**CITATION:** *Mi5 Print & Digital v. Larmer*, 2025 ONSC 729
**COURT FILE NO.:** CV-17-00570437-0000
**DATE:** 20250203

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**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** *Mi5 Print & Digital Communications Inc. et al. v. Craig Larmer et al*

**BEFORE:** Associate Justice Rappos

**COUNSEL:** *Peter Carey*, for the Plaintiffs

*Mark Laschuk*, for the Defendants Craig Larmer, Lesley Ann Sharpe, and Lesley Ann Sharpe cob as LCS Imagining

*D. Jared Brown*, for the Defendants Ronald Morgan and Barrie Williams

**HEARD:** September 11, 2024 (in person)

## REASONS FOR DECISION

### Overview

[1] Mi5 Print & Digital Communications Inc. and 2214264 Ontario Inc. are the Plaintiffs in this action. They are in the business of commercial print and digital communications.

[2] This action was commenced on February 27, 2017. The core of the Plaintiffs' claim is that a former employee, the Defendant Craig Larmer, breached his fiduciary duties owed to the Plaintiffs, misappropriated the Plaintiffs' business opportunities, and solicited the Plaintiffs' clients to send work to the other Defendants.

[3] The Defendants filed their statements of defence by April 17, 2017. Certain Defendants also counterclaimed against the Plaintiffs.

[4] On May 13, 2017, the Plaintiffs obtained an interim interlocutory injunction for one year restraining the Defendants from soliciting or having any further contact with the Plaintiffs' clients.

[5] In his Reasons for Judgment, Justice Lederman held that the Plaintiffs had a strong *prima facie* case against Mr. Larmer for breach of fiduciary duty, and a strong *prima facie* case against the other Defendants for providing assistance to him in breaching his fiduciary duty.

[6] In a subsequent decision dated July 11, 2017, Justice Lederman ordered costs of $65,000 against the Defendants on a joint and several basis. The costs award was eventually paid by the Defendants by January 31, 2018.

[7] The interim injunction expired on May 13, 2018. The Plaintiff served a defence to one of the Defendant's counterclaim on May 30, 2018.

[8] Notwithstanding that almost eight (8) years has passed since this action was commenced, the parties have not exchanged affidavits of documents, conducted examinations for discovery, participated in mediation or set the matter down for trial.

[9] The Plaintiffs sought a status hearing so that the action would not be administratively dismissed for delay.

[10] The Plaintiffs argue that their action should not be dismissed and that the Court should set deadlines for the completion of the remaining steps necessary to have the action set down for trial. The Plaintiffs' position is that they have always intended to prosecute the action, the action has a high probability of success, that their former counsel failed to advance the claim on a timely basis, and that they have attempted to move the matter forward and the Defendants have prevented the matter from progressing for over two years.

[11] The remaining Defendants[1] argue that the action should be dismissed for delay because the Plaintiffs have failed to provide an acceptable explanation for the delay, and they would be prejudiced if they are required to continue to defend this action.

[12] For the reasons that follow, I refrain from rendering a decision on the motion at this time, since the Plaintiffs failed to serve their materials on their former counsel, who may be impacted by this motion. Former counsel must be given an opportunity to submit evidence in response to the allegations made against him by the Plaintiffs. If he does so, further written submissions and oral argument will likely be required to ensure fairness in this process, which is particularly important since one of the options available to the Court on the motion is to dismiss the action.

## **Legal Principles**

[13] Subrule 48.14(1) of the *Rules of Civil Procedure* provides that an action shall be administratively dismissed for delay where it has not been set down by the fifth (5$^{th}$) anniversary of the commencement of the action.

[14] The deadline in this action was initially February 27, 2022. That deadline was extended to August 28, 2022 pursuant to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, which suspended the running of limitation periods and procedural time periods from March 16, 2020 to September 14, 2020 due to the Covid-19 pandemic.

[1] The two corporate Defendants filed for bankruptcy in 2018.

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[15] However, notwithstanding that the time periods began to run again on September 17, 2020, the Superior Court of Justice refrained from administratively dismissing claims for delay under subrule 48.14(1) until May 13, 2024.

[16] The parties were unable to come to an agreement on a timetable that would have prevented any possible administrative dismissal. As a result, to avoid a dismissal, the Plaintiffs brought a motion for a status hearing.

[17] Subrule 48.14(7) provides that the plaintiff shall show cause why the action should not be dismissed for delay. At a status hearing, the Court may dismiss the action for delay, or, if it is satisfied that the action should proceed, the Court may, among other things, set deadlines for the completion of the remaining steps necessary to have the action set down for trial.

[18] The legal test on a status hearing motion is well settled. The plaintiff is required to establish that there is an "acceptable explanation" for the delay, and demonstrate that the defendant will not suffer any non-compensable prejudice if the action is allowed to proceed.[2]

[19] The test is conjunctive. Even if a plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. If the plaintiff is not able to provide a satisfactory explanation, it is still open to the court to dismiss the action, even if there is no proof of actual prejudice to the defendant.[3]

[20] In applying the test, the court must carefully balance two fundamental principles: (a) a civil action should, if possible, be decided on the merits and procedural rules should be interpreted accordingly, and (b) procedural rules that aim to resolve disputes in a timely and efficient manner can only achieve their goals if they are respected and enforced.[4]

[21] Timelines prescribed by the *Rules* should be complied with, and the failure to enforce the *Rules* undermines public confidence in the capacity of the justice system to process disputes fairly and sufficiently. However, the court must allow some latitude for unexpected and unusual contingencies that make it difficult or impossible to comply, and should avoid a purely mechanical application of timelines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits.[5]

[22] With respect to the first part of the test, what constitutes an "acceptable explanation" depends on the circumstances of each case. The explanation does not have to be "perfect" or "good". An "adequate" or "passable" explanation will suffice as being acceptable.[6]

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[2] *Beshay v. Labib*, 2024 ONCA 186, para. 11.
[3] *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544, para. 32.
[4] *Ibid.*, para. 18.
[5] *Ibid.*, para. 19.
[6] *Martellacci v. Pitney Bowes of Canada Ltd.*, 2024 ONSC 320, para. 16.

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[23] In considering the reason for the delay, the court should consider whether the plaintiff demonstrated an intention to prosecute the action since its commencement.[7]

[24] The court is primarily concerned with the rights of the litigants, as opposed to the conduct of their counsel. An action should not ordinarily be dismissed by reason of the inadvertence of counsel, or an error committed by counsel. An innocent client should not suffer the irrevocable loss of the right to proceed because of such actions.[8]

[25] With respect to the second part of the test, the conduct of the defendant is also a factor to be considered, especially where a plaintiff encounters some resistance when trying to move the action along.[9] This analysis requires some apportionment of responsibility for the delay.[10]

[26] The prejudice at issue is to the defendant's ability to defend the action because of the plaintiff's delay, not because of the sheer passage of time.[11]

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**Analysis**

[27] The Plaintiffs' position is that they always intended to prosecute this action, and that the delay was caused by their former counsel, David Rubin ("**Former Counsel**"), and by conduct on the part of the Defendants. As a result, they believe they have an acceptable explanation for the delay and that it should not be held against them. The Plaintiffs also argue that the Defendants will not suffer any non-compensable prejudice if the action is allowed to proceed.

*Delay by Former Counsel*

[28] Former Counsel was lawyer of record for the Plaintiffs from the commencement of the action on February 27, 2017 until January 5, 2021, when Mr. Carey, the Plaintiffs' current counsel, served a Notice of Change of Lawyer.

[29] In their notice of motion, the Plaintiffs state that they became concerned about "the failure of its then counsel to advance its claim on a timely basis". They allege to have constantly contacted Former Counsel to move the matter forward, and that after new counsel was appointed in January 2021, Former Counsel "for reasons known only to himself… did not transfer the file until March 2022".

[30] The Plaintiffs rely on an affidavit of Derek McGeachie, the president and director of the Plaintiffs. Mr. McGeachie's evidence can be summarized as follows:

(a) Former Counsel was delayed in responding to a draft expert report the Plaintiffs received in September 2019. The report was finalized in January 2020 and served in July 2020.

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[7] *Beshay v Labib*, 2023 ONSC 2874, para. 15.
[8] *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, para. 27.
[9] *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592, para. 53.
[10] *Ibid.*, para. 57.
[11] *Ibid.*

(b) Mr. McGeachie had concerns of the slow speed of progress with the action and expressed his frustration to Former Counsel in December 2019 and in the months thereafter. He raised the possibility of retaining new counsel in April 2020.

(c) On July 21, 2020, Former Counsel sent a letter to counsel to the Defendants to canvass interest in an early mediation or to have a call to discuss a discovery plan. The letter said that it had been "some time since we last communicated" and Former Counsel was taking "this opportunity to re-establish communication lines".

(d) Mr. McGeachie followed up with Former Counsel in October and November 2020, and decided in November 2020 that it was necessary to retain new counsel.

(e) Mr. McGeachie spoke with Mr. Carey about taking over the file. On November 6, 2020, Mr. McGeachie sent an e-mail to Former Counsel requesting that he provide his file to Mr. Carey.

(f) Mr. McGeachie and Mr. Carey followed up with Former Counsel regarding delivery of his file in late 2020 and throughout 2021. The file was delivered to Mr. Carey in March 2020.

(g) Mr. McGeachie believes the Plaintiffs have a good case and he has always intended to prosecute the case.

[31] Mr. McGeachie appended many e-mails to his affidavit in support of the Plaintiffs' position that they intended to prosecute the action and that there had been delay on the part of Former Counsel. Many of the e-mails were significantly redacted.

[32] Mr. McGeachie was cross-examined on September 5, 2024. During the examination, the Plaintiffs' position was that the redactions related to irrelevant matters or privileged communications. The Plaintiffs refused numerous requests to produce unredacted emails.

[33] Also, during the examination Mr. McGeachie raised the possibility that Former Counsel may have been requesting payment for accounts, and may have used the unpaid accounts as an excuse for why the action had not progressed further. Mr. McGeachie also noted that Former Counsel told him he would not release the physical file until he had received payment.

[34] In connection with answers to undertakings, the Plaintiffs provided copies of some unredacted emails that had been requested by the Defendants.

[35] In an email dated November 16, 2020, Former Counsel stated that "bandwidth is very much a two-way issue" in response to Mr. McGeachie's comment that it appeared that Former Counsel didn't have the "bandwidth for this case".

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[36] In emails dated November 25, 2020 and January 4, 2021, Former Counsel stated he would provide a copy of the file upon completion of a number of steps, including payment of his final account and the outstanding account on the matter.

[37] There were also emails produced concerning the cost of the proceeding to date, and how Mr. McGeachie did not want to pay amounts owed to Former Counsel. In an e-mail dated January 18, 2021, Former Counsel stated that he had previously said that he could do no more work until an account was paid, and that by January 2018 he was still owed approximately $17,000.

[38] In that same e-mail, Former Counsel indicated that a defence to Mr. Larmer's counterclaim had not been filed because he was waiting for an analysis from the Plaintiffs.

[39] The content of the unredacted emails paint a different picture than what was set out in Mr. McGeachie's affidavit.

[40] The issue is I am faced with on this motion is that there is no evidence before the Court from Former Counsel regarding this matter. As noted in the factum of certain of the Defendants, "absent evidence from [Former Counsel], this Court cannot assess the reasonableness of his delay".

[41] The Plaintiffs rely on a decision of Associate Justice D. Michael Brown in *Martellacci v. Pitney Bowes of Canada Ltd.*, where he held that that the responsibility for 23 months of delay was on the plaintiff's lawyer and did not attribute that delay to the plaintiff.[12]

[42] However, in that case, the lawyer swore an affidavit, where he largely attributed the delay to "his own lack of diligence in moving the case forward".[13] As well, the lawyer said that his practice was impacted by a serious personal health matter, along with the Covid-19 pandemic, and that the "inactivity on this file was the result of the other demands on the lawyer's time and attention, both in his practice and his personal life'".[14]

[43] The Defendants point to *Saini v. Sun Life Assurance Co.*, where two lawyers for the plaintiff and a legal assistant submitted affidavits that the "matter had fallen through the cracks in the lawyer's office."[15] Justice Morgan held that a plaintiff's lawyer putting a file in abeyance was not an adequate explanation for delay, nor was solicitor inadvertence, negligence, or lack of proper organization bordering on negligence.[16]

[44] During Mr. McGeachie's cross-examination, Mr. Carey confirmed that he had not notified LAWPRO with respect to any issues concerning Former Counsel's representation of the Plaintiffs. Mr. Carey also indicated that Former Counsel had been advised of the motion by his office, but he could not confirm when that occurred. Lastly, Mr. Carey informed the Court that Former Counsel

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[12] *Martellacci v. Pitney Bowes of Canada Ltd.*, 2024 ONSC 320, para. 14.
[13] *Ibid.*, para. 12.
[14] *Ibid.*, para. 10
[15] *Saini v. Sun Life Assurance Co.*, 2013 ONSC 4463, para. 10.
[16] *Ibid.*, para. 11.

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was not served with the Plaintiffs' motion materials. It appears Former Counsel was also not served with the materials of the Defendants.

[45] In my view, while I recognize that the onus is on the Plaintiffs to satisfy the applicable test and put their best foot forward on this motion, it would not be appropriate to render a decision on the motion without providing Former Counsel with an opportunity to respond to the allegations made against him by the Plaintiffs.

[46] Subrule 37.07(1) provides that a notice of motion "shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise". In my view, Former Counsel may be affected by the order sought on this motion. If the outcome is an order of dismissal for delay, Former Counsel may potentially be subject to a claim in negligence for his representation of the Plaintiffs in this action.

[47] The *Rules* are to be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.[17] For the Court to render a decision that puts into practice this underlying principle, Former Counsel must have an opportunity to put forward his side of the story. This is particularly the case given that previously redacted portions of the e-mails attached to Mr. McGeachie's affidavit contained information that raises concern that the delay the Plaintiffs' wish to attribute to Former Counsel may at least partially be of their own doing. I must receive more detail on the relationship between Former and Counsel for the Plaintiffs before I can render a decision as to whether the Plaintiffs have an acceptable explanation for the delay in prosecuting this action during the time period they were represented by Former Counsel.

[48] As a result, I am hereby directing the Plaintiffs to forthwith send a copy of this Endorsement to Former Counsel, along with copies of all the materials that were uploaded to Case Centre for this motion, including those uploaded by the Defendants. Former Counsel shall confirm via e-mail to my Assistant Trial Coordinator whether he wishes to file responding materials for this motion. If he does, the parties shall contact my Assistant Trial Coordinator to schedule a case conference to discuss the exchange of materials and whether further written submissions and oral argument is necessary to complete the motion.

Associate Justice Rappos

**DATE:** February 3, 2025

[17] Subrule 1.04(1), *Rules of Civil Procedure*.

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