**CITATION:** Ciamarra v. Pesce, 2015 ONSC 8015
**COURT FILE NO.: CV-09-376055**
**MOTION HEARD:** 20150427
**REASONS RELEASED:** 20151222



**SUPERIOR COURT OF JUSTICE – ONTARIO**

**BETWEEN:**

**ANTHONY CIAMARRA**

Plaintiff

- and-

**EMILIO PESCE**

Defendants

**BEFORE:** MASTER D. E. SHORT

**COUNSEL:** *J. Van Allen* Fax: (416) 869-0271
-for the Plaintiff Moving Party
*Melvin Sokolsky* Fax: (905) 479-7025
-for the Defendant Responding Party

**REASONS RELEASED:** December 22, 2015

## Reasons for Decision

## I. Overview

[1] This Motion is for an Order setting aside the Order Dismissing Action for Delay, dated April 10, 2014 and if necessary, an Order restoring this action to the Trial List.

[2] The Plaintiffs claim is for damages for breach of contract in respect of a commercial lease agreement between the Plaintiff and the Defendant and damages that were allegedly caused to fixtures and equipment by the Defendant, which damage were discovered after the Defendant vacated the premises on July 2, 2008 without notice to the Plaintiff.

[3] The defendant is alleged to have carried on a dental laboratory business as a sole proprietorship under the name Ultra Bond Dental Laboratories. The statement of claim alleges that the plaintiff and defendant into entered into a commercial lease agreement in 1992, for a period of 5 years ending on January 31, 1998. The lease contained an option to renew for a further 5 years, which option apparently was exercised, leading to negotiations in 2008 for a

further five-year extension.

[4] The plaintiff asserts that the defendant agreed to the terms contained in the 3rd lease renewal agreement and Commenced payment of rent payable in the 3rd lease renewal agreement on April 1, 2008. On July 2, 2008 the defendant and his company vacated the leased premises "without notice to Ciamarra"

[5] the statement of defence asserts that it or about 1981, 418451 Ontario limited operating as ultra Bond Dental Ceramic laboratory entered into a lease with the previous landlord to lease the subject premises. Specifically, the pleading asserts that "at no time has Pesce in his personal capacity, entered into any agreement with CMR" it is further asserted that Ultra Bond did not agree to extend the lease for further five-year term, but rather became a monthly tenant pursuant to the provisions of the existing written lease.

Thus we have a relatively straightforward dispute as to who, with the parties to the lease agreement, and whether or not it was renewed for further five-year term.



## II. Action Commenced

[6] Initially the Plaintiff retained Anthony Potestio ("Potestio") his previous counsel in February of 2009.

[7] On April 9, 2009, a Statement of Claim on April 9, 2009 as a Simplified Procedure matter. Within a week of that service, the then lawyer for the Defendant served a Notice of Intent to Defend and Request to Inspect Documents on behalf of the Defendant.

[8] Later the same month produced documentation in accordance with the Request to Inspect Documents which he sent to the Defendant's lawyer by regular mail. On April 28, 2009, counsel for the Plaintiff agreed to provide the Defendant with a further 30 day waiver of defence.

[9] On May 11, 2009, the lawyer for the Defendant served a Statement of Defence. Thus within little more than a month of the action being commenced pleadings from both sides had been *served*

[10] Regrettably it appears the defendant did not file the defence. As a consequence of this failure on August 11, 2009, the Court issued a Notice of Action Dismissal. Neither side responded. On October 6, 2009, the Court issued an Order Dismissing Action as Abandoned.

[11] It appears that between June 2009 and March 2010, the Plaintiff's then counsel, Potestio, had no further communication with the lawyer for the Defendant.

[12] Apparently unaware of the dismissal, On February 26, 2010, the Plaintiff swore an Affidavit of Documents which was served on March 18, 2010 together with Schedule "A" productions.

[13] On March 22, 2010, Potestio received a fax from defence counsel enclosing the Order Dismissing Action as Abandoned, dated October 6, 2009.

[14] This was the first notice Potestio had of the Order Dismissing Action as Abandoned.

[15] Potestio did not receive the Order Dismissing the Action as Abandoned at either of his Toronto, Woodbridge or Thunder Bay offices. The first time that Potestio became aware of the Order Dismissing Action as Abandoned was when he received defence counsel's correspondence on March 22, 2010.

[16] Apparently a search of the Court file revealed that both the Notice of Action Dismissal and the Registrar's dismissal were sent to "P.O. Box 3047, Thunder Bay, Ontario,", an address which had not been used by Potestio for at least 4 years.

[17] Pursuant to Rule 48.14(2), Potestio wrote to the Plaintiff to advise of the Dismissal Order and to advise that a Motion was being brought to set aside the Dismissal Order.
[18] In or around October of 2010, Suzanne B. Quinn ("the Plaintiff's lawyer") was retained to assume carriage of this matter
[19] On February 15, 2011, Master Hawkins issued a Consent Order setting aside the Registrar's Dismissal Order, dated October 6, 2009. The Order also required the Defendant to deliver an Affidavit of Documents by March 15, 2011. Finally, the Order stated that the Registrar shall not dismiss the action for delay prior to April 30, 2011.
[20] On March 10, 2011, the Trial Record was served. The Trial Record was filed on April 13, 2011.

## III. Settlement Attempts

[21] On May 5, 2011, the Plaintiff's lawyer attended mediation. The parties were unable to come to a settlement at mediation. After the mediation, a Mediator's Report was filed with the Court. From and after that time, the Plaintiff's lawyer believed that the Court would issue a Notice to her regarding the scheduling of a pre-trial in this matter.
[22] On May 19, 2011, the Defendant served an Offer to Settle.
[23] Subsequently on October 14, 2011, the Plaintiff's lawyer wrote to the lawyer for the Defendant to advise that her client wished to make a further offer to settle prior to setting the action down for trial and asked that the lawyer for the Defendant canvass with the Defendant his willingness to settle the matter as per the attached offer.
[24] On January 10, 2012, the Civil Trial Office faxed the Plaintiff's lawyer a Certification Form to set pre-trial and trial dates which was inadvertently dated January 10, 2011. It would seem that the paralegal named who was assisting and had carriage of the Plaintiff's file at the time did not bring the Certification Form to the Plaintiffs lawyer's attention at the time it was received.
[25] On May 20, 2012, the Plaintiff's lawyer served a Notice of Readiness for Pre-Trial Conference.

## IV. Injury to Counsel

[26] In June of 2012, the Plaintiff's lawyer went to Ireland to attend a family wedding. While in Ireland, she was involved in a slip and fall incident in which she sustained serious injuries. The particulars of her injures were (i) a fracture of the lateral malleolus of the left ankle with subluxation. She fractured her ankle in two places and it was completely displaced. In addition, there was significant tearing of the ligaments in her ankle and detachment from the bone; (ii) Complete tear of the ACL in her left knee. As a result, the Plaintiff's lawyer was hospitalized in Ireland for three days where she underwent surgery. Her treatments included a surgery to set and repair her ankle, called open reduction and internal fixation of the fracture. The fracture was stabilized with a seven hole plate and intra fragmentary screw along the lateral side over the fibula.
[27] When the Plaintiff's lawyer returned home to Toronto, it was discovered that her ankle ligaments were torn and she required two additional surgeries which she underwent over the next several weeks that followed. An additional injury was later discovered. She required many weeks

of physiotherapy before she could have her final surgery which was performed in January of 2013. During this time she remained housebound and could not walk or drive.

[28] The day before the Plaintiffs lawyer's fourth and final surgery in January of 2013, she was involved in a motor vehicle accident in which she suffered injuries. Her recovery from her motor vehicle accident injuries was complicated by the fact that she had to walk with crutches for several months after her last surgery in January of 2013. As a result, the Plaintiff's lawyer did not return to her full-time duties at the office until in or around July of 2013.

[29] Understandably the injuries sustained in the car accident made mobility even more challenging, extended the time required to convalesce from surgery, and caused their own set of issues including but not limited to severe headaches, inability to focus, inability to sit or work at a computer for any meaningful length of time.

[30] This was a difficult time for the Plaintiff's lawyer and her practice as she was a sole practitioner. She had difficulties trying to continue managing and operating her practice. However, she had a trusted paralegal and assistant both of whom monitored her files and corresponded with her to keep her apprised of developments while she was convalescing and absent physically from the office.

## V. Status Notice: Action Not On a Trial List

[31] In June of 2013, the Court issued a Status Notice: Action Not On A Trial List. Although the Notice was received by the Plaintiffs lawyer's office in or around June of 2013, unfortunately through inadvertence and for reasons not known to her, this Notice was not reviewed by anyone in her office or brought to her attention. As such, she did not take steps to respond to the Status Notice.

[32] When the Plaintiff's lawyer returned to her practice in July of 2013, she began to undertake a review of not only her ongoing files but also the new files that had come in to the office during her recovery.

[33] On April 10, 2014, the Court issued an Order Dismissing Action for Delay which was sent to the Plaintiff's lawyer' s home. She does not pick up the mail regularly so the Dismissal Order did not come to her attention until May of 2014. It was at that time that she reviewed this file and discovered the Status Notice dated June 2013.

[34] On May 5, 2014, the Plaintiff's lawyer wrote to the Plaintiff to advise him of what was the second administrative dismissal of the action.

[35] On August 6, 2014, counsel to the lawyer for the Plaintiff served the Notice of Motion for this Motion returnable December 19, 2014.

## VI. No cross examinations in Simplified Matters

[36] The defendant resisted that motion. In his Affidavit sworn December 13, 2014, the Defendant states that he has lost touch with some of the witnesses listed in his Affidavit of Documents and he states:

> ...I have lost touch with some of the witnesses listed in my Affidavit of Documents, and I have no idea whether I can find them now. One of the witnesses has dementia. They would prove evidence that the

> Plaintiff knew that the premises were left in the same or better condition than when my company first moved in.

[37] On December 19, 2014, the motion was adjourned to permit the Plaintiff time to deliver reply materials. It was anticipated at that time that the counsel to the lawyer for the Plaintiff would also cross-examine the Defendant's Affiant on his Affidavit sworn December 13, 2014 and that the Defendant would cross examine the Plaintiff Affiants. However, counsel to the lawyer for the Plaintiff subsequently determined that this was a simplified procedure action and as such, cross-examinations were not permitted.

[38] As a consequence of that restriction, January 30, 2015, the Plaintiff swore a Reply Affidavit in which he states that he had reviewed the Defendant's Affidavit of Documents and in particular Schedule "D" in which the Defendant sets out names and addresses of persons who might reasonably be expected to have knowledge of the transaction or occurrences at issue in this action.

[39] The Plainttiff bears the onus of proof in the case I am not satisfied on the evidence before me that any potential witnesses that may be unavailable have been demonstrated to their being in possession of evidence relevant to the core issues in this case. The parties to the lease and whether it was renewed are threshold issues to the bulk of the plaintiff's claims. The defendant would still seem to be in a position to mount his defence on these issues.

## VII. Issues and the Law

[40] In deciding whether or not to set aside a Registrar's Dismissal Order, the Court adopts a contextual approach and will make the Order that is just in the circumstances of the case. In *Habib v. Mucaj,* [2012] O.J. No. 5946, the Court of Appeal considered a case in which the Master had set aside a Registrar's dismissal. The Court's reasons included the following:

> "There are four well established factors to consider when deciding to set aside an order to dismiss an action:
>
> (i) *explanation of the litigation delay*- a deliberate decision not to advance the litigation will usually be fatal;
> (ii) *inadvertence in missing the deadline*- the intention always was to set the action down within the time limit;
> (iii) *the motion* is *brought promptly*- as soon as possible after the order came to the party's attention; and
> (iv) *no prejudice to the defendant* - the prejudice must be significant and arise out of the delay: *Reid v. Dow Corning Corp.* (2011), 11 C.P.C. (5th) 80 (Ont. Div. Crt.).
>
> 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. Here, the Master specifically referenced the proper test and engaged in the weighing exercise. He found that, after the weighing exercise, the just result was to set aside the dismissal order. The Master's order was discretionary and was made as part of his duty to manage the trial list.

> The decision, therefore, attracts significant deference from a reviewing court *Finlay v. Paassen,* 2010 ONCA 204.
>
> Furthermore, on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel. However, where the lawyer's conduct is not inadvertent but deliberate, this may be different:
> *Marche d'Alimentation Denis Theriault Ltee. v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660 (O.C.A.), at para. 28. Here, the plaintiff lawyers' conduct was found by the Master not to be deliberate. Simply because the appeal judge's view is that the conduct was "negligent" or "bordering on negligent", does not mean the Master was not entitled to find the conduct not to be deliberate or not intentional."

[41] I am satisfied in this case that the conduct of counsel was in no way deliberate. There are inherent difficulties in practicing as a sole practitioner and when events transpire which prevent the normal functioning of the practice, the client should not be prejudiced in any way.

[42] It is not necessary that a Plaintiff satisfy all four of the *Reid* factors to succeed on a motion to set aside a Dismissal Order. Prejudice is invariably a key factor. See *Scaini v. Prochnicki,* [2007] 85 O.R. (3d) 179 (ONCA)

[43] Between June 2012 and July 2013, the Plaintiff's lawyer was severely limited in her mobility and ability to supervise her practice as a sole practitioner. The litigation delay has been explained. Any litigation delay was neither intentional nor was the action abandoned.

[44] In June of 2013, the Court issued a "Status Notice: Action not on a Trial List". Although the Notice was received by the Plaintiff's lawyer's office in or around June of 2013, unfortunately through inadvertence and for reasons not known to her, this Notice was not reviewed by anyone in her office or brought to her attention. As such, she did not take steps to respond to the Status Notice. The Plaintiff's lawyer discovered the Status Notice after the action had been dismissed for delay on April 10, 2014.

[45] The inadvertence in missing the deadline has been explained.

[46] On April 10, 2014, the Court issued an Order Dismissing Action for Delay. In May 2014, the Plaintiff's lawyer reviewed this matter and discovered the Status Notice and Dismissal Order. 61. On August 6, 2014, counsel to the lawyer for the Plaintiff served a Notice of Motion for this Motion returnable December 19, 2014.

[47] There has been no Motion delay.

[48] In my view there will be no permanent prejudice to the Defendant if the Order Dismissing Action for Delay is set aside:

> a. The Defendant has had full production by way of the Response to Request to Inspect Documents and Affidavit of Documents;
> b. The parties themselves are the key witness and other witnesses with relevant evidence are available:
> c. The Defendant has full knowledge of the facts and defences pleaded; and
> d. The Defendant has in his possession all documentation he requires to defend the action.

## VIII. Confirmation of Approach

[49] While I have reached my decision in this case based on the existing case law at the time, the matter was argued before me. I am of the view that my conclusions would be further supported by a more recent decision of the Court of Appeal.

[50] On September 2, 2015, while this matter was under reserve, Justices Sharpe, Lauwers and van Rensburg of the Ontario Court of Appeal released their decision in *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592,

[51] There Justice van Rensburg was addressing an appeal from a motion judge's refusal to restore an action to the trial list under rule 48.11. In reversing the judge's order which had resulted in the action subsequently being administratively dismissed, the Court articulated these concerns and directions indicating the preference in all but the clearest of cases that an action should not be dismissed for delay. Her analysis considers earlier decisions in this area including *Nissar v. Toronto Transit Commission*, 2013 ONCA 361;115 O.R. (3d) 713 and *1196158 Ontario Inc. v. 6274013 Canada Ltd.* ,2012 ONCA 544; 112 O.R.(3d) 67:

> "43. Where, as here, the refusal to restore an action to the trial list will result in its dismissal, the *Nissar* test, informed by the case law respecting rule 48.14 dismissals, will apply. This is because the inevitable result of the failure to restore the action to the trial list would be dismissal, as occurred here. As discussed in several decisions of this court concerning dismissal for delay, a motion judge must strike a balance between the need for efficiency and the need for flexibility, such that cases can be tried on the merits **where there is a reasonable explanation for non-compliance with the rules**: see *1196158 Ontario Inc.*, at para. 20, *Fuller*,[2015 ONCA 173] at para. 25, *Faris v. Eftimovski*, 2013 ONCA 360, 306 O.A.C. 264, at para. 24, and *Kara v. Arnold*, 2014 ONCA 871, 328 O.A.C. 382, at para. 9.
>
> ....
>
> 45 As to the nature of the explanation for delay, in the judgment followed in *Nissar*, *1196158 Ontario Inc.*, Sharpe J.A. referred variously to the requirement for the plaintiff to show an "acceptable", "satisfactory", or "reasonable" explanation for the delay. Therefore I take these adjectives to be interchangeable in this context. The motion judge in this case referred to the appellant's requirement to show a "reasonable explanation" for the delay, not an "acceptable explanation" as worded in *Nissar*. No error is alleged by either party with regard to the articulation of the test.
>
> 46. A motion to restore an action to the trial list is **not a "blame game",** where counsel should be required or encouraged to take a defensive stance and justify their conduct of the litigation on a month-by-month basis. **Rather, in assessing whether a plaintiff's explanation for delay is reasonable, a motion judge should consider the overall conduct of the litigation, in the context of**

> **local practices**, which can vary quite widely between jurisdictions. Practices for scheduling pre-trial conferences and trials differ throughout the province, because they must meet the needs of particular regions and courthouses. These practices can affect the expectations of the parties, their counsel and the courts as to timing.
> …
> 48. …. **a proper delay analysis does not consider the conduct of an action in a vacuum.**" [my emphasis throughout]

[52] On a contested status hearing the court is asked to balance the interests of the parties. In *1196158 Ontario Inc. v. 6274013 Canada Ltd.* the Ontario Court of Appeal stated:

> [19] Time lines prescribed by the Rules of Civil Procedure or imposed by judicial orders should be complied with. Failure to enforce rules and orders undermines public confidence in the capacity of the justice system to process disputes fairly and efficiently. On the other hand, procedural rules are the servants of justice not its master. **We must allow some latitude for unexpected and unusual contingencies that make it difficult or impossible for a party to comply.** We should strive to avoid a purely formalistic and mechanical application of time lines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits.

[53] I have added my emphasis to a number of extracts from Justice van Rensburg's recent observations in *Carioca's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2015 ONCA 592,:

> "***Delay***
> **51** The motion judge's analysis focussed mechanically on whether blame could be attributed to the appellant at each stage of the litigation. Once he found delay, he failed to go on to weigh the evidence and evaluate whether the explanation provided was reasonable. Had he done so, he would have taken into account important factors such as the circumstances in which the action came to be struck from the trial list and the fact that the case was now ready for trial.
> **52** Applying too exacting a standard for restoring an action which has been struck from the trial list may well hinder the objective of an efficient justice system, as parties and counsel would argue over keeping matters on the trial list for fear that, once struck, they might never be restored. Fighting highly contested motions over cases being struck and restored to the trial list is not an effective use of scarce judicial and legal resources. Ontario courts are actively discouraging a "motions culture" among counsel, and the Supreme Court of Canada has called for **a "shift in culture", citing the need for a process that is proportionate, *timely* and affordable**: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28.

> **53** While this court has stated frequently that the plaintiff bears the primary responsibility for moving a case forward, it has also acknowledged that the conduct of a defendant is a factor, especially where a plaintiff encounters some resistance when trying to move the action along: *1196158 Ontario Inc.*, at para. 29. The suggestion that it is normal and acceptable for a defendant, if not to actively delay, to simply wait for the plaintiff to make the next move, may be based on a conventional view of litigation strategy. **The objectives of timely and efficient access to justice, and effective use of court resources require all parties to play their part in moving actions forward, and for counsel to act in a way that facilitates rather than frustrates access to justice:** *Hryniak,* at para. 32. For these reasons, although the burden of proof on the motion is on the plaintiff, the **conduct of *all* parties in relation to the litigation is relevant in determining whether to restore an action to the trial list."**

[54] I have endeavoured to weigh the role of each side in delaying this matter with a view to following the Court's guidance in *Carioca*'s:

> **54** The motion judge's approach here focussed almost exclusively on the appellant's conduct, and did not consider the overall dynamics of the litigation. This resulted in an imbalanced view of at least four aspects of the appellant's actions. First, at the time the motion below was heard, the case was ready to proceed to trial. Any objection raised by the respondent had been met, and the parties were capable of complying with the requirements of rule 53.03 for the exchange of expert reports. Keeping an action that is ready for trial off the list is punitive rather than efficient. Second, the action sought to be restored had been summarily struck from the trial list by a judge's order at an appearance where the parties were jointly seeking new dates for a pre-trial and trial, and not at the respondent's request. Third, the appellant had never lost sight of the need to restore the action to the trial list, had brought its motion reasonably promptly after the action had been struck, and, as the motion judge observed "had no motive to delay the action". Finally, the respondent had not indicated any serious concerns about the pace of the litigation until it opposed the motion to restore the action to the trial list.

[55] This last observation would seem to apply to this case as well

## IX. Disposition

[56] In the result the Registrar's dismissal is set aside and the case is to now be restored to the Trial List.

[57] The plaintiff will ensure that the Registrar is made aware promptly of this restoration.

[58] Although the Plaintiff has been successful, he is nevertheless being given an indulgence. However the Defendant in my view might well have consented to the order now made, in the unique circumstances of this case.

[59] I am therefore awarding the costs of this motion to the Defendant in the cause. The parties shall endeavour to resolve the costs of this motion. If they cannot within 30 days, then I may be contacted to determine an appropriate quantum.

Released: December 22, 2015

R.127/DS

Master D. E. Short