

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ROBERT KROLL, Plaintiff

AND:

DANIEL NAIMAN, Defendant

BEFORE: Associate Justice Mak

COUNSEL: Matthew Gould, for the Plaintiff

Baron Levi, for the Defendant

HEARD: February 27, 2026, by videoconference

REASONS FOR DECISION

- [1] The plaintiff, Robert Kroll, claims that in or about May 2018, he loaned \$118,300 to the defendant, Daniel Naiman, for Mr. Naiman’s down payment for the purchase of a property. Mr. Kroll also claims that he paid renovation bills for the property in the approximate amount of \$35,000. Mr. Kroll alleges that Mr. Naiman did not repay him these amounts.
- [2] On March 10, 2020, the Statement of Claim was issued. In the claim, Mr. Kroll claims from Mr. Naiman the total of \$153,000 plus interest arising from these alleged loans. Mr. Naiman served a *pro tem* Statement of Defence on May 22, 2020.
- [3] On September 8, 2025, the registrar of the court issued an Order Dismissing Action for Delay pursuant to r. 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as the action had not been set down for trial by the fifth anniversary after the action was commenced.
- [4] Mr. Kroll brings this motion for an order to set aside the dismissal order and to reinstate the action to the “active list”. Mr. Naiman opposes this motion.
- [5] Rule 48.14(1)1 states the registrar shall dismiss an action for delay where it has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action. Consequently, if an action has not been set down for trial within those five years, the action crosses the line and begins to move into the realm of “inordinate” delay: *Barbiero v. Pollack*, 2024 ONCA 904 at para. 22.

- [6] The parties agree that for Mr. Kroll to obtain an order setting aside the registrar's dismissal order, he must satisfy the following four factors set out by Master Dash in *Reid v. Dow Corning Corp.*, and adopted by the Court of Appeal in *Scaini v. Prochnicki*, 2007 ONCA 63:
- (a) An explanation of the litigation delay;
 - (b) Inadvertence in missing the deadline;
 - (c) The motion is brought promptly; and
 - (d) No prejudice to the defendant.
- [7] A contextual approach is preferred to a rigid test requiring the plaintiff to satisfy each of the main factors, as this allows the court to make the order that is just in the circumstances. There may also be other relevant criteria. While the plaintiff is not required to satisfy each of the four factors separately to succeed, it may be that the plaintiff comes up short on one, and it is of such importance that, taken together with the other factors, the plaintiff must fail: *Scaini* at paras. 23, 24 and 25.
- [8] On a motion for an order setting aside a registrar's dismissal, the court must consider two underlying policies: (1) civil actions should be decided on their merits; and (2) civil actions should be resolved in a timely and efficient manner in order to maintain public confidence in the administration of justice. The weight of authority from the Court of Appeal has leaned towards the first policy consideration: *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 at paras. 25 and 26.
- [9] Both parties agree that Mr. Kroll brought this motion promptly. The parties disagree with the remaining three factors.
- [10] The chronology of this litigation after the delivery of the *pro tem* Statement of Defence on May 22, 2020, is as follows:
- (a) On June 5, 2020, Mr. Naiman's counsel served a Demand for Particulars and Request to Inspect Documents on Mr. Kroll's former counsel. Neither Mr. Kroll nor his counsel provided a response.
 - (b) On June 8, 2020, Mr. Kroll's counsel requested that Mr. Naiman's counsel withdraw themselves from this lawsuit on the basis of an alleged conflict of interest. Mr. Naiman's counsel refused to do so. On June 25, 2020, Mr. Kroll's counsel advised they would be scheduling a motion to remove Mr. Naiman's counsel as lawyer for Mr. Naiman once the courts had reopened, as they were not hearing matters due to the pandemic. Further correspondence was exchanged between counsel for the parties on this issue; the last of such was dated July 3, 2020 from Mr. Kroll's counsel and July 10, 2020 from Mr. Naiman's counsel.

- (c) To date, Mr. Kroll has not brought a motion to remove Mr. Naiman's counsel as lawyer of record.
 - (d) On September 10, 2025, Mr. Kroll's former lawyers advised Mr. Kroll the action had been dismissed for delay.
 - (e) After the July 3, 2020 letter from counsel for Mr. Kroll, Mr. Naiman received no further communication from Mr. Kroll or his counsel until October 17, 2025, when Mr. Naiman's counsel received an email from Mr. Kroll's current counsel advising they had been retained by Mr. Kroll.
- [11] Mr. Kroll swore an affidavit in support of his motion. In his affidavit, he states that in the years after starting the lawsuit, he has had many difficulties which prevented him from pursuing the lawsuit. His affidavit details the various circumstances he states led to the litigation delay. These include his parents' medical issues from 2020 to 2024, which Mr. Kroll states necessitated his involvement in their daily lives. In January 2025, Mr. Kroll suffered a stroke requiring hospitalization and treatment including speech therapy from February to April 2025.
- [12] Mr. Kroll states that as of late September 2025, he has been reorganizing documents and gathering all relevant information for his affidavit of documents and examinations for discovery.
- [13] Mr. Kroll states he has the evidence relevant to his claim, and no witnesses or documents have been lost due to the passage of time. His affidavit includes a breakdown of all the amounts he allegedly loaned to Mr. Naiman that are part of Mr. Kroll's claim. Attached to the affidavit as exhibits are copies of cheques and a confirmation of transfer regarding these amounts he allegedly loaned to Mr. Naiman.
- [14] Mr. Naiman's motion record contains an affidavit sworn by Gwendolyn Adrian, counsel at the law firm retained by Mr. Naiman. Exhibits to the affidavit include social media posts from March 21, 2020 to November 2, 2025. These posts purport to show that Mr. Kroll has attended at least 29 recreational, social and professional events and 10 out-of-country vacations between the issuance of the Statement of Claim and this motion.
- [15] Mr. Kroll also swore a reply affidavit in which he denies attending 29 recreational and/or social events from March 10, 2020 to October 30, 2025, and denies attending 10 out-of-country vacations during the same period. Mr. Kroll states that many of the photos in the social media posts are "old pictures" taken long before they were posted, and most of these posts are for necessary work events for his livelihood, historical photos taken in Toronto during his family health crisis, or short local trips taken for his mental health.
- [16] Mr. Naiman did not swear an affidavit for this motion. Neither Mr. Kroll nor Ms. Adrian were cross-examined on their affidavits.
- [17] I accept Mr. Kroll's explanation for the delay. Although Mr. Naiman's motion record contains various social media posts purporting to show how Mr. Kroll spent some of his

leisure time from 2020 to 2025, it is undisputed that Mr. Kroll and his parents had health issues from 2020 to 2025, and Mr. Kroll provided detailed explanations for these social media posts in his reply affidavit. I accept Mr. Kroll's explanations for these posts, along with Mr. Kroll's uncontroverted statement in his affidavit that his and his parents' health issues, along with other difficulties detailed in his affidavit, prevented him from pursuing the lawsuit.

[18] I find that the registrar's dismissal order was not made due to inadvertence. Mr. Kroll has led evidence to explain that he intended to prosecute the action within the time limits set out in the *Rules* but failed to do so through inadvertence. The evidence led by Mr. Kroll includes the following:

- (a) In June, July and October 2020, he gathered relevant documentation to prepare for the exchange of Affidavit of Documents and examinations for discovery, and organized with his former lawyer, Dheeraj Bhatia, a motion and corresponding affidavit to remove Mr. Naiman's counsel as counsel for Mr. Naiman due to an alleged conflict of interest.
- (b) On December 31, 2021, Mr. Kroll sent himself an email reminder to speak to Mr. Bhatia regarding the status of his action and followed through with an in-person meeting.
- (c) On September 13, 2022, Mr. Kroll contacted Mr. Bhatia regarding the status of the action and told him that they needed to proceed. Mr. Kroll gave Mr. Bhatia instructions to proceed with a motion. Mr. Bhatia's office replied the same day asking for a further retainer. Mr. Kroll did not respond.
- (d) On February 21, 2024, Mr. Kroll met with Mr. Bhatia in-person to discuss the status of the action and advised that he wanted to proceed.
- (e) On February 22, 2024, Mr. Bhatia wrote to Mr. Kroll stating that Mr. Kroll mentioned to Mr. Bhatia "several other times" that Mr. Kroll did not have the funds available for the motion, and would let them know.
- (f) On February 22, 2024, Mr. Bhatia asked Mr. Kroll for a retainer to pursue the motion, and advised Mr. Kroll that it has been four years since the claim was commenced, and the court may dismiss his claim for non-prosecution.
- (g) Mr. Kroll's brief email reminder to himself, dated March 25, 2025, regarding the lawsuit.

[19] I find the evidence does not show that Mr. Kroll always intended to prosecute the action within the time limits set out in the *Rules* but failed to do so through inadvertence. Rather, the evidence indicates Mr. Kroll was sporadically engaged in this litigation from 2020 to 2025, and that upon being notified of the administrative dismissal in September 2025, Mr. Kroll endeavoured to gather all relevant documentation for this action.

- [20] I find there is no prejudice to Mr. Naiman. Although the delay has been almost 5.5 years – from March 10, 2020 when the Statement of Claim was issued, to September 8, 2025 when the action was administratively dismissed – Mr. Kroll has presented evidence that all relevant documents have been preserved, including copies of cheques for the amounts Mr. Kroll alleges he paid directly to Mr. Naiman and cheques to two third parties for amounts Mr. Kroll alleges he paid on behalf of Mr. Naiman. Mr. Kroll has also provided email correspondence exchanged between the parties on February 13 and 14, 2020 regarding Mr. Kroll’s demand for repayment.
- [21] Ms. Adrian’s affidavit does not speak to whether the delay has prejudiced Mr. Naiman. Further, although Mr. Naiman submits in his factum that he has “proffered evidence that he has lost documents in several moves”, and he does not know what documents to preserve because the action was not properly pleaded and because Mr. Kroll did not respond to his Demand for Particulars and Request to Inspect Documents, Mr. Naiman did not swear an affidavit for this motion stating as such. Therefore, these submissions are bald and unsupported.

Disposition

- [22] Having considered and weighed all the relevant factors discussed above, I conclude the most just outcome is for the registrar’s order to be set aside. While Mr. Kroll is primarily responsible for the delay in this action, in the absence of prejudice, an order setting aside the registrar’s dismissal properly balances the parties’ interests and is consistent with the court’s preference for matters be tried on their merits. The court therefore sets aside the registrar’s dismissal order.
- [23] Mr. Naiman submits that if the court sets aside the dismissal, the court should order a timetable peremptory on Mr. Kroll, and the timeline can only be varied by order of the court. I agree with Mr. Naiman. However, I would add that the timetable can also be varied on the parties’ consent.
- [24] If the parties cannot agree on the dates and steps in the timetable within 30 days of today, they may schedule a case conference before me. The parties have been provided instructions on how to do so.

Costs

- [25] Mr. Kroll was successful on his motion. A successful party is ordinarily entitled to their costs. However, subject to any offers to settle served by Mr. Naiman that may warrant a costs award payable to him, it is fair and reasonable there be no order as to costs. Mr. Kroll seeks an indulgence from the court, and it was reasonable for Mr. Naiman to oppose the motion.
- [26] If Mr. Naiman has served any offers that would lead to a conclusion that he is entitled to costs, he may submit to the court within 20 days of today the offer(s) and costs submissions in writing. The costs submissions shall not exceed three single-sided pages, double-spaced

with 12-point font, and shall be submitted to the attention of the Trial Coordinator. Mr. Kroll may then respond within 10 days thereafter.

Associate Justice Mak

Date: May 25, 2026