointments with Mr. Opara between December 19, 2023 and May 2, 2023. Mr. Opara sought to rely on these notes to explain his failure to comply with previously ordered timetable for the delivery of motion materials and undertakings. Contrary to previous directions from the court, these notes were not attached to an affidavit so they are not properly in evidence. In any event, there is nothing in these notes on their face that speaks directly to Mr. Opara's ability to respond to this motion nor to answer his undertakings. Mr. Opara also sent a separate letter from an occupational therapist (also not attached to any affidavit) to my attention only, by email through the assistant trial coordinator. As this letter was not in evidence nor provided to the defendants, I have not considered it. I note that Mr. Opara in his oral submissions took the position that most of the health information in the letter from the occupational therapist was already included in his December 13, 2023 affidavit.

[14] The plaintiff has filed no evidence in response to the substantive issues on the motion to dismiss for delay. Mr. Opara's December 13, 2023 affidavit is the only affidavit evidence filed by the plaintiff over the course of five separate attendances on this motion. That affidavit deals with Mr. Opara's state of health between August 2023 and December 2023 and was filed solely for the purpose of seeking an adjournment of the motion. In paragraph 1 of the affidavit Mr. Opara "categorically" states that "this Affidavit is not in any way a full or detailed response of the Plaintiff to the Motion of the Defendants in this matter".

Dismissal for delay

[15] The Ontario Court of Appeal set out the governing test on a motion to dismiss for delay under Rule 24.01 in *Ticchiarelli v. Ticchiarelli*,[1] as recently summarized in *NWG Investments Inc. v. Fronteer Gold Inc.*[2]:

> "…an action should not be dismissed unless the delay is (i) inordinate, (ii) inexcusable, and (iii) prejudicial to the defendants such that it gives rise to a substantial risk that a fair trial of the issues will not be possible."

[16] On the record before me, I find that the delay by the plaintiff in this case meets all three criteria for dismissal set out by the court of appeal.

(i) The delay is inordinate

[17] The inordinance of the delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss.[3] In this case the delay from the commencement of the action to the service of the motion to dismiss is approximately 7.5 years. More than 8 years have now passed since the close of pleadings. No steps have been taken by the plaintiff to advance this action since Mr. Opara was examined for discovery in 2018, more than 6 years ago. But for the suspension of administrative dismissals in March 2020 due to the COVID-

[1] 2017 ONCA 1 (CanLII), at para. 12
[2] 2024 ONCA 331 (CanLII), at para. 2
[3] *Ticchiarelli*, at para. 15, citing with approval *Langenecker v. Sauvé*, 2011 ONCA 803, at para. 8

19 pandemic, this action would have been administratively dismissed for delay by the Registrar under Rule 48.14 over 4 years ago, in May 2020.

[18] In *Ticchiarelli*, the court of appeal agreed with the motion's judge's assessment that an 11-year delay from the commencement of the action was inordinate. In *828343 Ontario Inc. v Demshe Forge*, Mew J surveyed some of the leading cases on dismissal for delay in which Ontario courts had found that delays between the commencement of proceedings and the motion dismiss of between 5 years and 15 years to be inordinate. [4] In *Ali v. Fruci*, the court of appeal upheld the motion judge's finding that a 5-year delay from the commencement of the action was inordinate, although the court described it as "a close case".[5] In *Bourque v. Nogojiwanong Friendship Centre*, Justice Charney found that a 6-year delay from the close of pleadings was inordinate.[6]

[19] As Charney J explains in *Borque*, "Inordinate delay" is contextual. It depends on the circumstances of the case. Some litigation, because of the issues raised and/or the parties involved, might move even more slowly than the average case. This is not an overly complex case. In my view, it is a case that could have proceeded in accordance with the timelines contemplated by the *Rules of Civil Procedure*. I find that the delay of 7.5 years from the commencement of the action to the service of the notice of motion, coupled with the 6-year period in which the plaintiff took no steps to advance the action, to be an inordinate delay.

(ii) The delay is inexcusable

[20] The court of appeal in *Langenecker v. Sauvé* described the assessment the court should undertake in considering whether the delay is inexcusable:

> [9] The requirement that the delay be "inexcusable" requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay. As LaForme J. explained in De Marco, at para. 26, explanations that are "reasonable and cogent" or "sensible and persuasive" will excuse the delay at least to the extent that an order dismissing the action would be inappropriate.
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> [10] In assessing the explanations offered, the court will consider not only the credibility of those explanations and the explanations offered for individual parts of the delay, but also the overall delay and the effect of the explanations considered as a whole.[7]

[21] Despite multiple opportunities, the plaintiff has filed no evidence in response to the substantive issues on this motion. There is no explanation in the record before me for the 7.5 year delay between the commencement of this action in May 2015 and the service of the notice of motion in November 2022. Even if I were to consider Mr. Opara's affidavit of December 13, 2023

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[4] 2022 ONSC 350 (Div. Ct.) at para 85 (aff'd 2022 ONCA 412)
[5] 2014 ONCA 596 at para. 11
[6] 2018 ONSC 2494, (SCJ) at para 31
[7] 2011 ONCA 803 (CanLII) at paras. 9 and 10

in response to the substance of this motion (despite his submission that it was not to be so considered), it only covers the period August 2023 to December 2023.

[22] There is no evidence in the moving defendants' affidavits that would explain the delay. The plaintiff has primary responsibility to advance the action. Nevertheless, defence counsel was actively taking steps to move the action along through to August 2019. Between August 2018 and August 2019, counsel for the moving defendants wrote to Mr. Opara on at least seven occasions seeking to obtain his answers to undertakings and to schedule the continuation of his examination for discovery from April 2018. Mr. Opara was non-responsive to most of this correspondence and failed to confirm his attendance at two scheduled examinations for discovery in August 2019, resulting in cancellations of both.

[23] On August 28, 2019, counsel for the moving defendants wrote to Mr. Opara advising that the remainder of his examination for discovery could not be conducted until he had answered the undertakings from his April 2018 examination. Defendants' counsel invited Mr. Opara to contact them to reschedule the continued examinations once the answers to undertakings have been provided. Mr. Opara never responded to this correspondence and made no attempt to provide any answers to his undertakings until June 2024. In my view, the moving defendants acted reasonably in attempting to advance the litigation and in giving up on those attempts after a year of trying with no meaningful response from Mr. Opara. This is not a case of the defendants "lying in the weeds."

[24] There is no explanation for the plaintiff's delay in the evidence filed on this motion, let alone one that is "reasonable and cogent" or "sensible and persuasive". I find that the delay was inexcusable.

(iii) The delay is prejudicial to the defendants

[25] As outlined in *Ticchiarelli*, the test is whether the delay has been prejudicial to the defendants in that it creates a substantial risk that a fair trial of the issues will not be possible. A finding of inordinate delay creates a rebuttable presumption of such prejudice. There is an evidentiary burden on the plaintiff to demonstrate that the responding defendants have not been prejudiced.[8] For example, a plaintiff might lead evidence that key witnesses remain available and that important documents have been collected and preserved.

[26] This case relates to flooding at the plaintiff's office premises that occurred over 11 years ago. The key witnesses include employees of plaintiff who are no longer employed there, most of whose full names and last known contact information were not identified by the plaintiff until the undertaking for this information was answered on June 5, 2024. The plaintiff's insurance adjuster's file for the flooding incident has not been produced despite the plaintiff's undertaking to produce it in 2018. The damages claimed are primarily for lost income due to the business interruption. The determination of these damages will necessarily require evidence of the plaintiff's income from both before and after the flooding incidents. The plaintiff gave undertakings in 2018 to produce various documents dating back to 2009 in support of his income prior to the flooding

[8] *Ticchiarelli*, supra, at paras 28, 29 and 32.

incidents. Most of these documents have still not been produced. The plaintiff has provided no evidence that the witnesses to the events of 11 years ago are still available, nor that the outstanding key documents have been preserved.

[27] The plaintiff's last-minute response to undertakings supports a presumption of prejudice rather than rebutting it. Mr. Opara undertook to provide copies of the plaintiff's corporate tax returns from 2009 to 2018 and to obtain the complete accounting files from the accounting businesses that prepared his taxes during this period. In his June 5, 2024 response to undertakings, Mr. Opara advises that a request has been made to CRA for the corporate tax returns and that he is awaiting documents by mail. He indicates that one of the accounting businesses he used during the period has since closed down operations and cannot be located. He states that he has made a request to the other accounting business and is awaiting a response. On the undertaking to produce insurance adjuster's file, Mr. Opara responds (somewhat paradoxically): "There is no file in existence. I can provide you with consent to obtain same if you want." Presumably, he means consent to obtain it from the insurance adjuster.

[28] It is clear that the plaintiff no longer has many of the key documents in support of the damages and income loss claim, some of which are claimed to have been destroyed in the flood. Instead, the plaintiff was to obtain copies of those documents from third parties. By waiting more than 6 years until June 2024 to make these requests the plaintiff has created a substantial risk that these documents are no longer available. The records undertaken to be produced go back 15 years. This is well beyond the normal records retention period for most businesses and the retention period required by CRA. There is no evidence that these third parties have retained these records.

[29] I find that the plaintiff has failed to rebut the presumption of prejudice to the defendants arising from the plaintiff's inordinate and inexcusable delay. I would dismiss the plaintiff's action on this basis alone. I also find that the evidence filed, coupled with the plaintiff's last-minute and partial response to undertakings, particularly as it relates to key financial documents that have not been produced, supports a finding of actual prejudice to the defendants such that it gives rise to a substantial risk that a fair trial of the issues will not be possible. I would dismiss the plaintiff's action on this basis as well.

Costs

[30] The moving defendants were entirely successful on the motion and should have their costs. As the action has been dismissed, the moving defendants should have their costs of the action as well. Although the defendant City of Toronto supported the motion, they have not sought costs of the motion or the action.

[31] In granting the alternative relief sought on the motion to the moving defendants on March 7, I awarded costs of the motion to the moving defendants on the partial indemnity scale in the amount of $6,000. This represented the moving defendants' costs from the service of the Notice of Motion in November 2022, through to the fourth attendance on the motion on March 7, 2024. The moving defendants now seek partial indemnity costs incurred on the motion since March 7, 2024 in the amount of $1,857.72. This request is based on a costs outline filed, after removing certain disbursements which were either already included in the March 7, 2024 costs award or in

the costs outline filed for the action. The plaintiff submits that his amount is high for the preparation of this attendance. I disagree. Given the significance of the motion to the parties and considering the work done since March 7, which included a supplementary motion record and a factum, together with preparation for and attendance at a 2-hour motion hearing, I find that $1,857.72 is within the reasonable expectations of the parties.

[32] The moving defendants seek $10,115.39 in partial indemnity costs of the based on a separate costs outline filed. That amount should be reduced by $320.00 to $9,795.39 to remove the disbursement for the motion filing fee that was included in my March 7 costs award. I find that the time and disbursements reflected in this costs outline are reasonable and proportional given the steps that were taken by the moving defendants in response to this $1,000,000 claim. The amount claimed in costs of the action is within the reasonable expectation of the parties.

Disposition

[33] The moving defendants' motion is allowed. The plaintiff's action is dismissed. The plaintiff shall pay to the moving defendants their costs of the motion fixed in the amount of $1,857.72 and their costs of the action fixed in the amount of $9,795.39, payable within 30 days. I have revised and signed the draft order filed by the moving defendants, which shall be provided with this endorsement.

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D. Michael Brown, Associate Judge

DATE: November 4, 2024