CITATION: Synergy IT Solutions Inc. v. UTC Fire & Security Canada Inc., 2024 ONSC 48
COURT FILE NO.: CV-16-2244-0000
DATE: 2024 01 03

SUPERIOR COURT OF JUSTICE – ONTARIO
7755 Hurontario Street, Brampton ON L6W 4T6

RE: SYNERGY IT SOLUTIONS INC., Plaintiff

AND:

UTC FIRE & SECURITY CANADA INC., Defendant

BEFORE: Justice Wilkinson

COUNSEL: MILNE, James R., for the Plaintiff

BASMADJIAN, Ara, for the Defendant

HEARD: December 19, 2023, by video conference

RULING ON MOTION

[1] The Plaintiff, Defendant by Counterclaim, Synergy IT Solutions Inc. ("Synergy"), requests a status hearing to fix the next steps in this litigation, and also requests an Order fixing a timetable for this action following a schedule proposed by Synergy. Synergy also asks for an Order that a dismissal for delay pursuant to Rule 48.14 shall not be issued during the period specified in the timetable.

[2] The Defendant, Plaintiff by Counterclaim, UTC Fire & Security Canada Inc. indicates in its pleadings that it carries on business as “Chubb Edwards” (“Chubb”). Chubb opposes this motion stating that Synergy does not provide a reasonable explanation for its breach of Rule 48.14 of the *Rules of Civil Procedure.* Chubb also takes the position that Synergy’s delay in moving the matter forward has prejudiced Chubb, as two of its key witnesses are no longer in its employ.

[3] For the reasons that follow, I find that Synergy has satisfied its onus to provide an acceptable explanation for the delay, and that Chubb will not suffer non-compensable prejudice as a result of the action being permitted to proceed.

Background

[4] This matter arises as a result of a contract dispute between Synergy and Chubb. As per the contract, Synergy was hired by Chubb to install security equipment for a third-party pharmaceutical company, Pathcon Inc.

[5] The work under the contract began in July 2015. On October 2, 2015, Chubb instructed Synergy not to proceed further with the work, alleging a safety breach.

[6] Synergy commenced this matter by way of Statement of Claim on May 13, 2016 filed in Simplified Procedure. Chubb delivered a Statement of Defence and Counterclaim on June 30, 2016.

[7] Chubb served its affidavit of documents and productions on October 6, 2016, sworn by Jason Hoskins, the Regional Installation Project Manager. Chubb provides affidavit evidence that Mr. Hoskins no longer works for Chubb. Chubb's affidavit is silent as to whether or not Mr. Hoskins' contact information is available to Chubb.

[8] Chubb also provides evidence that Jan Fahoom, who was the Projects Supervisor at Chubb at the relevant time, also no longer works for Chubb, and his present contact information is unknown.

[9] Synergy delivered its affidavit of documents and productions on November 24, 2016.

[10] Synergy served its Reply and Defence to Counterclaim on February 11, 2020.

[11] The parties did not agree to a Discovery Plan.

[12] It appears that there was not much activity on this file for several years. However, both parties attended examinations for discovery on February 25, 2021.

[13] By the time the matter proceeded to discoveries, both Jason Hoskins and Jan Fahoom no longer worked for Chubb.

[14] Chubb acknowledges that it has not yet produced the undertakings arising from its discovery, but notes that Synergy also has not yet produced its answers to undertakings.

[15] On July 20, 2023, counsel for Synergy wrote to counsel for Chubb requesting that the parties set a timetable for the matter. On July 26, 2023, counsel for Chubb responded to counsel for Synergy, indicating that as this action was commenced in May of 2016, it should now be dismissed for delay pursuant to Rule 48.14 of the *Rules of Civil Procedure*.

[16] Counsel for Synergy wrote to counsel for Chubb on September 22, 2023, proposing a draft timetable for the action, together with a draft consent and draft order.

[17] On October 3, 2023, counsel for Chubb sent an email to counsel for Synergy indicating that Chubb would not consent to a timetable in the action given the age of the action.

[18] On October 4, 2023, Synergy offered a hearing date of October 20, 2023 for this motion, but counsel for Chubb was not available. The next available motion date when counsel for Chubb was available was in December 2023, which was when the motion proceeded.

[19] The five-year deadline to file a trial record specified in Rule 48.14 was extended by 183 days pursuant to O. Reg. 73/20, resulting in an expiry of the limitation period in this matter on November 12, 2021.

[20] Synergy has not yet served a notice of readiness for pre-trial conference (Form 76C), or a trial record.

[21] No Order dismissing the action for delay has been delivered to the parties by the registrar pursuant to Rule 48.14(1).

[22] No prior status hearing has been held in this matter to date. No timetable has been agreed to or imposed regarding this action to date, and no prior motions have been argued.

The Issue: Should this action be dismissed for delay?

The Position of Synergy

[23] Synergy submits that there is no specific rule dealing with a motion to set a timetable where no Rule 48.14 Order has been issued. The Plaintiff cites Rules 1.04(3) and 1.04(5) of the *Rules of Civil Procedure* to support the Court's authority to deal with the present circumstances in a manner analogous to a motion to set aside a Rule 48.14 Order.

[24] Synergy provides affidavit evidence sworn by its counsel that both parties have contributed to the delay in moving this matter forward. Further, Synergy

indicates in its affidavit that its delay in moving this action forward was caused in part by disruption experienced by its counsel's practice due to the COVID-19 pandemic. Specifically, Synergy cites the following factors that contributed to the delay:

> a) In or around April 2020, Plaintiff counsel began working exclusively from home. Prior to the COVID-19 outbreak, Plaintiff counsel's files were predominantly paper based.
>
> b) The structure of Plaintiff counsel's law firm was two lawyers and one administrative staff person, who was experienced. In mid 2020, this individual stopped working for Plaintiff's counsel due to disruption caused by COVID-19.
>
> c) The law firm experienced multiple major staffing changes with part-time staff in 2021 and 2022. The law firm did not hire a full-time administrative staff person until late 2022, after the Rule 48.14 five-year deadline to file the trial record had already passed.

[25] Synergy submits it is not contested that the trial record was not passed in time due to inadvertence on the part of its counsel.

[26] Synergy further submits that this motion was brought promptly once the missed Rule 48.14 deadline was discovered.

[27] Synergy further submits that Chubb does not provide any evidence of prejudice that it has suffered as a result of the delay, as its two employees with

knowledge of the matters in issue had already left its employ prior to the February 25, 2021 discovery. Synergy also notes that the discovery took place within the five-year deadline imposed by Rule 48.14.

[28] Synergy suggests that a new timetable should be put into place to move this matter to its conclusion in a timely and efficient manner, and that further delays are not anticipated. Synergy also submits that the fact that the Plaintiff attended examinations for discovery in February of 2021 demonstrates that the Plaintiff intended to proceed with the litigation.

[29] Synergy particularly emphasizes that the facts in the present case can be distinguished from other cases where the Plaintiff's action was dismissed by the registrar under Rule 48. In the present case, there has been no Rule 48 dismissal order.

Position of Chubb

[30] Chubb states that Synergy failed to deliver a notice of readiness for pre-trial conference (Form 76C) on or before November 21, 2016 and, more importantly, failed to deliver a trial record on or before November 11, 2021.

[31] Chubb takes the position that Synergy does not provide a reasonable explanation for its breach of Rule 48.14, and that its delay has prejudiced Chubb as two of its key witnesses are no longer employed by Chubb.

[32] Chubb also submits that Synergy's affidavit evidence is inadmissible hearsay, indicating that the lawyer swearing the affidavit does not have personal knowledge of the evidence being put before the court.

[33] Chubb argues that Synergy has failed to provide sufficient affidavit evidence of its intention to proceed with the litigation. Chubb relies upon *DK Manufacturing Group Ltd. v. MDF Mechanical Limited*, 2019 ONSC 6853, 2 C.C.L.I. (6th) 203, and states that Synergy has failed to provide evidence directly from the Plaintiff confirming its intention to proceed with the litigation, and from the lawyer with carriage of the file to explain the delay.

[34] Chubb also points out that its own failure to provide answers to undertakings did not prevent Synergy from filing a trial record, as Rule 48.04 permits a motion to compel answers to undertakings to be brought after a trial record has been filed.

[35] Chubb notes that the proposed timetable anticipates the action being set down for trial by April 30, 2025, which does not suggest that the matter is ready to proceed to summary judgment, as is stated in the affidavit of Harpreet Sachdeva-Milne, a lawyer with the law firm representing Synergy.

[36] Chubb relies upon the consolidated notice to the professions prepared by the Ontario government effective May 19, 2020, to argue that notwithstanding COVID-19, Synergy must explain to the court how COVID-19 has made compliance not feasible:

> During this temporary suspension of in-court operations, counsel and the parties are expected to comply with existing orders and rules of procedure, as well as procedures in this and other Regional Notices, to bring cases closer to resolution, to the extent they can safely do so through virtual means. This guidance also applies to self-represented parties.
>
> For example, where it is possible through virtually means to comply with timelines, produce documents, engage in discoveries, attend pre-trials, case conferences and hearings, and respond to undertakings, those steps should be pursued. Where COVID-19 has prevented lawyers and parties from fulfilling their obligations, they should be prepared to explain to the Court why COVID-19 has rendered compliance not feasible.

[37] Chubb also argues that Synergy does not provide documentary evidence that its counsel's law firm was disrupted by COVID-19.

The Law

[38] In a simplified procedure action, under Rule 76.09 the Plaintiff shall, within 180 days after the first Statement of Defence or Notice of Intent to Defend is filed, set the action down for trial by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and forthwith filing the notice with proof of service.

[39] The parties agree that Rule 48.14(4) of the *Rules of Civil Procedure* applies to both ordinary and simplified procedure actions. The administrative dismissal rule does not apply if, at least 30 days before the expiry of the deadlines for a dismissal order, a party files a timetable and a draft order establishing the timetable. If the parties do not consent to a timetable, any party may, before the

expiry of the applicable period referred to for an administrative dismissal order, bring a motion for a status hearing.

[40] Rule 48.14(7) indicates that at the status hearing, the Plaintiff must show cause that the action should not be dismissed for delay. If the court is satisfied that the action should proceed, the judge at the status hearing may set a timetable to ensure the completion of the remaining steps necessary to have the action set down for trial.

[41] At a contested status hearing, the Plaintiff bears the burden of demonstrating that there was an acceptable explanation for the delay, and that if the action is allowed to proceed, the defendant would not suffer non-compensable prejudice (*Henderson v. Kenora-Rainy River Districts Child & Family Services,* 2022 ONCA 387, at para. 6).

[42] The Plaintiff bears the burden of satisfying both aspects of the test. The Court of Appeal confirms in *1196158 Ontario Inc. v. 6274013 Canada Limited et al*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 32, that this is a conjunctive, rather than a disjunctive, test:

> The test is conjunctive, not disjunctive. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. And if the plaintiff is not able to provide a satisfactory explanation for the delay, it is still open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant.

[43] The Plaintiff must provide specific evidence justifying the delay. Tulloch J.A. indicates in *Faris v. Eftimovski*, 2013 ONCA 360, 363 D.L.R. (4th) 111, at para. 33:

> Since the purpose of Rule 48 is to enable the court to control the pace of litigation and ensure that disputes are resolved in a time-effective manner, imposing the onus on the Plaintiff to show cause why the action should not be dismissed for delay is fair.

[44] In determining if a matter should be dismissed for delay, the court is to consider the following factors as set out in *Reid v. Dow Corning Corp*. (2001), 11 C.P.C. (5th) 80 (Ont. S.C.):

1) Explanation of the litigation delay;

2) Inadvertence in missing the deadline;

3) The motion is brought promptly; and,

4) No prejudice to the Defendant.

[45] A contextual approach to the factors set out in *Reid* is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The Court is to make the Order that is just in the circumstances (see *Finlay v. Van Paassen* et al., 2010 ONCA 204, 101 O.R. (3d) 390, at para. 27).

[46] The decision of Master Robinson in *DK Manufacturing Group Ltd. v. MDF Mechanical Limited*, 2019 ONSC 6853, 2 C.C.L.I. (6th) 203, also provides guidance as to the factors to be considered when determining if an action should

be dismissed for delay. Two of the criteria listed in *DK Manufacturing* include requiring the Plaintiff provide affidavit evidence of its intention to proceed, and requiring affidavit evidence from the lawyer having carriage of the file.

[47] There is a well-established presumption of prejudice with long delays. In *Langenecker v. Sauvé*, 2011 ONCA 803, 286 O.A.C. 268, Doherty J.A. writing for the Ontario Court of Appeal states at para. 11:

> Prejudice is inherent in long delays. Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the inference of prejudice to the defence case flowing from that delay.

[48] But the existence of prejudice suffered by a party is not necessarily sufficient to justify taking away the plaintiff's right to continue with the action. Doherty J.A. also states in *Langenecker*, at para. 9, that the requirement that the delay be "inexcusable" requires a determination of the reasons for the delay, and an assessment of whether those reasons afford an adequate explanation for the delay. Doherty J.A. further indicates that explanations that are reasonable and cogent, or sensible and persuasive will excuse the delay, at least to the extent that an order dismissing the action would be inappropriate.

[49] In *Habib v. Mucaj*, 2012 ONCA 880, 31 C.P.C. (7th) 1, at para. 5, the Court of Appeal confirms that evidence of the prejudice to a litigant caused by the delay must be significant, and arise out of the delay. The Court of Appeal also requires at para. 6 that consideration of delay be approached from a contextual perspective:

> No one factor is necessarily decisive of the issue. Rather, a "contextual" approach is required where the court weighs all relevant considerations to determine the result that is just.

[50] In *Habib*, the Court of Appeal also notes at para. 7 that "the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel".

Analysis

[51] I do not find that Synergy's failure to serve a notice of readiness for pre-trial conference pursuant to Rule 76.09 is an appropriate reason to dismiss this action for delay. Chubb concedes that Rule 48.14 also applies to claims brought under the simplified procedure rules. Accordingly, my analysis will focus on the failure of Synergy to request a timetable or file a trial record within the requirements of Rule 48.14.

[52] At present, this matter is a viable action. Although the registrar certainly has the authority to dismiss the action for delay pursuant to Rule 48.14(1), to date this has not occurred. Nonetheless, I am proceeding with this analysis as if an order has already been issued under Rule 48.14(1).

Explanation for the delay

[53] The failure of Synergy to present evidence on its own behalf at this motion is not fatal. While the recommendation in *DK Manufacturing* to have the Plaintiff produce evidence on its own account, and to produce an affidavit from counsel with carriage of the file is good practice, the failure of Synergy to do so in this instance is not determinative of the issue. I am required to consider all the factors in the circumstances to arrive at a fair determination as to whether the delay is acceptable.

[54] The fact that Synergy participated in examinations for discovery in 2021 demonstrates an intention to proceed with the litigation, at least up to that point. Although it has not yet produced its undertakings from that discovery, its failure to do so does not automatically create an inexcusable delay, particularly when Chubb also did not provide answers to undertakings in the same time frame.

[55] The affidavit evidence from the Plaintiff on this motion comes from Harpreet Sachdeva-Milne, who has been a partner since 2017 at the two-person law firm representing Synergy. Ms. Sachdeva-Milne indicates in her affidavit that she has reviewed the contents of the file, and further, indicates that she has knowledge of the general operations of the firm. As this is a two-person law firm, I accept Ms. Sachdeva-Milne's evidence that she has personal knowledge of the impact of the COVID-19 pandemic on her law firm.

[56] As the litigation history in this matter is not controversial, and given Ms. Sachdeva-Milne's personal knowledge of the firm's operations during the relevant time frame, it is not fatal to Synergy's position that the affidavit it presents to explain the delay in this matter was not prepared by counsel of record, James Milne. I reject Chubb's characterization of Ms. Sachdeva-Milne's affidavit evidence as "inadmissible hearsay".

[57] The history of this litigation includes approximately 3 ½ years of unexplained delay between the time when the Statement of Defence and Counterclaim was served in June of 2016, and the delivery of the reply and defence to the Counterclaim in February of 2020. However, this delay is permissible under the *Rules of Civil Procedure,* given that Rule 48.14 provides the Plaintiff with five years from the issuance of the Statement of Claim to set the matter down for trial. Examinations for discovery took place within the five-year deadline, on February 25, 2021.

[58] The real issue for me to determine is if the failure of the Plaintiff to request a timetable or file the trial record by the five-year deadline (extended to November 12, 2021 by O. Reg. 73/20) is reasonable, given the entire context of this litigation, and the imposition of the COVID-19 pandemic.

[59] The affidavit from Ms. Sachdeva-Milne indicates that the firm lost its main experienced employee in mid 2020 due to disruption caused by the COVID-19

pandemic. The affidavit does not provide specific reasons as to why this individual left the firm, although the suggestion appears to be that the firm was no longer able to provide full time work for its employee, as Ms. Sachdeva-Milne's affidavit refers to hiring part-time staff in 2021 and 2022 "as workflow gradually increased to pre-COVID levels".

[60] Notwithstanding the failure of Plaintiff's counsel to provide greater detail with respect to this issue, I accept that for a two-person law firm, losing its main employee in the first year of the pandemic created significant administrative challenges for the firm.

[61] Notwithstanding the loss of this employee, Plaintiff's counsel was able to arrange for the matter to proceed to discoveries in February of 2021. The real issue is the failure of the Plaintiff law firm to continue to push this matter forward in a timely fashion following the conclusion of the discoveries.

[62] Ms. Sachdeva-Milne indicates in her affidavit that the firm worked with part time administrative assistance "at times" in 2021 and 2022, but did not hire a full time assistant until late 2022. Unfortunately, the Plaintiff's law firm experienced further staffing changes in January and April 2023.

[63] It does not surprise me that this instability created by staffing changes contributed to Plaintiff's counsel missing the deadline to file the trial record, and further, its apparent failure to be aware that the deadline had been missed for some

time afterwards. In addition, I accept that the sudden switch caused by the pandemic from paper-based files to paperless files created additional disruption at the firm.

[64] The failure of Synergy to provide documentary evidence of its staffing challenges is not determinative in this case. I am satisfied that the affidavit evidence presented by the Plaintiff regarding the impact of the pandemic on this particular law firm is sufficient to address the legal tests that must be considered when determining a dismissal motion.

[65] Synergy asked Chubb to consent to a timetable in July 2023, approximately 1 ½ years after the deadline to do so had expired pursuant to Rule 48.14. Given the numerous changes the Plaintiff's small law firm went through during the pandemic period, including moving out of an office environment to a home based office, shifting from paper to paperless file management, and dealing with multiple staff changes, I find that Synergy offers an acceptable explanation for the 1 ½ year delay in requesting a timetable from Chubb.

Inadvertence in missing the deadline

[66] Counsel for Synergy presents adequate evidence as outlined above that there was no intention on the part of the Plaintiff to ignore the deadline to propose a timetable or file the trial record.

Was the motion brought promptly?

[67] Plaintiff counsel first requested that Chubb consent to a timetable in July of 2023. When that consent was not provided by Chubb, the motion date in December of 2023 was secured in October 2023. I find that Synergy did not engage in unreasonable delay in bringing this motion.

Is there prejudice to Chubb?

[68] I recognize the inherent prejudice in long delays. The facts in issue in this litigation occurred in 2015, and it is now eight years later. I also recognize the concern raised by Chubb that it is prejudiced by the fact that two of its employees who had particular knowledge of the events in question are no longer employed by Chubb.

[69] However, the evidence before me is that the former employees of the Defendant had already left its employ by the time discoveries were conducted in February of 2021. Therefore, even if the Plaintiff had filed the trial record on time within the requirements of Rule 48.14, Chubb would still have experienced some degree of prejudice for which it would have no remedy under the *Rules*.

[70] It should also be noted that Chubb provides evidence that one of its former employees cannot be found. Its affidavit is silent about its ability to locate the other former employee.

[71] Apart from the two employees no longer in its employ, Chubb does not provide any additional evidence of the prejudice it will experience if this action is permitted to proceed. I also note that Chubb provides no evidence that it raised any concerns about delay prior to attending examinations for discovery on February 25, 2021.

Conclusion

[72] Given the impact of the COVID-19 pandemic on this particular law firm, including significant staffing disruptions, I am satisfied that Synergy provides a reasonable explanation for its delay in moving this matter forward. Further, Chubb fails to provide sufficient evidence of the prejudice it has suffered as a result of the delay in this matter to justify dismissing Synergy's claim.

[73] Synergy therefore satisfies its burden to demonstrate that there was an acceptable explanation for the delay, and that Chubb will not suffer non-compensable prejudice as a result of the action being permitted to proceed.

[74] The parties are to contact my judicial assistant at melanie.powers@ontario.ca to schedule a time to come before me at 9 am via Zoom in the next two weeks to conduct a status hearing. The parties are to send their proposed timetables to my judicial assistant in advance of the status hearing. Unless there are exceptional circumstances of which I am not aware, it is my expectation that the timetable will provide for a date in 2024 to file the trial record.

Costs

[75] The parties have agreed that the costs of this motion will be fixed at $2,500, which I order to be paid forthwith by Chubb to Synergy.

Wilkinson J.

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RULING ON MOTION

WILKINSON J.

Released: January 3, 2024