CITATION: Chang Xin Construction v. 2049390 Ontario Inc., 2025 ONSC 1283
COURT FILE NO.: CV-21-668503
DATE: 20250226

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

B E T W E E N:	)	
	)	
8682470 CANADA INC. o/a CHANG XIN CONSTRUCTION	)	D. Stoddard, *for the plaintiff*
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
2049390 ONTARIO INC. and JRJF GROUP CORP.	)	R. Hosseini and P. Sooresrafil, *for the defendant, 2049390 Ontario Inc.*
	)	
Defendants	)	
	)	
	)	**HEARD:** February 25, 2025

REASONS FOR DECISION
(Ruling on Defendant's Motion to Adjourn Trial)

Robinson A.J.

[1] The defendant, 2049390 Ontario Inc., served a motion record on Friday seeking to adjourn this peremptory trial. I directed that the motion be heard at the commencement of trial. Specifically, the defendant seeks to adjourn only this week of trial, with a view to commencing trial next Tuesday and new dates being fixed for any additional trial days needed after next week. The plaintiff opposed the motion.

[2] After hearing the parties' submissions, I sought to prepare an oral ruling, but ultimately felt that more detailed reasons were needed to explain my disposition given the nature and circumstances of the defendant's request to adjourn, which is based on asserted health concerns of

the defendant's principal. I accordingly advised the parties that I was denying the adjournment request and dismissing the defendant's motion for written reasons to follow. These are my reasons for that disposition.

ANALYSIS

[3] Whether to adjourn a scheduled civil trial is a highly discretionary decision. A trial judge is afforded wide latitude in deciding whether to grant or refuse an adjournment request. In exercising that discretion, the trial judge is required to balance the interests of the plaintiff, the interests of the defendant, and the interests of the administration of justice in the orderly processing of civil trials on their merits: *Graham v. Vandersloot*, 2012 ONCA 60 at para. 5.

[4] Various factors may be considered when assessing an adjournment request, but an important consideration is ensuring that litigants are not deprived of a decision on the merits: *Graham v. Vandersloot, supra* at para. 5.

[5] The defendant argues three main considerations in deciding this adjournment request, relying on the decision in *Cheng v. MacKenney*, 2017 BCSC 2264, at paras. 18-20: a litigant's right to fair trial, whether there has been deliberate delay or misuse of the court, and whether there is any non-compensable prejudice. The defendant argues that denying the adjournment request will significantly impact trial fairness, that there has been no deliberate delay or misuse of the court, and that the plaintiff cannot point to any non-compensable prejudice.

[6] Although a British Columbia case, the court in *Cheng v. MacKenney* outlines several relevant factors that are properly considered when faced with a request to adjourn trial. As set out in para. 8 of that decision, those considerations include: (a) the expeditious and speedy resolution of matters on their merits (or, to use Ontario language from subrule 1.04(1) of the *Rules of Civil Procedure* RRO 1990, Reg 194, the just, most expeditious, and least expensive determination of a proceeding on its merits); (b) the reasonableness of the request; (c) the grounds or explanation for the adjournment; (d) the timeliness of the request; (e) the potential prejudice to each party; (f) the right to a fair trial; (g) the proper administration of justice; (h) the history of the matter, including deliberate delay or misuse of the court process; and (i) the fact of a self-represented litigant.

[7] Since this is a lien action under the *Construction Act*, RSO 1990, c C.30, the summary character of lien actions as set out in s. 50(3) is also a relevant consideration.

[8] This is the second adjournment request made by the defendant. These trial dates were fixed nearly a year ago at a hearing before me on April 8, 2024. They were fixed on a peremptory basis against both parties. The defendant's current lawyers were retained in August 2024. Subsequently, in October 2024, the defendant arranged a case conference to seek an adjournment of the trial, primarily citing concerns of the challenges for new counsel to get up to speed and be ready for trial. I denied that adjournment request for reasons given at the time. Defendant's counsel appears to have worked diligently since that time on trial preparations.

[9] The current adjournment request is based on the asserted medical situation of the defendant's principal, James Kan, who is the sole director, officer, and shareholder of the

defendant. Mr. Kan's affidavit in support of the motion outlines that he is suffering from "unforeseen medical circumstances that have significantly impacted [his] ability to participate effectively in these proceedings." He describes that he is "experiencing serious medical and health issues that have significantly affected my well-being."

[10] There is also evidence from a law clerk with the defendant's lawyers, who outlines their ongoing inability to obtain timely instructions from Mr. Kan since January 2025, and the multiple attempts to communicate with him. The law clerk's affidavit sets out that, on February 18, 2025, Mr. Kan spoke with one of the lawyers and advised that "he was not mentally or physically capable of moving forward with the trial or providing instructions." He is said to have reported "experiencing extreme fatigue, dizziness, and loss of focus."

[11] Various medical notes and records have been disclosed in support of Mr. Kan's current medical condition, including a letter from his family physician, Dr. Raymond Tsang, as well a clinical notes and records from Dr. Tsang, from a psychiatrist who assessed Mr. Kan on January 28, 2025, and from ER visits. The defendant points specifically to Dr. Tsang's letter dated February 19, 2025, which states, in part, as follows:

> Mr Kan is unable to attend his upcoming civil litigation court case due to the following symptoms:
>
> - severe fatigue
> - loss of focus, difficulty reading and comprehending new material
> - poor short term memory

[12] There is no indication as to how long Dr. Tsang has been Mr. Kan's family physician. Dr. Tsang sets out that he believes the symptoms are a result of "excessive stress that he has endured as a result of this court case" and possibly from a drug side effect. There is no mention in the letter of any medical assessment having been performed.

[13] I am not satisfied that the asserted grounds for adjournment and explanation for requiring it are sufficiently supported by the record before me. In my view, the defendant has not been transparent as to the circumstances under which Mr. Kan went to his doctor last week, what specifically he told his doctor, and what specifically he requested. Since two of the factors that I must consider are the reasonableness of the adjournment request and the grounds or explanation for it, that lack of transparency is significant.

[14] Ultimately, in my view, the disclosed clinical notes and records do not support Mr. Kan's symptoms as being chronic nor do they support that his current medical condition has been assessed by any medical professional as reasonably or likely interfering with Mr. Kan's ability to meaningfully participate in this litigation.

[15] Importantly, the material before me supports that, although some assessments were done in January 2025, Mr. Kan requested and obtained a doctor's letter from Dr. Tsang, but without Dr. Tsang or any other medical professional conducting an independent assessment into Mr. Kan's asserted current medical condition. There is nothing in Dr. Tsang's clinical notes from his consultations with Mr. Kan suggesting otherwise.

[16] Dr. Tsang's clinical notes reflect that, on February 19, 2025, he had phone call with Mr. Kan. There is a list of the same symptoms outlined in Dr. Tsang's letter, plus two additional symptoms. The notes go one to make the following statement:

> pt did want to try to go to civil court but cannot due to above symptoms
> (construction trial)
> needs lawyer's letter for it

[17] The notes indicate a referral to a doctor on March 24, 2025 (which is noted in Dr. Tsang's letter). There is also a note about directing Mr. Kan to stop taking a drug called Cipralex (prescribed by Dr. Tsang on January 21, 2025 per his clinical notes) and to start taking another drug called Duloxetine, which Mr. Kan is to take for 1-2 weeks before being reassessed. A further note then states, "Letter for lawyers emailed to pt".

[18] In late January 2025, Mr. Kan attended an appointment with a psychiatrist, Dr. Elias Khorasani-Zadeh. A letter from Dr. Khorasani-Zadeh dated January 28, 2025, which was generated after that appointment, has been produced. It indicates that the appointment was virtual and that Mr. Kan reported that he "faced significant psychosocial stressors that have caused considerable debilitation", that he "finds attending family court for custody of his children extremely stressful", and that "ongoing issues with a previous property he owned, which is currently under construction, has significantly distressed him." The last point appears to relate to the various litigation, including this lien action, arising from the construction project that is the subject of this trial.

[19] In the letter relied upon by the defendant as supporting the adjournment, Dr. Tsang notes that Mr. Kan's symptoms are "possibly from the Rx medication". Dr. Khorasani-Zadeh directed Mr. Kan to discontinue his Cirpralex prescription and initiate Duloxetine. Although defendant's counsel submits that the cause of Mr. Kan's symptoms remain under investigation, Mr. Kan has not explained why he did not immediately follow that medical advice. There are emails indicating that Dr. Tsang ultimately dealt with it once made aware on February 18, 2025 that Mr. Kan was still taking Cipralex.

[20] Importantly, Dr. Khorasani-Zadeh describes Mr. Kan as having speech with "normal rate, rhythm, tone and volume", that his thought processes were "coherent", that his cognition seems "grossly intact", and that his insight and judgment were "good". The psychiatrist did note Mr. Kan's mood as being "stressed and anxious", but nothing in the report supports that Mr. Kan's daily functioning was being significantly impacted or that he could not meaningfully participate in litigation or at this trial. Rather, the psychiatrist recommended "ongoing psychotherapy to address coping strategies to deal with psychosocial stressors, anxiety, and depressed mood", with a change in mood medication. There is no recommendation to avoid litigation pending a change in symptoms. There is similarly no evidence that Mr. Kan has taken that advice and arranged psychotherapy to assist him.

[21] Reports from Mr. Kan's visits to the ER similarly do not support the defendant's position. Clinical notes and reports before me comment on Mr. Kan's condition after being assessed as "unremarkable" and that reported symptoms had resolved prior to discharge.

[22] There is also nothing before me supporting that Dr. Tsang has conducted any current medical assessment of Mr. Kan or his symptoms. No such assessment is indicated in Dr. Tsang's letter or clinical notes. I note that a prior letter obtained from Dr. Tsang dated January 21, 2025, prepared in support of Mr. Kan not attending a hearing in his family proceedings, specifically identified that a medical assessment had been performed. Conversely, after Dr. Tsang was contacted by Mr. Kan last week, a virtual consult was set up. Mr. Kan reported his symptoms. Dr. Tsang's clinical notes report only what Mr. Kan told him. No further assessment appears to have occurred. The letter put before me on this motion then followed.

[23] Put simply, Dr. Tsang appears to have taken Mr. Kan's word that he is currently suffering from the stated symptoms and that they are impacting his ability to participate in this trial, without conducting any independent verification.

[24] I have also considered the emails sent by Mr. Kan to Dr. Tsang prior to the virtual consult on February 19, 2025, which preceded Dr. Tsang's letter. They are heavily redacted, including information on what was requested with respect to the letter itself. That includes the content of an email from the defendant's lawyer about the requested letter that was clearly forwarded to Dr. Tsang by Mr. Kan, but has not been included in the materials.

[25] Also, as the plaintiff points out, Dr. Tsang's letter does not say that Mr. Kan is unable to meaningfully participate at trial. It says he is "unable to attend". Mr. Hosseini has made submissions on how I should interpret that to mean that Mr. Kan is "unable to participate", but "attend" and "participate" have different grammatical meanings. Absent evidence of Dr. Tsang having conducted a medical assessment, and given the lack of transparency around the communications with him, I am not prepared to draw that inference.

[26] Having reviewed Dr. Tsang's notes, the letter from the the psychiatrist, the clinical notes and records from Mr. Kan's ER visits, and the various emails, no medical professional has assessed that Mr. Kan is unable to meaningfully participate in these proceedings or instruct counsel, particularly with accommodation by attending via videoconference. Mr. Kan has made that determination himself.

[27] I do not dispute the law clerk's evidence that defendant's counsel has had difficulty obtaining instructions. However, their understanding of why Mr. Kan has failed to provide instructions is based entirely on what he has told them. Put simply, the law clerk's affidavit outlines the fact of what Mr. Kan has said. It is not evidence of the truth of those statements. The law clerk's affidavit is accordingly only evidence of a lack of timely instructions, not the reasons for it.

[28] In my view, the defendant had not made out the grounds or explanation for its adjournment request. I was not convinced from the material before me that Mr. Kan is unable to participate at trial. His attendance this week is possible by Zoom videoconference, which has been set up for the duration of trial. He will not be testifying this week.

[29] Although the foregoing was sufficient to deny the adjournment request and dismiss the motion, I still considered the other factors.

[30] Notably, I am concerned with the late disclosure of an asserted medical condition that has been ongoing for at least the past month. Importantly, this is not the first time that Mr. Kan has asked for a doctor's note to defer a legal proceeding. As mentioned above, Mr. Kan previously obtained a letter from Dr. Tsang dated January 21, 2025, stating that Dr. Tsang had conducted a medical assessment and deemed that Mr. Kan was "unable to attend his upcoming court case due to medical reasons." That letter concerns the family litigation in which Mr. Kan is involved. Per an email in the record, a copy of that letter was provided to defendant's counsel in this lien action on January 24, 2025.

[31] A medical assessment finding that Mr. Kan was unable to participate in his family proceedings, which do not appear to have been a trial, ought to have been promptly disclosed. It was not. Notably, over the last month, there have been two hearings before me with no suggestion that Mr. Kan was suffering any ongoing medical issues that could potentially impact the trial. These were peremptory trial dates, as expressly confirmed in my reasons for denying the defendant's prior adjournment request. The failure to disclose the medical concern more promptly, even if an adjournment was not being sought at that time, is heightened by the peremptory nature of the trial dates.

[32] This is also a lien action. As already noted, lien actions are statutorily prescribed to be as far as possible of a summary character: *Construction Act,* s. 50(3). These trial dates have been fixed on a peremptory basis since April 2024. The peremptory nature of the trial dates is itself a factor, particularly given my concern that the adjournment request has been made on the eve of trial despite the underlying asserted symptoms having been present for at least a month.

[33] I also agree with the plaintiff that the issue of trial fairness in this case is distinguishable from the two cases cited by the defendant.

[34] *Graham v. Vandersloot* dealt with an adjournment request for the plaintiff to complete up-to-date medical reports for trial to prove her claim for damages in circumstances where liability had been admitted. Admitted liability was a significant factor cited by the Court of Appeal in overturning the decision to deny adjournment of trial, since it undermined the motion judge's principal concern regarding prejudice. That is not the case here.

[35] *Cheng v. MacKenney* dealt with an adjournment request arising from the plaintiff's lawyer being scheduled for surgery less than a month before trial, with a four-week post-operative recuperation period. Another lawyer was argued to be available, but that lawyer felt he could not adequately represent the plaintiff and the plaintiff wanted her existing lawyer at trial. The court found that the surgery was necessary, could not be delayed, and that litigants should, within reason, be entitled to their choice of counsel. On my reading of the decision, a primary concern for the court was the plaintiff being effectively forced to self-represent at trial. That, too, is not the case here.

[36] Liability and damages are heavily disputed in this case. The defendant's counterclaim is significantly greater than the plaintiff's lien and contract claims. I ordered a hybrid trial, with all but two witnesses testifying in chief by affidavit. Most of those affidavits were exchanged prior to the asserted worsening of Mr. Kan's symptoms. Mr. Kan himself swore a trial affidavit on

January 17, 2025, despite the clinical notes and records indicating that similar symptoms were reportedly ongoing at that time. Regardless, except for the two *viva voce* witnesses, all of the parties' evidence in chief, including Mr. Kan's own evidence, has already been tendered. I am not convinced by the defendant's arguments that it will be deprived of a decision on the merits if the adjournment is not granted. The fairness concerns at play in both *Graham v. Vandersloot* and *Cheng v. MacKenney* are quite different from this case.

[37] It is also a factor that the proposed adjournment would bifurcate the trial, seemingly with the plaintiff's case completed next week and, given my own current trial availability, with the defendant's case not completed until the fall. That raises procedural fairness and administration of justice concerns. Also, if the entire trial is adjourned, I cannot currently provide fixed, consecutive trial dates of the same duration until at least October 2025. Availability of counsel was not canvassed when the motion was argued, since it was to be addressed if an adjournment was granted. However, at the time of the last adjournment request in October 2024, my fall trial dates conflicted with Mr. Stoddard's schedule. As a result, trial could well be adjourned for another year. This is a 2021 action. Discussions between various witnesses and verbal approval for work performed by the plaintiff is squarely at issue. I am concerned with the impact on witness memories of a further, lengthy adjournment.

DISPOSITION

[38] For the foregoing reasons, I found it was neither necessary nor in the interests of justice to adjourn the trial. I accordingly denied the adjournment request and dismissed the defendant's motion.

ASSOCIATE JUSTICE TODD ROBINSON

Released: February 26, 2025