CITATION: The Corporation of the City of Ottawa v. 152610 Canada Inc. et al, 2024 ONSC 6217
COURT FILE NO.: CV-18-78556
DATE: 2024/11/25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Corporation of the City of Ottawa (Plaintiff/Moving Party)

AND

152610 Canada Inc. o/a Laurin Construction Group et al (Defendants)

Concrete Polishing and Sealing Ltd. et al. (Responding Parties)

BEFORE: Justice A. Kaufman

COUNSEL: Susanne M. Sviergula, Cavanagh LLP, Agent for the Lawyers for the Plaintiff

Theresa Hartley, Mccague Borlack LLP, WSP Canada Inc., Responding Party

Eni Eski, Lundy Levy Eski Baum, Architecture 49 Inc., Responding Party

Lea Nebel, Blaney McMurtry LLP, 152610 Canada Inc. o/a Laurin Group and 4241258 Canada Inc. o/a Laurin General Contactors, Responding Parties

Margot Pomerleau, MBC Law, Concrete Polishing and Sealing Ltd., and City Group (2001) Ltd., Responding Parties

Brett Moldaver, Moldaver Barristers, R&D Technical Solutions Ltd., Responding Party

HEARD: November 21, 2024

ENDORSEMENT

[1] The City of Ottawa ("the City") moves to set aside the Registrar's order dated June 12, 2024, which dismissed this action for delay. The City seeks to reinstate the action and extend the time to set it down for trial.

[2] The defendants and the third party, R&D Technical Solutions Ltd., consent to or do not oppose this motion. If reinstated, they are prepared to follow the plaintiff's proposed timetable.

[3] The third parties, Concrete Polishing and Sealing Ltd. and City Group (2001) Ltd. (the "responding parties"), oppose the motion.

Test for Setting Aside a Registrar's Order for Delay

[4] The Court of Appeal in *Piedrahita v. Costin*, 2023 ONCA 404, outlines the test for setting aside a dismissal order for delay:

> i) have the plaintiffs provided a satisfactory explanation for the litigation delay;
>
> ii) have the plaintiffs led satisfactory evidence to explain that they always intended to prosecute the action within the applicable time limits but failed to do so through inadvertence;
>
> iii) have the plaintiffs demonstrated that they moved forthwith to set aside the dismissal order as soon as the order came to their attention; and
>
> iv) have the plaintiffs convinced the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiffs' delay or as a result of steps taken following the dismissal of the action?

[5] This test is flexible, requiring courts to balance the parties' interests while considering the public's interest in timely dispute resolution (*Prescott v. Barbon*, 2018 ONCA 504).

[6] The responding parties concede that the City acted promptly to address the dismissal and that it failed to set the action down due to the inadvertence of counsel.

Facts

[7] This action is for damages to a parking garage due to the defendants' alleged negligent design and construction. The City had the claim issued on November 28, 2018, and an early mediation occurred on December 4, 2018. Defences and third-party claims followed in 2019 and 2020.

[8] By September 17, 2020, affidavits of documents were exchanged, and the City was discovered on September 22, 2020. It answered its undertakings by March 23, 2021.

[9] A second mediation was planned for January 26, 2020, but was postponed to allow the City to obtain an additional report addressing the cause of the damage and repair costs. Counsel for the plaintiff was of the view that the additional report was necessary because additional deficiencies had been discovered in late 2021.

[10] There does not appear to have been any progress to the litigation between January 20, 2020 and June 14, 2022. Counsel for the plaintiff (not Ms. Sviergula) provided an affidavit stating that he regularly followed up with the plaintiff about the status of the expert report.

[11] Mr. Faris, a senior project manager for the City of Ottawa stated in his affidavit that repairs were being done to the garage between January 20, 2022 and June 14, 2024, the cost of which were being claimed in this litigation. Some of the repairs could only be performed in clement weather as the garage is made of concrete. Moreover, the contractor the City retained to repair the garage added or created new deficiencies. The City commissioned an expert report to differentiate between the damages caused by the defendants, and those caused by the contractor it retained to complete the repairs. The consultant it retained to prepare the report did not respond to Mr. Faris' enquiries in a timely manner, but the City finally obtained the report in August of 2024.

[12] Mr. Faris' evidence is that the city had always intended to pursue this action. Mr. Faris confirms that the City has preserved all its documents relating to the project and the repairs.

Analysis

[13] In my view, the City has shown sufficient grounds for reinstating the action.

[14] This litigation involves six parties, and some delay is inevitable in such cases. All parties engaged in mediation, exchanged documents, and the City completed discovery.

[15] The responding parties argues that while the City explains the work done to the garage, it fails to address inaction in the litigation. In my view, the evidence of ongoing works to the garage explains the pace of the litigation. All parties were understandably interested in obtaining an accurate assessment of damages attributable to the defendants before incurring additional litigation costs. By agreeing to adjourn the second mediation, they tacitly agreed to await the consultant's report. The real cost of repairing deficiencies offers a more reliable basis than estimates, and the City had an obligation to mitigate its damages by conducting this work in the most economical way, which affected the repair schedule.

[16] I do not suggest that, in all cases, a plaintiff will be justified in pausing the litigation while undertaking repairs to a property it alleges was deficiently constructed by the defendants. But where this is done with the apparent consent of the defendants, the plaintiff's action ought not be dismissed for delay.

[17] In my view, the explanation for the delay is justifiable.

[18] I am also convinced that the City consistently intended to pursue the action and that the delay resulted from inadvertence. Mr. Faris' unchallenged evidence is that the City has always intended to pursue the action and counsel for the plaintiff confirmed that the dismissal arose from a clerical error regarding the deadline to set the action down. Counsel for the plaintiff testified that between January 2022 and June 2024, he responded to the defendants' requests for updates about the status of the plaintiff's report and followed up with his client.

[19] Finally, I am not persuaded that the responding parties would suffer prejudice as a result of the action being reinstated. The prejudice in this context is to the defendant's ability to defend the action that would "[arise] from steps taken following dismissal, or which would result from restoration of the action following the registrar's dismissal": 806480 Ontario Ltd. v. RNG Equipment Inc., [2014] O.J. No. 2979, 2014 ONCA 488, at para. 4.

[20] The responding parties claim they would suffer prejudice if the action is reinstated, arguing that the elapsed time and delays have further complicated the plaintiff's assessment of repair costs and determination of liability. Although it is regrettable that the City's contractor caused additional damage to the garage, this complication does not constitute prejudice arising from reinstatement. Furthermore, any challenges the City faces in determining liability or assessing repair costs fall on the plaintiff, who carries the burden of proof.

Consequence of reinstatement on third parties.

[21] The defendant, Architecture49 Inc., commenced a third-party claim against R & D Technical Solutions Ltd. and City Group (2001) Ltd on July 2, 2020. Its claims are for contribution and indemnity and are entirely derivative. It does not assert any separate cause of action. It consented to the plaintiff's motion to set aside the Registrar's order dismissing the action and to the timetable that was proposed.

[22] Architecture49 Inc's counsel appeared at the motion to address an issue raised in the responding party's factum, namely, the re-instating of the deemed dismissal of the third-party claims. The responding parties suggested that the defendants were required to seek an Order setting aside the dismissal of the Third Party actions and questioned whether the defendants acted promptly in seeking this relief.

[23] When an action is dismissed under Rule 48.14, Rules 24.03 and 24.04 apply to counterclaims, crossclaims, or third-party claims, except for Rule 24.04(1.1). Rule 24.04(1) states: "Unless the court orders otherwise, when an action against a defendant who has crossclaimed or made a third-party claim is dismissed for delay, the crossclaim or third-party claim shall be deemed dismissed."

[24] Architecture49 Inc. contends that the Rules do not specify the effects on third-party claims when a Registrar's order dismissing the main action for delay is set aside. It argues that a defendant ought not be required to file a motion to reinstate a third-party claim that is purely derivative of the main action.

[25] I agree that once an administrative dismissal is set aside, the deemed dismissal under Rule 24.04(1) is no longer applicable, which automatically revives the third-party claims. It would be unfair to deny the defendants the opportunity to pursue their third-party claims, especially since these claims were dismissed not due to the defendants' own delay, but due to the plaintiff's failure to set the action down before the action's fifth anniversary. The third party claims themselves are four years old and were not administratively dismissed for delay.

Timetable

[26] The responding parties are of the view that the timetable proposed, which was agreed to by all parties except them, is too ambitious and is simply a "placeholder". I encourage the parties to negotiate a revised timetable with the responding parties. If the parties cannot agree, they may request a 9:15 a.m. case conference before me to set a timetable for the remaining steps.

Costs

[27] As the plaintiff succeeded on the motion, it is presumptively entitled to costs. I have reviewed the parties' respective cost outlines. The plaintiff seeks $8,931.97 on a partial indemnity basis, while the responding parties claim $6,636.38.

[28] It is understandable that the City, as the moving party with the burden of proof, incurred more costs than the responding parties on this motion. I set the City's costs at $7,000, all-inclusive, to be paid within 30 days.

[29] Architecture49 Inc. appeared at the motion to address an issue related to the reinstatement's impact on third-party claims, as mentioned in the responding parties' factum. I award it costs of $1,000, payable by the responding parties within 30 days.

A. Kaufman J.

Published: November 25, 2024

CITATION: The Corporation of the City of Ottawa v. 152610 Canada Inc. et al, 2024 ONSC 6217
COURT FILE NO.: CV-18-78556
DATE: 2024/11/25

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: The Corporation of the City of Ottawa (Plaintiff/Moving Party)

-and-

152610 Canada Inc. o/a Laurin Construction Group et al (Defendants)

Concrete Polishing and Sealing Ltd. et al. (Responding Parties)

COUNSEL: Susanne M. Sviergula, Cavanagh LLP, Agent for the Lawyers for the Plaintiff

Lea Nebel, Blaney McMurtry LLP, Lawyer for the Defendants

Margot Pomerleau, MBC Law, Lawyer for the Responding Parties

ENDORSEMENT

Justice A. Kaufman

Released: November 25, 2024