

CITATION: The Guarantee Company of North America v Picard, 2025 ONSC 1126
COURT FILE NO.: CV-18-00607141
MOTION HEARD: 20240207, 20250129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Guarantee Company of North America, Plaintiff

AND:

Mary Tatiana Picard, Maram Building Corporation, Tyler Scorpion Holdings Inc.
and Demcor Construction Services Inc., Defendants

BEFORE: Associate Justice L. La Horey

COUNSEL: Alfred Esterbauer and Sydney Hodge, Agent for Counsel for the Moving Party
Plaintiff

Krista Chaytor and Dylan Dilks, Counsel for the Responding Party Defendants

HEARD: February 7, 2024, January 29, 2025

REASONS FOR DECISION

OVERVIEW

- [1] The plaintiff, The Guarantee Company of North America (“GCNA”), brings this motion for an extension of time to serve the statement of claim in this action or to validate service of the statement of claim as of March 16, 2022. The statement of claim was issued October 17, 2018. Under the *Rules of Civil Procedure*, the statement of claim was required to be served by April 17, 2019. There is no dispute that the plaintiff’s counsel (not Mr. Esterbauer or Ms. Hodge or anyone from their firm) did not make any attempt to serve the statement of claim on any of the defendants before March 2022. The defendants oppose the motion.
- [2] For the reasons that follow, the plaintiff’s motion is dismissed.

BACKGROUND AND CHRONOLOGY

- [3] GCNA, a surety, issued six labour and material payment bonds between 2014 and 2016 to Maram Building Corporation (“Maram”) in relation to six separate construction projects for which Maram acted as the general contractor. In addition, GCNA also issued a construction lien bond in relation to another construction project.
- [4] On September 16, 2014, GCNA and the defendants entered into an Indemnity Agreement (the “Indemnity Agreement”) pursuant to which the defendants agreed to indemnify GCNA

for payments made by it in relation to the bonds. Demcor Construction Services Inc. (“Demcor”) was a subcontractor on the projects. Tyler Scorpion Holdings Inc. (“Tyler”) was a holding company for Maram. Mary Tatiana Picard is the sole director and officer of Maram and Tyler. Ms. Picard was a director of Demcor for a period of time, although the defendants assert that she was not a director when she mistakenly signed the Indemnity Agreement on behalf of Demcor in 2014. Ms. Picard’s husband, Raymond Polidoro, is Demcor’s current director.

- [5] GCNA claims that it made payments under the bonds amounting to \$409,755.20. It claims that it is entitled to indemnification for this amount plus another \$50,000 in expenses from the defendants, jointly and severally. Between the first and second day of argument on this motion GCNA amended its statement of claim to remove its claims for damages for breach of trust and an accounting.
- [6] The six projects in question were substantially performed, or the contracts were terminated, between 2015 and 2016.
- [7] Beginning in 2016, GCNA received about 29 claims under the bonds. From March 2016 through October 2018, GCNA sought the defendants’ positions on the claims, including defences, set-offs, claims or counter-claims. Ms. Picard provided information and documents to GCNA’s representative, Luciana Polsoni. The information provided included binders of hard copy documents as well as electronic documents. The plaintiff alleges that the defendants failed to provide timely information to defend some of the claims. GCNA made payments on the claims in the period October 14, 2016 to February 21, 2018. During this time, GCNA reminded the defendants that it would be looking to them for repayment of any amounts paid out under the Indemnity Agreement.
- [8] On October 1, 2018, Ms. Polsoni instructed GCNA’s counsel, Borden Ladner Gervais LLP (“BLG”), to issue a statement of claim as soon as possible in respect of the claim on the Indemnity Agreement. In her email to Sonny Ingram, an associate at BLG, she said that they could serve the statement of claim after GCNA sent a demand letter to the defendants. Mr. Ingram had carriage of a number of similar files for GCNA.
- [9] On October 2, 2018, Ms. Polsoni sent a demand letter dated October 1, 2018, on behalf of GCNA, to the defendants seeking payment under the Indemnity Agreement of \$409,755.20 by October 5, 2018, failing which GCNA would “move forward with formal legal proceedings” against the indemnitors. She also conveyed this same information to Ms. Picard in a telephone call.
- [10] On October 26, 2018, Ms. Picard received what would be her final correspondence from GCNA for over for three years. Nowhere in this correspondence does Ms. Polsoni mention that GCNA had issued a statement of claim against the defendants.
- [11] As noted, the statement of claim was issued on October 17, 2018. Mr. Ingram sent a copy of the issued claim to Ms. Polsoni the next day. Mr. Ingram did not arrange for service of

the statement of claim. The six-month deadline for service of the statement of claim expired on April 17, 2019.

- [12] On April 22, 2019, Ms. Polsoni sent an email to Mr. Ingram asking for an update on the action. In her email she said that she would “like to look at limitation dates and next steps to the extent of what I will need to prepare and provide to you.” Mr. Ingram did not provide a written response. Both Ms. Polsoni and Mr. Ingram swore affidavits on the motion and were cross-examined. Neither could recall speaking about this file in the period after this email. BLG has produced its redacted dockets for this matter in answer to an undertaking. There is no docket entry by Mr. Ingram for receiving this email and no docket entry for a call around this time.
- [13] Mr. Ingram’s affidavit indicates that he was facing personal challenges following the birth of his first child on August 11, 2019, namely: difficulties that he and his wife had raising their son during the COVID-19 pandemic in the absence of childcare assistance; increased demands from clients with urgent issues due to the pandemic; and difficulty accessing paper records during the pandemic. Mr. Ingram did not disclose these challenges to BLG. He departed BLG in January 2021.
- [14] Upon Mr. Ingram’s departure, the file was transferred to another associate at BLG (“second BLG associate”) in February 2021. The file was then transferred to a third associate at BLG (“third BLG associate”) in October 2021. There is no affidavit from either of them on this motion and no explanation provided by the plaintiff as to why they have not provided affidavits. Richard Yehia, the current BLG lawyer with carriage, did file an affidavit on this motion.
- [15] The statement of claim identifies two BLG lawyers as lawyers of record, Mr. Ingram and a BLG partner, Richard Shaban. Although Mr. Yehia and Mr. Ingram state that Mr. Ingram had sole carriage of the file, they do not explain why Mr. Shaban’s name is shown on the statement of claim.
- [16] On February 10, 2021, Mr. Shaban docketed to the file as follows: “Considering file status and next step; following up with [second BLG associate] and R. Yehia.” Mr. Shaban has not filed an affidavit on the motion and no reason was provided for why he did not do so.
- [17] The docket report shows that on February 11, 2021, a law clerk obtained a print-out of the court action. The second BLG associate entered a docket on February 23, 2021, for correspondence with Mr. Ingram, Mr. Yehia and clerks regarding “AOS”, *i.e.* affidavit of service.
- [18] Mr. Yehia’s evidence is that the second BLG associate contacted him in March 2021 and told him that she could not locate an affidavit of service for the file. Mr. Yehia says that he advised her of the steps that could be taken to verify service, including checking the court records. On April 5, 2021, this associate made a docket entry as follows: “Incorporated R. Yehia’s comments into report, research test for extension of service; sent report to R. Shaban.”

- [19] In his affidavit, Mr. Yehia also deposes that the second BLG associate told him that she spoke to Ms. Polsoni who believed that the claim had been served. The defendants object to this evidence, on the basis that it is hearsay. I agree that it is hearsay. As noted, the plaintiff did not give a reason why the second BLG associate did not provide an affidavit on the motion. Ms. Polsoni does not mention this conversation in her affidavit and on cross-examination, Ms. Polsoni said that she could not recall any communication with anyone about the matter at BLG after her email to Mr. Ingram on April 22, 2019, until March 2022. In these circumstances, Mr. Yehia's evidence on this point is not reliable.
- [20] Mr. Yehia deposes in his affidavit that he assumed carriage of the file on March 3, 2022. However, Mr. Yehia had involvement in the file as early as February 10, 2021, according to BLG's dockets. Mr. Yehia says that he reviewed the file on March 3, 2022, and determined the statement of claim had not been served. His evidence is that he advised his client of this the same day by telephone call to Ms. Polsoni. Ms. Polsoni, in her affidavit, says that it was only in or around April 2022 (not March 2022) that she learned that the statement of claim had not been served. She says that she relied on BLG to advance the action on behalf of the plaintiff.
- [21] Meanwhile, on January 11, 2022, Ms. Polsoni sent an email to Ms. Picard regarding outstanding litigation matters. In that email she says: "In terms of claim matters and litigation matters, the only outstanding matters are" and lists two actions commenced by Maram's subtrades. She notes that one of the actions is due to be dismissed as there had been "five years without activity." She asks for an update on a lien action where GCNA had issued a lien bond which was being handled by Maram. Notably, the indemnity action commenced by GCNA against the defendants is not mentioned. This was the first communication from GCNA to the defendants in over three years, since October 26, 2018.
- [22] BLG attempted service of the statement of claim on the defendants in March 2022. When BLG was unable to serve the statement of claim at the defendants' last known address, Mr. Yehia contacted Ms. Picard by email on March 16, 2022 asking for the defendants' current addresses and attaching a copy of the statement of claim.
- [23] Ms. Chaytor then contacted Mr. Yehia to discuss the matter on March 22, 2022. When it became apparent that the defendants were unlikely to consent to an extension of the time for service, BLG contacted LawPro. LawPro appointed counsel and the notice of motion in this matter was served on July 8, 2022.

LAW AND ANALYSIS

- [24] Rule 14.08 of the *Rules of Civil Procedure* requires that a statement of claim be served within six months of issuance. However, a court may extend the time for service on such terms are just (Rule 3.02). Rule 1.04(1) provides that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[25] The leading case on a motion to extend the time for service of a statement of claim is the decision of the Court of Appeal in *Chiarelli v Wiens*.¹ There the court held that the basic consideration is whether an extension of the time for service will advance the just resolution of the dispute, without prejudice or unfairness to either party.²

[26] In *Chiarelli*, the Court of Appeal said:³

The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided on its facts, focusing ... on whether the defence is prejudiced by the delay.

[27] More recently, in *Tookenay v O'Mahony Estate*,⁴ Justice J. Paul R. Howard listed a number of factors that courts have considered in determining whether an extension of time to serve a statement of claim should be granted, as follows:

- a. the length of the delay,
- b. the evidence filed that explains the delay,
- c. whether the evidence regarding the explained delay is sufficient,
- d. whether or not the plaintiff moved promptly for an extension of time after the period expired,
- e. whether or not the delay in serving the claim resulted from the direction, participation, or involvement of the plaintiff personally in the service of the claim,
- f. the extent to which the defendant, themselves, bears some or all of the responsibility for this delay,
- g. whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned his claim,
- h. whether the applicable limitation period for the action has already expired,
- i. whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against the defendant, and
- j. whether the defendant would suffer prejudice if the motion is granted.

¹ *Chiarelli v Wiens*, 2000 CanLII 3904 (ONCA)

² *Chiarelli* at para 12

³ *Chiarelli* at para 17

⁴ 2024 ONSC 709 at para 32

Explanation for the delay

- [28] On a motion to extend the time for service of the statement of claim, the plaintiff must provide a reasonable explanation for the delay.⁵ The defendants argue that the plaintiff has not done so. As noted above, the plaintiff made no effort to serve the statement of claim until March 2022 when Mr. Yehia sent a copy of it to Ms. Picard by email.
- [29] The defendants divide the time from the issuance of the statement of claim to the first attempt at service into four periods of delay. The first period of delay is from the issuance of the statement of claim in October 2018 to the six-month deadline for service, *i.e.* April 17, 2019. The second period is from April 18, 2019, to August 19, 2019 (the start of Mr. Ingram’s personal difficulties).
- [30] The only explanation for the delay during this period of time given by Mr. Ingram in his affidavit is his statement that he handled a significant volume of these actions for GCNA and his statement that: “Through inadvertence, I mistakenly omitted to serve this Statement of Claim.”
- [31] On cross-examination Mr. Ingram was asked for his explanation for his failure to have the claim served and responded as follows:
- Q15. And I’m assuming you have no explanation for what happened, just you didn’t do it, is that correct?
- A. That’s correct.
- [32] The third period runs from the start of Mr. Ingram’s personal difficulties in August 2019 until he left the firm in January 2021.
- [33] There is no explanation provided by Mr. Shaban for BLG’s failure to attempt service of the statement of claim during the first three periods of delay, notwithstanding that he is listed as a lawyer of record on the statement of claim and was involved in the fourth period, as evidenced by BLG’s dockets.
- [34] The fourth period of delay runs from Mr. Ingram’s departure in January 2021 to March 2022, when the plaintiff first attempted service of the statement of claim. During this period four BLG lawyers docketed to the file. Only one of these lawyers, Mr. Yehia, provided an affidavit on this motion.
- [35] By April 5, 2021, at the very latest (when the second BLG associate docketed for researching the test for an extension of the time for service and reporting to the senior lawyer) the plaintiff’s lawyers either knew the statement of claim had not been served or they ought to have known it. However, BLG did not take any steps to serve the statement

⁵ *Bargain Club Inc. v Co-Operators General Insurance Co.*, 2018 ONSC 3402 at paras 12 – 14. See also *Gupta v Venka*, 2022 ONSC 754 (Div. Ct.) at para 23.

of claim until March 2022, almost one year later. The motion was not brought promptly after BLG discovered or ought to have discovered the error.

[36] Even if the plaintiff has provided a reasonable explanation for the delay to the point where Mr. Ingram left the firm, there is no reasonable explanation for why BLG did not determine whether the statement of claim had been served shortly thereafter and take the necessary steps.

[37] In *Chiarelli*, the court held that on a motion to extend time for service, “the court should be concerned *mainly* with the rights of litigants, not with the conduct of counsel”.⁶ [emphasis added]

[38] In *Marche D’Alimentation Denis Theriault Ltée v. Giant Tiger Stores Ltd.*⁷ (a case involving a motion to set aside a dismissal order) the Court of Appeal held:

[28] One important consideration is that the plaintiff will not be left without a remedy. I recognize here the need to ensure that adequate remedies are afforded where a right has been infringed. The law will not ordinarily allow an *innocent client* to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor: see, e.g., *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780, [2000] O.J. No. 296 (C.A.), at para. 9. [emphasis added]

[39] The defendants submit that the “innocent client” does not exist in this case. Based on the record before me, and for the purposes of this motion only, I agree.

[40] Ms. Polsoni followed up with BLG on one occasion, in April 2019. There is no evidence that she followed up at any time in the years following.

[41] Although Ms. Polsoni said in cross-examination that she was not a sophisticated legal person and that she did not know the time limits of when things had to happen in litigation, it is clear from her correspondence quoted above that she was aware that there were time limits for the steps in an action and “limitation periods”. She knew that an action could be dismissed after five years for delay. The plaintiff in this case is a sophisticated business entity and Ms. Polsoni is someone who directs the conduct of litigation in the course of her duties.

Prejudice

[42] The Court of Appeal in *Chiarelli* provided the following guidance for the exercise of the court’s discretion in connection with the issue of prejudice:⁸

⁶ *Chiarelli*, at para 9

⁷ 2007 ONCA 695

⁸ *Chiarelli* at paras 10, 12, 14 – 16.

- (a) the court should not extend the time for service if to do so would prejudice the defendant;
- (b) the plaintiff bears the onus of demonstrating that the defendant would not be prejudiced by the extension;
- (c) the defendant has an evidentiary obligation to provide some details of prejudice to it which would flow from an extension of time for service;
- (d) the defendant cannot create prejudice by its failure to do something that it reasonably could have or ought to have done; and,
- (e) prejudice that will defeat an extension of time for service must be caused by the delay.

- [43] Although the plaintiff sent a demand letter in October 2018, no copy of the statement of claim was ever provided to the defendants such that they had no notice that a claim had been commenced until March 2022. Ms. Polsoni’s email to the defendants of October 26, 2018, does not mention that the action has been commenced. After that email, neither the plaintiff nor BLG communicated with the defendants for over three years until Ms. Polsoni sent an email to Ms. Picard on January 11, 2022, which refers to two claims against Maram by subtrades as “the only outstanding matters”. In her affidavit, Ms. Picard says that after years of not hearing from the plaintiff, she assumed that GCNA would not be taking any further steps with regard to the Indemnity Agreement. Ms. Picard’s evidence is that there was money owing to Maram by the owners of the projects from which the payments to the subcontractors could have been made. In these circumstances it was reasonable for the defendants to believe that the plaintiff was not going to pursue its claims against them.
- [44] The defendants assert that they are prejudiced as the server that contained many of Maram’s digital records was corrupted and became inoperable in 2021. In particular, Maram lost detailed accounting records. Ms. Picard is unable to locate all of the relevant emails and physical records. Demcor’s physical records relating to the construction projects were destroyed by water damage in January 2021. Had the statement of claim been served in time or even within a year or more after the deadline for service, the defendants would have been on notice to preserve their documents.
- [45] The plaintiff contends that the defendants are not prejudiced in their ability to defend the action because GCNA preserved all of its documents, including the documents provided to it by the defendants which amount to thousands of pages. GCNA and the defendants were aligned in interest in defending the bond claims, and therefore, the plaintiff says that the defendants would have provided any relevant documents to it during the period of time that GCNA was assessing and handling the bond claims.
- [46] The plaintiff submits that this is a case that can be determined entirely on the available record, as it turns on the information that GCNA had available to it at the time that GCNA

paid the claims. The plaintiff also asserts that there are only limited defences as there is a contractual presumption of liability.⁹

- [47] If the matter proceeds, one of the defendants' defences will be that GCNA failed to investigate the claims and properly adjust and mitigate its losses under the bonds and did not act in good faith. The defendants will argue that GCNA acted precipitously in paying out some of the claims and did not provide enough time for the defendants to provide information to GCNA to assist it in defending the claims. Maram will also allege that GCNA ought to have obtained payments from the owners. Demcor will defend on the basis that it is not liable under the Indemnity Agreement as GCNA released Demcor by letter dated May 27, 2016. As I understand it, there is a live issue as to whether Demcor was released from obligations pre-dating that letter.
- [48] At the relevant time, GCNA did not have a written policy related to the retention of emails and electronic documents. GCNA's evidence is that claim file handlers (such as Ms. Polsoni) are instructed to retain all emails and documents in the event of or in anticipation of litigation. It is possible that GCNA's record keepers did not keep all relevant documents through error or because they did not believe that a document was relevant. For instance, it appears that GCNA does not have all of the emails from its underwriting staff relevant to the issue of the release of Demcor.
- [49] While GCNA has the documents that the defendants provided to it in regards to the claims of the subcontractors, Ms. Picard's evidence is that GCNA would not have all of the documents relevant to the defendants' defences. Ms. Picard provided to GCNA only the documents that were requested by Ms. Polsoni. In some case, Ms. Picard provided summaries without the backup documentation.
- [50] I am satisfied that the defendants would be prejudiced in defending the action due to the loss of relevant documentation.
- [51] The defendants also raised the issue of witnesses unavailability, specifically with respect to former employees of the defendants. However, the former employees left the defendants' employ prior to the commencement of the lawsuit, such that any prejudice would not be prejudice arising from the delay in serving the statement of claim. Further, the plaintiff has located the defendants' former employees and GCNA's witnesses remain available. However, the problem that memories fade over time has been compounded by loss of the defendants' documents, such that the former employees of the defendants may not have the necessary documents available to them to refresh their memories.
- [52] The defendants also argue that they are prejudiced because Maram has lost the ability to commence claims in contract against the owners of the projects to recover the amounts owing to Maram under the contracts for the various projects. However, any such claims may have been barred by the two-year limitation period for such claims prior to the

⁹ The plaintiff relies on *Travelers Insurance Company of Canada v LCL Builds Corporation*, 2018 ONSC 1805

deadline for service of the statement of claim given that the projects were substantially performed in or around 2015-2016. I accept that the defendants' ability to pursue claims for contribution and indemnity against the owners is made more difficult by the passage of time and the possibility that the owners no longer have the relevant documents.

- [53] I find that the defendants would be prejudiced as a result of the plaintiff's delay in the service of the statement of claim. The plaintiff's delay has put the defendants' ability to defend the claim at risk.

Conclusion

- [54] Having considered the circumstances of this case, I am not satisfied that the extension of time for service will advance the just resolution of the dispute, without prejudice or unfairness to the parties.

DISPOSITION AND COSTS

- [55] Despite the able arguments of Mr. Esterbauer, the plaintiff's motion is dismissed.
- [56] I encourage the parties to agree on costs. If they cannot, the defendants may submit costs submissions by March 14, 2025. The plaintiff may deliver responding submissions by March 28, 2025. Submissions are limited to three double-spaced pages, exclusive of attachments.
- [57] I wish to commend both counsel teams for the quality of their written and oral advocacy.

L. La Horey, A.J.

Date: February 19, 2025