

CITATION: Pushie v. Guidarelli, 2025 ONSC 1060
COURT FILE NO.: CV-16-58234
DATE: 2025-02-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JAMES PUSHIE)
) S. Presvelos, Counsel for the Plaintiff
Plaintiff)
)
– and –)
)
CARMELA GUIDARELLI) P. Cote, Counsel for the Defendant
)
Defendant)
)
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)
)
) **HEARD:** February 12, 2025

2025 ONSC 1060 (CanLII)

THE HONOURABLE JUSTICE M. BORDIN

Overview

- [1] This proceeding was started as an application on July 29, 2016. In 2021 it was dismissed at a hearing without *viva voce* evidence. In 2022 the Divisional Court set aside the dismissal, ordered the trial of the whole application, and made procedural orders. The parties are at odds about what constitutes the pleadings, whether evidence contained in an affidavit of the plaintiff that was ruled not to be admissible at the initial hearing is admissible at the trial, and the scope of the evidence that may be lead at trial.
- [2] The plaintiff’s motion before the court seeks to address those issues and seeks leave to amend the plaintiff’s pleadings. To understand this motion, it is necessary to consider the nature and history of the proceedings.

The History of the Proceedings

- [3] The following is intended as a brief overview of the application. In providing this overview, I make no findings of fact.
- [4] The plaintiff and the defendant had been romantically involved. In May 2013, the defendant took title to the property at 54 Gertrude Street in Hamilton (“the Property”). The purchase price was \$100,000, which was paid by arranging a mortgage for \$92,000. The balance of

about \$11,000 for the down payment and closing expenses came from the plaintiff's account, business account, and/or from a business account of Pusherelli Corporation, a business owned jointly by the parties.

- [5] The parties lived in the Property together with the plaintiff's children from about the time of the purchase until about May 2016. The plaintiff made some monthly payments to the defendant which she applied to the mortgage. Both the plaintiff and the defendant contributed towards renovations to the Property and its improvement.
- [6] After the parties separated in 2016, the defendant excluded the plaintiff from the Property.
- [7] The underlying issue is whether funds advanced by the plaintiff to purchase the Property were an investment, or a loan. The plaintiff claims an implied, constructive, or resulting trust based on the mortgage payments he made, and certain work he performed to improve the Property. The plaintiff claims a share in the appreciation of the market value of the Property and a sale of the Property. The defendant disputes the plaintiff's contributions.
- [8] After the application was commenced, the parties exchanged affidavits and conducted cross-examinations. The plaintiff then sought to tender further evidence shortly before the hearing. At issue is the plaintiff's May 17, 2021, affidavit and exhibits. The defendant objected to the affidavit and Skarica J. ruled that the affidavit was not admissible on the application.
- [9] On June 21, 2021, Skarica J. dismissed the application. The plaintiff appealed. On June 27, 2022, Emery J., sitting as a single judge of the Divisional Court, allowed the appeal and set aside Skarica J.'s order. Emery J. was of the view that it was necessary for the court to hear *viva voce* evidence.
- [10] Emery J. ordered a trial of the whole application on the following terms:
- a. The trial shall be heard by a different judge;
 - b. The affidavits considered on the application shall be treated as the pleadings for the trial. The affidavits ruled inadmissible by the application judge shall not form part of the pleadings;
 - c. The cross-examinations conducted for the application shall be treated as examinations for discovery; and
 - d. Each party shall serve an affidavit of documents by August 31, 2022, along with a copy of all documents listed in Schedule A.
- [11] A pretrial was held on July 5, 2023, and this motion was served in July 2023 shortly after the pretrial. When this motion was served, the matter was on the September 11, 2023, trial sittings. A new trial date has not yet been scheduled.
- [12] The defendant has remained in possession of the Property throughout. There is a caution registered on title which she states impacts her ability to deal with the Property.

The Materials Filed

[13] The parties have filed the following materials on this motion.

- a. The Plaintiff's Motion Record dated July 17, 2023 containing the affidavit of lawyer Evan Presvelos;
- b. The Respondent's Motion Record containing:
 - i. The affidavit of the plaintiff sworn August 28, 2023;
 - ii. The affidavit of Veronique Frenay sworn August 19, 2024; and
 - iii. The affidavit of the plaintiff sworn January 21, 2025.
- c. The Plaintiff's Reply Record dated July 4, 2024, containing the affidavit of lawyer Evan Presvelos;
- d. The Plaintiff's Supplementary Reply Record dated January 21, 2025, containing the affidavit of lawyer Evan Presvelos.
- e. The Defendant's Factum dated August 29, 2023;
- f. The Plaintiff's Factum dated September 12, 2023;

Orders Sought by the Plaintiff

[14] The plaintiff seeks the following orders:

- a. Allowing the plaintiff to produce all further productions as contained in the plaintiff's affidavit of documents for use at trial;
- b. Requiring the parties to disclose any further, relevant documentation pursuant to the *Rules of Civil Procedure* if discovered;
- c. Allowing the plaintiff to file and rely on the expert report prepared by Terry Route dated September 15, 2023, at trial;
- d. Amending the plaintiff's pleading.

The Defendant's Position

[15] The defendant's position can be summarized as follows:

- a. The plaintiff cannot rely on his May 21, 2021 affidavit and exhibits thereto at the trial because it was ruled inadmissible by Skarica J., the Divisional Court ruled that the affidavit shall not form part of the pleadings, there is no explanation for why

the evidence was not tendered with the plaintiff's initial affidavit, and because the defendant would be prejudiced by its admission.

- b. Some of the evidence sought to tendered by the plaintiff is solicitor and client communications and settlement negotiations and as such is privileged.
 - c. It is not clear what pleading is to be amended, the plaintiff has already amended his pleading once, and the defendant would be prejudiced by the amendments.
- [16] At the hearing, the defendant did not take issue with the expert report previously served by the plaintiff. The defendant seeks an opportunity to respond if the plaintiff serves an updated report with an updated valuation of the Property.

Pace of the Litigation

- [17] The issue of delay factors into the defendant's position, so I will address the progress of the litigation here.
- [18] The defendant complains in her first affidavit about the slow pace at which this matter has moved forward. She recites the progress of the litigation back to 2017. She complains that the plaintiff has dragged out the litigation and that his lawyers have acted discourteously and in an oppressive manner.
- [19] Whatever transpired before the initial hearing in June 2021, the matter was heard and determined by Skarica J. in June 2021, and then appealed. The decision on the appeal was released on June 27, 2022.
- [20] In accordance with the order of Emery J., the plaintiff served his affidavit of documents in August 2022. The defendant did not serve an affidavit of documents as ordered. By July 2023, the defendant had not served an affidavit of documents.
- [21] On consent, the parties scheduled the pretrial for July 5, 2023, and scheduled the trial for the September 2023 trial sittings. In July 2023, the plaintiff offered to be examined on the documents he produced in his affidavit of documents. I was not directed to a substantive response to this proposal from the defendant.
- [22] The endorsement from the pretrial indicates that there was an issue about whether the parties could engage in further examination for discovery. The pretrial judge directed that if a party wanted to conduct discoveries on any additional documents produced, the parties could bring a motion for directions by no later than July 19, 2023.
- [23] The plaintiff served this motion on July 17, 2023. It has taken 18 months to have the motion heard.
- [24] The motion was initially scheduled by the plaintiff as a short motion on August 17, 2023. Defence counsel was not available at that time. Defence counsel also took the position that the motion should be a long motion. The motion appears to have been scheduled to be heard

in early September, 2023. Plaintiff counsel took the position that the motion could not proceed because of the “late filing” of the defendant’s motion materials on August 28, 2024.

- [25] The parties agreed to schedule the motion for the week of November 20, 2023. Evidence relating to the reason why the motion was not scheduled earlier was not drawn to the court’s attention.
- [26] In this jurisdiction, both parties are required to file motion confirmation forms. The plaintiff did not file the required motion confirmation form in November. Neither did the defendant. As a result, the motion did not proceed the week of November 20, 2023. It appears that the motion might have been put on a list in mid-December 2023, but it was ultimately adjourned on consent to the week of January 8, 2024.
- [27] The motion was not called to be heard by the trial coordinator until January 19, 2024. It did not proceed in part due the schedules of both lawyers. It was adjourned on consent to the week of February 26, 2024. It appears that plaintiff’s counsel did not confirm the motion and it did not proceed. Plaintiff counsel next reached out to defence counsel on May 19, 2024 seeking dates for the motion.
- [28] In July, on consent, the motion was scheduled for the end of August 2024. It was not heard in August 2024 because of a lack of judges. The motion was kept on a running weekly list. Beginning September 20, 2024, plaintiff counsel, with copy to defence counsel, began inquiring of the trial coordinator when the motion could be heard. As requested by the trial coordinator, plaintiff counsel provided his availability for the motion in September and October 2024. His availability was limited. On October 1, 2024, the trial coordinator asked counsel to revisit their schedule because when one counsel not available for more than a week the motion was considered adjourned. Defence counsel was copied on all correspondence.
- [29] On November 7, 2024, plaintiff counsel provided his availability in November 2024. On the record before me, defence counsel did not respond to the September and October correspondence until November 8, 2024. He indicated that he was not available the following week and stated he was on the trial list from November 18, 2024 to December 9, 2024. Defence counsel asserted that the plaintiff had to obtain leave to reschedule the motion which resulted in a case conference before Sheard J. on December 9, 2024, at which the motion was scheduled for a hearing in late January of this year which ultimately brought the matter before me.
- [30] As can be seen, the 18-month delay stems from a combination of factors. It is difficult on the record before me to determine precisely who is responsible for each delay. Some delay was caused by plaintiff counsel, some was caused by defence counsel, and the balance was due to a combination of a lack of availability of counsel, lack of judges, and unexplained reasons for the delay. It appears the plaintiff caused somewhat more of the delay than the defendant. However, I find the difference is not significant.

The Scope of the Evidence at Trial

- [31] As noted, the defendant objects to the plaintiff being able to rely on the May 17, 2021, affidavit of the plaintiff, including exhibits thereto.
- [32] Skarica J.'s found that the plaintiff's May 17, 2021, affidavit contained irrelevant evidence, evidence which was not responsive to the earlier cross-examination of the defendant and that no satisfactory explanation was provided for why the information was not disclosed in the plaintiff's initial affidavit.
- [33] It is clear from his reasons that in deciding not to allow the plaintiff to rely on the May 17, 2021 affidavit Skarica J. relied on *Rule 39.02* and the jurisprudence considering the *Rule*. The defendant submits that Skarica J.'s reasons were not appealed by the plaintiff and that the Divisional Court's determination that the affidavit did not form part of the pleadings, means the evidence the evidence contained in the affidavit cannot be tendered at trial. I do not agree.
- [34] The defendant's arguments and submissions all rely on *Rule 39*. All the cases relied upon by the defendant are cases involving motions and applications and the application of *Rule 39*.
- [35] Skarica J. heard the application on a paper record. He determined the admissibility of evidence on the hearing in accordance with the rules that govern applications, in particular, *Rule 39.02*. One of the purposes of the rule is to provide some finality to the exchange of evidence before a motion or application.
- [36] *Rule 39* governs applications, not trials. Evidence at trial is governed by *Rule 53* and the common law as to admissibility.
- [37] Emery J. was of the view there should be *viva voce* evidence and ordered that the whole of the application proceed to trial. He also ordered that the cross-examinations conducted for the application shall be treated as examinations for discovery and that each party shall serve an affidavit of documents by August 31, 2022.
- [38] Emery J. was addressing steps that would be required in an action, not an application. He did not set out a complete procedural schedule or set of orders for a trial.
- [39] Emery J.'s order that the affidavits be treated as the pleadings and that the affidavit ruled inadmissible by the application judge shall not form part of the pleadings is not a determination of what is admissible at trial. Pleadings are not evidence. Pleadings contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved: r. 25.06(1). Determining what constitutes pleadings is not the same as determining what evidence may be called at the trial or what may be included in an affidavit of documents.
- [40] Emery J. did not limit further discovery, limit the documents to be included in the affidavit of documents, or limit the evidence to be called at trial. It is clear from his decision that the

parties would call *viva voce* evidence. He did not direct that evidence in chief would be led by way of the existing affidavits.

- [41] *Rule 30.02* requires every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action to be disclosed as provided in *Rules 30.03 to 30.10*, whether or not privilege is claimed in respect of the document. Parties have an ongoing obligation to disclose relevant documents. This obligation continues after the completion of examinations for discovery: *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310, at paras 41 – 42.
- [42] The parties here have an ongoing obligation to disclose relevant documents.
- [43] In submissions, the defendant admitted that the evidence at trial will be *viva voce* evidence, not evidence by affidavit. The defendant conceded that if new relevant evidence was discovered the parties would be entitled to lead this evidence at trial. The defendant submits that the only limit on the evidence to be lead at trial is that the plaintiff cannot lead evidence contained in his May 17, 2021 affidavit even if it is relevant. I do not agree.
- [44] The admissibility of evidence is based in part on its relevance. Relevance is based on the issues in the litigation as defined by the pleadings. Admissibility is best determined by the judge hearing the evidence at trial. The Divisional Court did not impose a limit on relevant evidence to be tendered at trial.
- [45] The defendant also submits that she will be prejudiced by the plaintiff being able to rely on the evidence contained in his May 17, 2021, affidavit because the evidence had been ruled inadmissible by Skarica J. and because it is detrimental to her case. Neither is a reason to exclude the evidence in this case.
- [46] The defendant has now been aware of the disputed evidence for almost four years. She asserts the plaintiff should not be allowed to rely on evidence in the May 17, 2021, affidavit because he has never explained why it was not disclosed or tendered earlier. While this is an issue in an application and motion in light of *Rule 39.02*, given a party's ongoing disclosure obligation in an action or matters proceeding like an action, such an explanation is not required in order to call evidence at trial that has been disclosed years before trial.
- [47] For all these reasons, subject to relevance and admissibility to be determined by the trial judge, the plaintiff is not precluded from tendering evidence at trial that is contained in his May 17, 2021 affidavit. Similarly, the defendant is not limited to only calling evidence that is contained in her affidavits filed.

The Allegedly Privileged Evidence

- [48] The defendant objects to the plaintiff relying on evidence in his May 2021 affidavit that discloses:
- a. Allegedly privileged settlement proposals contained in text messages between the parties; and

- b. Alleged solicitor and client privileged communications from the defendant posted online in a blog post.

- [49] The defendant seeks to have this evidence excluded from the evidence lead at trial. For the reasons set out above, the plaintiff is not precluded from attempting to call such evidence at trial because it was in his May 17, 2021, affidavit.
- [50] The parties did not provide the court with a sufficient evidentiary or legal basis to determine whether the evidence is privileged. The parties conceded that the trial judge is best suited to determine whether privilege applies to the communications and whether the communications may be admitted into evidence. The trial judge is best positioned to make an evidentiary ruling on privilege in the context of *viva voce* evidence at trial, the issues before the trial judge, and the evidentiary foundation for admissibility or privilege.

Amendment of Pleadings

- [51] When this motion was served in July 2023, the plaintiff sought leave to amend his pleadings.
- [52] The defendant asserts that because of the order of the Divisional Court, the plaintiff's pleading is comprised only of his original affidavit. The defendant asserted that the Divisional Court had struck out the Notice of Application. When pressed, the defendant conceded that the Divisional Court had not done so. I find that the plaintiff's pleadings includes the plaintiff's Notice of Application which had been amended once before in April 2021.
- [53] The defendant submits that she does not know what amendments the plaintiff proposed and so could not respond. The proposed amended notice of application is attached as Exhibit P to Mr. Presvelos' January 2024 affidavit. The defendant has had the amended pleading for over a year.
- [54] The proposed amendments are not significant. Some of them are beneficial to the defendant. Principally, the plaintiff seeks to add a claim for damages in the alternative, based on facts already pleaded. The plaintiff also removes some of the relief he was initially seeking. It is evident from the original pleading that the plaintiff asserts contribution to the property entitling the plaintiff to an interest in the property. To obtain that interest, the plaintiff must prove his contribution. If not entitled to an interest, and if it is determined that the money advanced was a loan, it is obvious from the facts pleaded that the plaintiff would seek the return of those funds. The amendment provides clarity to the relief sought by the plaintiff based on the facts already pleaded.
- [55] *Rule 26.01* provides that on motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
- [56] The *Rule* is framed in mandatory terms: the court must allow the amendment, unless the responding party would suffer non-compensable prejudice, the proposed pleading is scandalous, frivolous or vexatious, or the proposed pleading fails to disclose a reasonable

cause of action: see *Klassen v Beausoleil*, 2019, ONCA 407. The defendant relies only on the first ground to oppose the amendment.

- [57] The court may refuse an amendment where it would cause non-compensable prejudice. The prejudice must flow from the amendment and not some other source: *Klassen* at para. 31. At some point the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party is presumed. In such a case, the onus to rebut the presumed prejudice lies with the moving party: *Klassen* at para. 31.
- [58] Alternatively, the responding party may resist the amendment by proving actual prejudice by leading evidence that the responding party has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *Klassen* at para. 31.
- [59] Irrespective of the form of prejudice alleged, there must be a causal connection between the non-compensable prejudice and the amendment: *Klassen* at para. 33.
- [60] The only prejudice the defendant could point to is that she might incur additional costs because of the amendment, and she cannot deal with the Property until the conclusion of the trial. The defendant remains in sole possession of the Property. Other than a bald assertion, the defendant led no cogent evidence of any impact on her ability to deal with the Property. In any event, this arises from the delay in having the matter determined on its merits, not from the proposed amendment.
- [61] The defendant could not demonstrate any actual prejudice flowing from the amendment and did not draw the court's attention to evidence that the defendant has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs. The defendant relies on presumed prejudice that she says arises from the lengthy delay in seeking the amendment and the lack of justification for the delay.
- [62] The defendant asserts that the proposed amendment does not add anything that was not already a part of the prior amended notice of application. She asserts there is no need for the proposed amendment. The defendant submits that the monetary value of any claim for damages for the plaintiff's contribution are not substantial. The defendant's position suggests there is no non-compensable prejudice to the plaintiff.
- [63] The plaintiff does provide some explanation for the timing of the amendment and why it was made after the initial hearing and appeal was completed. The amendment was initially sought in July 2023. There is no explanation for the delay between July 2022 and July 2023. The specific amendments were not set out until January 2024. There is no explanation for why the amendments were not contained in the motion in July 2023. The delay following January 2024 is shared between the plaintiff, the defendant, and other causes.
- [64] I find that in the circumstances before me, the length of delay does not give rise to a presumption of prejudice. Any prejudice to the plaintiff can be compensated in costs. Even if there is a presumption of prejudice and the inability to deal with the Property could give

rise to non-compensable prejudice, there is no causal connection between the non-compensable prejudice and the amendment. The prejudice does not flow from the amendment.

[65] The plaintiff shall have leave to amend the Notice of Application.

[66] The plaintiff was directed to file a consolidated Amended Amended Notice of Application by 10 a.m. on February 14, 2025. As of the date of the release of this decision, the plaintiff has failed to do so.

Disposition

[67] I make the following orders;

- a. The defendant shall serve an updated affidavit of documents and productions no later than 30 days from the release of these reasons;
- b. As required by the rules, the parties have an ongoing obligation to disclose relevant evidence if subsequently discovered or obtained;
- c. The parties shall complete examinations for discovery on documents not already subject to cross-examination no later than 90 days from the release of these reasons;
- d. The parties shall answer all undertakings no later than 60 days after the completion of examinations for discovery, if any;
- e. The parties shall serve any motions for undertakings or refusals by no later than 90 days after the completion of examinations for discovery, if any;
- f. The plaintiff may seek to have admitted at trial expert evidence set out in the report of Terry Route dated September 15, 2023;
- g. The plaintiff may serve an expert report updating the value of the property no later than 60 days before trial;
- h. The defendant may serve an expert report responding to the updated expert report, if any, no later than 30 days before trial;
- i. The admissibility of any expert reports shall be determined by the trial judge;
- j. Unless the parties consent in writing, or the trial judge orders otherwise, any reports filed later than the above deadlines are not admissible at trial;
- k. Whether evidence is privileged and whether it is admissible shall be determined by the judge hearing the trial;
- l. Subject to relevance and admissibility to be determined by the trial judge, the plaintiff is not precluded from tendering evidence at trial that is contained in his

May 17, 2021, affidavit and is not limited to only calling evidence that is contained in his affidavits filed prior to the hearing before Skarica J.

- m. Subject to relevance and admissibility to be determined by the trial judge, the defendant is not limited to only calling evidence that is contained in her affidavits filed prior to the hearing before Skarica J.
- n. The plaintiff is granted leave to amend paragraph 1 of his Amended Notice of Application in accordance with paragraph 1 of the Amended Notice of Application attached as Exhibit P to the affidavit of Evan Presvelos sworn January 4, 2024.

Costs

[68] If the parties cannot resolve the issue of costs, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages in length, together with excerpts of any legal authorities and a bill of costs. The plaintiff's submissions are to be served by no later than March 3, 2025; the defendant's by no later than March 13, 2025.

[69] All submissions are to be filed with the court and uploaded to Case Centre, with a copy to the trial coordinator by end of day March 13, 2025. If no submissions or written consent to a reasonable extension are received by the court by March 13, 2025, the matter of costs will be deemed to have been settled.

Bordin, J.

Released: February 18, 2025

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REASONS FOR JUDGMENT

Justice Bordin

Released: February 18, 2025