CITATION: 1833761 Ontario Inc. v. 2253659 Ontario Inc, 2024 ONSC 5356
COURT FILE NO.: CV-19-618295
DATE: 2024 09 26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1833761 ONTARIO INC. and ALI YEHYA, *Plaintiffs*

- and -

2253659 ONTARIO INC., MUSTAPHA ELMENINI, JOHN POLETES and JOHN POLETES PROFESSIONAL CORPORATION, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: K. Schoenfeldt, *for the defendants, John Poletes and John Poletes Professional Corporation (moving parties)*

R. Khemraj, *for the defendants, 2253659 Ontario Inc. and Mostapha Elmenini (moving parties)*

S. Hussain, *for the plaintiffs (responding parties)*

HEARD: May 23, 2024 (by videoconference)

REASONS FOR DECISION
(Motions to Dismiss for Delay)

[1] John Poletes and John Poletes Professional Corporation (the "Poletes Defendants") and Mustapha Elmenini and 2253659 Ontario Inc. (the "Elmenini Defendants") bring separate motions to dismiss this action for delay pursuant to rule 24.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Rules*"). The plaintiffs oppose the motions primarily on the basis that, despite any delay, a fair trial is still possible and it would be unjust to dismiss the plaintiffs' action without an adjudication on the merits.

[2] In the action, the plaintiffs seek $3.5 million in damages against the defendants arising from the alleged wrongful termination of a commercial lease for a pharmacy run by the plaintiffs. Ali Yehya is a pharmacist and the principal of 1833761 Ontario Inc., the tenant under the lease. 2253659 Ontario Inc. was the landlord and is alleged by the plaintiffs to have acted on the improper direction of Mostapha Elmenini when terminating the lease in 2016. The Poletes Defendants provided legal advice to the plaintiffs on the lease in 2010.

[3] This action was commenced in Ottawa in March 2018. It was transferred to Toronto, on consent, in March 2019. In the six years since the action was originally commenced, the only steps completed before the defendants brought these motions were closing pleadings and the Poletes

Defendants serving their affidavit of documents. After the motions were brought, shortly before the hearing, both the plaintiffs and the Elmenini Defendants served their affidavits of documents.

[4] I have struggled with whether to permit this action to proceed. In my view, Mr. Yehya (on his own behalf and on behalf of the corporate plaintiff) has not taken reasonable steps to advance this litigation. I accept that Mr. Yehya has not forgotten this proceeding and has intended to pursue it. However, he has never prioritized it. In my view, plaintiffs cannot bring substantial claims in the court system and expect that both defendants and the court will let them move their actions forward only when it is convenient to them to do so. That is, in essence, the explanation for delay given by the plaintiffs here: Mr. Yehya's personal circumstances were such that he could not advance this action, although those circumstances and his inability to address this litigation were never shared with the defendants. Instead, they were left completely in the dark as to what was happening and afforded no opportunity to consider or agree to defer next steps until Mr. Yehya's life had sufficiently stabilized to move the action forward.

[5] I have no reason to doubt Mr. Yehya's evidence on the personal hardships that he has endured. However, in my view, his failure to communicate his inability to advance this litigation and apparent expectation that he did not need to advance his $3.5 million claim is troublesome, to say the least.

[6] Nevertheless, having considered the totality of the evidence before me, I am satisfied that it would be unjust to dismiss this action without first providing the plaintiffs an opportunity to rectify the complacency they have demonstrated in advancing their action. I find the delay to be sufficiently excusable by Mr. Yehya's personal circumstances and am not convinced by the defendants' arguments that there is substantial risk that a fair trial is no longer possible. I am dismissing both motions and am imposing a strict timetable for next steps.

ANALYSIS

Relevant legal framework

[7] The Poletes Defendants and the Elmenini Defendants each move to dismiss the action for delay under subrules 24.01(1) and 24.01(2) of the *Rules*.

[8] Both motions seek relief under subrule 24.01(1)(c). It permits a defendant who is not in default under the *Rules* or an order of the court to 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. The Elmenini Defendants also raised subrule 24.01(1)(b) in oral submissions, but I have not considered it. Dismissal under that provision turns on failing to note defendants in default within thirty days after the default. Pleadings have now been closed for years. In my view, any failure by the plaintiffs to note the defendants in default (which was to their benefit) is not fairly raised at this point as a basis to dismiss this action.

[9] There is no dispute on the applicable test for relief under subrule 24.01(1). An order dismissing an action for delay under subrule 24.01(1) is warranted where (i) the default is intentional or contumelious; or (ii) the delay is inordinate, inexcusable, and prejudicial to the

defendant, in that it gives rise to a substantial risk that a fair trial of the issues will not be possible: *Langenecker v. Sauvé*, 2011 ONCA 803 at para. 5. Both the Poletes Defendants and the Elmenini Defendants seek relief under the second branch of the test. They do not take the position that the plaintiffs' delay has been caused by the plaintiffs' intentional conduct showing distain or disrespect for the court process.

[10] Both motions also seek relief under subrule 24.01(2). It provides that the court shall dismiss an action for delay where either of the circumstances described in paragraphs 1 and 2 of subrule 48.14(1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust. Since this action has not been set down for trial, paragraph 1 of subrule 48.14(1) applies. It requires that an action be set down for trial or terminated by any means by the fifth anniversary of its commencement.

[11] Two of the cases before me discuss the applicable test under subrule 24.01(2). Both set out that the test for a status hearing under rule 48.14 also applies to a motion to dismiss under subrule 24.01(2), namely that the plaintiff must demonstrate an acceptable explanation for the delay and establish that the defendant would suffer no non-compensable prejudice if the action proceeds: *Loiselle v. Violette*, 2018 ONSC 2469 at para. 11; *Dupuis v. W.O. Stinson & Son Limited*, 2019 ONSC 5762 at para. 13.

Are the moving defendants in default under the Rules or an order of the court?

[12] As noted above, there is a threshold requirement in subrule 24.01(1) that a moving defendant must not be in default under the *Rules* or an order of the court. There have been no court orders against the defendants in this action. The plaintiffs concede that the Poletes Defendants are not in default under the *Rules.* They delivered all required pleadings and served their affidavit of documents well prior to bringing this motion. However, the plaintiffs argue that the Elmenini Defendants are in default of the *Rules* and are thereby precluded from bringing their motion.

[13] The Elmenini Defendants did not serve their affidavit of documents until May 15, 2024, which was shortly before the motion hearing and well after they had brought their motion. The plaintiffs submit that, having failed to serve an affidavit of documents, the Elmenini Defendants are in default under the *Rules* and barred from bringing their motion. In support of that position, they cite the decision of Master Dash in *Sanders v. Emmerton*, 2009 CanLII 25985 (ON SC) at para. 5.

[14] The Elmenini Defendants argue that they are not in default of any obligation under the *Rules.* They rightly point out that *Sanders* was decided under a prior iteration of subrule 30.03(1). As noted in the decision, subrule 30.03(1) at the time expressly required that parties serve an affidavit of documents within ten days after the close of pleadings. That is not the language of the current rule. The ten day deadline was removed over fifteen years ago by O Reg 438/08, which amended subrule 30.03(1) (among other amendments to the *Rules*). The Elmenini Defendants do not dispute that they had not served their affidavit of documents before this motion was brought. They simply submit that they were not in default of any current rule by not having done so. They argue, essentially, that I cannot find them in default of an obligation that has no prescribed deadline.

[15] The obligation to serve an affidavit of documents still exists under subrule 30.03(1), but I agree there is no longer any specific timing prescribed for serving it. Timing of documentary discovery has been shifted into rule 29.1. Specifically, all parties intending to obtain discovery evidence under the *Rules* have an obligation under subrule 29.1.03(1) to agree to a discovery plan. Subrule 29.1.03(3)(b) provides specifically that the discovery plan is to include dates for the service of each party's affidavit of documents. No discovery plan has been agreed in this case.

[16] In considering this issue further, though, there is a problem with the Elmenini Defendants' position. I agree that there is no longer a specifically prescribed deadline to serve an affidavit of documents, but there is another obligation that the parties have overlooked: agreeing to a discovery plan. The *Rules* create a positive obligation on parties to agree to a discovery plan, the timing of which is governed by subrule 29.1.03(2). That subrule expressly provides that the discovery plan "shall" be agreed before the earlier of (a) 60 days after the close of pleadings or such longer period as the parties may agree to, and (b) attempting to obtain discovery evidence. Put another way, all parties have a positive obligation under the *Rules* to coordinate on a discovery plan by no later than 60 days after the close of pleadings, unless they agree to a later date.

[17] There is no evidence before me of any discovery plan being proposed by the defendants or the timing of one being discussed between the parties. That begs the question: is a defendant in default under the *Rules* if the defendant fails to comply (or attempt to comply) with the obligation in rule 29.1.03 to agree to a discovery plan? None of the parties made submissions on that issue. I considered whether to invite supplementary submissions, but determined that I need not decide the issue. I would still be allowing the action to proceed on the substantive tests under subrules 24.01(1) and (2).

Has there be inordinate delay?

[18] Inordinance of delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss: *Langenecker, supra* at para. 8. However, as acknowledged by the Court of Appeal in *Langenecker*, most litigation does not move at a quick pace. Inordinance of delay must be assessed in the particular circumstances of each case.

[19] I have no hesitation finding that the delay in this action has been inordinate. Prior to these motions being brought, the plaintiffs took no substantive steps in some six years, other than exchanging pleadings. Notably, pleadings did not close until months *after* the Poletes Defendants had served their affidavit of documents in May 2020. The plaintiffs served their outstanding reply and defence to the Elmenini Defendants' counterclaim in September 2020. The Elmenini Defendants thereafter served their reply to defence to counterclaim in October 2020.

[20] The period of delay following the close of pleadings is particularly stark. The defendants heard nothing from the plaintiffs or their lawyer between September 2020 and April 2022. The Poletes Defendants' lawyer then wrote to the plaintiffs' lawyer seeking clarification on whether the plaintiffs intended to pursue the action, inviting the plaintiffs to either move the action forward or dismiss it. The response was a proposed amended statement of claim, then another.

[21] In July 2022, Mr. Yehya served a notice of intention to act in person and advised that he would be bringing a motion to amend the statement of claim. In response, the Poletes Defendants' lawyer advised Mr. Yehya that he would need to seek leave of the court to represent the corporate plaintiff. Mr. Yehya's evidence on this motion is that he was unaware of that requirement, since he is not a lawyer. Nothing further happened between August 2022 and November 2023, when the plaintiffs appointed new counsel in response to these motions being brought. Even after appointing new counsel, the defendants heard nothing until February 2024, when plaintiffs' counsel initially requested an adjournment of this motion. The plaintiffs affidavit of documents was thereafter served on May 8, 2024, a few weeks before I heard both motions.

[22] The plaintiffs argue that the Poletes Defendants acquiesced in some delay by consenting to the first proposed amendment to the statement of claim. I disagree. There is no cogent evidence supporting any acquiescence in delay by the Poletes Defendants. Email correspondence from the Poletes Defendants' lawyer clearly indicated a desire to advance the litigation. In response to the first proposed amendments, the Poletes Defendants' lawyer confirmed only that his clients would not oppose the proposed amendments. It remained the plaintiffs' obligation to advance an amendment motion, which started and stopped, and then did not happen at all.

[23] There is, in my view, some complicity in the delay by the Elmenini Defendants, though. Like the plaintiffs, they have taken no steps to advance their $400,000 counterclaim. On the record before me, they have demonstrated a similar complacency with respect to their own claim. However, that does not negate the inordinance of the plaintiffs' own delay.

Is the delay inexcusable?

[24] Determining whether a delay is inexcusable requires determining the reasons for the delay and whether those reasons afford an adequate explanation for the delay. In considering the reasons provided, 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: *Langenecker, supra* at para. 9.

[25] Although the moving defendants have the ultimate burden on this motion, the plaintiffs have an evidentiary burden to provide a reasonable explanation for the delay and rebut any presumption of prejudice arising from the delay: *Ever Fresh Direct Foods Inc. v. Jamia Islamia Canada Ltd.,* 2021 ONSC 1278 at para 85. Although the defendants' conduct may be relevant, the plaintiffs are ultimately responsible for moving the action forward: *Wallace v. Crate's Marine Sales Ltd.,* 2014 ONCA 671 at para. 18.

[26] The plaintiffs' main explanations for delay are that Mr. Yehya had difficulty finding a lawyer, that his ability to instruct lawyers was limited during his time living in northern Ontario, that he suffered various health challenges, and that he was dealing with ongoing economic hardship.

[27] I agree with the defendants that Mr. Yehya's inability to find counsel and living and working in northern Ontario are not reasonable or persuasive explanations for the delay. Notably, after the plaintiffs' original counsel obtained an order removing him from the record, the plaintiffs

were unrepresented for a period of only three months between January and March 2020. Mr. Yehya retained new counsel in March 2020, who continued as the plaintiffs' lawyer of record until July 2022. Nevertheless, no substantive steps were taken by the plaintiffs to advance their case after serving their defence to counterclaim September 2020. The explanation given by Mr. Yehya that he was only able to retain and instruct new counsel by telephone is not a cogent explanation for anything. I accept that he was forced to take work in northern Ontario and relocate to Vermillion Bay during and following the pandemic, but Mr. Yehya has not explained how his location itself impacted his ability to advance this action. For example, there is no evidence that his telephone or internet access was limited.

[28] I accept that the plaintiffs' former lawyer had his licence to practice law revoked in July 2022, leading to Mr. Yehya serving a notice of intention to act in person. That was beyond the plaintiffs' control. Nevertheless, Mr. Yehya seems to hang his hat on living and working in Vermillion Bay as a complete answer to why he could not retain new counsel. There is no corroborating evidence of Mr. Yehya's purported communications with lawyers about potential retainers, but the crux of his evidence remains that he was able to telephone and speak with potential lawyers.

[29] The plaintiffs point to certain health concerns suffered by Mr. Yehya, notably ongoing depression that started after losing his business in 2016. In his supplementary affidavit, Mr. Yehya outlines that he also suffered car accidents in December 2017 and February 2018, as well as further accidents between August 2018 and January 2020. Photographs of vehicle damage are appended to his affidavit.

[30] The Poletes Defendants submit that Mr. Yehya's ongoing depression and stress is not a cogent explanation for the delay, since they did not impact his ability to commence this action, retain lawyers, prepare and swear an affidavit of documents, or respond to this motion. Viewed in isolation of other circumstances, I tend to agree with the Poletes Defendants. In addition to their points, no evidence has been tendered by Mr. Yehya on how the car accidents impacted his ability to deal with this litigation. However, I cannot divorce Mr. Yehya's health concerns from the evidence on his economic circumstances. Both are part of the factual matrix underpinning the plaintiffs' explanation for delay.

[31] The plaintiffs point to several economic hardships that Mr. Yehya has suffered, notably the following:

(a) having to fund legal fees for a disciplinary proceeding with the Ontario College of Pharmacists (alleged by Mr. Yehya to have resulted from a false complaint by Mr. Elmenini);

(b) impacts on his employability due to the College proceedings and a requirement to disclose to any pharmacy employer (i) the proceedings, (ii) ongoing monitoring by the College, and (iii) an undertaking with respect to both his health conditions and regularly seeing a forensic psychiatrist and family physician about them;

(c) having to work as a labourer to support his family when unable to find pharmacy work; and

(d) ultimately needing to take work in northern Ontario (specifically in Vermillion Bay, Dryden, and Thunder Bay) to support his family and pay legal expenses.

[32] I accept that there were ongoing costs of dealing with the proceedings before the College and that those proceedings were significant to Mr. Yehya and his livelihood, since his pharmacist licence is his primary source of income. There is evidence before me of the legal fees incurred. I also accept that Mr. Yehya had to move to Vermillion Bay to earn income to support his family and that he was busy as a staff pharmacist at two pharmacies in Vermillion Bay and Dryden. I further accept that, because of his financial dependence on those jobs, he could not leave Vermillion Bay. I am satisfied that the context of Mr. Yehya's health and financial circumstances, combined with his necessary geographic location, reasonably made it harder for him to advance this litigation himself and to find and instruct a lawyer to assist him.

[33] None of these concerns were communicated to the defendants. The defendants had no idea why the plaintiffs were failing to advance this litigation. Mr. Yehya's attention was evidently (and understandably) more focused on dealing with the College and earning income to support himself, his family, and legal expenses than it was on advancing this litigation. I find it relevant that, similar to the case in *Starr v. Canadian Medical Laboratories Ltd. Cybermedix Health Services Ltd.*, 2003 ONCA 2817, there is no evidence supporting that Mr. Yehya consciously decided not to pursue this action. Mr. Yehya's affidavit evidence supports an intention to pursue the action, but an inability to do so given his personal circumstances.

[34] That context is important in assessing the explanation for delay in the totality of Mr. Yehya's personal circumstances. Although Mr. Yehya ought to have communicated his personal challenges and intention to pursue this action, I accept that the plaintiffs' delay is excusable in context of the surrounding circumstances.

Is there a substantial risk that a fair trial is not possible?

[35] The foregoing is sufficient to dismiss relief under subrule 24.01(1)(c) of the *Rules*, but I would have found insufficient prejudice to warrant dismissing this action in any event.

[36] Inordinate and inexcusable delay is not enough. Delay must also be prejudicial to the defendants by giving rise to a substantial risk that a fair trial of the issues will not be possible. The delay must prejudice the defendants' ability to put their case forward for adjudication on the merits. In the face of inordinate delay, a rebuttable presumption arises that the defendants are prejudiced. The presumption of prejudice derives largely from a recognition that memories fade over time and the principle that justice delayed is justice denied: *Langenecker*, *supra* at para. 11; *Tanguay v. Brouse*, 2010 ONCA 73 at para. 2.

[37] There is no cogent evidence of any actual prejudice. Both the Poletes Defendants and the Elmenini Defendants rely on presumed prejudice.

[38] I agree that a presumption of prejudice has arisen here. By the time these motions were heard, over six years had passed since the action was commenced. The underlying dispute relates to a lease negotiated in 2010, with legal advice given by the Poletes Defendants at that time, and

alleged breaches of the lease and improper conduct by the Elmenini Defendants when the lease was terminated in 2016.

[39] The only affidavit put forward on this motion, relied upon by all defendants, is an affidavit from the Poletes Defendants' lawyer. No evidence has been tendered from either of the individual defendants or any other representatives of the corporate defendants.

[40] Although the Poletes Defendants argue that "the memories of all of the parties (and witnesses) have understandably faded", there is no direct evidence of that. I find that significant in this case. I accept the Poletes Defendants' submissions that, based on the pleadings and responding materials, oral agreements and discussions will be central in deciding this action. Nevertheless, there is no evidence from Mr. Elmenini or Mr. Poletes themselves, both of whom were presumably capable of providing affidavits. I thereby have no direct evidence on the state of their recollections about interactions with Mr. Yehya and the alleged oral discussions and agreements. The moving affidavit does not identify any other witnesses for the Poletes Defendants (or the Elmenini Defendants) that may need to be called, and whose memories may have faded.

[41] In my view, the defendants' arguments on presumed prejudice weaken when contextualized by their decisions not to identify necessary trial witnesses and not to put forward party witness evidence on their current recollections (or lack thereof) about disputed events.

[42] The Poletes Defendants also point to the evidence (by way of their sworn affidavit of documents) that they do not have their complete file. Schedule C to their affidavit of documents indicates that it was destroyed in the ordinary course of business seven years after they closed their file in 2010. However, that is not prejudice arising from delay in prosecuting this action (as the Poletes Defendants conceded during submissions). They submit, however, that I should consider it in context of Mr. Yehya's evidence that he does not have access to documents provided to his second lawyer or the documents allegedly confiscated by the Elmenini Defendants. They submit that few documents have been produced on the relationship with the Poletes Defendants and no evidence has been preserved.

[43] My problem with this argument is that there is no evidence or argument on what lost or inaccessible documents would reasonably have dealt with the plaintiffs' relationship with the Poletes Defendants. On this motion, I am concerned with prejudice arising from the delay, not prejudice that would have been present in any event. I am unable to find that, on a balance of probabilities, there has been a failure by the plaintiffs to preserve documents in their possession, control, or power since the commencement of litigation that are relevant to the retainer with or legal advice provided by the Poletes Defendants.

[44] I acknowledge that there is case law supporting that the failure of a plaintiff to tender evidence rebutting presumed prejudice may be a "fatal flaw" in responding to a rule 24.01 motion: see, for example, *Szpakowsky v. Tenenbaum*, 2017 ONSC 18 at para. 61. However, the strength of the presumption of prejudice also matters. The plaintiffs have carefully reviewed the length of delay in the various cases put before me, contrasting cases that have been dismissed and cases that have not been dismissed with reference to the total duration of delay. I am convinced that, while

there is a presumption of prejudice here, it is not as strong as in many of the cases cited by the defendants.

[45] I accept that there will some prejudice to the defendants from this action being allowed to proceed. However, as the plaintiffs point out (citing one of my prior decisions), the test is not that there is "some prejudice". The test is that there is prejudice giving rise to "a substantial risk that a fair trial of the issues will not be possible": *Tsivaras v. The Cadillac Fairview Corporation*, 2023 ONSC 3973 at para. 24.

[46] There is evidence before me of relevant documents being preserved, albeit that the sufficiency of those documents is disputed. However, no convincing argument has been advanced for why the existing documents will not be sufficient to refresh faded memories on the legal services provided by the Poletes Defendants and interactions with the Elmenini Defendants. The plaintiffs cannot fairly be expected to divine what Mr. Elmenini and Mr. Poletes may or may not actually recall in order to rebut a presumption that their memories have faded. They could have provided that evidence themselves, but elected not to do so. Based on his affidavit, Mr. Yehya appears to recall the underlying events.

[47] I am not satisfied that, on a balance of probabilities, the presumed prejudice from delay is strong enough to give rise to a risk that a fair trial is no longer possible, let alone a substantial risk. In my view, the plaintiffs have rebutted the presumption of prejudice that has arisen in this case. There being no evidence of actual prejudice, I would not dismiss this action under subrule 24.01(1) of the *Rules*.

Is it unjust to dismiss the action for delay?

[48] Relief under subrule 24.01(2) of the *Rules* has two elements. I must find that (i) one of the circumstances described in subrule 48.14(1) applies to the action; and (ii) the plaintiffs have failed to demonstrate that dismissing this action would be unjust. Dismissal under subrule 24.01(2) is mandatory if both elements are satisfied.

[49] It is undisputed that paragraph 1 of subrule 48.14(1) is engaged, since the action has not been set down for trial and the fifth anniversary of this action being commenced had passed before the two motions were brought. The plaintiffs took no steps to move for a status hearing under subrule 48.14(5). The only issue before me is whether the plaintiffs have established that it would be unjust to dismiss this action.

[50] As noted earlier in these reasons, two cases before me support that, in establishing that it would be unjust to dismiss the action, a plaintiff must meet the test for a status hearing under rule 48.14. Specifically, the plaintiff must demonstrate an acceptable explanation for the delay and establish that, if the action were allowed to proceed, the defendant will not suffer any non-compensable prejudice: *Loiselle v. Violette, supra* at para. 11; *Dupuis v. W.O. Stinson & Son Limited, supra* at para. 13.

[51] In *Kara v. Arnold*, 2014 ONCA 871, in the context of an appeal from a status hearing, the Court of Appeal discussed the balance between enforcing the *Rules* and having disputes decided on their merits. The court held, at para. 9, as follows:

> Dismissals for delay involve a careful balance between two competing values. On the one hand, the *Rules of Civil Procedure* need to be enforced in a way that ensures timely and efficient justice, in the interests of plaintiffs, defendants, and society in general. On the other hand, society in general, and the parties, have an interest in the resolution of disputes on their merits and in the availability of flexibility to avoid potentially draconian results, by providing the opportunity for parties to offer a reasonable explanation for delay when it takes them beyond established timelines.

[52] These competing principles run through my earlier assessment under subrule 24.01(1) and my ultimate decision on it. My reasons under that test also support that, on the facts of this particular case, it would be unjust to dismiss this action under subrule 24.01(2). I have accepted the plaintiffs' explanation for delay and am satisfied that the presumption of prejudice to the defendants in this case is not as strong as it has been in other cases. In my view, the extent of presumed prejudice is not sufficient non-compensable prejudice to warrant a dismissal order.

Timetable for next steps

[53] In the event that I did not dismiss the action for delay (as I have not), I asked the plaintiffs to propose a timetable and a new set down deadline. The defendants collectively prefer to fix an outside set down deadline and work cooperatively on a timetable for steps that work for all counsel. I was frankly surprised to hear that the defendants agreed that the set down deadline should be much later than the plaintiffs' own proposal. I am advised that the plaintiffs initially proposed April 30, 2025, which was then amended to July 31, 2025. The defendants have requested a set down deadline of November 30, 2025.

[54] Counsel for each of the Poletes Defendants and the Elmenini Defendants submit that additional time will permit a reasonable timetable that will not be breached. It will also mean that the court's involvement should not be needed to vary it. The proposed later set down deadline takes into account the various schedules of the lawyers for the parties. I was advised of potential scheduling conflicts for counsel in having examinations before the fall and concerns about the current delays in Toronto motion scheduling and motion return dates.

[55] I am unmoved by these submissions, no matter how reasonable they may seem on their face. The defendants have come before this court alleging inordinate and inexcusable delay and that the length of time between the underlying incident and this motion is so great that I should dismiss this action. Notwithstanding that position, they wish to have an extended period to complete discoveries, undertakings, and mediation, and thereafter set the action down for trial. The two positions are, in my view, at odds.

[56] Although unsuccessful in convincing me that the action should be dismissed, the defendants were successful in convincing me that there has been ongoing and inordinate delay. Now they ask for further delay. I do not agree that the requested set down deadline of November 30, 2025 is reasonable. If the plaintiffs are agreeable to an earlier date, then the

defendants, whose submissions centred on complaints of ongoing delay, cannot justify a later set down date. I will not condone further unnecessary delay in moving this action to trial readiness now that the issue has been put in the court's hands.

[57] In my view, the plaintiffs' proposed set down deadline allows more than sufficient time to complete all remaining steps. While I am fixing a timetable for those next steps, it will remain open to the parties to vary that timetable on mutual consent pursuant to rule 3.04 of the *Rules.* Put simply, counsel will have the flexibility to discuss and amend the timing of all remaining steps to a set down.

DISPOSITION

[58] For the above reasons, I am exercising my discretion to permit this action to proceed, albeit on terms. I accordingly order as follows:

(a) The defendants' respective motions are dismissed.

(b) The following timetable and orders shall apply to next steps in the action:

(i) Supplementary affidavits of documents, if any, shall be served with electronic copies of all Schedule A productions by October 31, 2024.

(ii) Examinations for discovery shall be completed by January 31, 2025.

(iii) Any motions arising from discoveries, including refusals, undertakings, and additional productions, shall be brought (but not necessarily heard) by April 25, 2025.

(iv) For all motions on refusals and undertakings, the parties shall exchange the charts required by subrule 37.10(10) of the *Rules* **prior to** booking and serving any motion materials, which shall be exchanged on a timetable agreed by counsel for the parties acting reasonably.

(v) Mandatory mediation shall be completed by June 30, 2025.

(vi) The action shall be set down for trial by July 31, 2025.

(c) The timetable in subparagraph (b) above may be amended by the parties on mutual consent without the need for a court order, except for the set down deadline, which may only be amended by further court order.

(d) The registrar shall dismiss this action for delay unless it has been set down for trial or terminated by any means prior to the new set down deadline of July 31, 2025.

(e) Setting the action down for trial shall be without prejudice any motion for which leave would otherwise be required under rule 48.04, provided that such motion has been booked and brought, with motion record served, prior to the set down.

(f) This order is effective without further formality.

COSTS

[59] Because the plaintiffs had served offers to settle these motions, I could not hear costs submissions at the time of the hearing. Typically, costs of a motion are awarded to the successful party. However, as set out in subrule 57.01(2) of the *Rules*, the fact that a party is successful in a step in a proceeding does not prevent the court from awarding costs against the party. Permitting the action to proceed is, in my view, a significant indulgence given the complete lack of communication by the plaintiffs about the reasons for not advancing this case and their seeming complacency with the litigation delay. My decision involves accepting evidence that was late-served by the plaintiffs on the eve of the hearing. In the circumstances, I am considering whether to award costs of the motions to the defendants, despite the plaintiffs' formal success in opposing their motions.

[60] Costs outlines have been exchanged. I encourage the parties to settle costs of the motion. If they cannot agree, then written costs submissions shall be exchanged. The plaintiffs shall serve any costs submissions by October 11, 2024, which shall include the plaintiffs' position on whether the defendants should be awarded any costs and, if so, in what amount and/or the position on costs claimed by the plaintiffs for each of the two motions. The defendants shall serve their responding costs submissions, including any costs claim that they may make themselves, by October 25, 2024. The plaintiffs shall serve reply submissions, if any, by November 1, 2024. Costs submissions shall not exceed four (4) pages, excluding any offers to settle and case law, with any reply submissions not exceeding two (2) pages.

[61] Once served, all costs submissions shall be submitted by email directly to my Assistant Trial Coordinator, Christine Meditskos, with proof of service. Unless exchanged and submitted in accordance with the above, the parties shall be deemed to have agreed on costs.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: September 26, 2024