CITATION: 1405217 Ontario Inc. v. Feren Signs & Graphics 2024 ONSC 3495
COURT FILE NO.: CV-16-566878
MOTION HEARD: 20230605

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1405217 Ontario Inc. 1788618 Ontario Inc. and Bravo Pizzeria & Grill, Plaintiffs

AND:

Feren Signs & Graphics, and Feren Signs & Awnings Ltd., Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Jillian Beaulieu, counsel for the moving party defendant Feren Signs & Awnings Ltd.

Robert Dowhan, counsel for the moving party third party 2297076 Ontario Ltd. c.o.b.Woods Electrical Contractors in CV-17-576837

Laura Guzzo, counsel for the defendants Crawford & Company (Canada) Inc., Randy Corsini and Mark Beattie, in CV-17-576837 and the defendants Origin and Cause Inc., Michael Stewart and Chris Panasiewicz in CV-17-576833

Rick Aucoin, counsel for the lawyer for the responding party plaintiffs and moving parties on the cross motion

HEARD: 5 June 2024

REASONS FOR DECISION

[1] Two fires at the plaintiffs' premises in Niagara Falls spawned three actions. The first fire in January 2015 gave rise to the within action, CV-16-566878. The second fire in June 2015 gave rise to actions CV-17-576833 and CV-17-576837. Taking into account the COVID extensions, the deadline to set the CV-16 action down for trial was 29 June 2021 and the deadline to set the CV-17 actions down was 10 December 2022.

[2] Feren Signs & Awnings Ltd. ("Feren") is a defendant in this action and in CV-17-576837, as well as a third party in CV-17-576833. 2297076 Ontario Ltd. c.o.b. Woods Electrical Contractors ("Woods") is a third party in CV-17-576833 and in CV-17-576837.

[3] Feren and Woods bring motions to dismiss the actions for delay. Crawford & Company (Canada), Randy Corsini and Mark Beattie ("Crawford"), defendants in CV-17-576837 did not bring their own motion but support the moving parties' motions. This decision is written in CV-16-566878, but applies equally to the two 2017 actions.

[4] The plaintiffs bring a cross motion for a status hearing, for an order to amend the statement of claim to clarify the relief sought against Crawford and to correct a misnomer in CV-17-576837.

Progress and Status of Actions

[5] The plaintiffs commenced the CV-16 action on 29 December 2016. While Feren does not have the plaintiffs' affidavit of service for the statement of claim, it is not disputed that it filed its statement of defence on 23 May 2019. The CV-17 actions were both commenced on 9 June 2017. Various defences, crossclaims, third party and fourth party claims were served throughout 2018 and 2019. The last pleading was delivered on 6 September 2019. The actions then lay dormant for almost a year.

[6] Counsel for Feren had advised the plaintiffs on 17 April 2019 that it had just learned that its client had dissolved in March 2017 and that the president and sole director had very recently died. There was no response for more than a year, until June 2020 when plaintiffs' counsel wrote to advise that he would bring a motion for representation orders and would be producing damages documentation. He also proposed transferring the actions to the Niagara region. Unfortunately, none of these promised steps took place and the actions again remained dormant for a further two years. The June 2020 letter remained the only action taken by the plaintiffs on the files from September 2019 to July 2022.

[7] On 27 July 2022, plaintiffs' counsel canvassed motion dates for November 2022 to deal with their proposed motions to amend the CV-177-576837 claim and to extend the set down dates for all three actions. The defendants noted in their response of 28 July 2022 that:

> "As far as I am aware, your email is the first communication from your office since June 15, 2020. The deadline to set action #1 (CV 16-566878) has expired. In addition, as we advised on April 17, 2019, my client dissolved on March 15, 2017 and its principal passed away. As such the action is stayed."

[8] As requested, the defendants also provided their November availability for the plaintiffs' proposed motions. Despite having these dates, the plaintiffs did not schedule the motions.

[9] In October 2022, the plaintiffs delivered a draft affidavit of documents and productions. In the fall of 2022, they attempted to add Feren's insurer, Economical, to the action by requisition, which was rejected in November 2022.

[10] After the possible November motion dates came and went, the plaintiffs unilaterally booked their motions for various relief for 2 February 2023. In their email of 11 November 2022 advising the defendants of the February date, the plaintiffs indicated "our motion records will follow next week." Unfortunately, the plaintiffs did not deliver their motion materials the week following or at any time thereafter and the motions did not proceed.

The plaintiffs then indicated they would bring a motion for a case conference to establish a timetable but then never scheduled that motion either.

[11] After the actions had sat in abeyance for six or seven years, in May 2023, the defendants scheduled their dismissal motions for 24 August 2023. There was no response from the plaintiffs until August 4, when they proposed that the motions be held in abeyance, the defendants consent to the plaintiffs' motion and agree on a timetable. Ultimately when the parties attended in court on August 24, the defendants' motions had to be adjourned to permit the plaintiffs to bring a cross motion and all motions were put over to a long motion date, the next available of which was in June 2024. The plaintiffs did not serve responding materials to the dismissal motions (which they were served in May 2023) or their cross motions until November 2023. They also took no steps to propose a timetable in those intervening months.

[12] In the last seven and eight years, none of the actions has proceeded beyond the pleadings stage. No attempts have been made to schedule examinations for discovery.

[13] The moving defendants and third party move under rules 48.14 and 24.01(2). The combined rules provide that where an action has not been set down for trial by the fifth anniversary of its commencement, the court shall dismiss it for delay unless the plaintiff demonstrates that dismissal of the action would be unjust.

[14] In order to defend a motion to dismiss for delay under rule 48.14, a plaintiff must demonstrate both that it has an acceptable explanation for the delay in the litigation and that the defendants would not suffer non-compensable prejudice if the actions were allowed to proceed. (see *Khan v Sun Life Assurance Company of Canada* 2011 ONCA 650 at paragraph 1). If either branch of the test is not satisfied, the court may dismiss the action.

[15] Given the lapse of time, the courts have noted that placing the onus on the plaintiff is mandated not only by the plain wording of rule 48.14(7) but also by the greater severity of the plaintiff's delinquency in pursuing its claim. In other words, at this juncture, the emphasis on the objectives expressed in rule 1.04(1) to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" must necessarily shift towards ensuring that disputes be resolved expeditiously and in a time-efficient manner. (see *Faris v Eftimovski* 2013 ONCA 360 at paragraph 41.)

The plaintiffs have not provided an acceptable explanation for the delay

[16] A plaintiff need not account for every minute of delay, but must at least explain most of the delay and certainly all significant periods of material delay (*Madore v Metro Toronto Condominium Corp. No. 1228* 2015 ONSC 4750 at paragraph 26).

[17] Action CV-16 was commenced 7.5 years ago and the two CV-17 actions were commenced seven years ago, almost to the day. Pleadings closed four years ago. Other than one letter from the plaintiffs in June 2020 advising that they would bring a motion (which they then did not do), there was no activity on the files from 2019 to 2022.

[18] In the spring of 2019, the plaintiffs' present lawyer took over carriage of the actions from an associate who was leaving the firm. The lawyer assumed carriage of these actions even though he had already inherited several large files when his partner retired at the end of 2018 and had, according to his affidavit, an unusually heavy workload. As a result, the plaintiffs' lawyer did not look at these files for a year, until the spring of 2020.

[19] Plaintiffs' counsel wrote a letter to the defendants in June 2020 to discuss issues, including the need to amend the claim in CV-17-576837 and to propose mediation, all of which were rejected by the defendants. The plaintiffs then served a draft fresh as amended statement of claim and in September 2020 drafted a motion for leave to amend. That motion was not filed and, indeed, was not served until almost three years later, in August 2023. It is part of the relief the plaintiffs seek on their cross motion before me, almost four years later.

[20] In considering the reasonableness of any explanation for the delay in question, the court will "almost invariably engage in a weighing of all relevant factors in order to reach a just result" (*Kara v Arnold* 2014 ONCA 871 at paragraph 13). Plaintiffs' counsel attributed the delay from June 2020 to the summer of 2022 to "a combination of COVID restrictions, diminished resources, workload, a health issue in the spring of 2021 and inadvertence."

[21] In considering these factors, I note that no particulars of these reasons for delay were provided and I find they do not equate to an acceptable explanation. The resource and workload issues seemed to exist from the time the plaintiffs' lawyer took over carriage of the actions in 2019. The current lawyer of record filed an affidavit stating that the matters did not move forward because he had a health issue in the spring of 2021. According to his affidavit, he was also busy with other files that required his attention including a lengthy trial in the spring of 2022 and an appeal in late 2022. This does not align with the fact that the present lawyer/deponent was not lawyer of record during this time period. He did not become lawyer of record until October 2022. Another lawyer in the firm was counsel from January 2019 to October 2022 and there is no evidence about that lawyer's workload or why he did not move the actions forward.

[22] The firm may have been stretched but it appeared to have managed to adequately resource other files and simply put these actions on the back burner. It could have hired other lawyers or simply acknowledge the resource shortage and advised the clients to transfer their files elsewhere.

[23] The impact of COVID was not felt from 2016 to 2020 and cannot excuse delay over those years. While COVID had an initial impact in the spring of 2020, courts heard motions virtually after a short period of time. After the initial uncertainty of COVID settled and counsel returned to work, albeit virtually, the parties could still have agreed on a discovery plan, exchanged sworn affidavits of documents and productions, and conducted discoveries.

[24] The claim of inadvertence, while an explanation, cannot be an acceptable one when no particulars are provided. The inadvertence should have been detailed in order to explain the many years of inaction on these files.

The plaintiffs have not rebutted the presumption of non-compensable prejudice to the defendants and third parties if the actions were allowed to continue

[25] Even if the plaintiffs had provided a reasonable explanation for their delay, I find they have not rebutted the presumption that the defendants and third parties would suffer non-compensable prejudice as a result of the inordinate delay were the actions allowed to continue.

[26] The Vice President, Claims, of the plaintiffs' insurer deposed that he believed the defendants would suffer no prejudice because they had early notice of the claim, the plaintiffs had produced all their relevant liability and damages documents, they were able to investigate the cause of the fires and there was no evidence of any missing documents or witnesses that could not be located.

[27] He and the current lawyer depose that there were communications between adjusters predating the statements of claim that suggest that the investigator for Feren allegedly agreed with the conclusions of the plaintiffs' experts. The plaintiffs did not include that communication or the conclusions from their expert's report in the record, so I have not placed must weight on this submission.

[28] To satisfy their evidentiary onus, the plaintiffs must lead evidence that the issues do not rely on the memory of witnesses or that necessary witnesses are available and recall their testimony in detail (*NWG Investments Inc. v. Fronteer Gold Inc*. ("NWG") 2023 ONSC 4826 at paragraphs 61, 63 and 74). There is no evidence that the plaintiffs located or spoke to any relevant witnesses. The insurer deposed that a list of "prospective witnesses" was provided in August 2023 as part of a revised affidavit of documents in the CV-16 action. As the revised affidavit of documents was not included, there is no evidence whether the list included only the plaintiffs' proposed witnesses or all proposed witnesses with contact information. At best, these witnesses would only have evidence about the January 2015 fire, which is the subject of the CV-16 action and not the June 2015 fire, the subject of the two CV-17 actions.

[29] Even if former employees could be located now, I accept that it is unlikely that their memories will be fresh concerning a sign installation that took place fourteen years ago, in 2010 and fires that took place nine years ago, in 2015.

[30] The deponent did not address the fact that the owner and sole director of Feren at the time of the fires was not examined for discovery before she died in April 2019. I find the plaintiffs' evidence is not sufficient to rebut the presumption of non-compensable prejudice.

[31] Further I find that Feren has led evidence with the passing of the company's owner and director that it would suffer actual prejudice if the matters were allowed to proceed.

[32] A particular issue arises with respect to whether the CV-16 action can be dismissed at this stage. In May 2023, Feren served its dismissal motion records with a return date of 24 August 2023. After the motion records were served but before the motion was heard, the

plaintiffs delivered a notice of readiness for pretrial in the CV-16 action. They argue that the action cannot now be dismissed for delay as it does not meet the criteria of rule 48.14, *i.e.,* having been set down for trial.

[33] While the defendants did not move to strike out the notice of readiness for pre-trial conference, little stock can be put in the notice or in the plaintiffs' statement that they are ready for a pre-trial conference. Clearly, they are not, given the state of the file and the lack of productions and discoveries.

[34] I find that the CV-16 action is also subject to dismissal for two reasons. First, rule 48.14(1) provides that an action is to be dismissed by the registrar where it has not been set down for trial "by the fifth anniversary of the commencement of the action". The CV-16 action was set down on 14 August 2023, more than two years after the 29 June 2021 adjusted set down date.

[35] Second, as was held in *NWG, supra*, the test for measuring the period of delay, as endorsed by the Ontario Court of Appeal (in *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 at paragraph 15), is to be based on the length of time between the start of proceedings and the motion to dismiss. This is consistent with the decision in *Computer Enhancement v. J.C. Options* 2013 ONSC 4548 where the court confirmed that a party's rights crystallize when a motion is brought. As of May 2023, when the defendants served their motion, the plaintiffs had not set the action down for trial and the five year deadline to do so had long expired.

Conclusion

[36] After weighing all relevant factors in order to reach a just result, I find it would be unfair to the defendants to allow the actions to proceed. The defendants' motions are granted and the plaintiffs' cross motion dismissed.

Costs

[37] Feren seeks costs on a partial indemnity basis in the amount of $11,880.59 for each of the three actions. In addition, they seek costs thrown away of the 24 August 2023 attendance in the amount of $4,500, or $1,500 per action. The defendants worked to secure the August 24 date starting in February 2024. Nothing was heard from the plaintiffs until August 17 when they advised that they would deliver responding materials on August 18. Then on August 18, the plaintiffs advised that they would be seeking an adjournment to respond and to bring their own cross motions.

[38] Woods seeks its costs of the motions on a partial indemnity basis in the amount of $18,127.08, inclusive of HST and disbursements. It also seeks a nominal, yet to be stated, amount for costs of the actions, recognizing that it has only delivered pleadings.

[39] The plaintiffs have indicated that they wish to attempt to resolve the issue of costs. Absent submissions from the parties by 31 July 2024, the issue of costs will be presumed to have been resolved.

Date: 18 June 2024

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Associate Justice Jolley