CITATION: Dale et al. v. The Toronto Real Estate Board et al., 2023 ONSC 3738
COURT FILE NO.: CV-09-374829
DATE: 20230621

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LAWRENCE MARK DALE, STEPHEN MORANIS as ASSIGNOR and REALTYSELLERS (ONTARIO) LIMITED, as ASSIGNOR, Plaintiffs

AND:

THE TORONTO REAL ESTATE BOARD, ANN BOSLEY, JANE DOYLE, MARILYN BAUBLE, CYNTHIA LAI, DAVID PEARCE, RON ABRAHAM, DONALD BENTLEY, ANN BRISCOE, MICHAEL DOSMAN, JOHN DIMICHELE, SHARON FUDA, DANIEL GARGARELLA, WILLIAM JOHNSTON, JOSE RHODES, MICHAEL MANLEY, DOROTHY MASON, PAUL ETHERINGTON, DINA MAGLIETTA, KEN MCCLENAGHAN, JOHN MEEHAN, MAUREEN O'NEILL, JEO DE LEO, PAMELA PRESCOTT, BHUPINDER RANDHAWA, DON RICHARDSON, TREB-REN VENTURE INC., THE CANADIAN REAL ESTATE ASSOCIATION, RICHARD WOOD, SAMIR BACHIR, DAVID GAGNON, GERRY THIESSEN, TIM WALSH, JOHN FROESE, JOHN FRASER, BRAD GILBERT, JEAN-GUY SAVOIE, NOREEN BARWISE, DOROTHY WOODD, HARRY DELEEUW, CALVIN LINDBERG, DANIEL BENNETT, ALAN TENNANT, PETER BRADY, PHILIP NESRALLAH, BRAD SCOTT, PIERRE BEAUCHAMP, RON MERKLEY and TOM BOSLEY, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Katherine Kay and Mark Walli*, for Lawyers for, The Canadian Real Estate Association, Ann Bosley, Richard Wood, Samir Bachir, David Gagnon, Gerry Thiessen, Tim Walsh, John Froese, John Fraser, Brad Gilbert, Jean-Guy Savoie, Noreen Barwise, Dorothy Woodd, Harry Deleeuw, Calvin Lindberg, Daniel Bennett, Alan Tennant, Peter Brady, Philip Nesrallah, Brad Scott, Pierre Beauchamp, Ron Merkley and Tom Bosley

John Campion and Kevin Mooibroek for The Toronto Real Estate Board, Jane Doyle, Marilyn Baubie, Cynthia Lai, David Pearce, Ron Abraham, Donald Bentley, Ann Briscoe, Michael Dosman, John DiMichele, Sharon Fuda, Daniel Gargarella, William Johnston, Jose Rhodes, Michael Manley, Dorothy Mason, Paul Etherington, Dina Maglietta, John Meehan, Maureen O'Neill, Jeo De Leo, Pamela Prescott, Bhupinder Randhawa, Don Richardson and TREB-REN Venture Inc.

Stephen Moranis, in person

No one appearing for Lawrence Mark Dale or Realtysellers (Ontario) Limited

HEARD: March 24, 2023

ENDORSEMENT

Introduction

[1] This action was commenced by a statement of claim issued on March 19, 2009. It has a long procedural history.

[2] When the action was commenced, the named plaintiffs were Lawrence Mark Dale, Stephen Moranis, and Realtysellers (Ontario) Limited, as Assignor.

[3] One set of defendants comprises The Canadian Real Estate Association ("CREA") and twenty-two former CREA officers or directors (together, the "CREA Defendants").

[4] Another set of defendants comprises The Toronto Real Estate Board (now the Toronto Regional Real Estate Board) ("TRREB"), TREB-REN Venture Inc., and twenty-two former directors and one current director of TRREB (collectively, the "TRREB Defendants").

[5] In the action, the plaintiffs claim damages in the amount of $540,000,000 for various causes of action including (i) breaching the terms of settlement agreements in previous litigation, (ii) breach of a duty of good faith and a breach of a collateral warranty in relation to the settlement agreements, (iii) breaches of the *Competition Act*, (iv) the tort of civil conspiracy, (v) inducing breach of contract and tortious interference with contractual relations, together with declaratory relief. The Plainitffs also claim punitive damages in the amount of $10,000,000.

[6] The CREA Defendants and the TRREB Defendants move for an order dismissing this action for delay. In the alternative, these parties seek an order requiring the plaintiffs to post security for costs.

[7] For the following reasons, the action is dismissed for delay.

Background Facts

[8] This action was commenced in 2009. The plaintiffs when the action commenced were Mr. Dale, Mr. Moranis and, as assignor, a company which Mr. Dale and Mr. Moran are said to have incorporated, Realtysellers (Ontario) Ltd. ("Realtysellers"). Realtysellers has been inactive since November 2012 for failure to comply with the *Corporations Tax Act*.

[9] CREA is an incorporated national trade association representing real estate broker/agents and salespeople working through more than 70 real estate boards and associations across

Canada. One of CREA's member boards, the Toronto Regional Real Estate Board ("TRREB") (formerly known as the Toronto Real Estate Board), is also defendant in this action, as are numerous individuals associated with TRREB.

[10] In 2002, Realtysellers sued all of the TRREB Defendants and the CREA Defendants (except one). The 2002 action was resolved by Minutes of Settlement in December 2003 (the "Settlement Agreement").

[11] In this action, the plaintiffs allege that certain interpretations of CREA's rules governing the use of its MLS® trademarks were the result of a broad conspiracy among the defendants to harm the plaintiffs. The plaintiffs also allege that ratification of the interpretations was a flagrant breach of the Settlement Agreement.

Procedural history of the action

[12] As noted, the action was commenced in March 2009 by issuance of a statement of claim.

[13] After the statement of claim was served, the CREA Defendants notified the plaintiffs that they would be moving to strike out the statement of claim for failure to disclose a reasonable cause of action against them. The TRREB Defendants brought their own motion to strike out the statement of claim. Both motions were heard together in November 2011. The defendants' motions were dismissed in January 2012 and leave to appeal was denied by the Divisional Court in March 2012.

[14] The plaintiffs delivered a Fresh as Amended Statement of Claim dated February 1, 2011.

<u>Administrative dismissal of the action in 2012 and consent Order setting aside administrative dismissal</u>

[15] In August 2012, the action was administratively dismissed by the Registrar. The plaintiffs brought a motion to set aside the dismissal order in September 2012 which was resolved by way of a consent order dated October 26, 2012. The consent order provided, among other things, that the dismissal order would be set aside, that the defendants who had filed statements of defence in May 2012 were granted leave to file a Fresh as Amended Statement Defence, and that the parties would endeavour to agree on a timetable for the litigation within 21 days of the consent order.

<u>Timetable set for the action</u>

[16] The CREA Defendants served their Fresh as Amended Statement of Defence in October 2012 and, shortly thereafter, the parties agreed on a timetable for the action, which was approved by Order of Master McAfee in December 2012. This order provided that the action would be dismissed for delay if it had not been set down for trial or otherwise terminated by December 31, 2014.

[17] In January 2013, the parties convened a meeting to confer about a discovery agreement. The defendants sent a draft discovery agreement to counsel who had been retained as agent

for the plaintiffs at the time before the meeting. No discovery plan was agreed upon at the January 17, 2013 meeting, or at any other time.

[18] December 2013, Mr. Moranis served a Notice of Change of Lawyers appointing a new lawyer of record to replace Mr. Dale (who had to that point been representing Mr. Moranis and Realtysellers).

Mr. Dale sets the action down for trial

[19] In December 2014, Mr. Dale set the action down for trial on behalf of himself and Realtysellers.

Legal counsel retained to represent Mr. Dale and Realtysellers

[20] In November 2015, counsel for the CREA Defendants received a letter advising that counsel had been retained by Mr. Dale and Realtysellers to represent them.

The Defendants' summary judgment motions

[21] December 18, 2015 and February 29, 2016, respectively, the TRREB Defendants and the CREA Defendants each served a motion for summary judgment dismissing the action on the grounds that the plaintiffs' claims raised no genuine issue requiring a trial. Counsel for Mr. Dale and Realtysellers advised that they intended to bring a cross-motion for summary judgment. They later did so.

Mr. Moranis assigns his interest in the claims made in the action to Mr. Dale; an Order to Continue is issued

[22] In this time frame, counsel for Mr. Dale also advised that Mr. Moranis had assigned his interest in the claim to Mr. Dale.

[23] An Order to Continue dated May 27, 2016 was issued by the Court on the basis of an affidavit filed by Mr. Dale stating that "on February 25, 2015 Stephen Moranis assigned his interest in this proceeding to Lawrence Mark Dale".

Scheduling of summary judgment motions

[24] The parties arrange to attend Civil Practice Court on December 23, 2016 to schedule the summary judgment motions. Shortly before this hearing date, Mr. Dale and Realtysellers delivered motion materials including a 104 page affidavit sworn by Mr. Dale appending 103 exhibits. The CPC date was rescheduled to January 27, 2017 to allow the defendants to review and consider the plaintiffs' motion materials and for the plaintiffs to deliver an expert report. Mr. Dale and Realtysellers delivered a supplemental motion record with an expert report shortly before the new CPC date.

[25] The defendants sought and obtained the agreement of counsel for the plaintiffs to have the action case managed. The parties attended Civil Practice Court on January 27, 2017 and

the presiding judge issued an endorsement appointing me as the case management judge for the action. A timetable for the summary judgment motions was agreed upon and they were scheduled for hearing in late April 2018. By the end of December 2017, all affidavit materials for the summary judgment motions had been served.

Document production dispute and production motion

[26] In January 2018, the plaintiff served notices of examination requiring persons who had sworn affidavits on behalf of the CREA Defendants and the TRREB Defendants to be cross-examined. The notices contained expansive requests for production of documents to which the defendants objected. On March 28, 2018, the plaintiffs served a motion under Rule 34 point seeking production of the documents demanded in the notices prior to the cross examinations. The production motion was heard in April 2018 and reasons for decision were released on June 1, 2018. I ordered the defendants to deliver an affidavit of documents. On June 15, 2018, the defendants brought motions for leave to appeal this order. On November 30, 2018, the Divisional Court dismissed the defendants' motion for leave to appeal.

[27] In March 2019, the CREA Defendants and the TRREB Defendants served their respective affidavits of documents.

Defendants' attempt to proceed with summary judgment motion; Mr. Dale serves Notice of Intention to Act in Person

[28] In January 2020, the defendants took steps to proceed with the summary judgment motions. On January 3, 2020 the TRREB Defendants served Mr. Dale with a notice of examination for cross-examination on his affidavit.

[29] Shortly thereafter, counsel for Mr. Dale served the defendants with Mr. Dale's Notice of Intention to Act in Person and advised that going forward the defendants were to communicate with Mr. Dale directly.

[30] On March 11, 2020, the TRREB Defendants wrote to Mr. Dale and Mr. Moranis confirming that examinations out-of-court were being arranged for Mr. Dale and Mr. Moranis to be conducted on April 6-8, 2020.

[31] On March 19, 2020, Mr. Moranis advised that he was in the process of consulting with counsel regarding, among other things, the propriety of the summons and that, due to the COVID-19 pandemic, the examinations should be rescheduled to a later date. Due to the ongoing COVID-19 pandemic, on May 4, 2020, Messrs. Moranis and Dale were advised that their May examinations were being rescheduled to July 9, 2020 and that if these examinations could not be held in person at that time, they would need to proceed by videoconference.

[32] On July 6, 2020, the TRREB Defendants wrote to Messrs. Dale and Moranis indicating that under the relevant public health guidance their examinations would be able to proceed in person. Mrs. Dale and Moranis responded that they would not attend their examinations

either in person or by videoconference. Mrs. Dale and Moranis failed to attend the scheduled examinations and the TRREB Defendants obtained certificates of non-attendance.

Attempts to schedule a case conference

[33] In the fall of 2020, the defendants attempted to schedule a chambers appointment to establish a timetable for the examinations of Messrs. Dale and Moranis and the summary judgment motions. A case conference was tentatively scheduled for November 27, 2020. Mr. Moranis advised the court by email that he was unavailable on that date. Mr. Moranis objected to the imposition of a timetable until he had the opportunity to retain appropriate counsel and bring an application to reinstate himself as a plaintiff in the action. The chambers appointment did not proceed.

Motions to dismiss action for delay

[34] In June 2022, the defendants served motions to dismiss this action for delay. At a scheduling case conference held on August 19, 2022, I directed the plaintiffs to deliver responding materials, if any, on or before November 14, 2022. A scheduling conference was arranged to be held on December 7, 2022 to approve the timetable for remaining steps in relation to the dismissal motions.

[35] At the August 19, 2022 case conference, Mr. Dale advised that he would retain legal counsel to represent him by September 20, 2022.

[36] Mr. Dale did not deliver materials in response to the motions to dismiss for delay. Mr. Dale did not attend the December 7, 2022 case conference.

[37] Two days before the December 7, 2022 case conference, Mr. Moranis sought to adjourn the case conference so that he could retain legal counsel to contest the assignment of his interest in the litigation to Mr. Dale. Mr. Moranis referred to alleged breaches of the assignment agreement by Mr. Dale that were the subject of court orders made by Justice O'Brien in February and March 2020. Mr. Moranis had previously raised this issue with the Court in November 2020. At the December 7, 2022 case conference, I declined Mr. Moranis' request for an adjournment of the scheduling hearing. The motions to dismiss for delay were scheduled to be heard on March 24, 2023.

[38] Mr. Dale has an outstanding $75,000 costs order, jointly and severally with two other defendants, owing to TRREB. This costs order was made in another proceeding.

Analysis

[39] From the outset, Realtysellers was named as a plaintiff in the capacity as assignor, and had no beneficial interest in the claims made in the action. Mr. Moranis assigned his interest in the action to Mr. Dale in February 2015 and, from this time forward, Mr. Moranis did not have a beneficial interest in the claims made in the action. He is named in the title of proceedings (amended by the Order to Continue) as an assignor. Although since at least

November 2020, Mr. Moranis has indicated an intention to set aside the assignment and seek to reinstate his status as a plaintiff with a beneficial interest in the action, he has not brought a motion for this relief. Mr. Dale is the plaintiff who has a beneficial interest in these claims.

[40] Mr. Moranis appeared at the hearing of these motions to oppose them. He submits that the claims in the action are serious and raise issues of public importance that deserve to be adjudicated on the merits. Mr. Moranis says that similar claims have been made in other litigation in the Federal Court of Canada and that the outcome in that litigation will affect the claims made in this action. Mr. Moranis submits that if the action were to be dismissed, he should not be liable for costs.

[41] Because Mr. Moranis assigned his interest in the claims made in this action for Mr. Dale, I do not consider Mr. Moranis to be a party with status to oppose the motions. In any event, Mr. Moranis did not file affidavit evidence in response to this motion and he did not explain the reasons for the delay of this action caused by inactivity during the time that Mr. Dale has been the only plaintiff with a beneficial interest in the claims. I will take Mr. Moranis' status into account, if necessary, with respect to costs.

[42] Mr. Dale, having started the action, and being the plaintiff with a beneficial interest in the claims advanced in the action, bears primary responsibility for moving the action along. On these motions, for this reason, the inquiry is focused on Mr. Dale's conduct. The defendants cannot, however, wait in the weeds hoping to gain a tactical advantage by obstructing the progress of the action. See *366012 Ontario Inc. v. Boudreau et al.*, 2022 ONSC 2527, at para. 17. There is no evidence that the defendants have done so.

[43] The test for dismissal for delay is well established. A court should dismiss an action for delay where: (i) the delay is caused by the intentional conduct of the plaintiff or its counsel that demonstrates a disdain or disrespect for the court process; or (ii) the delay is inordinate, inexcusable and such that it gives rise to a substantial risk that a fair trial of the issues in litigation will not be possible because of the delay. The test is disjunctive, such that satisfying either branch warrants dismissal for delay: *Cardillo v. Willowdale Contracting et al*., 2020 ONSC 2193, at para. 32-33.

[44] The first ground upon which the defendants rely for these motions is rule 24.01 of the *Rules of Civil Procedure*.

[45] Rule 24.01(1) provides, in part, that a defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed to set the action down for trial within six months after the close of pleadings.

[46] Mr. Dale set the action down for trial, although this was not done within six months of the close of pleadings. I do not regard this failure as justifying a dismissal order under rule 24.01(1). The moving parties have not pointed to any other ground set out in rule 24.01(1) as justifying an order dismissing the action for delay.

[47] In addition to rule 24.01, the court has inherent jurisdiction to prevent an abuse of its own process which includes the discretionary power to dismiss an action for delay: *Wallace v. Crate's Marine Sales Ltd*., 2014 ONCA 671, at para. 22; *North Toronto Chinese Alliance Church v. Gartner Lee Ltd.*, 2012 ONCA 251.

[48] I first address the second branch of the test for dismissal of an action for delay.

[49] In *Langenecker v. Sauvé*, 2011 ONCA 803, at para. 3, Doherty J.A. noted that an order dismissing an action for delay is obviously a severe remedy where a plaintiff is denied an adjudication on the merits of his or her claim. Justice Doherty went on to observe that equally obviously an order dismissing an action for delay is sometimes the only order that can adequately protect the integrity of the civil justice process and prevent an adjudication on the merits that is unfair to a defendant.

[50] In *Langenecker*, Doherty J.A. explained how the court should address a motion for dismissal for delay on the ground that the delay has been inordinate, inexcusable, and such that it gives rise to a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay.

[51] The inordinance of the delay is measured by reference to the length of time from the commencement of the action to the motion to dismiss: *Langenecker*, at para.8. In that case, Doherty J.A. expressed that there is no doubt that 15 years from the commencement of the action to the motion to dismiss constitutes inordinate delay. Although there were periods during the course of this action where time passed because of contested interlocutory motions and appeals and were not caused by inactivity by Mr. Dale, I am satisfied that in the absence of an explanation, the length of time from the commencement of Mr. Dale's action in March 2009 to the motions to dismiss for delay in June 2022, a period of thirteen years, constitutes inordinate delay that requires an explanation.

[52] The requirement of inexcusable delay requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay. In assessing the explanations offered, the court will consider not only the credibility of those explanations and explanations for individual parts of the delay, but also the overall delay and the effect of the explanations considered as a whole: *Langenecker*, at para. 10.

[53] Mr. Dale was given a full opportunity to respond to the motions and explain his conduct in relation to the lengthy delay of the action. At a scheduling conference held on August 19, 2022 in which Mr. Dale participated, he was directed to deliver responding materials, if any, on or before November 14, 2022. At this scheduling conference, Mr. Dale advised that he would retain legal counsel to represent him by September 20, 2022. He did not do so. No responding motion materials were served by the deadline, or ever. Mr. Dale did not join the scheduling case conference on December 7, 2022 when the hearing date for these motions was set.

[54] Mr. Dale did not appear at the hearing of this motion. On March 24, 2023, the day of the hearing of these motions, through an email sent at 9:46 a.m. (to my judicial assistant and

to counsel for the defendants), Mr. Dale requested an adjournment of the motions. At the hearing of this motion, Mr. Moranis referred to this email requested an adjournment on behalf of Mr. Dale.

[55] Mr. Dale's email states, incorrectly, that the December case conference was held without his knowledge or any effort to include him. Mr. Dale was informed of the scheduling of the December 7, 2023 case conference during the August 19, 2022 case conference. He was sent the endorsement confirming this date.

[56] In his email, Mr. Dale refers to events involving his elderly mother who is wheel chair bound with whom Mr. Dale lives and for whom Mr. Dale is the sole caregiver. Mr. Dale relied on these responsibilities to support his request for a delay of the hearing of these motions to another date. Mr. Dale offered to share details of the reasons for his request for an adjournment at another hearing to re-schedule the motions.

[57] After receiving Mr. Dale's email and after the commencement of the hearing on March 24, 2023, I stood down the hearing of the motions for 30 minutes during which counsel for the CREA defendants contacted Mr. Dale by email to notify him that his request by email for an adjournment had not been granted. The email sent to Mr. Dale included the link for the virtual hearing so that he could join it if he wished. Mr. Dale did not join the hearing.

[58] Mr. Dale had known since at least December 15, 2022 that a hearing date of March 24, 2023 had been scheduled for these motions. On December 15, 2022, in response to an email from Mr. Dale, my judicial assistant sent him copies of my endorsements from the August 19, 2022 case conference held virtually (which Mr. Dale joined) and the December 7, 2022 case conference held virtually (which Mr. Dale did not join).

[59] In the circumstances, in the absence of any evidence from Mr. Dale to explain why he did not file responding material by the deadline, or even after the deadline, or why he could not attend the hearing of these motions (which was conducted virtually), I denied Mr. Dale's request for an adjournment.

[60] The evidentiary record of the steps taken by Mr. Dale to prosecute this action since it was commenced in 2009 shows that he has done very little to do so and, when steps were taken, they were almost invariably in response to actions taken by the defendants. Not all of the delay that has ensued by the passage of time is Mr. Dale's fault. Some significant periods of time passed as a result of motions unsuccessfully brought or opposed by the defendants (and motions for leave to appeal). However, Mr. Dale has had many opportunities over the years to move this action to an adjudicative hearing and he has failed to do so. I am satisfied that many years of delay have been caused during this litigation by inactivity by Mr. Dale.

[61] These circumstances called for Mr. Dale to come forward with explanations for the delays that occurred due to his inactivity at various stages throughout the litigation and for the overall delay. Mr. Dale chose not to respond to this motion with affidavit evidence or even to appear at the hearing to explain the reasons for the inordinate delay of the action. Mr.

Dale has not shown that the periods of delay for which he is responsible, which have substantially contributed to the overall inordinate delay of this action, are excusable.

[62] The third requirement is directed at the prejudice caused by the delay to the defendants' ability to put their case forward for adjudication on the merits. In *Langenecker*, at para. 11, Doherty J.A. noted that prejudice is inherent in long delays and the longer the delay, the stronger the inference of prejudice to the defence case flowing from the delay. It is presumed that memories fade over time, and an inordinate delay gives rise to a presumption of prejudice.

[63] Mr. Dale's claim as pleaded includes a claim of conspiracy involving the defendants or some of them. The claim as pleaded includes an allegation that individual defendants reached an agreement by which they would induce TRREB and CREA to breach the Settlement Agreement, but that "particulars of that agreement are not yet known to the Plaintiffs".

[64] Proof of this claim will require witness testimony going to the alleged conspiratorial agreement. Such evidence has not been adduced in the action so far. No examinations for discovery of representatives of TRREB or CREA, or examinations of individual defendants or other witnesses, have been conducted. There are 45 individual defendants who will be asked to recall events from 15 years ago.

[65] I am satisfied that given the inordinate delay that has ensued in this action, and the nature of the claims made, a presumption of prejudice to the defendants arises. Where there is a presumption of prejudice, the defendant need not lead actual evidence of prejudice and the action will be dismissed for delay unless the plaintiff rebuts the presumption. See *Armstrong v. McCall*, 2006 CanLII 17248 (Ont. C.A.), at para. 11.

[66] To rebut the presumption of prejudice, the plaintiff must persuade the Court with convincing evidence that no prejudice will be suffered as a result of the delay, and that there is not a substantial risk that a fair trial will not be possible. See *Musselman v. Estate of Robert Carbin*, 2016 ONSC 7745, at paras. 24 and 53. Evidence to rebut the presumption of prejudice includes evidence that the issues in dispute do not require the recollection of witnesses or that necessary witnesses are available with a full recollection of events: *Berg v. Robbins*, 2009 CanLII 85303 (Ont. Div. Ct.), at para. 14.

[67] Mr. Dale has chosen not to come forward with evidence to show that the defendants will not be prejudiced if the action were to proceed to an adjudication on the merits. Mr. Dale has failed to rebut the presumption of prejudice that has arisen.

[68] I conclude that to excuse the delays occasioned by Mr. Dale's failures over many years to prosecute the action with reasonable diligence would undermine public confidence in the administration of justice and unfairly subject the defendants to the prejudice that is presumed to follow from the inordinate delay of this action and which has not been rebutted.

[69] For these reasons, I grant the motions by the CREA Defendants and by the TRREB Defendants and exercise my inherent jurisdiction to dismiss the action for delay.

[70] Given this conclusion, it is not necessary for me to decide whether, had I not dismissed the action for delay for these reasons, the action should be dismissed under the first branch of the test for dismissal for delay.

Motion for security for costs

[71] The TRREB Defendants and the CREA Defendants move, in the alternative, for an order for security for costs pursuant to rule 56.01 of the *Rules of Civil Procedure*.

[72] If I were to be found to have erred in dismissing this action for delay, the motions for security for costs would have to be decided. For this reason, I go on to address the motions for security for costs.

[73] Although the title of proceedings in the action (as amended by the Order to Continue) includes Realtysellers and Mr. Moranis as named plaintiffs, their status as plaintiffs is as assignors, and the evidence is that the only plaintiff who has a beneficial interest in claims made in the action against the defendants is Mr. Dale. I find that only Mr. Dale has a beneficial interest as plaintiff in the claims made in the action. For this reason, I do not need to decide whether rule 56.01 would require Realtysellers or Mr. Moranis to post security for costs.

[74] The initial onus is on the defendant to show that the plaintiff appears to fall within one of the enumerated categories in rule 56.01. If the defendant meets this onus, the onus shifts to the plaintiff to avoid an order for security for costs by showing that the plaintiff has sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs order, the order is unjust or unnecessary, or the plaintiff should be permitted to continue with the action despite their impecuniosity. See *Air Palace v. Abdel*, 2021 ONSC 7882, at para. 27.

[75] Rule 56.01(1)(c) provides (in the relevant part) that the court, on a motion by the defendant in a proceeding may make such order for security for costs as is just where it appears that the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part.

[76] TRREB has an outstanding and unpaid $75,000 costs order against Mr. Dale in another action bearing Court File No. CV-20-00646872-00CL. With interest, the unpaid amount is approximately $78,000.

[77] TRREB has met its initial onus. This is a complex action. Voluminous materials have already been filed for use on the summary judgment motions. TRREB has already incurred substantial legal expenses in defending the action and substantial additional legal expenses will be incurred to defend the action going forward. Mr. Dale has not shown that the nature of the action, or other circumstances, are such that he should be permitted to continue with the action without an order for security for costs. I am satisfied that, if the action were not dismissed, it would be just to make an order requiring Mr. Dale to post security for costs.

[78] TRREB provided an anticipated Bill of Costs for the action through to the conclusion of the summary judgment motion. In defending the action, the TRREB Defendants have incurred $415,642 in legal fees up to the time the dismissal for delay motion was brought. The TRREB Defendants estimate that they will incur an additional $200,000 in legal cost to complete the summary judgment motions. The total costs already incurred, and expected to be incurred, total $666,420. The TRREB Defendants seek security for costs on a partial indemnity scale in the amount of $437,344 which is approximately 65% of the expected total costs to the end of the summary judgment motions.

[79] I have reviewed the TRREB Defendants' anticipated Bill of Costs. I am satisfied that the amount of $400,000 is a reasonable estimate of the amount of costs that the TRREB Defendants can expect to be awarded on a partial indemnity scale if they are successful on the summary judgment motions.

[80] If I had not granted the motions to dismiss the action for delay, I would have granted the motion by the TRREB Defendants for an order for security for costs in the amount of $400,000.

[81] The CREA Defendants also move, in the alternative to its motion to dismiss the action for delay, for an order for security for costs directing the plaintiffs to post security in the amount of $400,000.

[82] CREA submits that the outstanding costs award owed to TRREB together with evidence of unsatisfied costs awards owed to parties in other proceedings, evidence that Mr. Dale has been found in contempt of eight separate orders in family law proceedings involving his former spouse where the Court has described Mr. Dale as a "vexatious litigant", and the absence of evidence that Mr. Dale has sufficient assets in Ontario to pay a costs award are circumstances which make an order for security for costs in favour of the CREA Defendants just.

[83] The CREA Defendants have not shown that Mr. Dale has an unsatisfied costs award owing to any of them. I am not satisfied that the CREA Defendants have satisfied their initial onus of showing that, with respect to them, Mr. Dale falls into one of the enumerated categories in rule 56.01(1).

[84] The CREA Defendants also cite rule 56.09 of the *Rules of Civil Procedure* in support of their motion for security for costs. Rule 56.09 provides:

> Despite rule 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications.

[85] CREA submits that if I were to exercise my discretion not to dismiss the action for delay, it is open to me to impose as a condition of granting this relief (that is, not dismissing the action for delay) an order for security for costs.

[86] In support of this submission, CREA cites *Kahn v. Metroland Printing, Publishing & Distributing Ltd*., [2005] O.J. No. 1787. In *Khan*, the Court of Appeal held that the concept of relief encompasses favourable orders to which a party is legally entitled which may include an "indulgence" as a sub-category of relief. The Court of Appeal explained the meaning of "indulgence" in this context as referring to "some form of favourable order to which a party, ordinarily, is not legally entitled, but which a court has the discretion to grant". An example given by the Court of Appeal of such an indulgence is the refusal to dismiss or stay an action where such dismissal or stay is otherwise warranted. In *Khan*, the Court held that the motion judge had erred in applying rule 56.09 where relief in the form of a stay of proceedings was denied. An order for security for costs under rule 56.09 would only have been available if the motion judge had found grounds to stay the action, but exercised his discretion not to do so.

[87] If I had denied the motion by the CREA Defendants to dismiss the action for delay, this would have been because they failed to meet the test for dismissal for delay according to established jurisprudence under either branch. On the record before me, and given my decision to dismiss the action for delay, I am unable to find that, if their motion to dismiss the action for delay had been dismissed, the CREA Defendants would have been entitled to an order for security for costs under rule 56.09.

Disposition

[88] For these reasons, the motions by the CREA Defendants and by the TRREB Defendants to dismiss the action for delay are granted. The action is dismissed.

[89] I direct the CREA Defendants and the TRREB Defendants to make written submissions with respect to costs (limited to three pages, excluding costs outlines) within 15 days. If costs are sought against them, Mr. Dale and Mr. Moranis may make responding submissions in writing (also no longer than three pages, excluding costs outlines) within 15 days thereafter. If so advised, the moving parties may make brief reply submissions within 5 days thereafter.

Cavanagh J.

Date: June 21, 2023